

Structure of Legislation: A Paradigm for Accessibility and Effectiveness

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Abstract

The aim of this article is to examine how the structure of legislation can nurture accessibility and effectiveness of legislation.

It explores whether the legislative drafter in carrying out the task of drafting can nurture effective communication of the policy maker's intent to the targeted audience by making use of the structure of legislation as a tool, to ensure the legislation is accessible to the end user, and foster effectiveness.

The third and fourth stage of Thornton's stages of the drafting process – design and composition – would be examined and also Peter Butt's types of structure, which relates to the drafting of legal documents but would be applied in this paper, to the drafting of legislation.

Keywords: effectiveness of legislation, structure of legislation, accessibility of legislation, quality drafting, clarity.

A Introduction

Legislation is the framework by which governments achieve their purposes. A government needs legislation in order to govern. Politicians and administrators see legislation as a means to attain their economic, cultural, political, and social policies¹ and a tool for development and fostering regulatory behaviour in every society.

Statute law is seen to govern almost every facet of our lives, from birth to death, and even after.² As legislation governs all parts of our lives in any given society, it is of utmost importance that legislation be readable, understandable, and that the audience of the legislation understand it to foster compliance and effectiveness of the legislation. I concur with Bennion's sentiments when he said:

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1 V.C.R.A.C. Crabbe, *Legislative Drafting*, London, Cavendish Publishing Limited 1993, p. 2.

2 S. Krongold, 'Writing Laws: Making Them Easier to Understand', *Ottawa Law Review*, Vol. 24, 1992, pp. 495-582, at 499.

It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend.³

Legislation is both a crystallisation and declaration of rights, privileges, duties, and legal relationships and a form of communication;⁴ therefore, when drafting a piece of legislation, the drafter, saddled with the task of translating policy into legislation, has an obligation to convert legislative proposals into legally sound and effective law⁵ and to communicate same clearly to the targeted audience⁶ in order to ensure compliance and effectiveness.

The past 20 years has seen a growing interest in the format of legal texts. Part of this interest⁷ stems from public demand for more readable legal documents.⁸ The contents of legislation should be ordered logically, from the readers' perspective, to enable the reader read and use it quickly and effectively.⁹ The unquantifiable impact that legislation has on the lives of citizens requires that it should be of quality and the quality of any legislation must follow function.

I Quality and Effectiveness of Legislation

Quality of legislation is an issue that has triggered a lot of debates in recent times. Xanthaki defines 'quality legislation' as that which is capable of producing regulatory result required by policy makers, a law which is capable of producing, leading to efficiency and effectiveness.¹⁰ There is a direct link between the qualities of legislation with the certainty in law and ultimately the rule of law and human right.¹¹ Quality refers to the substance and the form of the law;¹² the form refers to the drafting and presentation of texts, and substance includes conformity with principles of good legislation, effectiveness of rulemaking.¹³

- 3 F. Bennion, *Writing Laws: Making Them Easier to Understand*, 2nd edn, London, Oyez Longman 1983, p. 8.
- 4 R. Dickerson, *Materials on Legal Drafting*, St. Paul, Minn., West Publishing Co. 1981, p. 19; C. Stefanou, 'Is Legislative Drafting a Form of Communication?', *Commonwealth Law Bulletin*, Vol. 37, No. 3, 2011, pp. 407-416, at 308.
- 5 E. Moran, 'Legislative Drafting without Borders', *International Journal of Legislative Drafting and Law Reform*, Vol. 1, 2012, pp. 169-174, at 169.
- 6 P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, 2nd edn, New York, Cambridge University Press 2001, p. 170.
- 7 M.M. Asprey, *Plain Language for Lawyers*, 3rd edn, Liechhardt, The Federation Press 2003, p. 8.
- 8 D. Elliot, 'Writing Rules: Structural Style', International Conference on Legal Language, Linguist and Lawyers, 2004, p. 6.
- 9 Butt & Castle 2001, p. 170.
- 10 H. Xanthaki, 'Duncan Berry: A Visionary of Training Legislative Drafting', *The Loophole CALC*, No. 1, 2011, p. 18.
- 11 W. Dale, *Legislative Drafting: A New Approach*, Butterworths 1977, p. 340.
- 12 Piris, 'The Legal Orders of the European Union and of the Member States: Peculiarities and Influences in Drafting', *European Journal of Law Reform*, Vol. IV ½, 2006, p. 8,
- 13 C. Radaelli & F. De Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, Manchester, Manchester University Press 2007, p. 28.

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It entails the structure of legislation and how accessible the legislation is to the public.¹⁴

The quality of the legislation hangs on the structure or scheme of the legislation.

The Organisation for Economic Cooperation and Development identified different quality standards which are user standards such as clarity, simplicity, and accessibility; design standards which have to do with flexibility and consistency of rules and application; legal standards for structure and drafting; and analytical standards relating to benefit-cost and cost-effectiveness test.¹⁵

Quality of legislation is a universal pursuit, and the main goal of a drafter is to achieve effectiveness; this is a universal goal which cuts across all jurisdictions;¹⁶ in both the civil and common law systems, this is because effectiveness is a common functionality that can be applied to the drafting of legislation.¹⁷ Mousmouti states that “quality essentially refers to the real word outcomes of legislation and the degree of achievement of its goals; in other words it refers to effectiveness”.¹⁸

Legislation cannot improve unless effectiveness becomes the guiding value concerning design and drafting legislation.¹⁹ Effectiveness is the extent to which the observable attitude and behaviour of the target population correspond to the attitudes and behaviours prescribed by the legislation.²⁰ Effectiveness of legislation has to do with the features of the legislative text: the purpose and objectives, initial design, analysis, and means of a piece of legislation with its real-life outcomes.²¹

It is argued that improved quality of legislation would lead to accessibility and consequentially effectiveness.²² Legislation of good quality is one that is clear, simple, and effective;²³ the drafter therefore employs the criteria of effective-

- 14 J.C. Piris, ‘The Quality of Community Legislation: The View Point of the Council of Legal Service’, in Kellerman *et al.* (Eds), *Improving the Quality of Legislation in Europe*, The Hague, Kluwer 1998, p. 28.
- 15 OECD, ‘Background Note to the OECD Reference Checklist for Regulatory Decision Making’, Point 3.
- 16 H. Xanthaki, ‘Transferability of Legislative Solution: The Functionality Text’, in C. Stefanou & H. Xanthaki (Eds), *Drafting Legislation: A Modern Approach*, Ashgate 2008, p. 17.
- 17 H. Xanthaki, ‘European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation’, <<http://slr.oxfordjournals.org>>, accessed on 13 February 2014.
- 18 M. Mousmouti, ‘Operationalizing Quality of Legislation through the Effectiveness Test’, *Legisprudence*, Vol. 6, 2013, p. 197.
- 19 M. Mousmouti, ‘Effectiveness as an Aid to Legislative Drafting’, *The Loophole: CALC*, Vol. 2, 2014, p. 15.
- 20 L. Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’, *Statute Law Review*, Vol. 22, No. 2, 2001, pp. 119-131.
- 21 Dickerson 1981, p. 191.
- 22 V. Vanterpool, ‘Critical Look at Achieving Quality in Legislation’, *European Journal of Law Reform*, Vol. 9, 2007, p. 167.
- 23 European Parliament Council Commission International Agreement on Better Law Making (2003), *Official Journal of the European Union* C C32; A. Watson-Brown, ‘In Search of Plain English – The Holy Grail or Mythical Excalibur of Legislative Drafting’, *Statute Law Review*, Vol. 33, No. 1, 2012, pp. 7-23.

tiveness – clarity, precision, cost efficiency, and unambiguity – in drafting the legislation.²⁴

Effectiveness is the extent to which the legislation influences in the desired manner the social phenomenon, which it aims to address.²⁵ It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.

