A Critical Look at Achieving Quality in Legislation

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A. Introduction

It is clear that we now live and function within the 'age of statutes',[1] given the steady rise in importance of statute law over the common law, and the reality that statute law is the primary source of law in our modern societies.[2] In focus, statutory rules, through legislative acts and regulations, control every aspect of our lives. For governments, legislation is of critical importance in the management of a country's political, economic, social, legal and administrative affairs, and it is the primary tool by which governments accomplish its political objectives.[3] On the whole, the business of governing is carried out by virtue of statutory powers granted to ministers and other public authorities, and by establishing statutory relationships between the state, citizens, and private organisations.[4] In this environment therefore, there can be no avoidance of statute law given its unavoidable intrusion in the lives of all members of society.

Of greater concern, however, is that despite the importance of statute law in our everyday lives, legislation by its nature is often found not to be as easily communicated to persons as other forms of writing.[5] The unintelligibility of

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1 G. Calabresi, A Common Law for the Age of Statutes 2 (1982).

2 R. Martineau & M. Salerno, Legal, Legislative and Rule Drafting in Plain English 4 (2005).

3 According to Crabbe, no matter what a person's aversion to the law may be, a modern state has to legislate in order to accomplish certain political objectives and certain particular public policies. Legislation is necessary to interfere with vested rights and interests. Also, the purse strings of governments are dependent of legislation to impose taxes, duties, or excise and imports: V. R. A. C. Crabbe, Legislative Drafting 1 (1993).

4 D. Miers & A. Page, Legislation 211 (1982).

5 According to Sir Christopher Jenkins, First Parliamentary Counsel, UK, in a submission *The Legislative Process*, *in* Report of the House of Commons Select Committee on the Modernisation of the House of Commons, First Report, Session 1997/98, 23 July 1997, (Cmnd. 190).

> A Bill's sole reason for existence is to change the law … A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less

European Journal of Law Reform, Vol. 9, no. 2, pp 167-204.

many of today's laws has in recent years been raised not merely as a theoretical problem, but rather it is also argued that unintelligibility of laws results in deeper social and economic costs, which communities cannot afford to bear.[6] The greatest social costs stem from the risk of laws being enacted without them being properly understood.[7] Whereas, the economic costs include factors such as the increased need for legal advice, the higher costs of administration, and the overall increased cost in litigation.[8] The debate on clarity and intelligibility in the law has been ongoing in the form of the plain language movement for some time, and there is no indication that the momentum of this movement is decreasing.[9] On the contrary it may be argued that the movement has extended so that persons are not just concerned with the use of plain language in legislation only, but have widened their concern such that the issues of 'quality of legislation' now assume greater importance on political agendas.[10] It was suggested that the political debate on quality has been fuelled by the increasing complexity and sheer volume of legislation that is now produced by National Legislatures world over, on one part.[11] On the other part, it is asserted that the concern for overall accessibility and intelligibility of legislation envisages that legislation is no longer just concerned with various aspects of 'lawyers law',[12] but that increasingly legislation is having direct bearing on the social, economic and legal issues of ordinary citizens and

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> easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter.

6 Law Reform Commission of Victoria (Australia), Report No. 33, *Access to the Law: the Structure and Format of Legislation*, May 1990, at 4.

7 *Id.*, at 4: According to the report certain social costs include a wide lack of understanding of the laws as enacted. These could result in persons committing offences unknowingly; of people being unaware of benefits and opportunities which are legally available to them, and in the increased lack of participation by people in the live of their communities and in decision-making.

8 *Id.*

9 The modern plain language movement strummed up great momentum between the 1960s-1970s in the United Kingdom, the United States, Australia, and later on in Canada. The focus of the movement that advocates simplified, un-convoluted language in legal documents, which arguable hinders understanding of the meaning by its users, may be summed up as follows:

> Plain English is language that is not artificially complicated, but is clear and effective for its intended audience. While it shuns the antiquated and inflated word and phrase, which can readily be either omitted altogether or replaced with a more useful substitute, it does not seek to rid documents of terms which express important distinction. Nonetheless, plain language documents offer non-expert readers some assistance in coping with these technical terms. To a far larger extent, plain language is concerned with matters of sentence and paragraph structure, with organisation and design, where so many of the hindrances to clear expression originate.

Law Reform Commission of Victoria (Australia), Discussion Paper No. 1, *Legislation, Legal Rights and Plain English*, (1986), at 3.

10 E. Caldwell, Comments, *in* A. Kellerman, *et al.* (Eds.), Improving the Quality of Legislation in Europe 79, at 79 (1998).

11 *Id.*

12 For further reading on the what constitutes 'lawyer's law', *see* W. Hulbert, Law Reform Commissions in the United Kingdom, Australia, and Canada, 1-13 (1986).

private businesses. The sustained argument continues to be that these factors have generated a wider audience or readership of legislation for which greater attention must be taken to ensure their understanding of the substance of the legislative text.[13] In 1975, the Renton Committee expressed particular concerns about the complex language, structure and form of the legislative text which tends to typify common law drafting. Despite the extensive work of the Committee however, repeatedly it is lamented that not much has changed since the Committee's recommendations to address obscurity and inaccessibility in legislation.[14] The movement for quality legislation therefore continues in stride. By far the most significant development in the movement to date is that by Resolution at the highest political level of the European Union, there came a call to improve the quality of legislative drafting, and for Community legislation to be drafted, clearly, simply, and precisely through the adoption of certain guidelines.[15]

The concern for quality legislation also has particular implications for the users of legislation in a democratic state. Within our democratic societies and cultures, the laws of a legitimately authorised Legislature are the supreme laws which all must adhere to, and which must be upheld by the judiciary.[16] In this context the concern about whether every member of society, even the 'lay person' reads legislation or not is a mere moot point, as the primary conception of the rule of law insists that all persons, without exception, are subject to the laws of the Legislature. Against this legal-political context the concern of quality in legislation or quality of such law is indeed of moment. If we are to accept that all persons within democratic societies are without exception governed by the law of the legislature, then as a corollary it ought to be mandatory upon national legislatures to ensure as far as possible that the laws by which the citizenry are

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[13] H. Xanthaki, *The Slim Initiative*, 22(2) Statute Law Review 108, at 108 (2001). According to Xanthaki, the concern of quality in EU legislative texts was influenced by two factors in particular. Firstly, was that as legislation which placed extensive rights and duties on EU citizens increased in volume, there came a call for greater accessibility of legislation, in view of a wider, and perhaps less technical audience. Secondly, owing to the principle of direct effect (under which EU legislative texts are deemed directly applicable to Member States, even if not transposed into national law), it was raised that this implied a need for the original text to be so clearly, simply, and unambiguously drafted that interpretation by and application to Member States could be easily satisfied.

[14] P. Butt & R. Castle, Modern Legal Drafting 68 (2001); R. Thomas, *Plain English and the Law*, 6(3) Statute Law Review 139, at 148 (1985).

[15] By Council Resolution of 8 June 1993, on the quality of drafting of Community Legislation (93/C 166/01), The Council of the European Communities adopted by Resolution that the general objective of making Community legislation more accessible should be pursued through systematic consolidation and by implementing guidelines against which Council texts should be checked when drafted.

[16] T. M. Franck, *Democracy, Legitimacy, and the Rule of Law: Linkages*, *in* N. Dorsen & P. Gifford, Democracy and the Rule and Law 69 (2001). Franck asserts that implicit in the rule of law is that the courts would apply legitimate law made by democratically elected legislators, when determining whether a proposed exercise of power accords with rules of fairness as agreed by the democratic process. A principle element of democracy is that ultimate power rests with the electorate, in that it is the electorate that elects the legislature, and it is through the electorate that the legislature and the executive derive their legitimacy and authority to function. For Franck therefore, the element of legitimacy is the basic fibre to the rule of law.

governed are prepared with deliberate emphasis on simplifying, clarifying, and accurately articulating norms. In fact it may even be argued that this is an inherent constitutional duty placed on national legislatures. Ultimately, it is argued that greater understanding of the law of the Legislature, through improved quality of legislation, would likely lead to greater accessibility and complicity with the law. At the very basic, those who are governed should readily understand the laws by which they ought to subject themselves.

It should be stated forthrightly that the notion of quality legislation has so far not been reduced to a single definition, but given its recent usage among national legislatures and the Legislature of the European Union ("EU"), it may be said to encompass two concepts.[17] On one hand, quality legislation concerns legislation that is appropriate, adequate and precise in solving the problem it is intended to solve. On the other hand, it must also achieve this aim through language and structure that is readily understandable to those who are affected by it, and those who must administer it.[18] These issues have been categorised as signifying quality in substance of the law, and quality in the form of the law.[19] Overall, the pursuit of quality in legislation therefore advocates a certain balance arising from the foundation that legislation achieves its highest quality when it has attained its true function. This essentially means that as legislation is intended to govern and impact upon wide audiences, the texts should be accessible, in that they are unambiguous and simple to comprehend, but yet precise and most effective in achieving the desired intention of the sponsors.[20] In view of these expectations therefore, it is asserted that quality in the legislative product can only be achieved through the collaborated efforts of the legislative sponsors or the relevant Ministry or Department, the drafter and the Legislators.

While it is appreciated that the journey to quality legislation will include many travellers, the primary objective of this paper is to critically analyse the drafter's role towards achieving quality in the legislative product. Within the entire legislative process, the drafter is the actor who is primarily tasked with transforming legislative policy into legislative form. The drafting process, with which the drafter is concerned, is according to Thornton, a five stage process which includes: (1) understanding the proposal; (2) analysing the proposal; (3) designing the law; (4) composing and developing the draft; and (5) scrutiny

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17 C. W. A. Timmermans, *How to Improve the Quality of Community Legislation: The viewpoint of the European Commission*, *in* A. Kellerman, *et al.* (Eds.), Improving the Quality of Legislation in Europe 39, at 44 (1998).

18 Martineau & Salerno, *supra* note 2, at 11.

19 According to Jean-Claude Piris, quality in legislation includes both quality in the substance of the law and quality in the form of the law. He elaborates that quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of the appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other areas of governmental policy. Quality in the form of the law, on the other hand, concerns accessibility, namely transparency in the decision-making process, and dissemination of the law. *See* J. C. Piris, *The Quality of Community Legislation: the Viewpoint of the Council Legal Service*, *in* A. Kellerman, *et al.* (Eds.), Improving the Quality of Legislation in Europe 25-38 (1998).

20 Martineau & Salerno, *supra* note 2, at 11.

and testing.[21] It is noteworthy that this formula has essentially been retained in Thornton's successive works, and it is this formula which continues even today to form the basis of the structuring of many legislative drafting exercises throughout the Commonwealth. This being the basic formula by which many modern drafter's carry out their work, the primary concern of this paper is how then is the pursuit to quality legislation channelled throughout this drafting process. The proponents of quality in legislative drafting assert that the characteristics of quality legislation include clarity, simplicity, precision, accuracy, and plain language in the legislative text.[22] Essentially, these are the pillars on which quality legislation must rest. As such, the writer intends to critically examine the characteristics of quality legislation, assess how they are utilised by the drafter at each stage in the drafting process, and to consider how they impact upon quality legislation specifically.

Given that legislative drafting is essentially a practical exercise, it is determined that the objects of this paper would be best achieved through the exercise of structuring and drafting an actual bill. The structuring and draft of a *Status of Children* Bill for the Virgin Islands would in this regard serve as a representative case study through which the objectives of the paper will be pursued, and the conclusions of this research tested. This particular case study was selected for two reasons. The first arises from a concern that legislation of this kind is greatly needed in the Virgin Islands to stem the continued discrimination in law against children who were born out of wedlock, and their fathers. More importantly however, it is contemplated that this legislative proposal would significantly impact upon the private family lives of all citizens of the Virgin Islands, which would then suggest that its readership and audience would be wide and diverse. Since the achievement of a legislative draft that is simple, intelligible and accessible to its wide and diverse audience epitomises the very objective of quality legislation, it is asserted that this legislation would here serve as an appropriate research tool, as it represents the kind of legislation for which quality would be made an issue. The case study will be structured following the five stages prescribed by Thornton. This methodology allows the writer to assume that the control represents a wider circle of drafts, and the conclusions drawn from this exercise may be equally applied to other drafts.