Legislation, by the use of a logical structure, is made clear to the audience; the quality of being clear and easily perceived or understood²⁶ can lead to effectiveness,²⁷ and this makes compliance a matter of conscious choice for the user. Thus, in its narrow sense, quality in legislation is synonymous to effectiveness and effectiveness can be achieved when the targeted audience act in accordance with the provisions of the legislation.

It therefore behoves the drafter to draft the structure of the piece of legislation in a way that is sensible, attractive, and comprehensible to the reader²⁸ that is accessible to the reader.

II Accessibility of Legislation

Access to legislation is a key element of the rule of law.²⁹ The efficacy and maintenance of the rule of law, which are the foundations of any parliamentary democracy, have at least two prerequisites. First, people must understand that it is in their interests, as well as in that of the community, that they should live their lives in accordance with the rules. Secondly, they must know what those rules are.³⁰

According to Lord Simon of Glaisdale:

legislation which is difficult to understand is derogation from the democratic right of a citizen to know what law he is governed.³¹

This obligation can be seen as the other side of the rule that says ignorance of the law is no excuse for failing to comply with it;³² it is therefore of enormous importance that laws are made accessible to the public.³³

24 Xanthaki 2008.

25 I. Jenkins, *Social Order and the Limits of the Law: A Theoretical Essay*, Princeton, Princeton University Press 1981, p. 180; R. Cranston, 'Reform Through Legislation: The Dimension of Legislative Technique', *North Western University Law Review*, Vol. 73, 1978-1979, p. 875.

26 *Compact Oxford English Dictionary of Current English*, Oxford University Press 2005.

27 H. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents*, London, John Murray 1902, p. 61.

28 Butt & Castle 2001, p. 231.

29 W. Robinson, 'Accessibility of European Union Legislation', <www85.opc.gov.au/calc/papers.htm>, accessed on 13 July 2014).

30 *Merkur Island Shipping Co. v. Laughton* [1983] 1 ALL E.R. 334. *Blackpool Corporation v. Locker* [1948]1 All ER 85, 87. The Preparation of Legislation (Renton) 36.

31 G.C. Thornton, *Legislative Drafting*, 4th edn, London, Butterworths 1996, p. 50.

32 D. Greenberg, *Craies on Legislation*, Sweet & Maxwell 2008, p. 373.

33 *Jones v. Randal* (1774)1 Cowp.37, 40. *Martindale v. Falkner* (1846)2 C.B.706, 719 and *Reg. v. Tewkesbury Corporation* (1868) L.R. 3 Q.B. 629,635.

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Accessibility goes beyond the simple question of whether citizens can obtain a text to whether they can reasonably be expected to understand the text and its application to their lives once they have obtained it; this was considered in the case of *Sunday Times v. United Kingdom*,³⁴ where the Court of Appeal distilled what it saw as a rule of the European Court of Human Rights and declined to recognise national laws which are not adequately accessible.

Legislation should be accessible not only in the physical sense but the content and meaning, the format, and structure of the legislation also need to be understandable. The targeted audience ought to be able to navigate around legislation and understand it.³⁵

The legislative drafter, as a translator of policy into legislation, is faced with the challenge of creating texts that embody the law in a fixed form and to communicate the same law to everyone: the parliamentarians who will enact the law, the citizens whose rights and interests will be affected by it, and the officials who will enforce it.³⁶ When the audience of legislation do not understand the legislation, they are less likely to comply with the law or exercise the rights under it;³⁷ this therefore makes the legislation ineffective.

Butt's stand is that structure and form are crucial to an effective, readable legal document.³⁸ The contents of the legislation should be consciously ordered to enable it be read quickly and efficiently, and to achieve this, that legislation be ordered logically from the readers' point of view. It could be said that the logical structure of legislation triggers compliant behaviour from the bulk of its addressees, even if they do not know the penalty for non-compliant behaviour.³⁹

The structure of legislation in most cases is determined either by statute or by the established practice; the effect of this is that the drafter has little or no choice but to conform to what is the 'house style'. This contradicts the creative or innovative role that the drafter is expected to play in the preparation of legislation.

III Audiences of Legislation

Drafters have paid little attention to the challenge of communication, communicating from the standpoint of the audience. It is pertinent that one cannot decide on the form in which statute law should ideally be presented without knowing the type of person for whom it is intended, that is the user of the legislation.

34 [1979-1980] 2 EHRR 245.

35 R. Sullivan, 'The Promise of Plain Language Drafting', *McGill Law Journal*, Vol. 24, 1992, pp. 97, 188.

36 Krongold 1992, p. 499.

37 *Ibid.*

38 P. Butt, *Modern Legal Drafting: A Guide to Using Clearer Language*, 3rd edn, New York, Cambridge University Press 2013, p. 129.

39 W. Voermans, 'Wetgeving als software voor menselijk handelen? (Legislation and ICT-Applications) preadviezen van de Vereniging voor wetgeving en wetgevingsbeleid (Contribution to the Annual Conference of Dutch Association for Legislation) (Weka Den Haag 2005) 105-110; D. Kelly, 'The Victorian Experience of Plain Drafting', *Legislation and Its Interpretation: A Discussion and Seminar Papers*, 1998, p. 57.

1. *Who Then Is the Audience of Legislation?*

Duncan Berry identified the audience of legislation as all who will potentially read the legislation or whose activities it will control.⁴⁰ He takes it for granted that these different groups are to be addressed simultaneously, and the challenge for the drafter is finding a voice that communicates successfully with all of them.⁴¹

Hant contends that legislation should be both accessible and understandable to 'the ordinary man' who is an ordinary person of ordinary intelligence and education, who has a reasonable expectation of understanding legislation and of getting the answers to the question he or she has.⁴² Murphy holds that the ordinary people are and should be the intended audience.⁴³ Sullivan conceptualises the audience of legislation to mean the audience targeted by the parliament or the least experienced.⁴⁴

Thornton holds the view that a legislative drafter cannot succeed in communicating to the general public⁴⁵ but must endeavour to draft the law in such a way as to successfully communicate to (1) lawmakers, (2) persons who are concerned with or affected by the law, and (3) the members of the judiciary. Thornton contends that a sound structure lays the foundation for a draft that is understandable and recommends that the format of the text of the legislation should be drafted with the needs of the users in mind.⁴⁶

Butt concurs, stating that the structure and form are crucial to an effective and readable legal document.⁴⁷ The effectiveness of the legislation is promoted by the logical organisation of the legislation, which assists the users and contributes to the successful communication of the policy intent.

This goes to show that the audience's analysis is crucial in legislative drafting. The drafter is faced with a challenge of identifying whom the policy message is addressed to when designing the structure and drafting the legislation. This analysis depends on the context and the subject matter of the piece of legislation.

The legislative drafter has a duty to draft the structure of the legislation in a way that is clear to the audience. Different audiences bring different levels of competence in different contexts to their reading. Drafters should also be aware of this reality when conceptualising and designing the structure of the legislation.

The multiple users of legislation results, sometimes parts of a rule, will be used largely by one group and other parts by many groups, but identifying the various user groups helps decide how to structure the rule and make it functional for the people who use it.⁴⁸

40 D. Berry, 'Audience Analysis in the Legislative Drafting Process', *The Loophole: CALC*, 2002, p. 62; *The Preparation of Legislation (Renton Report)* Cmnd. 5053, 1975.

41 *Ibid.*

42 B. Hant, 'Plain Language in Legislative Drafting: Is It Really the Answer?', *Statute Law Review*, Vol. 22, No. 25, 2001, p. 27.

43 D. Murphy, 'Plain Language in a Legislation Drafting Office', *Clarity*, Vol. 33, 1995, p. 3.

44 Sullivan 1992, p. 118.

45 Thornton 1996, p. 48.

46 H. Xanthaki (Ed.), *Thornton's Legislative Drafting*, 5th edn, Bloomsbury 2013, p. 204.

47 Butt 2013, p. 129.

48 D.C. Elliott, 'Writing Rules: Structure and Style', 'International Conference on Legal Language', Edmonton, Alberta, Can 1994, pp. 24-27.

B Structure of Legislation

Structure is a complex construction: manner or basis of construction or organisation.⁴⁹ It is the quality of being well organised or to arrange something according to a plan or system.⁵⁰

Thornton distinguishes five stages in the process of drafting, and the structure of the legislation comes up in the third and fourth stage in the process of drafting, which is the design and composition stage of the draft. Dickerson described structure as the logical pyramid in which the location of specific items in the hierarchy of substantive ideas shows their inter-relationships and relative importance.⁵¹

Careful layout and design of legislation are as important as clear language. If a document looks terrifying, it does not matter how easy the words are; they will never be read. Good design and structure set the tone and communicate the intent as much as the words do to the reader.⁵² It can help users locate relevant provisions; it leads the user and aids the overall accessibility of the legislation.⁵³

In the present global world where common principles, rules, and regulations in the drafting of legislation across the common versus civil law divide indicate an approximation and convergence of their respective drafting styles,⁵⁴ the structure of legislation is one similarity that cuts across all jurisdictions and can be used to nurture accessibility of legislation.⁵⁵

The structure of legislation can act as a road map for users who want to find the relevant provisions. A well-conceived structure leads the user to the place of interest and, therefore, the overall accessibility of the legislation.⁵⁶

The layout and design are not merely cosmetic, but they improve understanding by helping the readers find their way around the document, aiding assimilation of the contents.⁵⁷ Communication experts have proved that document design has an important effect on the reader's ability to read, find, understand, and use the information in a document.⁵⁸

The structure of legislation carries the primary burden of demonstrating the writer's logic; without an adequate structure, the legislation will only accidentally serve its purpose. The readers of the legislation can only apprehend, understand, and behave as prescribed by the legislation only if its structure is logical and not

49 *Collins English Dictionary*, Harper Collins Publishers 2012, p. 569.

50 *Compact Oxford English Dictionary of Current English*, 3rd edn, revised, Oxford University Press 2013, p. 1029.

51 Dickerson 1981, p. 79.

52 A. Siegel, *Conference of Experts in Clear Legal Drafting National Centre for Administrative Justice*, Washington DC 1978 (Reproduced in Reed Dickerson, *Materials on Legal Drafting* 1981, p. 294).

53 W. Voermans, 'Styles of Legislation and Their Effects', *Statute Law Review*, Vol. 32, No. 1, 2011, p. 47.

54 H. Xanthaki, 'Editorial: Burying the Hatchet between Common and Civil Law Drafting Styles in Europe', *Legisprudence*, Vol. 6, No. 2, 2012, pp. 133-148, at 147.

55 *Ibid.*

56 Voermans 2011, pp. 38-53.

57 Butt 2013, p. 173.

58 Asprey 2003, p. 242; Watson-Brown 2012, pp. 7-23.

difficult.⁵⁹ The arrangement that is appropriate in any given case is determined by the needs of the persons who will be making use of the text.⁶⁰

It may be argued that choosing the structure of legislation may not be the prerogative of the drafter and that the drafter is expected to draft legislation that fits into the statute book and follow the existing methodology and conventions prevalent in the jurisdiction in relation to the structure.⁶¹ But legislation is a communication, and it is not effective if there is no communication, a structure which has been the practice over a period of time but does not achieve its purpose of communication is not effective and falls short of legislative quality.

Structuring a piece of legislation involves how the drafter on analysing the policy decides to group and order the provisions of the legislation. Grouping involves the gathering of individual chapters into parts and individual sections into chapters. Ordering determines the sequence of parts within the legislation, chapters within a part, and sections within the chapter.⁶²

There is really no uniformity in the structure and arrangements of the various parts of a statute followed by various countries; it depends on the subject matter.⁶³ In England, the definitions are kept at the end of the Act; in India, and, in recent years, also in the United States, they are inserted at the beginning. The short title of an Act finds a place as the first section in India and in the United States, while in England, it generally appears as the last section.

There is, of course, no all-purpose arrangement that is the most suitable for all sets of ideas. The draftsman should make sure that he is reflecting the point of view that best advances the purposes of his client.⁶⁴ The traditional structure of legislation in most jurisdictions takes the following form with slight variations.⁶⁵

*I Traditional Structure*⁶⁶

Preliminary provisions

- *Long title*
- *Preamble (if a preamble is necessary)*
- *Enacting clause*
- *Short title*
- *Commencement*
- *Duration/Expiry*

59 A. Seidman, R. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, The Hague, Kluwer Law International 2001, pp. 207-209.

60 H. Martin & R. Ohmann, *The Logic and Rhetoric of Exposition*, revised, 1963, p. 152.

61 G. Bowman, 'The Art of Legislative Drafting', *European Journal of Law Reform*, Vol. 7, No. 3, 2005, pp. 3-18, at 10.

62 Sullivan 1992, p. 212.

63 P.M. Bakshi, *An Introduction to Legislative Drafting*, N.M. Tripathi 1972, p. 70; Dickerson 1981, p. 57.

64 Dickerson 1981, p. 57.

65 *Legislative Manual: Structure and Style*, NZLCR, Vol. 35, 1996, p. 190.

66 Helen Xanthaki, Lecture notes on Structure of Legislation, 2013-2014 <<http://studyonline.sas.ac.uk/course/view.php?id=17>> accessed 18 August 2014.