Section B of this paper is concerned with stage one of the drafting process and it elaborates on the importance of the form and substance of legislative instructions and its relationship with understanding the proposal and quality. Also, it examines the attitude of the drafter towards gaining sound understanding of the legislative proposal, and the overall need for early collaboration between the sponsors of legislation and the drafter as the first positive steps toward achieving quality.

Section C focuses on the rigors of analysing the proposal's overall suitability to have legal effect, in accordance with the second stage in the drafting process. It speaks to the drafter's role in analysing the substance of the legislative policy

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[21] G. C. Thornton Legislative Drafting 128-174 (1996).

[22] H. Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 Common Market Law Review 651, at 660 (2001).

through deliberate assessment of factors such as the proportionality of the proposal, the suitability of the legislation in addressing the problem, and identifying the various intended audiences and users of the legislation.

In Section D, the writer will design and compose the law, in accordance with the third and fourth stages of the drafting process. The technical aspects of achieving quality in form are the central focus of this chapter. Here the drafter intends to concentrate on the practical exercise of drafting legislation that is as far as possible clear, simple and precise. Also, considering the central relationship of accessibility to quality in legislation, it is essential for the drafter to at this stage elaborate upon the practicalities of pursing clarity, simplicity and precision in the text.

Finally, having attained a draft of the *Status of Children Act*, in Section E the relationship between scrutiny and quality legislation is first assessed. Secondly, the significance of quality in legislation will be reviewed having regard to the implications of democracy, legitimacy, and the rule of law for quality legislation.

B. Understanding the Proposal

Perhaps it is simply a most basic rule that before one can embark on a task, he or she must fully understand the nature and objective of such task. For Thornton, the first stage of the drafting process is no different in this respect, as the very first task of the drafter is to understand the purposes of the legislation which he or she has been instructed to draft.[23] Within Parliamentary democracies, the Executive controls the legislative programme to the extent that it is generally government's policies that are the impetus for legislation.[24] This therefore means that the first stage of the preparation of any legislation, the formulation of policy, is quite distinct from the legislative drafter's first task in the legislative drafting process.[25] The formulation of policy is a matter that primarily rests with the sponsors of legislation. In the majority of cases it is government ministries and departmental officials who make recommendations to the Minister that legislation should be introduced to deal with specific issues. In other instances, other interested bodies also participate in pushing policy to the forefront for governments to address.[26] In every case however, policy is formulated on the conviction that legislation is needed to facilitate such policy. Once the policy is formulated it is then that the legislative drafter is presented with instructions to design and prepare the legislative text, "the weapon to meet the policy target."[27]

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[23] Thornton, *supra* note 21, at 128-129.

[24] Crabbe, *supra* note 3, at 19.

[25] E. Driedger, The Composition of Legislation, Legislative Forms and Precedents (1976), at xv.

[26] Very often the formulation of policy does not originate with a government department, even though it must later be channelled through a ministry. Other sponsors of legislation may include Commissions of Enquiries and Committees of Parliament, public and private organizations, interest or pressure groups, and consultants who at times also make suggestions or recommendations for legislation.

[27] Caldwell, *supra* note 10, at 82.

In pursuit of quality in legislation, it must be emphasised that there are many players who must contribute to this achievement throughout the legislative process. However, there is little doubt that the drafter is perhaps the most significant player, as it is ultimately his or her responsibility to prepare the legislative draft. It is this draft which will be later tested and scrutinized for its quality. It is this draft which should firstly achieve its legislative objectives, and must also be drafted so that it is clear, simple and accessible to its audience.[28] As such, the drafter's understanding of the proposal is the central focus of this stage in the drafting process, as the quality of the output is directly related to the quality of the input at this stage. For Thornton, communication of the legislative policy to the users and audience is a significant responsibility placed on the drafter once instructions are received.[29] As such, if the drafter's appreciation of the governing purposes of the legislation is inaccurate or incomplete, then the drafter's communication of same would reflect his own misshapen inaccuracies and incompleteness.[30] What may even be worse is if the drafter is uncertain, this uncertainty may likely jeopardize the structure of the bill. It may also result in misplaced emphasis on irrelevant provisions, and a risk of misleading users on the primary purposes of the legislation.[31]

At this stage therefore, there are three factors in particular which are critical to ensuring that the drafter attains such of what is critical in order that his or her contribution will enhance the legislative product. Firstly, the sponsors of the legislation must take care to provide the drafter with proper instructions which properly articulate the substance of the legislative policy and its intended effects. Secondly, although it is argued repeatedly that the drafter should not involve himself with the formulation of policy, there is every indication that the drafter will and should at times be involved in matters of policy to gain sound understanding of the proposal. Thirdly, there must be full collaboration between the policy makers and the drafter. Essentially, this is the stage in the drafting process where the drafter must seek to gain sound understanding in order to properly develop the policy into legislative form. It is here where the drafter will for the first time be exposed to the substance of the proposal, the objectives of the proposal and the audience of the proposal. In this regard, each of the above elements factor into ensuring that the drafter thoroughly appreciates the extent of the task to be embarked upon.

I. Adequate Instructions

A most critical aspect of gaining sound understanding is to transform governmental policy into enforceable law.[32] As such, the drafter must be clear and certain about what he or she intends to say, which is in fact a transfer of what the sponsors of the legislation intend to say.[33] This being the reality of the work of the drafter, a

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28 Martineau & Salerno, *supra* note 2, at 11.
29 Thornton, *supra* note 21, at 131.
30 *Id.*
31 *Id.*
32 Crabbe, *supra* note 3, at 19.
33 *Id.*

most critical aspect of gaining sound understanding of the proposed legislation is for there to be properly communicated instructions to the drafter, on the policy and the purpose of the legislation. If the legislative aims of the sponsors are well stated, the drafter's task is made easier. If on the other hand the aims are unclear or incomplete, these inadequacies may later reflect in the legislative draft.[34] According to Thornton, there are certain key elements that should form the basis of all instructions that are forwarded to the drafter. Collectively, in Thornton's view, these elements provide the foundation for ensuring that the drafter is allowed the benefit of the most critical and relevant information towards understanding the purpose of the legislation. Thornton offers that the drafter would be most assisted by legislative instructions, if such instructions elaborate upon the following, namely: (a) the background information to the policy, which would provide the drafter with factual or the legal context to appreciating the legislative intention of the proposal; (b) the principal objects of the legislation – the drafter must know exactly what the legislation is intended to achieve; (c) how are the principal objects to be achieved – by what means; and (d) the known financial, administrative, legal, or other implications or difficulties of such proposal.[35]

It is asserted that by the adoption of this format, the drafter is better able to appreciate the most relevant information that has bearing on the formulation of the policy and the intended legislation.[36] Particular details of the background rules and effects of the common law provide context of the problem that the legislation seeks to address. An understanding of prior law is often times helpful in understanding the purpose of a statute, and may well provide guidance on the interpretation of its language.[37] In this case study, for example, the drafter can better appreciate the extent of the legal discrimination of the common law rules – "the problem", and the continued effects of such problems in particular. Additionally, from the instructions one can also gain a first appreciation of the target audiences, which will clearly include all fathers and mothers of the society, and all illegitimate persons – children or adults. An early indication of these factors in the drafting process should not be under-estimated. From the instructions the drafter is better able to analyse whether the proposal is in fact the most appropriate means of solving the problem, whether it would co-exist in the existing legal context, and also whether it is likely to have legal effect at all. The drafter's digestion of appropriate and adequate instructions is therefore the first exercise towards achieving quality in the substance of the legislation. This view is supported by Sir Patrick Mayhew, who in his work openly credited the admirable drafting of the Children Bill, (UK) in part to clear and complete instructions

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[34] D. C. Elliot, *Getting Better Instructions for Legislative Drafting*, Pre-Conference Clinic, at Just Language Conference, Victoria, British Columbia, 21 October 1992, found at http://www.davidelliott.ca/papers/getting.htm#8, at 7.

[35] Thornton, *supra* note 21.

[36] According to Thornton, good instructions will illuminate: the nature of the problem by providing background information, the purposes of the proposed legislation, the means by which those purposes are to be achieved, and the impact of the proposals on existing circumstances and law: Thornton, *supra* note 21, at 130.

[37] W. Statsky, Legislative Analysis and Drafting 36 (1984).

to the drafters.[38] In every drafting exercise, the drafter's ultimate objective is to achieve a draft that is clear, simple and precise in outlining the objectives of the proposal and securing its intelligibility for users and those affected. A drafter's sound understanding of the specific intentions of the sponsors and the objects of the proposal will more likely than not be converted into legislative text that in the first instance achieves the objectives that the sponsors intend. Also, where the drafter thoroughly understands the proposal, he or she is better able to reduce this understanding into clear and simple terms, in order to facilitate greater intelligibility of the legislation. In these ways it is concluded that the drafter who receives clear, complete, or adequate instructions, and who gains sound understanding of the proposal from same, has attained the first step in their role towards the production of a legislative draft of quality.

II. The Drafter and Policy

There are those who insist that it is a proper practice for legislative counsel to be concerned with matters of drafting the text of the legislation only, and that the issues of formulation of policy should be left to the proponents or sponsors of the legislation. Edward Caldwell for one asserts that the longer the two activities of, the formulation of policy and the production of a legislative text designed to achieve the policy, could be kept separate, the more likely it is that the legislation will achieve the desired effect.[39] There are times however, where instructions may for whatever reason be less than adequate in elucidating the governmental policy and its intended effects. In these circumstances, if the drafter does not engage in certain matters of policy in an effort to fill the gaps in the proposal, the likely result may be numerous redrafts to correct errors or omissions, or worse, the production of an insufficient law.[40] An alternate view therefore is that despite the general understanding that matters of policy predominantly fall within the domain of the legislative sponsors, the drafter should not be deterred from addressing certain matters of policy in view of the overall objective of attaining quality legislation. If the drafter is allowed input on matters of policy, in an effort to bolster his or her understanding of the legislation before drafting commences, or to address gaps in the policy formulation, there is a greater likelihood that critical drafting time will be speared in the long run (through avoidance of undue delays for further instructions, or to correct mistakes). Also, there is a greater chance for the production of a sound legislative product in the end.[41] As such, while the classic theory has been that the drafter should not seek to initiate or determine policy, it has been deemed most appropriate and even desirable for legislative counsel to address or even probe the sponsors on matters of policy, in

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[38] The Rt. Hon. Sir Patrick Mayhew, *Can Legislation Ever be Simple, Clear and Certain?*, 11(1) Statute Law Review 11, at 13 (1990).

[39] Caldwell, *supra* note 10, at 79.

[40] J. Stark, The Art of the Statute 13 (1996).

[41] In Crabbe's view, where the drafter takes this initiative it further ensures that the final legislation is not only reflective of the intentions of the sponsors, but is also a workable piece of legislation: Crabbe, *supra* note 3, at 21.

pursuit of greater understanding.[42] It is even asserted that the drafter has a duty to ask appropriate questions of the sponsors to ensure that matters overlooked are dealt with and the policy is thoroughly considered.[43] In light of these views it is argued therefore that the drafter should be involved in matters of policy only to the extent of achieving two objectives: Firstly, to aid his or her full understanding of the legislative policy and its intents, and secondly, to probe the sponsors for additional information which may prove essential towards shaping the most suitable legislative text.

III. Collaboration Between Policy Maker and Drafter

Another factor to be explored is the contribution of early intellectual collaboration between the drafter and the sponsors of the legislation.[44] While this may appear to be an obvious point, collaboration between the sponsors and the drafter is significant, and must be factored in from stage one of the drafting process. Collaboration involves a productive working relationship whereby the sponsors and the drafter support each other throughout the drafting process. This factor is particularly relevant when it is considered that in most jurisdictions the greatest challenge to optimum legislative drafting is the fierce demand of the parliamentary timetable.[45] The pressure on parliamentary time impacts upon the drafting process and the drafter in two particular ways. Firstly, it contributes to limiting the time for the provision of complete and clear instructions to the drafter. Secondly, it encroaches on the drafter's time to complete a task.[46] Parliamentary time is therefore an ever looming factor which puts pressure on the drafter once instructions are received.[47] Where there is full collaboration the drafter is readily aided to full understanding of the proposal, which then allows the drafter the opportunity to take full advantage of the critical and often limited time in the drafting process. Collaboration is therefore particularly important to the drafter

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42 Stark, *supra* note 40, at 13-14.