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- *Application*
- *Purpose clause*
- *Definitions*
- *Interpretation*

Principal provisions

- *Substantive provisions*
- *Administrative provisions*

Miscellaneous

- *Offences*
- *Supplementary provisions*

Final Provisions

- *Savings and transitional (these may also be placed in a schedule if they are long)*
- *Repeals*
- *Consequential amendments*
- *Schedules*

1 Preliminary Provisions⁶⁷

The Preliminary Provisions of a Bill are introductory provisions to a Bill. They are not the main or substantive provisions of a Bill although they are very useful and cannot be avoided in any given Bill. The Preliminary Provisions are as follows:

a) Long Title

The long title is a brief statement giving a short story of the principal way or ways in which the statute will affect the existing law. It is more comprehensive than a short title. The long title sets out the purpose or scope of the Act. It is part of the Act and may be used in interpreting the provisions.⁶⁸ According to Orr, the title of an Act is a key to interpretation and not just an administrative convenience.⁶⁹

In *Vacher & Sons Ltd. v. London Society of Compositors and Others*, Lord Moulton said:

The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole, and ascertaining its scope...

It has been suggested that the long title be abolished. In Canada, Australia, Kenya, and New Zealand, long titles are no longer being used while the United Kingdom and other Commonwealth countries continue to make use of long titles.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 229.

⁶⁹ G. Orr, 'Names without Frontiers: Legislative Titles and Sloganeering', *Statute Law Review*, Vol. 21, No. 3, 2000, pp. 188-212.

b) Purpose

The purpose clause, also called an object clause, aims to state what the statute tends to achieve. The purpose clause helps the audience of legislation to understand the goal the legislation seeks to achieve. It is a formal way of explaining what the legislation, or part of it, is intended to do.⁷⁰

c) Preamble

The preamble is a formal, but narrative statement, usually of the background, the circumstances, and reasons leading up to the enactment.⁷¹ While it is a source of information to the addresses, it has been difficult to convince jurists of its legal status.⁷²

Preambles are rarely used but are mostly used in constitutions and constitutional instruments, legislation implementing international agreements, legislation of an historic or ceremonial character, private Acts of Parliament, and decrees of military regimes.

It is argued that all the relevant matters or an object of a preamble could be in the body of the long title of the Act, thus making the preamble redundant.

d) Enactment Clause

An Act has an enacting formula and the appropriate or proper form of an enacting clause depends on the constitution of the specific jurisdiction, which has to be strictly followed. The enacting clause gives the statute its jurisdictional identity and constitutional authenticity.⁷³

e) Short Title

Because the long title sets out the scope of the statute, it tends to be too long, making it necessary to have a short title.⁷⁴ The short title is normally placed at the beginning of the Act, as its first section, but there are some jurisdictions that cite the short title at the end of the Act.

The short title has been described as a convenient label by which the statute is known or identified and must be short and succinct, limited to the topic covered. It is by the short title that an Act is identified and referred to.⁷⁵ An Act of parliament as a rule must have a short title, ending with the year in which it is passed.⁷⁶

70 Watson-Brown 2012, p. 14.

71 K.W. Patchette, 'Legislative Drafting Course Notes', RIPA International, Regents College London 1992, p. 171.

72 L. Orgard, 'The Preamble in Constitutional Interpretation', *Int' L. J. Const.*, Vol. 8, 2010, pp. 714-721.

73 R.M. Anderson, 'Drafting a Legislative Act in Arkansas', *Arkansas Law Review*, Vol. 2, 1947-1948, pp. 383-407, at 386.

74 P. Salembier, *Legal and Legislative Drafting*, Lexis Nexis 2009, p. 295.

75 Thornton 1996, p. 200.

76 Xanthaki 2013-2014, pp. 240-244.

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Lord Moulton once described the short title as a statutory nickname to obviate the necessity of always referring to the Act by its full and descriptive title.⁷⁷ The New South Wales Acts from 1995 no longer refer to a short title but instead the short title is referred to as the name of the Act.⁷⁸

The short title has been held not to be used in the interpretation of the body of an enactment, although the law is not certain on this point. In *Vacher & Sons Ltd. vs. London Society of Compositors*⁷⁹ and *National Telephone Co. Ltd. v. HM Postmaster-General*,⁸⁰ the court held that the short title may be used to assist in the interpretation of the body of an enactment.

However, there are a good number of judicial pronouncements against the use of short title in the interpretation of the body of an enactment.⁸¹

f) Commencement

An Act commences when it comes into operation or force. An Act may have been passed but may not have commenced. An Act is passed when all legislative steps have been completed and the assent of either Her Majesty or the President in case of a *Republic* is given. Once it has been assented to, it becomes part of the law of the land, while the commencement provision informs the audience on the status of the law whether it has come into operation or not.

The standard rule for commencement of legislation is invariably contained in the interpretation legislation. Where statute come into operation immediately, then no commencement provision is required.⁸² The commencement of an Act that is intended to regulate future conduct should not be permitted to occur before the text of the Act is published and available to the public.⁸³ Commencement provision should be expressed in direct unambiguous form; it must ensure adequate public notice.⁸⁴

The position of the commencement provision is not fixed; some jurisdictions place it at the beginning after the long title, and this is the practice in Nigeria and Brunei, while some place it at the end of the Act as is the case of *Indonesia*.

g) Duration Provision

An Act is perpetual in duration until it is repealed or it expires. However, if an Act or any part of it is intended to be of temporary duration, the Act ought to expressly provide a duration provision for its expiry to inform the reader of the validity of the Act.

77 Thornton 1996, p. 200.

78 *Ibid.*; *Vacher and Sons Ltd. v. London Society of Compositors* [1913] AC 107, 128.

79 [1913] AC 107.

80 [1915] AC 546 at 560.

81 *Re Vexatious Actions Act 1896, Re Boaler* [1915] KB 21, 40.

82 Xanthaki 2013-2014, p. 246.

83 *Ibid.*, p. 263.

84 *Ibid.*

h) Application Provision

An application provision gives an indication of the geographical area of application of a statute. This makes it certain the manner in which the new law affects situations and transactions existing at the time the law comes into force.

Applications provisions may make the legislation to apply to:

- a the existing circumstances at the coming into force of the legislation.
- b a territorial area.
- c particular person or things.
- d the Crown or the Government.

i) Purpose Clause

The purpose clause states the aim of the law; it can be a bridge between policy and law because it expresses the intent of the policy initiator. A purpose clause states what the statute intends to achieve; it is a formal way of explaining what legislation, or part of it, is intended to do.⁸⁵ The purpose clause aids the audience of the legislation to understand the particular legislation.⁸⁶

j) Definitions

A definition is used to give a standard meaning to words or phrases that occur frequently in an Act. It is used to avoid ambiguity and repetitions.⁸⁷ Definitions are placed at the beginning or at the end of legislation depending on the practice in a particular jurisdiction.

There are three broad classes of definition:

- **Delimiting definition:** It determines the limits of the significance to be attached to the term defined.
- **Extending definition:** This gives a term a meaning that goes beyond the dictionary meaning or meaning of common usage.
- **Narrowing definition:** This stipulates a meaning narrower in some respect than the common meaning.

Definitions themselves can lead to ambiguity if it plays no clear function in the text of the legislation.⁸⁸

The placement of definition in a legislative text has been the subject of debate. Traditionally they are placed at the beginning of the Act, but recent practice is that definitions are placed at the end or in the schedule; this is the practice in the United Kingdom.