43 *Id.* According to Stark, the drafter could employ two strategies aimed at forcing both the sponsors and the drafter to hone in on certain issues which may prove critical towards shaping the most suitable legislative text that is reflective of the policy. The first strategy is to describe the current law on the subject and inquire of the sponsor the specify ways they intend to alter that law. This approach enables the sponsor to re-evaluate the intended effects of the proposal, who may in the end choose to leave the current law in tact. The second strategy is to describe a hypothetical situation and ask the sponsor to clarify the intent of the proposal. The strategy may be particularly useful in helping the sponsor to appreciate the consequences of the intended proposal.

44 Elliot, *supra* note 34, at 13. *See also* Martineau & Salerno, *supra* note 2, at 16.

45 The pressure on parliamentary time stems from the drive of governments and their political agendas, and also to the rule that a bill will lapse if it does not receive royal assent in the session in which it was introduced: Mayhew, *supra* note 38, at 5.

46 Mayhew, *supra* note 38.

47 Sir Patrick Mayhew, equates this experience for the drafter to the last lap of a relay race. In this race however, unlike the other relay, the drafter's share of the load may well be unequally yoked, for if the drafter received partial or incomplete instructions, for instance, he may well have the greatest burden to bear: Mayhew, *supra* note 38, at 5.

for it aids in reducing excessive mistakes and undue delays in the drafting process. This in turn has implications for a timely, properly prepared legislative product which meets quality standards.

IV. Summary

The first limb of quality legislation is that the draft should properly reflect the objectives intended by the sponsors of the legislation. To this end, the first step is for the drafter to gain thorough understanding of the proposal as the sponsors intend it. Once understanding is gained it is then for the drafter to reduce such understanding of the proposal into a draft which reflects the quality of adequate instructions, in depth probing, and the maximum attention of the drafter's time.[48] In our case study, the instructions will reflect the results of further probing on the effects of the current state of the law. While this exercise is unique in that the writer is carrying doubled roles of policy sponsor and drafter, it is intended that the instructions would demonstrate an attempt to fill the existing gaps which will be left after the removal of the common law legal distinction between illegitimate and legitimate children. It was early determined that the primary objective of this legislation would affect several connecting issues, such as maintenance. The attempt to address these issues only reflects what may be possibly contemplated in an actual case. In such case the drafter may well be forced to raise policy issues and interact extensively with the sponsors, to aid understanding of the extent to which this legislation would address connecting policy issues. In the final analysis, a quality legislative draft can only be structured from the drafter's sound understanding of the proposal. In this regard, adequate instructions and early intellectual collaboration between the sponsors and the drafter, even on matters of policy, are essential to the drafter's success in structuring a legislative text that is consistent with policy, and otherwise intelligible.

C. Analysis of the Proposal

If the standards of quality of substance are to be present in the legislative draft, it is imperative that the drafter considers and addresses certain issues prior to the commencement of technical drafting. For Piris, quality in the substance of the law is the likely result where the drafter employs an extensive review of the legislative policy in order to ensure that it is consistent with existing law, practical and enforceable. He therefore advocates the review of a range of issues, such as: the subsidiarity and proportionality tests, an analysis of the appropriateness of the proposal, its likely duration and intensity, its consistency with previous measures, a cost/benefit analysis, and the impact of the proposal on other areas such as the environment.[49] The second stage of the drafting process, 'Analysis', provides such an opportunity. The drafter is at this stage expected to thoroughly

[48] Driedger, *supra* note 26, at 1.
[49] Piris, *supra* note 19, at 28.

analyse and mentally test whether the legislative policy is an effective means of achieving the aim of the law in question.[50] It bears repeating that quality is the standard which best defines legislation which achieves its two fold function.[51] In the first instance, legislation must be suitable and appropriate to achieving its objectives, and secondly, that this should be accomplished by intelligible form and content. In view of these objectives the drafter must take his understanding of the policy further, and through careful analysis, prepare the proposal in theory to have legal effect.[52]

Within common law jurisdictions, parliamentary counsel are usually required to undertake formal training as lawyers before becoming draftspersons. Having acquired this training, governments are greatly dependent on the advice rendered by the drafter at this stage, as they are deemed the most suited of the legislative team to judge the desired legal effect of the proposal.[53] Overall therefore, the drafter is expected to: (1) assess whether the objectives of the proposal may be best achieved through legislation of this kind, (2) consider whether the proposal accords with or offends against the existing legal frame work, including the constitution, and governing international law, and (3) to generally consider the practicality of the proposal, including identifying its audience.

I. Is the Legislative Proposal Best Suited to Meet its Objectives?

Within the context of the EU, one of the first tests employed to assess the need for a particular piece of legislation, a rule or a regulation are the tests of subsidiarity and proportionality.[54] While these tests are understood to entail specific considerations[55] within the EU community, they are generally utilised to safeguard against EU rules going beyond what is strictly necessary to address the issue, and to avoid the imposition of greater burdens on citizens than are necessary.[56] These general principles can be similarly applied within a national context in assessing the appropriateness of a particular instrument. Generally,

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[50] According to Thornton, the drafter should ensure generally that the legislative proposal is analysed against the existing law, that it addresses any responsibility areas and that the practicality of the legislation is assessed: Thornton, *supra* note 21, at 133.

[51] Martineau & Salerno, *supra* note 2, at. 4.

[52] Crabbe, *supra* note 3, at 19.

[53] Caldwell, *supra* note 10, at 82.

[54] Within the context of the EU, it has been discussed that EU legislation must be proportional (in other words most appropriate to meet the needs) to the aim to be achieved, it must be an effective means of achieving such aim- where appropriate alternate means of regulation must be considered, and must additionally be consisted with other existing rules: Piris, supra note 19, at 28.

[55] W. R. J. van den Hende, *Comment*, *in* A. Kellerman *et al.* (Eds.), Improving the Quality of Legislation in Europe, at 68 (1998): With regards to the test of subsidiarity, it is taken into consideration that there must be clear benefits of Community action by reason of its scale or effects; also, of whether the existence of transnational aspects which cannot satisfactorily be regulated by action by Member States. For proportionality, the major concern is the burden on the legal subject and the implementing bodies should be kept to a minimum without jeopardising the realisation of the aim.

[56] Timmermans, *supra* note 18, at 45.

drafters would at a very early stage consider whether the objectives of a proposal made would be better served through regulations or subsidiary legislation, as oppose to the use of primary legislation. In an environment where legislators are often accused of assuming that the legislative tool can solve every societal evil, it is appropriate for the drafter to assess whether the proposal for primary legislation is merited.[57] In so doing the drafter considers whether it is appropriate for government to take legislative action, as oppose to administrative or regulatory action on a given matter.

When we consider the proposal for the implementation of Status of Children legislation for instance, it is clear that the enactment of primary legislation is the most suitable means of meeting its objectives for two reasons. Firstly, the policy intends to abolish existing legal rules that can only be replaced through the sanctioning of the Legislature. Secondly, should these rules be abolished, the result will be a series of legal gaps where the existing rules previously applied. The principle of certainty in the law would therefore dictate that the Legislature would be responsible for determining what the governing law would be in its place. Take for example the issue of the presumption of legitimacy that currently exists to give children, who may have even been born under dubious circumstances of a married mother, the benefit of being legally recognized as the legitimate child of the husband. If this rule were abolished without more, this could present difficulties for the courts, in matters continuing under the *Matrimonial Proceedings and Property Act*.[58] One difficulty may be whether such child would be deemed a 'child of the marriage' in matters of a married couple or of a voidable marriage? Unless new rules are enacted to replace the previous ones, an incidence of legal uncertainty will occur. Legal uncertainty is a phenomenon which offends against the notion of quality legislation.[59] The analysis of how best should obligations and rights be given clear legal effect is therefore not a vain pursuit. Rather, it is fundamentally bound up in determining whether a legislative proposal is clear and determinate in its objectives.[60]

Another resulting consequence of the removal of the legal distinction in our case would be the question of to what extent should the rights of the father be exercisable. For example, after the legislation declares that all fathers are now vested with equal parental rights, would the father of an illegitimate child be allowed to remove, even forcibly, a child from the custody of its mother, or against a previous court order? The instant proposal anticipates this and it is recommended that a father should not be at liberty to immediately seize his new found rights, whether to disturb the child from its mother or guardian, or to offend against a previously made court order. Instead, where a child has already been living solely with its mother or guardian, the father should be expected to apply to the courts and to prove that it is in the best interests of the child to have it removed into his custody. This provision would not, as before, deny that the father is vested with the equal parental right of guardianship. However, a provision of this kind would

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57 Crabbe, *supra* note 3, at 19.
58 No. 6 of 1995, Laws of the Virgin Islands.
59 Timmermans *supra* note 18, at 44.
60 *Id*.

also take into consideration the practicality of the law as it existed for some time, and it would seek to appropriately balance the interests of the mother, the father, and the child. It is this kind of analysis which must be undertaken when the drafter and then the sponsor consider whether certain provisions are appropriate in meeting the policy objectives, but yet proportionate in balancing other governing interests. One aspect of quality legislation is that it must be therefore proportional to the aim to be achieved, and consistent with existing legislation. The drafter's contribution to this aspect of quality is greatest felt at this stage in the process.

II. Does the Proposal Fit into the Existing Legal Framework?

Ultimately, any enactment will form part of the existing governing laws, and so any proposal must be analysed for its compatibility with the existing law.[61] The drafter, who is also usually a lawyer, is particularly taxed with the task of transforming a given governmental policy into practical legislation that is workable and capable of enforcement by the courts.[62] The structuring of a legislative draft that is legally effective and legally certain is an essential aspect of quality legislation. This aspect of quality is deemed crucial to the proper implementation of the legal rules by the authorities, and also for the better understanding by the public of such rules.[63] It is also said that legal certainty, as a component of quality legislation, is essential for effective judicial protection.[64] This essentially means that certainty in the law ensures that the administrators, lawyers and justices who must use and interpret legislation, would be able to better do so fairly and consistently. It also means that persons of the general public would have a clearer sense of how their rights would be enforced. As such, when the drafter considers how a proposal is to fit into an existing legal framework, he or she must visualise: (a) how the proposal will amend or repeal existing legal rules, (b) how certain provisions would co-exist and be interpreted together, and (c) what transitional provisions would be required.[65]

1. Amendments and Repeals

The consequential amendment or repeal of existing legal provisions is an aspect of the analysis which contributes to legal certainty. Through thorough analysis, the drafter and the sponsor must consider how best to deal with any legal gaps made by the proposal. In our case study, two important legal effects on the existing law will be the repeal of the legitimacy Act, and the amendment of maintenance

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61 D. Miers & A. Page, Legislation 78-79 (1982).

62 Thorton, *supra* note 21, at 138.

63 European Commission, Legal Services, *Note on Seminars on the Quality of Legislation*, Brussels, 8 February 2006, found at: www.regeringen.se/content/1/c6/04/95/21/5d6498f4.pdf#search=%22quality%20in%20legislation%22.

64 Reference to Cases 212-217/1980 *Amministrazione delle Finanze dello Stato v. Salumi*, [1981] ECR 2735, *in* Xanthaki, *supra* note 13, at 652.

65 Thornton, *supra* note 21, at 133.

provisions respecting illegitimate children.[66] It is also critical for the drafter to assess whether a legislative proposal is consistent with the Constitution. This is particularly significant in jurisdictions where legislative provisions which are deemed repugnant to constitutional principles are likely to be expunged from the legislation[67] Consistency with international law must also be contemplated, as international rules also form part of a nation's legal structure. The instant proposal calls for the removal of the common law legal discrimination between children. This position is in fact well supported by international law, and in particular, the United Nations Convention on the Rights of the Child.[68] In fact the proposal purports to locally implement the principles which have been subscribed to in theory for many years.

2. How Would Rules Co-exist?

Quality legislation must be consistent with other legal rules, and must also be practical. The question of retroactivity and the extent of retroactivity is also a relevant issue to analyse at this stage. It is a general rule of law that unless the contrary intention appears, an enactment is presumed not to be intended to have retroactive operation.[69] Essentially, the idea is that current law should govern current activities, and that those who have arranged their affairs in reliance on a law which has stood for many years should not find that their plans have been retroactively upset.[70] It is understood that at the core of this principle is the basic rule of fairness.[71] If ever it is recommended that a provision should be retroactive, in that is to have certain effects from a time before the Act comes into force, this is to be properly contemplated and analysed for its resultant consequences. In our case study, a question for the drafter would be whether illegitimate children will be entitled to claim in relation to certain actions occurring before the commencement of this Act. For example, should an illegitimate child, whose status in law will now be changed after the enactment, now have a right to claim entitlement to an equal portion of their mother or father's intestate estate, where the mother or father died before the passing of this Act, and the property has already been administered? In other words, would the Act create a right to now inherit in these circumstances, where that right could not be exercised before? Also, could executors and previous

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66 Part V of the Magistrate's Court of the Procedure Act, Cap. 44.

67 In jurisdictions such as the US and South Africa for examples, constitutional provisions are supreme and all legislative provisions must be generally consistent with the Constitution, or will be struck down through judicial review.

68 *See* generally at: http://www.unhchr.ch/html/menu3/b/k2crc.htm.

69 F. A. R. Bennion, *Threading the Legislative Maze 7*, 162 Justice of the Peace 995, at 995 (1998).

70 *Id.*, at 995; *EWP Ltd. v. Moore* [1992] Q.B. 460, at 474.

71 D. Jenkins, Eight Centuries of Reports: or, eight hundred cases of solemnly adjudged in the Exchequer-Chamber, or, upon Writ of Error (1734). Published originally in French and Latin, (Great Britain: Court of Exchequer Chamber, Nurr and Gosling, 1734), at 284; According to Statsky:

> The danger of a retroactive statute is its potential for surprise and unfairness. At the time events are occurring, one set of rules apply. Then a statute is passed imposing a new set of rules on these events. This can lead to some harsh results.

Statsky, *supra* note 38, at 145.

administrators of estates be now sued for failure to give an interest in estates to children who would now be eligible for entitlement? While these would be questions of policy for the sponsors to determine, the issue of to what extent would the new vested rights and obligations be exercised must be properly and proportionately decided. A question of this kind is again associated with defining appropriate provisions to meet the policy objectives. As the responsibility rests with the drafter to make the policy workable, the drafter must occupy his or her imagination with questions of this kind, so as to allow a smooth working of clear and certain law when it is enforced.[72]

3. What Must Be Saved?

The drafter has also to consider what previous rules need to be saved, to ensure practicality, and what provisions must be put in place to ensure a logical transfer of old rules to new. In particular, transitional provisions are utilised to provide for the application of the legislation to certain circumstances which exist at the time when it comes into force.[73] For example, one issue which will of course arise in this case is what should be the legal rule be regarding the administration of estates that are in process at the time when the legislation comes into force. Another issue is whether mothers who were receiving maintenance for their children, at the time of the passing of the Act, should continue without interruption. Analysis and forethought on issues of this kind will secure the production of an appropriate and legally effective document. Additionally, draft legislation should also always contemplate an assessment of its impact on certain areas, such as the economy, the environment, or other governmental policies. In certain jurisdictions statements to this effect are a necessary part of the legislative process, and must be included whether certain effects or found or not.[74]

The substance of the law is critical, and careful forethought of every issue that is likely to impact upon the consistency and practicality of the proposal must be

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[72] According to Bennion,

> … [the drafter] should … be alert to observe flaws in the policy scheme which may interfere with its smooth working when transformed into law. For this he also needs some degree of imagination. By visualising what a scheme will mean in terms of real life when it comes to be put into operation, the draftsman may be able to suggest improvements and point out defects.

See F. A. R. Bennion, Constitutional Law of Ghana 344 (1962). Also, according to Sir Courtenay Ilbert,

> If a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualise things in the concrete, and to foresee whether and how a paper scheme will work out in practice.

See Sir C. Ilbert, Legislative Methods and Forms 240 (1901).

[73] Thornton, *supra* note 21, at 383.

[74] In Finland for example, a statement of the assessment of economic effects is required. It includes any effects on the public economy, the municipal economy, any connections with the state budget and effects on household and commerce: Ministry of Finance, Public Management Department, Report on The Drafting of Legislation and an Assessment of Its Impact in Finland.

examined. Quality in the substance of the law is therefore largely contingent on the extent of the analysis pursued by the drafter, and the addressing of all relevant issues prior the commencement of drafting.

III. Audience

The other major concern in the pursuit for quality in legislation is the user, or rather the audience of the legislation. Before drafting commences, it is important for the drafter to ensure that he or she has properly identified and analysed the audience of the proposed legislation. Having carried out the analysis of the appropriateness of the proposal, its practicability, and its potential enforceability, the next logical step for the drafter is the consideration of the audience. In other words, after careful contemplation of the 'what' in a given legislative proposal, the drafter must also consider the 'who'.[75] The audience of legislation typically refers to those persons on whom a legal burden is imposed or a benefit conferred, and also those who must administer the details of the law.[76] It is agreed that depending on the nature of legislation, the audience will vary. Essentially however, audience analysis at an early stage in the drafting process is critical for two reasons. In the first place, due recognition of the audience of legislation forms the second limb of quality legislation, where it is acknowledged that legislation can only be effective if it is properly communicated to those readers whom it purports to affect.[77] Secondly, as the impact on the audience is one means by which the overall quality of legislation is assessed, it is essential that the drafter carries out sound analysis of who will use the draft and for what purposes, before drafting commences. The audience should be a focal point for the drafter throughout the drafting process. A continuing fore thought as the drafter proceeds to break down and communicate legislative policy it sufficiently clear, simple, and precise terms that this audience can understand. These points are clearly related and can be reduced to one common factor, that in order for legislation to be effective it must be intelligible and accessible to its audience. Understanding the audience of legislation has been a debate that has been ongoing for some time. There are those who assert for instance, that at the end of the day legislation is really only read and understood by lawyers, judges, or administrators, and that it is a mere illusion to assume that the lay person reads legislation, or for that matter is interested in reading legislation.[78] The Renton Committee for instance recommended that the interests of the 'ultimate user'[79] should in principle take priority over the

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[75] Martineau & Salerno, *supra* note 2, at 34.

[76] *Id.*

[77] Berry, *infra* note 81, at 64.

[78] B. Hunt, *Plain Language in Legislative Drafting: Is it Really the Answer?*, 23 Statute Law Review 24, at 27-31 (2002); B. Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, 24 Statute Law Review 112, at 122 (2003). F. A. R. Bennion, *Don't Put the Law into Public Hands*, The Times, 24 December 1995.

[79] The Renton Committee in its report used the term 'ultimate user' to refer to the many groups and individuals, official and otherwise, who routinely apply and interpret legislative provisions. This group includes the officials of public institutions such as the courts, tribunals, local authorities and

interests of the legislators.[80] It is claimed that the 'ultimate user's demands of legislation are that it should be intelligible, legally certain, and also precise and clear. On the other hand, the proponents of the plain language movement, and even the proponents of quality legislation concede that it is fundamental that legislation, regardless of other arguments, is prepared so that it is understandable to all who will use the legislation, and who will eventually be governed by it as well. In order to communicate legislative documents effectively to this audience, the drafter must analyse how readers might think and feel as they interact with the document.[81] Schriver, a proponent for the use of audience analysis in law, asserts that there are three methods by which the audience of legal drafting may be assessed and determined.[82] Berry however, takes the analysis of Schriver a step further, and argues in his work that in relation to legislative drafting specifically, there is a common factor in Schriver's three approaches to audience analysis. This common factor he claims is that there must be a comparison of the drafter and the audience, and an assessment of their respective knowledge, values, and beliefs about a subject matter.[83] He further concludes that in order to understand the audience of legislation, the drafter must determine (a) what audiences are affected, (b) what are the purposes for which each audience will use the legislation, (c) whether the interests of the audience(s) are hostile or in favour of the Government, and (d) what is the audience's education and experience.[84]

In our case study, all mothers and fathers of varying backgrounds, ethnic groups, educational experience and exposure form one group that the legislation primarily targets. Another includes all children or persons who the law currently regards as illegitimate. The other group targeted by this legislation will include lawyers, judges, social workers, and other administrators. This law prescribes new rights and obligations on certain of this audience, and overall the progress of this legislation will be keenly followed by these persons. However, what is perhaps most significant is for the drafter of this legislation to be attuned to the 'non-lawyer' group of the audience. This will include persons of both high intelligence and low intelligence, or are educated or un-educated. Regardless of these factors however, the entire legislative audience will firstly have some interest in the substance of this legislation, for it concerns personal rights and duties. Secondly, as the legislation will equally apply to the entire audience, the legislation should as far as possible be intelligible and accessible to the range of persons affected. In view of this, the drafter in this case, as in other legislative exercises, should take particular care to use such language and structure in composing a draft that is capable of being

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public corporations, and private individuals such as accountants, architect barristers and solicitors: Report of the Renton Committee, *The Preparation of Legislation* (1979).

80 *See* Renton Committee Report, *id.*, Chap. VI.

81 D. Berry, *Audience Analysis in the Legislative Drafting Process*, 2000 Loophole 61, at 61 also found at: www.opc.gov.au/calc/docs/calc-june/audience.htm.

82 K. A. Schriver, Dynamics in Document Design 154 (1997).

83 This comparative analysis can put the drafter in a more informed position to make visual and verbal decisions that may bridge the gap between themselves and the audience: Berry, *supra* note 81, at 70.

84 *Id.*

readily understood by these who are affected by it, and who must also administer it.[85] In this regard, Berry argues that the drafter must meet three requirements. Firstly, the draft must be sufficient, containing necessary information. Secondly, it must be precise, in that it contains the correct information. Thirdly, it must be usable, in that it is organised and written so that all those who have to use it can find what they need and can understand what they find in the time that they are willing to spend on it.[86] Overall, when a legislative text is written clearly for its audience, it is good for government and business, good for consumers, good for lawyers, good for the law and it is good for Parliament and democracy.[87] The necessary prerequisite to this achievement therefore is that this audience, to whom the legislation will be communicated, must first be determined at an early stage in the drafting process. Thereafter this audience must remain a focal point for the drafter throughout the remainder of the process.

IV. Summary

The substance of ordinary laws, which govern and affect the lives of all citizens, should be intelligible to all such citizens and users. In other words, there is no point of there being law, where the purposes and effects of such law are not readily understood by those who must administer it, and those who must ultimately abide by it.[88] Bad quality legislation has been accused of leading to vague, conflicting, inaccurate provisions, and under- or over-regulation, which can damage the credibility of the legislator, and wounds public support of legislature[89] In fact, it is one view that bad legislation undermines the creation of a secure, properly regulated, competitive business environment with the EU community.[90] At this stage in the drafting process, the quality components of clarity, simplicity and precision are transposed into the practical analysis of delving into the content and effect of the proposed law, to allow for greater synergy with the existing law. This enables the drafter to build theoretically on the policy proposal, and to fill in whatever ever gaps may be exposed in the functionality of the legislation. When the drafter conducts thorough analysis of the policy and its likely effect in law, there is less likelihood that the legislation will not inadvertently amend or otherwise affect or confuse other existing provisions. There will be full contemplation of how the law will be administered and by whom, and whether it is capable of being enforced. There will also be full contemplation of those persons whom the legislation targets. In total this analytical exercise ensures that

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85 Martineau & Salerno, *supra* note 2, at 11.

86 D. Berry, Techniques for Evaluating Draft Legislation 1 (1996).

87 R. Thomas, *Plain English and the Law*, 6 Statute Law Review 139, at 139 (1985).

88 Central to the plain English movement is the assumption that the parties to the documents and the ordinary person comprise the audience of legal documents and legislation. The heart of the movement advocates clear and effective use of language for its intended audience: P. Butt & R. Castle, Modern Legal Drafting 86 (2001).