It is contended that it is appropriate that the attention of the legislature should immediately be directed to the essence of the legislation and not definitions. Definitions should indeed be used sparingly and only where there are strong arguments for giving a statutory expression, a meaning which it does not ordinarily carry.

85 Watson-Brown 2012, p. 14; A. Samuels, 'Ensuring Standards in the Quality of Legislation', *Statute Law Review*, Vol. 34, No. 3, 2013, pp. 296-299.

86 Xanthaki 2013-2014, p. 253.

87 *Ibid.*, p. 164.

88 Xanthaki 2013-2014, p. 167.

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k) Interpretation

The interpretation clause is a definition that is not restricted in its application to a distinct part of the Act and is placed in a separate section.⁸⁹ It is drafted mainly to avoid ambiguities and uncertainties and to avoid tedious repetition. The United Kingdom places the interpretation section near the end of the Act.

2 Substantive Provisions

Substantive provisions stipulate the rights, powers, privileges, and immunities of persons to benefit or be regulated. It is advisable to place substantive provisions before administrative or technical ones, but this principle is sacrificed to practicality.⁹⁰

a) Administration Provisions

The creation or extension of administrative agencies must be drafted in the framework of the Constitution. A checklist of administrative provisions includes the department, department head, appointment and removal, compensation, powers and duties, classification of employees, rules, civil service status, reports, and relationship to local government.⁹¹

b) Miscellaneous

Miscellaneous comprise of offences and provisions ancillary to offences as time limit for prosecution, continuing offences, offences by corporations, vicarious responsibility, and Supplementary provisions such as evidentiary provisions, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.

3 Final Provisions⁹²

These are provisions which are traditionally placed at the end of the legislation, such as:

a) Savings

Savings preserve or 'save' a law, a right or privilege which would otherwise be repealed or cease to have effect.⁹³ Savings is designed to preserve the statuesque in specific circumstances, such as preserving existing rights that might otherwise be repealed as a result of some new provisions; it keeps rights or obligations which might otherwise disappear when an existing law is repealed to continue to be law; the general rule is that a saving clause should not be included automatically but only when necessary.⁹⁴

89 Patchette 1992, p. 186.

90 Xanthaki 2013-2014.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*, p. 473.

94 R. Mohamad, 'Savings Clause: Get It Right', *Commonwealth Law Bulletin*, Vol. 37, No. 3, 2011, pp. 445-452.

b) Transitional Provisions

Transitional provisions generally make positive modifications to a new statutory scheme for a limited time.⁹⁵ Transitional provisions are necessary to enable a smooth transition between the existing law and the new law; they tie up the loose ends, which would otherwise be left dangling. For example, when the functions of an existing agency are taken up by a new agency, it is often necessary to provide for the transfer of the functions, property, and personnel of the prior agency to the new agency or to accommodate the change in duties. This is accomplished through the use of a transition clause.

c) Repeals Provisions

Repeals should always be in express terms, although in appropriate cases the courts will, if driven to do so, construe an implied repeal. Different terms are used to indicate repeal: 'revoke', 'rescind', 'delete', and 'cancel'.

Types of repeal provisions are:

- **Simple repeal:** where legislation is no longer required (unusual in practice);
- **Repeal and re-enactment:** where a new enactment consolidates the law which is essentially unchanged;
- **Repeal and replacement:** where existing legislation is being remoulded to meet new circumstances in different ways.

d) Sunset Provisions

Sunset provisions are expiry provisions; they determine the expiry of laws on a certain date and are designed to guarantee that the legislator decides on the merit of the legislation after a determined period.⁹⁶

e) Review Provisions

This is an alternative to the sunset provision. The purpose of the review provision is to empower the responsible minister, some other person, or authority to review operations of legislation after a specified period and to recommend to the parliament accordingly. This provision makes the parliament not lose sight of its creation.

f) Schedules

A Schedule is a convenient device for dealing with matters of detail which will otherwise unnecessarily encumber the main body of an Act. Matters of administrative detail may be provided for in a Schedule. The Schedule also frees the main body of an Act from a possible charge of untidiness;⁹⁷ they cannot stand on their own and must be appended to a particular provision in the main body of the legislation. This type of structure is generally followed in Australia, New Zealand, Nigeria, and many other Commonwealth countries.

⁹⁵ *Ibid.*

⁹⁶ S. Ranchordas, 'Sunset Clauses and Experimental Regulations: Blessing or Course for Legal Certainty?', *Statute Law Review*, 2014, pp. 7-18.

⁹⁷ V.C.R.A.C. Crabbe, *Legislative Drafting*, Oxford, Cavendish Publishing 1998, pp. 145-147.

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There is no 'right' structure for legislation and the choice is up to the drafter. In the case of some legislation, complex provisions are inevitable, but the drafter can help the reader if the initial provisions are easy and he is led gently to the inevitable complexity.⁹⁸ Though, consistency of practice within a jurisdiction undoubtedly facilitates predictability and easy use of statutes by regular users. Butt says if the traditional structure of legislation is to be followed, the drafter is likely to be denied the freedom to practice the art of drafting and structuring the legislation in the most effective way.⁹⁹

The principal purposes of legislation are:

- i to establish and delimit the law; and
- ii to communicate the law from the law making authority to society and in particular to the person affected by it.¹⁰⁰

Every written communication has a common purpose, which is to convey information in the writer's mind, through the medium of writing, into the mind of the reader. The objective is that nothing be lost in the formulation of ideas, the transcription of ideas into writing, and the accurate comprehension of those ideas by the reader.

When designing the structure of legislation, the Law Reform Commission of Victoria¹⁰¹ suggests it is important that the clear structure and organisation to the legislation be one that enables the answer to the particular problem to be quickly found. Dividing the legislation into parts makes it more readily comprehensible.

III Division into Parts

Driedger recommends that:

if the division of an Act into parts will make it more readable, will enable the scheme of the Act to be more readily comprehensible or will facilitate the drafting or passage of the measure, then it is not only proper but desirable so to divide it.

It is common practice to divide statute of legislation into groups of sections; this is to aid communication of the legislation to the audience. The decision to divide the legislation is best made at the drafting stage by the drafter when the major topic of the legislation has been identified and developed. The division into parts is an invaluable aid to intelligibility, readability, and comprehensibility. The divisions are Headings, Chapters, and Parts, group of sections, division, and sub-division.

98 Bowman 2005, p. 9.

99 Butt 2013, pp. 9-10.

100 Xanthaki 2013-2014, p. 49.

101 Law Reform Commission of Victoria, Access to the Law and Structure and Format of Legislation, Report 33, 1990.

IV *Organisation and Ordering of Provisions*

Ordering determines the sequence of parts within the Act, chapters within a part, and sections within a chapter. The usability to the bills primarily addressees and the administrators should govern the ordering of the parts, chapter, and sections within the legislation. Legislation should be organised so that readers can find their way around it easily.¹⁰²

The Law Reform Commission of Victoria noted that the success of a document in communicating depends greatly on the careful organisation of the material in it. The right facts must not only be selected but also be put in an order that shows the interconnections between the facts.¹⁰³

Poor organisation obscures underlying principles and deflects the reader;¹⁰⁴ the drafter therefore when conceiving the structure of the legislation should work out an arrangement of the provisions that would make them easy to locate, read, and be referred to. The structure should show the audience a pattern in the provisions; this makes easier to comprehend the information.¹⁰⁵

V *Grouping of Provisions*

Grouping involves gathering the individual chapters into parts and individual sections into chapters, depending on the nature, length, and complexity of the legislation. The judgement as to which items are to be placed together in order to establish their relationship is based on the criteria chosen for division by the drafter.¹⁰⁶

The drafter should group the provisions from the perspective of usability by those who use the legislation; this makes the legislation easy to read and understand and also allows for easy reference and citation by the audience.