89 H. Xanthaki, Standards of Quality in Legislation: The EU as a Case Study (unpublished), at 2.

90 *Id.*, at 2. *See Case 212-217/1980 Amministrazione delle Finanze dello Stato* v. *Salumi* [1981] ECR 2735.

a proposal is practical, consistent and enforceable. Having attained this level of quality in substance and content of the law, the proposal can then be reduced and communicated in a form that is clear, simple, precise.[91]

D. Quality in Legislation

By far the most significant role of the drafter in the legislative process is to effectively transposing a thoroughly analysed legislative policy into legislative form.[92] In other words the drafter's primary responsibility is the carrying out of the technical exercise of converting the narrative concept into clear, simple and unambiguous legislative text. The primary concern of this chapter is to examine the third and fourth stages of the drafting process, which are concerned with designing the legislation, and the composition and development of the draft, respectively.[93] For some this practical work is the most sensitive aspect of formulating legislation, and the drafter often bears the brunt of criticism for the legislative outcome, based on the language, structure, and overall presentation adopted in conveying the policy. It should be appreciated that the whole notion of quality in legislative drafting surfaced because of a number of deficiencies that were identified in traditional legislative drafting. Certain of the Renton Committee's comments on the poor quality of legislative drafting included criticism on the language, over-elaboration in the text, long sentences, and unhelpful structures.[94] William Dale also labelled common law legislative drafting as a system in which the drive is always in the direction of greater detail, and tending to produce texts of greater technicality, complexity and length.[95] Over time the argument has been that these deficiencies have manifestly contributed to unintelligibility and inaccessibility in the law. In fact this inaccessibility has also led to a feeling of alienation from the law for some, it having been rightly observed that it was felt that legislation required special expertise to be understood.[96] Despite these criticisms of common law drafting, in many quarters these drafting practices have continued so much so that in Dale's view they will not likely change except by a deliberate change in style.[97] The cry for quality in legislative drafting came in

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91 Xanthaki, *supra* note 22, at 660.

92 Thornton, *supra* note 21, at 125.

93 *Id.*, at 138-144.

94 The Renton Committee on the *Preparation of Legislation* was to review the practices of legislative drafting and the process of preparation of legislation, with a view to achieving greater simplicity and clarity in statute law. The Committee extensively criticised (1) language in legislative texts- it being said that the language is "legalistic, often obscure and circumlocutious, requiring a certain type of expertise to gauge its meaning", (2) over-elaboration – that in the pursuit of legal certainty, this has led to over-elaboration in many cases, (3) structure – that the internal structure, particularly the order of clauses, was often illogical and unhelpful to the reader. Report of the Renton Committee, *supra* note 79, at 27-31.

95 W. Dale, Legislative Drafting: A New Approach; A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom 333 (1977).

96 Renton Committee, *supra* note 79, at 27-31.

97 Dale, *supra* note 95, at 333.

response to this phenomenon, with the concern that legislation should be made deliberately simpler to facilitate greater understanding and intelligibility to its audience. Given that legislation has a specific purpose of great fundamental value to the functioning of any society, the efficiency of this purpose should not be minimised for reason only of undue difficulty and complexity in the structure, format and language of the text.[98]

There is no one magical formula for achieving quality in the legislative draft. However, the *Joint Practical Guide of the European Parliament, the Council and the Commission ('the Guidelines')* serves as the most structured attempt made so far in itemising certain requirements which collectively contribute to a quality draft.[99] Overall, it is advocated that the technical aspect of achieving quality in the legislative draft requires focused attention on clarity, simplicity, precision, accuracy, and plain language in the legislative text.[100] It is suggested that all the understanding and the analysis carried out by the drafter so far in the drafting process, should now be transposed into legislative form with these standards in focus.

I. Clarity

Legislation is not read for pleasure, it is read when users want to find out what the law is on a particular matter or when they want to solve a problem that has legal implications.[101] As such, when trying to understand legislation, readers judge the value of legislation on whether the information they are seeking is presented clearly, precisely and in the first place they look.[102] Traditional legal writing has been repeatedly accused of lending itself to obscurities, convoluted and circumlocutious language, and difficult sentence structure.[103] Any combination of these challenges will likely present a great hindrance to the readability of legislation.[104] As it is understood that intelligibility of accurately articulated policy is the benchmark of quality legislation, EU drafters are therefore expected to achieve

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[98] As per Martineau, *supra* note 2, at 12:

> Every provision in a document, legislation, or rule is designed to result in action or to have legal effect. To the extent that the audience of a document, legislation or rule has difficulty understanding it, the likelihood it will accomplish what its drafter intends is reduced.

[99] Also, to date the most comprehensive formula for achieving quality in the legislative text has been prescribed in the publication of the *Joint Practical Guide of the European Parliament, the Council and the Commission ('the Guidelines')*. This document takes into account the extensive commentary made on maintaining quality in community legislation of the EU. *See generally*, *Joint Practical Guide of the European Parliament, the Council and the Commission: for persons involved in the drafting of legislation within the Community institutions*, http://europa.eu.int/eur-lex/lex/en/techleg/17.htm.

[100] Xanthaki, *supra* note 22, at 660. Joint Practical Guide of the European Parliament, *supra* note 99.

[101] Berry, *supra* note 86, at 1.

[102] *Id*.

[103] Renton Committee, *supra* note 79, at 27-31.

[104] Law Reform Commission of Victoria (Australia), *supra* note 6, at 5.

quality, in the first instance, through attention to clarity in the text.[105] In this regard, language that is clear entails the use of words and sentence structures that are simple, concise, containing no unnecessary elements, and unambiguity.[106] In contemplation of our case study however, organisation of the legislation, avoidance of long sentences and punctuation are three aspects of clarity that will be examined.

1. Organisation of Material

Organisation of material in legislation is critical to helping the reader to understand legislation. In fact, stage three of the drafting process- designing the law, is simply concerned with doing just that. Before textual drafting begins, it is essential that the design of the legislation be organised and structured. For Thornton, the principal aim at this stage is to organise a structure that best facilitates communication of the content, but also achieves the objects of the instructions.[107] As far as possible therefore, the drafter should achieve a logical flow of information through the careful grouping of related material.[108] Many methods have been suggested as a means of achieving organisation which immediately communicates the central message to the reader.[109] However, since proper organisation contributes to clarity in the law, each drafter must bear the responsibility of ensuring that the organisation of the draft best enhances the communication of the purposes and objects of the policy.

2. Long Sentences

The use of long, complicated sentences, or long sense-bites,[110] has been widely criticised as another factor which leads to incomprehensibility in legislation. It is argued that even if the long sentences are accurate and grammatically correct, the short term memory of many readers will not allow for proper comprehension of large stretches of material.[111] In drafting legislation this practice should also be discouraged, since there is an equal chance that within long sentences the central message would be obscured, or that relevant details may be overlooked. Butt and

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[105] Joint Practical Guide for EU Drafters, *supra* note 99, at 10.

[106] *Id.*, at 10.

[107] Thornton, *supra* note 21, at 138.

[108] Report on *Access to the Law*, *supra* note 6, at 8.

[109] For instance, it was argued that the traditional form of Bills and Acts did not lend itself to effective communication of the central idea of the legislation at times. It is suggested by beginning with a commencement provision, a statement of aims or objectives, a list of defined words, then a provision dealing with the applicability of the legislation to the Crown, results in the message of the legislation being delayed, sometimes for several pages: Report on *Access to the Law*, *supra* note 6, at 8.

[110] According to Butt and Castle, another characteristic of traditional legal drafting is long slabs of unbroken text- long 'sense-bites'. It is said that when combined with a deliberate absence of punctuation and a lack of paragraphing, and indentation, this produces impenetrable text, confounding comprehension. Butt & Castle, *supra* note 88, at 108.

[111] Law Reform Commission of Victoria (Australia), Plain English and the Law: Guidelines for Drafting in Plain English, A Manual for Legislative Drafters, para. 70 (1987).

Castle suggest that the breaking down of long sense-bites into sub-paragraphs or indentations will likely transform the long sentence into manageable 'shorter sense-bites'. These are deemed to be simpler and allows for the reader to more quickly grasp the meaning.[112] 'Short sense-bites' can include phrases, reduced relative clauses, or simple sentences that are understandable, structured, chunks of information.[113] The notion of 'short sense-bites' can be even taken further if in a given case the call for clarity and simplicity demands that further efforts be taken to produce and even clearer draft.

What follows is a provision from the *Status of Children Act*, 1978 (Queensland).[114] Section 6(2) of this Act is an example of a long sense-bite, which demonstrates the difficulty long-windedness could have on clarity and understanding. Example B on the other hand, represents the approach the drafter of the instant case study would take in drafting this provision, bearing the concepts of short sense-bites in mind, and the overall pursuit of clarity.

> Example (A):
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> Protection of executors, administrators and trustees
>
> 6(2) Action shall not lie against an executor of the will or administrator or trustee of the estate of any person or the trustee under a document by any person who could claim an interest in the estate or property by reason only of any of the provisions of this Act to enforce a claim arising by reason of the executor, administrator or trustee having made any distribution of the estate or of the property held upon trust or otherwise acted in the administration of the estate or property held on trust disregarding the claims of that person where at the time of making the distribution or otherwise so acting the executor, administrator or trustee had no notice of the relationship on which the claim is based.[115]
>
> Example (B):
>
> Duty of executors, administrators and trustees.
>
> 20. (1) In any case of the administration of an estate, the executors, administrators or trustees shall take reasonable care to discern the identity of all persons who may be entitled to claim under such estate.
>
> (2) No action shall arise against an executor, administrator or trustee by an illegitimate person who is entitled to claim under an estate, where it is proved, on a balance of probabilities, that at the time of the administration of the estate, the executor, administrator or trustee had no notice of the relationship on which the claim is based.

The second draft, although subdivided, presents the objective of this section in a clearer and more intelligible form.

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[112] Butt & Castle, *supra* note 88, at 138.

[113] E. Tanner, *Clear, Simple and Precise Legislative Drafting: Australian Guidelines Explicated Using and EC Directive*, 25Statute Law Review 223, at 249-250 (2004).

[114] Found at http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/StatusChildA78.pdf#search=%22Status%20of%20Children%20Act%22.

[115] Section 6(2) of the Status of Children Act, 1978 (Queensland).

3. Punctuation

Traditionally, the maxim *De minimis non curat lex* – the law does not concern itself with trifles, was also used to discourage the use of punctuation in legal writing.[116] Moreover, just as with marginal notes and headings, Courts have traditionally not placed great value on punctuation in interpretation, in view of the practice that punctuation was commonly inserted by the printers after an Act had been passed.[117] However, modern drafters are increasingly encouraged to make greater use of careful punctuation in legislative text, as this also contributes to greater clarity in the law.[118] In fact, it is even asserted that the draftsman has the responsibility to use punctuation marks to enhance clarity and reduce ambiguity to a minimum.[119] In view of this function therefore, the drafter purposely utilised commas in the draft legislation case study, with the belief that such usage, as in ordinary usage in language, would aid in the communication of this legislation. Section 15(1) in the draft is one section, for example, where the use of commas has allowed for a certain flow in the reading and understanding of the provision.[120] The modern drafter must therefore not be limited by the traditional attitudes towards the use of punctuation in legislation. As one of the objectives to be achieved in quality drafting is clarity, the drafter's use of careful punctuation is well justified in favour of clarity. Overall, clarity of expression is one of the essential components to good quality drafting, but it is not an end in itself and is often difficult to achieve.[121] As such, the most achievable aim is for the drafter is to seek to express the problem or rule as clear and concisely as the value of the problem allows.[122]

II. Simplicity

The conflict between achieving simplicity and clarity, but yet certainty of meaning in the legislative text, is one which the modern drafter continues to grapple with. In the first place, many Parliaments, particularly within the common law legal system, are not generally keen to enact general statements of principles, particularly where the provisions relate to the creation of rights, duties or other obligations on citizens.[123] Governments much prefer to sanction a draft that is precise and certain at the expense of simplicity, and at times intelligibility, in order to avoid certain interpretations by the courts.[124] Even the Renton Committee in its report offered that the draftsman must never sacrifice certainty for simplicity, since the

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116 U. Lavery, *Punctuation in the Law*, 9 American Bar Association Journal 223, at 223 (1923).
117 Butt & Castle, *supra* note 88, at 139.
118 R. Wydick, *Should Lawyers Punctuate?*, 1 Scribes Journal of Legal Writing 7 (1990).
119 V. R. A. C. Crabbe, *Punctuation in Legislation*, 9 Statute Law Review 87, at 100 (1988).
120 *See* section 15(1) of Appendix III: (Arrears of Maintenance, etc.).
121 G. Tanner, QC, *Imperatives in Drafting Legislation: a Brief New Zealand Perspective*, 52 Clarity 7-11, at 7 (Nov. 2004).
122 Martineau & Salerno, *supra* note 2, at 11.
123 Mayhew, *supra* note 38, at 7.
124 Thornton, *supra* note 21, at 55.

result may frustrate the legislative intention.[125] While the conflict in achieving both these aims is evident, it is asserted that the solution must ultimately be for the drafter to strive for a balance in practice.[126] EU drafters are advised to attempt to reduce the legislative intention to simple terms in order to express it simply.[127] The objective of a provision must be certain, but it is also necessary that this is done without becoming too difficult to understand.[128] The use of plain language and sign posts in legislation are merely two techniques that may be relied upon in legislation to reduce what could be complex, to the simple.

1. Use of Plain Language

In practice, the use of plain language or English essentially means the deferral of the use of language that is complicated, technical or convoluted, in favour of plain, clear, ordinary language for its intended audience.[129] The traditional language of legislation has tended to be circumlocutious and complex, containing excessive 'lawyerisms' or 'legalese'.[130] However, the proponents for the use of plain language continue to assert that words used in common every day usage by persons of average intelligence and education are more easily read and understood than words that require a high level of education or specialized knowledge.[131] Given that we have already acknowledged that the audience for the *Status of Children* legislation will include persons at all levels of intelligence, the argument for the use of clearer or more commonly used words is well reasoned in this case. According to Crabbe, an Act of Parliament is part of the language of a people, and will be understood as language of that jurisdiction is understood. As such, he argues that any Act should therefore be drafted in accordance with the principles that govern language within a particular area as a means of ensuring full communication of that Act in that jurisdiction.[132] The language of the legislative text, and its intelligibility for readers and users is indeed one of the principal aspects by which quality legislation is judged.[133]

Take for example the following examples taken from the *Status of Children Act,* 2002 (The Bahamas). Section 3(1) concerns the objective of equalising the

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[125] Renton Report, *supra* note 79, at para 11.5.
[126] Mayhew, *supra* note 38, at 10.
[127] Joint Practical Guide, *supra* note 99, at 11.
[128] *Id.*, at 10.
[129] Law Reform Commission of Victoria (Australia), Discussion Paper No. 1, *Legislation, Legal Rights and Plain English* (1986), at 3; Butt and Castle argues that the legal profession's systematic mangling of the English language, perpetrated in the name of tradition and precision: Butt & Castle, *supra* note 88, at 1.
[130] Lawyerisms are words or phrases used primarily by lawyers. They are the jargon of the legal profession, and have been the curse of legal writing as long as there have been lawyers. Some of these include: the use of "further provided that", "herein above mentioned", "the same", "therefore", or even latin expressions such as: "per curiam", "res ipsa loquitur" or "res judicata". Essentially the plain language movement argues that the use of these and other similar expressions should not be used: Martineau & Salerno, *supra* note 2, at 59.
[131] *Id*., at 57.
[132] Crabbe, *supra* note 3, at 27.
[133] Joint Practical Guide for EU Drafters, *supra* note 99, at 11.

status of all children. Section 5 on the other hand provides for the abolition of the common law rule of construction. The principal problem with both of these sections is that while a lawyer would be able to decipher the meanings of these sections, it is likely that their objective and meaning would be less discernable to a non-lawyer reader. The persons whom these provisions will affect are, like in our legislation, persons of varying levels of intelligence, ranging from lawyers to judges to the bartender. It is therefore better that legislation of this kind be reduced to simpler, common language in order that the purpose and intent of the legislation is more easily understood. Examples D, on the other hand, represent a more plain language approach, which has been adopted in our draft legislation, in order to directly inform the reader of the objectives of these critical provisions.

> Example C:
>
> All children of equal status.
>
> 3. (1) Subject to the provisions of sections 6 and 16, for all the purposes of the law of The Bahamas the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.[134]
>
> Rule of construction.
>
> 5. Unless a contrary intention appears, any reference in an enactment or instrument to a person or class of persons described in terms of relationships by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined in accordance with sections 3 and 4.[135]
>
> Example D:
>
> Removal of legal distinction.
>
> 4. (1) The common law distinction which exists to distinguish between children who are born in wedlock and those who are born out of wedlock is abolished.
>
> (2) In every respect, all children, whether born within wedlock or outside of wedlock are equal before the law, and all rights, duties, and obligations owing to any child shall be determined by established relationships between the child and its mother and father.
>
> Abolition of the rule of construction.

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[134] Section 3(1) of the Status of Children Act, 2002, Commonwealth of the Bahamas; another example of a similar provision is found in Section 5, Status of Children Act, 1996, (New South Wales, Australia):

> 5 (1) For the purposes of any law of the State by or under which the relationship between any person and the person's father and mother (or either of them) arises, that relationship and any other relationship (whether of consanguinity or affinity) between the person and another person is to be determined regardless of whether the person's parents are or have been *married* to each other.

[135] Section 5 of the Status of Children Act, 2002.

> 5. (1) The rule of construction which prescribes that the words "children" or "issue", or any other like words denoting offspring shall when used within statutory or testamentary provisions be understood to mean legitimate children only, unless the contrary is proved, is abolished.

The practical direction for any drafter at this stage therefore is to take deliberate care in selecting words that will be easily understood by the users and all other readers. If we accept that intelligibility is greatly increased when the drafter drafts in clearer, or plainer language, then it behoves the drafter to pay particular attention to the audiences of legislation, and to responsibly select language with such audience in focus.[136]

2. Careful Use of Signposts for the Reader[137]

Agreeably the reduction of difficult or technical policy into plain or simple words may not be always easily achieved.[138] However, the current understanding of plain language in legislation is not just concerned with the words used. Plain language also concerns the use of materials which would offer a non-expert reader some assistance in coping with technical aspects of the legislation.[139] Legislative tools such as headings, titles marginal notes are considered in this regard, but also too, the use of tables, plans, formulas, and even maps in the legislative text. These are at times considered indispensable tools for conveying information more efficiently than mere words.[140] It is urged that additional tools be used conservatively, since the main objective is always to allow for a smooth, uninterrupted flow of information and rules. However, the drive for quality entails a rethinking of the means utilised to convey information, and a bold embrace of other means through which the correct information may be communicated. Interestingly, in light of the increased complexity of legislation over the years, many readers of legislation

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[136] The social costs [of unintelligible legislation] lie in the risk of laws being enacted without being properly understood; of people committing offences unknowingly; and of people being unaware of benefits and opportunities which are legally available to them. Participation by people in the life of the community and in decision making which affects their lives is substantially diminished. The economic costs are equally important … The need for legal advice is increased, expensive litigation results. Poor legislation further compounds the problem of the cost of legal regulation to Governments: Report on *Access to the Law*, *supra* note 6, at 4.

[137] Butt & Castle, *supra* note 88, at 134.

[138] Richard Thomas concedes that:

> A statute is a very different document from a leaflet, a form, a letter, or a contract which is designed for those with an average reading ability. It is addressing several audiences; it is trying to achieve maximum certainty, often with highly complex subjects, in a variety of circumstances; it springs from a tradition of policy-making and law-making according to detail; it has to spell out its effects upon numerous existing statutes and on the common law; … it has to serve as the virility symbol of government ministers and has to be designed to withstand the target practice of those in opposition

R. Thomas, *Plain English and the Law*, 6 Statute Law Review 139, at 148 (1985).

[139] Discussion Paper No. 1, *supra* note 129, at 1.

[140] Butt & Castle, *supra* note 88, at 144.

have come to rely on explanatory material, circulars or booklets which set out law in simpler form. There are those who assert that this is the better practice, as oppose to the drafter concerning himself with reducing legislation into simpler form.[141] The other view is that this practice may be dangerous as no simplistic explanation in lay terms can convey the legal position with complete accuracy.[142] Still, a modern drafter ought to be encouraged to freely use explanatory materials to bolster understanding by the reader. Quality in legislation is not limited to the simplicity of its text, but extends to any additional information, such as explanatory material or notes, which contribute to improving understanding of the legislation.[143]

III. Precision

Governments expect drafters to express legislative intention accurately, and capable of the one meaning – that is the meaning Government intends.[144] Common law drafters insist on including most, if not all details in the legislative text, so that the reader is informed directly of his or her rights or duties.[145] The common law drafter therefore principally strives for precision in the draft, on the conviction that precision correlates to certainty in the law.[146] Precision is an important aspect in drafting any legislation, for it is crucial that there are no

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[141] Bennion, *supra* note 78; According to Hunt,

> [n]either the drafter, nor the legislation itself should be regarded as a vehicle of communication to the public – rather it should form the basis from which the explanatory materials should take root. These explanatory materials, specifically directed at members of the public should seek to illustrate in plain and simple language, the nature and effect of each piece of legislation … However, it is imperative that we do not become distracted in our efforts to resolve the difficulty inaccessible legislation. The focus should turn to establishing some kind of formalized structure to effect the dissemination of the content of legislation in ways which take cognizance of the citizen's needs and abilities. From a legislative drafting perspective, dissemination of the content of legislation is the real way in which the needs of the citizens can best be served, not through distracting stratagems

Hunt (2003), *supra* note 78*,* at 122.

[142] Graham also argues that it could give rise to short cut interpretations of the law, or the law being wrongly applied: A. Graham, *Well in on the Act: A Government Lawyer's View of Legislation*, 9 Statute Law Review 4, at 5 (1988).

[143] K. Muylle, *Improving the Effectiveness of Parliamentary Legislative Procedures*, 24 *S*tatute Law Review 169, at 175 (2003).

[144] *The Role of Parliamentary Counsel in Legislative Drafting*, Paper following UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers, Ikampala-Uganda, March 2001, at 13.

[145] Tetley, W., *Mixed Jurisdixtions: Common Law vs. Civil Law (Codified and Uncodified)*, 4 Unified Law Review (N.S.) 591, at 593. Available at http://tetley.law.mcgill.ca/comparative/mixedjur.pdf.

[146] *Id*., at 16: It was found however that the preoccupation with precision and certainty also led to over-elaboration and prolixity in the text at times: Renton Report, *supra* note 79, at 27-31; T. Millet, *A Comparison of British and French Legislative Drafting: (with particular reference to the their respective Nationality Laws)*, 7 Statute Law Review 130, at 155-156 (1986).

mistakes or misinterpretations of the objects and purposes of the text.[147] It is here that the drafter's sound understanding of the proposal and analysis is ultimately tested, as he must accurately articulate the substance of the proposal based on his understanding of the proposal. The proper use of definitions, for example, is one practical means of ensuring a measure of precision in a draft. The primary role of definitions in all legal documents is to give precise meaning to words and phrases used in the document.[148] Overall, the precise drafting of the substance of the policy, including definitions, is a paramount concern in quality legislation. In addition to clarity and simplicity, the drafter must be particular about the avoidance of ambiguity and ensuring that the law is accurately stated. Precision in the law amounts to certainty in the law, which is in fact the very function of written law.