C **Types of Structure**

The conventional structure of legislation used by most jurisdictions as earlier considered is the traditional structure. Drafters are used to, in most cases, drafting legislation with similar structure based on precedents or practice; it is argued that this ensures precision, which promotes certainty. But it is argued that this also subverts the creative part of drafting which the drafter needs to carry out to produce an effective legislative text which would be more effective than the traditional form.¹⁰⁷

102 Krongold 1992, p. 509.

103 Law Reform Commission of Victoria, *Plain English and the Law* (1987), Appendix 1, 17.

104 E.N. (Ted) Hughes, 'Access to Justice, Law Reform Commission of Victoria, *Plain English and the Law*', p. 12.

105 I.M.L. Turnbull, 'Clear Legislative Drafting: New Approaches in Australia', *Statute Law Review*, Vol. 11, 1990, pp. 161-183.

106 Patchette 1992, p. 151.

107 Butt 2013.

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A well-structured legislation is only achieved with a measure of creative effort.¹⁰⁸ When considering drafting the structure of legislation, it is unwise to be dogmatic on any drafting matter. Greenberg observes that while there are occasional rules of thumb that may assist, they will do so only if applied flexibly and with an eye constantly on achieving the most clear, simple, and effective result in each context.¹⁰⁹

Asprey is of the opinion that there is something about the structure of a document that looks permanent, and we are tempted to stay with the existing structure and try to fit our own ideas in here and there; instead the drafter's ideas can set the structure; they should not have to fit an existing structure if it is not the best structure.¹¹⁰ When considering the structure of legislation, the drafter ought to look at communicating what the legislation is about. The New Zealand Law Commission recommends in its legislative manual on structure and style¹¹¹ that drafters should always try to write with the user in mind, and this means drafting as simply as possible.

There have been complaints about the state of legislation; the Renton Committee¹¹² noted complaints from even professional users such as judges who find it difficult to understand and stated that if lawyers find the law difficult, how the layman is expected to fare. In line with this, Lord Justice Harman¹¹³ described his experience on reading the English Housing Act 1957:

To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.

Most times the drafter drafts from the point of view of the authorities and formulates the provisions accordingly, but the law is meant to regulate the right of the individual; the provision therefore ought to be formulated from the point of view of those whose rights would be affected by the legislation.¹¹⁴ Legislation that is clear to the audience would undoubtedly be clear to the professional user.

Structure and form are crucial to an¹¹⁵ effective, readable, legal document.¹¹⁶ Butt looks at three logical structures for legal documents; these structures would

108 A. Lotscher, 'Conceptual and Textual Structure in Legislative Text', in A. Wagner & S. Cacciaguidi-Fahy (Eds), *Obscurity and Clarity in the Law Prospects and Challenges*, Ashgate 2008, p. 137.

109 Greenberg 2008, p. 387.

110 Asprey 2003, p. 93.

111 NZLC, Vol. 35, 1995; Reviewed (1996) 17(3) StatLR iii, Para. 141.

112 The Renton Committee, *The Preparation of Legislation*, p. 37.

113 *Davy v. Leeds Corporation* [1964] 3 All E.R. 390, 394.

114 *Supra* note 112.

115 Lotscher 2008, p. 142.

116 Butt 2013, p. 129.

be applied to the drafting of legislation. These three types of structure are the Telescoping Structure, the Thematic Structure, and the Chronological Structure.

I Telescoping Structure

The telescoping structure, here the legislation, is 'front-loaded', putting key information before less important information.¹¹⁷ The key information has to do with the subject matter that is key to the audience; then it broadens out to material that is less important to the audience, but is still important for carrying out the policy intent, such as the administrative provisions then it further broadens.

The logic behind the telescopic structure is that the audience of the legislation expect important materials to be at the beginning of the legislation and this structure meets that expectation by front-loading the legislation with the key issues.¹¹⁸

Research has shown that the human brain can only focus for a short period of time. Therefore, it is important that a user-centred approach to structure as opposed to logic-centred approach is adopted, and they are given the relevant information within this time span.

A telescoping structure allows the reader to meet the important material up front and therefore assists the audience in assessing relevant information easily. Asprey in support of this structure says that the organisation of the Bill will depend on what the document is, but it is important to set out the substantive provisions of the law preferably from the onset or beginning, so that they should not be hidden among administrative and procedural aspects of law.¹¹⁹

The telescoping structure is found in the Australian Income Tax Assessment Act 1997; the Act's first five sections address the core provisions then moves on to general rules of wide application and then moves down to the more specialised topics.

The Uniform Law Commission in promoting uniform and logical structure has tried to organise legislation in an order that takes into account the readers' perspective, thus:

- Title
- Preamble (if necessary)
- Definition
- Interpretation or Application Provision
- Sustenance of the Act
- Regulation of the Act
- Regulation-making power
- Transitional or Temporary provision
- Repealing and Amending Provisions
- Commencement Provision
- Schedules

117 Butt 2013, p. 130.

118 H. Thring, *Practical Legislator*, 2nd edn, London, John Murray 1902, p. 29.

119 Asprey 2003, pp. 92-95.

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- Forms
- The substance of the Act is closer to the beginning of the Act¹²⁰

II *Thematic Structure*

The thematic structure is drafted based on the each main topic, *seriatim*. It does not front load or place the key topics at the beginning of the legislation, rather it takes each topic to be provided for in the legislation and presents all the provisions relevant to each topic together. It takes the main topics and treats all the provisions in accordance to topic.

This structure keeps related materials together, promoting ease of understanding.¹²¹ Textual units dealing with the same subject form a thematic segment set. The audience of legislation with a thematic structure may have to go through the whole legislation because there may just be provisions relating to them in every thematic segment.

III *Chronological Structure*

The chronological structure presents the provisions of the legislation in accordance with the chronological order. It is drafted in the logical order of progression of the legislation.¹²²

This structure requires the audience to pay close attention all the time. It has key information in every part of the legislation which is relevant to the audience and therefore requires the audience paying close attention to all provisions in the legislation.

Legislation is not all the same and addresses different problems, and so it would be illogical to expect the same structure for everyone, but they can logically follow any one of the three structures. Butt, in addressing the accessibility of the audience, is of the view that the drafter would achieve effectiveness by drafting from the viewpoint of the audience.