IV. Summary

As for the technical side of drafting legislation, quality expectations are that the legislation must be clear, unambiguous, simple and precise. These are standards of good quality of legislation that are recognised in both common and in the civil law jurisdictions. They are effectively the pillar principles on which quality throughout the entire drafting process rest.[149] It is admitted that the achievement of each of these within a given draft is particularly challenging for the drafter, given the nature of legislation generally. It is argued however that in view of the goal of quality, the pursuit to achieve these principles should not be abandoned, but rather the drafter must be prepared to strive for a suitable balance of these in the

[147] Certainty in the law is regarded as having the advantage of directly informing all persons affected or concerned with the law, where they stand in relation to it. It is a firmly held principle in common law jurisdictions, that as far as possible the law should be comprehensive, clear and certain, before it reaches the judges: G. C. Thornton, Legislative Drafting 55 (1996). Additionally, the point should be made that the rules of statutory interpretation within these legal systems support the drafting techniques that have developed within these systems. The scope of this paper does not allow expansive discourse on the various governing rules in this regard, but it is sufficient to say for instance that justices in France are not put off by there expectant role that the courts will supply the detail in the face of a general principle. Whereas, in common law jurisdictions, those who instruct drafters will not generally accept broad principles, which in their view would lead to uncertainty, and they do not take pleasure in encouraging judicial lawmaking. The accepted rules of statutory interpretation therefore support and justify the particular drafting techniques practised within these legal systems

[148] The following is an example of a group of definitions that cannot be deemed to be of good quality, based on vagueness and imprecision of the terms: In this Act –

> *Parentage testing order* see section 11(2)(b).
>
> *Parentage testing* procedure see section 2A.
>
> *Prescribed court* see section 18C(1) (a),
>
> *Prescribed overseas* jurisdiction has the meaning given by the Family Law Act 1975 (Cwlth).

[149] Xanthaki, *supra* note 22, at 660.

draft.[150] According to Professor Dickerson, the ideal draft is one that the legislative audience will find easiest to understand and use.[151] The crux of achieving quality in legislative drafting itself is to reduce legislative policy into the most efficient and digestible form for the audiences. Law must but understood in order that it be deemed effective and functional. The modern drafter is therefore pressed to keep the audience in the forefront of the mind at all times. As such, every drafter ought to be particularly concerned to ensure that every word chosen, sentence structure, paragraph development, and use of language and punctuation, is deliberately calculated to produce the most effective and accessible legislative product. It is on achieving this delicate balance of clarity, simplicity and precision, that quality in legislation is most celebrated.

E. Scrutiny and Analysis

I. The Contribution of Legislative Scrutiny to Quality

The completion of a first legislative draft, after the execution of a slated design, is for the drafter an accomplishment. This however does not herald the completion of the final draft to be enacted, for before a draft is approved to be placed on the legislative calendar, it must be scrutinized by the sponsors, and perhaps other interested parties.[152] The scrutiny and testing stage of the drafting process enables the sponsors to assess firstly, whether the draft accomplishes the objectives that the sponsors themselves intended. It enables consultation from experts and other persons, who may eventually be users of the legislation, to render first feed back on the suitability and overall workability of the legislation. The fact that quality is achieved when the draft reaches its optimum potential of clarity and accuracy in the law, and yet simplicity and intelligibility for its readership, means that every opportunity allowed for further deliberation would safeguard an even greater quality product. In fact, the intention of there being a stage five in the drafting process, which is solely dedicated for further evaluation of the legislation product is, for Thornton, a deliberate and crucial stage in achieving quality in the final legislative draft.[153] The process of consultation and scrutiny is in William Dale's view a definitive contributing factor towards the attainment of quality legislation in many civil law countries.[154] When compared to common law drafting, which

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150 Mayhew, *supra* note 38, at 10.

151 D. Dickerson, Teacher's Manual for Materials on Legal Drafting 38 (1981).

152 Thornton, *supra* note 21, at 173.

153 *Id*.

154 He observed that statutory law in France has

> an order, a logical development, a freshness, a certain elegance, that, when compared, is missing from common law drafting. There is an absence of unfamiliar language, and a purity of expression, a clarity of utterance, and an overall quality of readability.

W. Dale, Legislative Drafting: A New Approach; A comparative study of methods in France, Germany, Sweden and the United Kingdom 87 (1977).

entails two processes-drafting and enacting the law, the additional stage for revision in civil law countries is the factor that perhaps is most credited for civil law legislation's edge of intelligibility and accessibility over common law legislation.[155]

It is agreed that optimum legislative scrutiny takes place at two levels. In the first place, there is room for early consultation and pre-legislative scrutiny.[156] One thinking underpinning scrutiny at this level is that it allows for greater flexibility and influence on the shaping of the Bill before it reaches Parliament. Also, at this stage there is far greater opportunity for non-governmental agencies to have substantive input into the overall quality of the bill. The next level of scrutiny is Parliamentary scrutiny itself. Constitutionally, the enactment of legislation is the responsibility of Parliaments, and therefore Parliaments must also assume responsibility for legislation that is of poor quality.[157] As such, it is crucial for Parliamentarians to fully utilise scrutinise a given legislative draft with the view of securing the greatest quality in the legislation.[158]

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[155] Dale in his work expressed much interest in the revision stage in the civil law legislative drafting process, which forms an integral part. He noted that amongst the continental countries, the revision stage incurred two steps:

> (i) In France all draft laws were examined and revised as necessary by the Conseil d'Etat; in Sweden many are referred to the Law Council; in Germany the Ministry of Justice performs an examining and co-ordinating role for all Federal draft laws. (ii) Parliamentary committees then closely scrutinise all draft Bills, in round table discussions attended by ministers and civil servants, and report on the Bills to the House. In Germany, further scrutiny is carried out by the committees of Bundesrat – the second Chamber, a process which is prescribed in the Constitution.

Dale, *supra* note 154, at 334.

[156] In the United Kingdom (UK) the most direct call for pre-legislative scrutiny came from the Modernisation Committee, which criticised the House for not availing itself of the opportunity to undertake systematic consideration of a number of draft bills that had been produced by the Government for prior consultation. *See* Report of the House of Commons Select Committee on the Modernisation of the House of Commons, First Report, Session 1997/98, 23 July 1997, paras. 19 & 20:

> The present Government's declared intention to build on its predecessor's policy of publishing a number of Bills in draft form provides a real chance for the House to exercise its powers of pre-legislative scrutiny in an effective way. … There is almost universal agreement that pre-legislative is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published … At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed, should, lead to less time being needed at later stages of the legislative process … Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.

[157] Dale, *supra* note 154, at 340.

[158] Report of the Hansard Society Commission on Parliamentary Scrutiny, The Challenge for Parliament: Making Government Accountable 28 (2001).

In the Virgin Islands, many drafts are only referred to the sponsoring Ministry for review for overall compliance with the legislative policy objectives. Little more is done to obtain the views of experts or other feedback back from other non-governmental organisations, save for in very specific cases.[159] Also, there are at present no Special Select Committees to perform the task of pre-legislative scrutiny in the Virgin Islands,[160] and as such the greatest legislative scrutiny currently occurs in plenary, and perhaps later by the Committee of the whole Council after the Second reading.[161] While this is the reality within many jurisdictions of the Commonwealth, this reality does not in any way diminish the value of the contribution of proper consultation and scrutiny of legislation to quality legislation overall. In fact it is proper for draft legislation to be reviewed and scrutinised especially at a pre-legislative level, to allow the drafter a further opportunity to revise the draft. It is understood that a first draft is merely that, a first draft which after the scrutiny process will be improved upon to the tune of certain of the recommendations made. In general, the receipt of further recommendations at the scrutiny stage in the legislative process re-directs the drafter's attention to the objectives of the legislation, and to how best to achieve the objects of quality. Given that quality legislation may have different meanings to different readers and users. Feedback of any kind must be carefully considered and utilised as constructive criticism. Thereafter the drafter must be prepared to revise the work. It is at this stage in the drafting process where it is most emphasised that the achievement of quality legislation is not the responsibility of one player in the legislative process, but rather the collaborative efforts of the sponsors, the ministers, the drafter, and the Legislature.

II. Quality Legislation and the Rule of Law

The call for quality in legislation in the Virgin Islands is imminent. However, being a much smaller jurisdiction than the UK, it is quite possible that the call and insistence on quality legislation may not be reached in like fashion, or may be some distance off. Despite the absence of an immediate call for quality by Ministers or even the wider public however, there exists an underlying argument that quality legislation should be produced as a right in any democratic state. Like so many nations of the world, the Virgin Islands too boast of its democratic heritage, and its commitment to fundamental democratic principles. Within democratic societies, the principle of the rule of law is one of paramount importance for governance,

[159] Recently, on the eve of the enactment of the Legal Profession's Act, 2006 (Virgin Islands), draft legislation was submitted to the Bar Council of the Virgin Islands during a brief period of pre-legislative scrutiny.

[160] By Section 72 of the Legislative Council Standing Orders, 1979, Other Standing Select Committees include: the Public Accounts Committee, the Standing Orders Committee, the Services Committee, the Committed of Privileges, and the Regulations Committee. Provision is made under Section 78 for the appointment by Council of Special Select Committees when the need arises. In the Virgin Islands there have not in recent years been appointments of special select committees for legislative scrutiny.

[161] Sections 56 & 57, Legislative Council Standing Orders, 1979 (Virgin Islands).

and it is understood in two respects.[162] In the first place, the rule refers to the right of a legitimately authorised legislature to pass laws for the general good, and to have them impartially applied and followed.[163] Secondly, it refers to the judiciary's authority to determine the state of the law in a given matter, having regard to prevailing legal norms.[164] The particular significance of this rule to governance is that the agreed principles of law enacted by the Legislature are regarded as neutral safeguards to protect the citizens from each other, and more importantly, the governed from arbitrary rule by governors.[165] For Franck these principles of law are those that are sanctioned through legitimacy by the citizens.[166] These are the rules that ground the communities, the institutions, and the liberties of citizens.[167] These are the rules that the public willingly subject themselves to as being the product of a right process. These are the rules which citizens agree to be governed by. The rule of law is therefore fundamental to the democratic political structure which upholds the right of all citizens to govern themselves.

In view of quality legislation, the argument is that given the pivotal role of the rule of law, and the laws of the Legislature to the governance of the state, the existing implication is that such laws should at basic be communicable, accessible

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[162] A. V. Dicey, Introduction to the Law of the Constitution 202-203 (1939). Dicey created a classical formulation of the rule of law in 1885. He stated that the rule of law has three meanings: It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power … Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

[163] Legitimate government defines the relationship between the state and subjects in which the citizen engages in matters of their governance, and thereby authorizes and influences government: R. Barker, Politicial Legitimacy and the State 3 (1990).

[164] R. Bellamy (Ed.), The Rule of Law and the Separation of Powers 253 & xi (2005); T. M. Franck, *Democracy, Legitimacy, and the Rule of Law: Linkages*, *in* N. Dorsen & G. Prosser (Eds.), Democracy and the Rule and Law 177 & 169 (2001): Franck asserts that implicit in the rule of law is that the courts would apply legitimate law made by democratically elected legislators, when determining whether a proposed exercise of power accords with rules of fairness as agreed by the democratic process. A principle element of democracy is that ultimate power rests with the electorate, in that it is the electorate that elects the legislature, and it is through the electorate that the legislature and the executive derive their legitimacy and authority to function. For Franck therefore, the element of legitimacy is the basic fibre to the rule of law.

[165] R. West, *Human Rights and The Rule of Law*", *in* T. Campbell, J. Goldworthy & A. Stone, (Eds.), Protecting Human Rights: Instruments and Institutions 91-114 (2001). According to West, in the American legal tradition, (which in this extract relied on the works of John Hobbes and John Paine), 'the rule of law' is expressed as a desire for legal control, or containment of the political process and the protection of the state against private aggression. Yet it may also be expressed as a commitment to the positive values of the state, 'the law as king', which, for Tom Paine, was the democratic will of the people, expressed through representative government in a functioning simple democracy.

[166] Legitimacy is regarded as the generic label for factors that concern our willingness to comply voluntarily with commands T. Franck, The Power of Legitimacy Among Nations 150 (1990).

[167] *Id*, at 169.

and intelligible to all citizens. It is a fact that not all citizens are knowledgeable of the laws which bind them, despite the general rules which dictate that all should have notice of law once published in the National Gazette, or even the indisputable backlash that "ignorance of the law is no excuse". The fact remains that incomprehensibility of laws, for many persons, continues to frustrate the full appreciation of the laws which are critical to their governance.[168] It may be true that not all citizens may have an interest in discerning the substance of the law, and only those who are directly involved with a particular matter will seek to be knowledgeable of a law's substance and effects. Yet, it remains the rule that all must be subject to the law, and this rule presumes accessibility by all of the law to which they must be subject. Quality legislation that is clear, simple and precise has the greatest potential of ensuring that there is equality of all citizens before the law, in the sense that these attributes enhance accessibility and comprehensibility for all. The greatest implication of the rule of law for quality legislation therefore, is that at the very least, every person should have the fairest opportunity to comprehend and assess every law to which they are bound to subject themselves. Certainly, this is best guaranteed when the law is deliberately prepared with particular focus on all the persons whom it binds.

IV. Summary

The road to good governance and the willingness of governed peoples to be compliant to law is connected to the interconnected concepts of democracy, legitimacy and the rule of law.[169] In a democratic state, every citizen is deemed to have a right to meaningful participation in the political process, and their own governance. As such, it is argued that this is easiest facilitated where the law is prepared with such deliberate care to ensure that it is communicated in language which is most easily understood by the greatest cross-section of citizens.[170] Another concern is that, just as the civil and political rights of citizens are to be protected against perverse legal rules,[171] so too must they be protected from perverse practices. One practice that is repugnant to achieving the benefit of this right is unintelligibility in the law. The specific concern in this regard has been that the primary target of legislation, 'the ordinary person' was most probably unable to comprehend the substance of the law, owing to the traditional language, form and sometimes structure used. It is often asserted that the ordinary man does not

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[168] Law Reform Commission of Victoria (Australia), *supra* note 6, at 4.

[169] Franck, *supra* note 167, at 174.

[170] According to Lord Macaulay:

> There are two things which a legislator should always have a view while he is framing laws; the one that they be, as far as possible, precise: the other that they should be easily understood … That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it is an evil.

Butt & Castle, *supra* note 88, at 59.

[171] O. Kirchheimer, *Remarks on Carl Schmitt's Legality and Legitimacy*, *in* W. Scheuerman (Ed.), The Rule of Law Under Siege: Selected Essays of Franz L. Newmann and Otto Kirchheimer 78 (1996).

usually engage in deciphering the substance of laws, nor does he need to.[172] The difficulty with this assertion is that it fails to pay due regard to certain entrenched civil and political constitutional rights of the citizen.[173] Every citizen must have a fair chance of capitalising on their right to meaningful participation in their governance.[174] A legislature's failure to enact legislation that is comprehensible by even the ordinary citizen, may yield results of a feeling of intimidation and alienation of the law making process, or worse, the break down of democratic legislation.[175] Acts of Parliament lay down our rights and our obligations, our powers, our privileges and our duties.[176] Statutes tell us what to do and what not to do. As such, there should be no misunderstanding as to the meaning they seek to convey.[177] The effective communication of laws to the people to whom they govern is a fundamental characteristic of laws of a democratic state.[178] For this reason, those who are elected to act on behalf of citizens must regard quality legislation as a priority. Adequate consultation and scrutiny at the production of the first legislative draft is for every Parliament a tremendous responsibility and duty. For Parliamentarians, this is the defining stage during which they must exercise their duty to ensure that the legislation to be enacted is accurate in meaning and intelligible to all its users. This legislative duty of enacting legislation of this quality is one that should not be derailed by notions of who could be excluded from the category of "the ordinary readership of legislation."[179] As democracy

[172] It is also even argued that should the ordinary person have need to decipher a legal rule, such person should have no difficulty in seeking the advice of an expert-lawyer, just a patient seeks medical advice from a doctor. Hunt (2002), *supra* note 78, at 27-31; Hunt (2003), *supra* note 78, at 122; Bennion, *supra* note 78.

[173] According to Kirchheimer, democracy safeguards the legal right of *all* citizens to take part in the entire extent of the political process, including, the electoral process, political parties, interest groups, and to an extent, legislative proposals: Kirchheimer, *supra* note 171, at 77.

[174] According to Barker, the political rights of citizens, which would include the rights of association with other citizens and groups, must be rights against a state, for without an active state, these rights are not necessary or meaningful. Barker, *supra* note 163, at 199.

[175] As cited in the Rt. Hon. Lord Brightman, *Drafting Quagmires*, 23 Statute Law Review 1, at 8 (2003); K. T. Hudson-Phillips, *A Case for Greater Public Participation in the Legislative Process*, 8 Statute Law Review 76, at 76 (1987); Xanthaki, *supra* note 22, at 652; Also, according to Hudson-Phillips, public participation in the law making process is inhibited by the difficulty experienced by most people in understanding the textual and content of laws: Hudson-Phillips, at 80.

[176] The kinds of governmental policies and decisions which are usually channelled through legislation include the imposition of duties or obligations on citizens, the extension or restriction of rights, powers of public officials to make orders, give grants or issue licences, or the imposition of taxes and fees. Legislation is also enacted to enable Ministers to exercise certain regulatory functions: R. Blackburn & A. Kennon (Eds.), Griffith and Ryle on Parliament: Functions, Practices and Procedures, 7-8 (2003).

[177] Crabbe, *supra* note 2, at 27.

[178] According to Boyles, two of the essential characteristics of a law are that it must be communicated and it must be intelligible. He asserts that a person cannot guide his conduct by rules if he cannot understand them: *See* Boyles for a recap of Professor Lon. L. Fuller's eight characteristics for governance by law: M. Boyles, Principles of Legislation: the Uses of Political Authority 60-63 (1978).

[179] Hunt, (2003), *supra* note 78, at 114-115 and Hunt (2002), *supra* note 78, at 27-31. It has been argued that while the pursuit of plain language in legislation is in fact a laudable ideal, the reality

itself epitomizes participation by all as equals, and the making of decisions that treat all with equal regard and respect, our democratic Parliaments should pay homage to these concepts in the enactment of legislation.[180] The enactment of quality legislation that contemplates comprehensibility to all governed must be construed, by Parliament, as a democratic responsibility, and by the people, as a democratic right.

F. Conclusion

In this exercise the writer sought to examine the essentials of quality legislation, and to critically analyse how these are utilised by the drafter in the drafting process. To this end, the strategy deployed was to examine the task of the drafter at each stage in the drafting process, and to analysis how the elements of quality legislation may be factored into each stage of the drafter's task. Thornton himself concedes that drafters must see the drafting process in a wider context in order that it be properly understood.[181] By this he meant that the drafting process entails more than the mechanical transformation of a policy into legislative words and frame. The drafting process, for Thornton, must be that process through which a policy is tested and refined in order to achieve the greatest possible practical operation.[182] Perhaps it may be said that Thornton himself was here contributing to the argument that a drafter must in fact assume some responsibility for the overall quality of a legislative draft. The call for quality legislation fully contemplates the drafter's contribution in ensuring that the final legislative product accurately represents policy, but is still intelligible to its readers. Quality legislation continues to be benchmarked by these two limbs, even though they are commonly referred to in terms of the quality characteristics of clarity, simplicity and precision in the draft. The drafter who is concerned with quality must approach every stage in the drafting process with these objectives in mind. In stages one and two of the drafting process – the pre-drafting stages, the drafter's theoretical work is aimed at preparing his or her mind to transpose the policy and its effects into legislative form. Proper understanding and analysis of the proposal prepares the drafter to be precise in the articulation of the law, thereby ensuring that the draft is legally effective. This portion of the drafter's work indeed has great bearing on fine tuning and testing the substance of the proposal. The peak of the drafter's work however, is carried out in stages three and four where the actual organisation

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is that the actual readership of legislation does not include lay persons, and the assumption that members of the public are interested in reading raw legislation is wrong one. The ordinary readership of legislation, according to Hunt, in fact includes lawyers, judges, regulators, law enforcers and interest groups, and not lay persons Hunt and others argue that in light of this harsh reality, the argument for clearer, and simpler which will likely be more accessible than the use of the traditional style, is diminished.

[180] J. Debeljak, *Rights and Democracy: A Reconciliation of the Institutional Debate*, *in* T. Campbell, J. Goldworthy & A. Stone (Eds.), Protecting Human Rights: Instruments and Institutions 117, at 139 (2003).

[181] Thornton, *supra* note 21, at 124.

[182] *Id*.

and drafting occurs. The drafter must take care to be guided by quality principles when determining the language, structure and material to be used in conveying the policy. The use of plain language, punctuation, signposts or even explanatory materials must be calculated as being likely to produce the desired characteristics. It is generally agreed that the pursuit of quality objectives at the time the drafter is composing the law is no easy undertaking. At the end of the day, legislation by its nature cannot be equated to other forms of writing and this may pose a challenge to the drafter in certain respects.[183] For instance, as the courts will always interpret legislation to be consistent with other existing laws, the drafter cannot easily simplify certain words which carry particular judicial meanings. As such the drafter tends to be greatly bound by the rules of Interpretation Acts when using techniques which enhance simplicity and clarity.[184] Additionally, as a provision must firstly be unambiguous and precise in meaning, this factor does not always easily lend itself to the reduction of the provision into simple terms.[185] The best that can be advised therefore, is for the drafter to aim to strike a balance of clarity, simplicity and precision in the draft. In actuality, the practicability of achieving quality in legislative drafting primarily hinges on one critical issue, that of stating the policy as simply as the value of the problem allows.[186] This therefore means that every legislative drafting exercise will pose its own challenges, and a drafter cannot properly apply the exact techniques of one drafting exercise to the next. Overall, it is concluded that the attainment of quality in legislation is determined by the balance of clarity, simplicity and precision to the greatest extent that a given policy will allow.[187]

As discussed, the quest for quality legislation has wider implications which encompass the right of every person to meaningful participation in their own governance. In this regard there is an even greater need for insistence on improvements to be made, particularly to those statutes which affect daily life.[188] Certain statutes will by nature have a wider readership than others. It is with respect to this wider readership, which contemplates the 'ordinary non-legal citizen', that it is asserted that legislation that is clear and simple in language is the most suited to ensuring intelligibility to even the 'ordinary person'. The proponents for quality legislation concede that the 'ordinary person', who had habitually been overlooked through traditional drafting styles, must be equally accommodated. Contrary to Bennion's view, law should be different to any other area of expertise, given that law as a tool of governance controls the ordinary lives of citizens.[189] For Butt and Castle, the fact that law is a tool of governance is sufficient reason for there to be insistence that legislative language should be as language is generally, and not confined to coded messages.[190] The conception of

183 Tanner, *supra* note 121, at 7.
184 *Id*.
185 Thomas, *supra* note 14, at 148.
186 Martineau & Salerno, *supra* note 2, at 11.
187 Joint Practical Guide, *supra* note 99, at 10.
188 Thomas, *supra* note 14, at 149.
189 Bennion, *supra* note 78.
190 Butt & Castle, *supra* note 88, at 95.

legislation as a tool of governance should be the impetus that drives all democratic jurisdictions to actively pursue quality legislation as a matter of good democratic practice.

The draft *Status of Children* Act was utilised in this work to test whether quality legislation may be achieved at the end of the drafting process[191] It was found however, that while the drafter will significantly contribute to the overall quality of legislation, the final achievement of quality legislation is not one which the drafter can achieve alone. In stage five of the drafting process, other participants of the legislative process are invited to provide input on the quality of the existing draft, and to offer constructive analysis for its betterment. Ordinarily, legislative scrutiny is carried out by the drafting team in the first instance, then the sponsors, other interested persons, and then Parliament. The contribution of scrutiny to quality legislation is undeniable. Quality legislation is unfortunately not an objective standard, and it therefore must be tested through the review process of scrutiny. Every participant to this process will have an input, but ultimately it is for Parliament to be satisfied with the quality achieved in the draft before it is enacted. In our democratic societies it is Parliament who is constitutionally charged with the responsibility of enacting laws. The existing implication therefore is that it is Parliament who must bear the responsibility and the criticism for the overall quality of any legislation. In the final analysis, it is determined that quality legislation is ultimately achieved through the collaborative effort of the sponsors, the drafter and Parliament. While it may be possible to analyse each party's individual contribution to this goal, it is significant to note that achieving quality legislation is a standard that must be collectively pursed and can only be achieved by the efforts of all parties to the legislative process.

[191] *See generally*, Appendix II.