No single structure will suit all transactions; however, we venture to suggest that if achievable without fracturing the essence of the transaction, readers prefer the telescoping (or front-loading) structure. This structure gives them key information as early as possible. The other two structures, thematic and chronological, require readers to pay close attention at all times as they read through the document, for they are likely to encounter key information throughout the legislation. If concentration lapses, they may miss important provisions.¹²³

There are cases where the statute may best be organised chronologically to enable easy access, for example in procedural matters.¹²⁴ The user is assisted if the clauses of the legislation are arranged as much as possible with related sections together and important statements of principle near the beginning.¹²⁵

120 Drafting Convention, Uniform Law Conference Part III; Krongold 1992, p. 510.

121 Butt 2013, p. 131.

122 *Ibid.*, p. 132.

123 Butt 2013, p. 135.

124 Salembier 2009, p. 287.

125 C. Hnad, 'Drafting with the User in Mind – A Look at Legislator', *Statute Law Review*, Vol. 4, No. 1, 1983, pp. 166-169.

IV *Telescoping Structure and the Audience*

The telescoping structure supports the audience-based drafting, which addresses the audience directly. It ensures that the needs of the ultimate audience of the law are provided for early in the legislative text. The needs of the audience must always be on the mind of the legislative drafter when drafting the legislation.¹²⁶ The audience of legislation determines how legislation is drafted.¹²⁷

It is argued that the audience-based drafting may not be achievable where the legislation addresses several audiences. The legislation can be composed of multiple layers so that a reader can obtain as much or as little information as required.¹²⁸

Bates suggests that where the legislation addresses several audiences the text with greater authority be drafted more formally while those addressing a wide audience are drafted in a less technical language.¹²⁹

Phil Knight and Joe Kimble in the bid to draft for the audience in their plain language rewrite of South Africa's human rights legislation tried to access the ability of an audience to find, read, interpret, and apply the legislation. Simulations were developed for professionals and lay people. They recorded an improvement in the use of the Act by legal professionals and lay readers which was achieved by improving the structure of the legislation and getting rid of legalese.¹³⁰

Also in the rewrite of the Employment Insurance Act (EIA) carried out by Vicki Schmolka and GLPi,¹³¹ user response to two plain language versions was tested and the results were similar to those reported by Knight. Groups working with both plain language versions performed better than groups working with the current version. User testing in South Africa, Hong Kong, New Zealand, and Canada supports the claim that it may be possible to draft legislation that is easier for many different audiences to use.¹³²

When contemplating the drafting of legislation based on the telescoping structure, the drafter placing provisions relevant to the audience at the beginning must first decide who the audience is. The drafter may draft legislation that is easier for different audiences to use or draft for different audiences.

Sullivan suggests that if audiences have different needs and interests, or bring a different knowledge base to the legislation, drafters must either shift back and forth among the several audiences, accommodating sometimes one group

126 Xanthaki 2013, p. VI.

127 I.V. Gendron, 'Can a Statute Be All Things to All People? The Reality of Audience Based Legislative Drafting', LL.M Major Research Paper, University of Ottawa 2000, p. 36.

128 Sullivan 1992.

129 T.S.T.J.N. Bates, 'Differential Drafting', *Statute Law Review*, Vol. 21, No. 1, 2000, pp. 57-69.

130 P. Knight, 'Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act, 1995', Stockport, UK, Plain English Campaign 1996, p. 39.

131 GLPi & V. Schmolka, 'A Report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada (August 2000) [unpublished]', referred to in Ruth Sullivan, 'The Promise of Plain Language Drafting', *McGill Law Journal*, Vol. 24, 1992, p. 107.

132 D. Berry, 'Audience Analysis in the Legislative Drafting Process' (June 2000) *Loophole: J. Commonwealth Ass'n Legis. Couns.* 61 at 62, 24.

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and sometimes another or they must single out a primary audience whose needs become their primary concern.¹³³

Having to draft legislation for audiences with competing interests, divergent backgrounds, and unequal power is a challenge that drafters face on a daily basis, when the drafter faces a dilemma when the drafter sits down to devise a structure for the legislation that would reflect the logic.

Bearing in mind that there are different groups of readers, with different interests and purposes in reading the document, Knight recommends that the logical approach to arranging the subject matter is to write for the least experienced reader.¹³⁴

When drafting the South Africa Human Rights Legislation, the drafters chose to write for the subcategory of the persons whose lives would be affected by the legislation. In other plain language projects, however, drafters have chosen to write for the audience that is most likely to read the legislation.

Writing for the actual readers of legislation is the approach taken in Australia; this practice excludes the uninformed lay users whose rights would be affected by the legislation; it is believed that more people are making use of legislation and these users may want to bypass the intermediaries and read the law themselves;¹³⁵ the structure of legislation should be addressed to the audience whose rights are actually affected by the legislation and not addressed only to the current users of the legislation.

D Structure of Legislation and Accessibility

Accessibility is vital to the credibility of legal and political systems; credibility creates stability, trust, and confidence and thus enhances economic performance. States have increasingly in recent years developed policies to improve the accessibility of their legislation and some have looked at the structure of legislation to improve the accessibility of their legislation.

The Court of appeal in *ZL & VL* addressed the concept of ‘sufficiently good law’ and the goodness it raised is that of accessibility.¹³⁶ This case discussed the physical publication of legislation, but accessibility goes beyond this; the *Sunday Times* case¹³⁷ goes beyond the physical access to legislation and questions whether citizens can reasonably be expected to understand the text and its application to their lives.

Accessibility is seen as a fundamental component of certainty.¹³⁸ In the Age of Enlightenment, the call for accessible legislative language or the drafting of simplified is intended to improve public acceptance of rules, reduce legal disputes,

133 Sullivan 1992, p. 110.

134 Knight 1996, p. 9.

135 Sullivan 1992, p. 115.

136 *ZL & VL v. Home Secretary and Lord Chancellor's Department* [2003] EWCA 25.

137 [1979-1980] 2 EHRR, 245.

138 *Administration des Douanes v. Gondrand Freres* [1981] ECR 1931; *Black Clawson Ltd. v. Papierwerke AG* [1975] AC.591.

limit the authority of jurists, or protect the sovereign from competing sources of law.¹³⁹ It is argued that since the law is addressed primarily to ordinary citizens, rather than lawyers and judges, it should be drafted so as to be fully intelligible to those affected by it.¹⁴⁰

As earlier stated, the use of structure of the legislation to aid accessibility is a practice which can be applied in all jurisdictions; whether within the common law or civil law systems, the structure of legislation is one similarity that cuts across all jurisdictions which can be used to nurture accessibility of legislation.

For example, the Swiss government has established an interesting system to organise legislation in a way that improves its accessibility.¹⁴¹ Examples of legislation drafted to aid accessibility are the Australian Income Tax Legislation, 2011, and the South Africa Human Rights Commission Act, 1994.

I Intelligibility

The Law Reform Commission of Victoria states that legislation should be drafted not for lawyers or judges but for its real audience, namely, “the group of people who are affected by it and the officials who must administer it”.¹⁴²

The structure of legal documents should therefore be improved, not in the hope of making the document intelligible to the average citizen but in order to make it intelligible to as many of those who are concerned with the relevant activities.¹⁴³ The legislation should speak directly to the very persons whose lives it affects.¹⁴⁴

The Community on Administrative Language observed that the drafter is always responsible for the intelligibility of a statute,¹⁴⁵ the drafter should therefore make use of every tool that would make the statute intelligible and clear to the audience, ideally all legislation should be readily intelligible.¹⁴⁶ Legislation that is easy to understand is less likely to result in disputes.¹⁴⁷

On the other hand, Justice Nazareth contends that speaking directly to the audience of legislation is a dream; saying complicated matters are not easily understood nor are explained and so such fanciful notions should be abandoned.¹⁴⁸

139 A. Fluckiger, ‘Concluding Remarks Can Better Regulation Be Achieved by Guiding Parliaments and Governments? How the Definition of the Quality of Legislation Affects Law Improvement Methods’, *Legisprudence*, Vol. 4, No. 2, 2010, pp. 213-218.

140 R. Assy, ‘Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language’, *Journal of Law and Society*, Vol. 38, No. 3, 2011, pp. 376-404, at 377.

141 CC L Mader, ‘Multilingualism and Other Distinctive Aspects of Swiss Legislation’, 2009.

142 Law Reform Commission of Victoria, Plain English and The Law (Report No. 9) (1987), Paras. 69-107.

143 *Ibid.*, Para. 71.

144 F. Bennion, ‘Confusion over Plain Language Law’, *Commonwealth Lawyers Association*, Vol. 16, No. 2, 2007.

145 A. Piehl, ‘Finland Makes Its Statute Intelligible: Good Intentions and Practicalities’, in A. Wagner & S. Cacciaguidi-Fahy (Eds.), *Obscurity and Clarity in the Law*, Ashgate 2008, p. 162.

146 W. Iles, ‘Legislative Drafting Practices in New Zealand’, *Statute Law Review*, Vol. 12, 1991, pp. 16-30, at 22.

147 Watson-Brown 2012, p. 12.

148 C.B.E. Nazareth, ‘Legislative Drafting: Could Our Statutes Be Simpler?’, *Statute Law Review*, Vol. 8, 1987, p. 81.

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The ultimate users demands of legislation are principally that it should be intelligible and legally certain, that is, precise and clear. Intelligibility here means that it is possible for the user to assimilate and understand the legislation without undue difficulty. A clearly planned structure improves the intelligibility of the text.¹⁴⁹

The use of telescoping structure of legislation by the drafter to communicate the policy to the audience can improve the audience understanding of the legislation. The law is made more intelligible to the user, and therefore the rate of compliance is enhanced and the quality of the legislation is improved by the use of an audience-based structure.¹⁵⁰

Audience-based structure can help the user understand their rights and obligations in various circumstances and, because they are adequately informed, may serve to reduce the incidence of litigation and enhance conformity to the legislation.

II Clarity

Clarity is the state or quality of being clear and easily perceived or understood.¹⁵¹ Clarity in the language of the law enhances understanding and transparency of legislation,¹⁵² but it does not depend on language alone but also on the proper selection of words and on their arrangement.¹⁵³ Clarity is an essential ingredient of legality, lack of which, may lead to legality being unattainable.¹⁵⁴

Considering the helplessness of the ordinary citizen faced with Legislation, Lord Radcliff¹⁵⁵ observed:

What willing allegiance can a man owe to a canon of obligation which is not even conceived in such a form as to be understood?

The Law Reform Commission of Victoria made proposals with respect to the organisation and formatting of legislation to enable the contents to be readily understood.¹⁵⁶ The clarity of the legislation can be enhanced by the structure of legislation.

149 A. Fluckiger, 'The Ambiguous Principle of Clarity of Law', in A. Wagner & S. Cacciaguidi-Fahy (Eds.), *Obscurity and Clarity in the Law*, Ashgate 2008, p. 16.

150 D.R. Miers & A.C. Page, *Legislation*, Sweet & Maxwell 1982, pp. 81-82.

151 *Compact Oxford English Dictionary of Current English*, Oxford, Oxford University Press 2005.

152 Lord Thring, 'Practical Legislation: The Composition and Language of the Acts of Parliaments and Business Documents', London, John Murray 1902, p. 61; H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot 2008, p. 1.

153 Thring 1902, p. 61.

154 L.L. Fuller, *The Morality of Law*, New Haven and London, Yale University Press 1969, p. 63.

155 Lord Radcliffe, 'Some Reflections on Law and Lawyers', *Cambridge Law Journal*, Vol. 10, 1948-1950, p. 361.

156 Law Reform Commission of Victoria (Report No. 33), 'Access to the Law: The Structure and Format of Legislation'.

Laws have to be drafted clearly so that those who are subject to them can know their rights and obligations. Citizens cannot be guided by incomprehensible rules. Rules are drafted in a complicated and convoluted fashion.¹⁵⁷

It is a common standard of good quality legislation in both the common and civil law drafting style.¹⁵⁸ Clarity in legislative drafting as a means of eliminating ambiguity and vagueness cannot be overstated,¹⁵⁹ it is a requirement for quality legislation.¹⁶⁰

It is a known fact that democracy requires clarity; the rule of law requires that the officers of the law understand and apply the law, and when the law is not clear and easily understood, it leads to expensive litigation.

Xanthaki expounded that clarity is a tool of effectiveness, which is the virtue sought after by the drafter; accordingly, what matters is that the audience of the particular statute receive the message the drafter attempts to communicate.

The drafter by use of the structure of legislation helps the addressees to easily access the contents of legislation because it communicates the specification of who does what and leaves its addressees in no doubt about what the law requires of them.¹⁶¹

Clarity promotes both communication and effectiveness. In complex legislation, therefore, it is beholden on the drafter to uphold clarity, and this drafter can achieve to a great extent by the use of structure, organising the legislation in a way that it makes the information clear and understandable to the audience.

Clarity is one of the basic qualities of good legislation. In order for legislation to be effective and of good quality, the provisions of the legislation must be clear and easy for the reader to understand. If the reader cannot comprehend the legislation, it would be a miracle if they behave as it prescribes.¹⁶²

Gashabizi opines that the drafter can draft a legislation that is unambiguous and precise ensuring consistency, coherence, and clarity by proper structuring of the legislation; the layout of the legislation can enable the reader to be gently introduced to the legislation.¹⁶³

The purpose of legislation is most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible, one in an unremitting pursuit of clarity by drafters.¹⁶⁴

In the legislative area, the very credibility of a legal system is at stake by the manner in which its laws are expressed. This was forcefully stated in the 1975 Renton Report by the British Committee on the Preparation of Legislation.¹⁶⁵

157 Salembier 2009, p. 1.

158 Xanthaki 2013.

159 Crabbe 1993, p. 43.

160 Xanthaki 2008, p. 11.

161 Seidman 2001, p. 256.

162 *Ibid.*

163 A. Gashabizi, 'In Pursuit of Clarity: How Far Should the Drafter Go?', *Commonwealth Law Bulletin*, Vol. 36, No. 3, 2013, p. 420.

164 H. Xanthaki, *Thornton's Legislative Drafting*, 5th edn, Bloomsbury Professional 2013, p. 55.

165 Renton Committee, *supra* note 112, p. 37.

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The legislative drafter can make use of several devices to make complex legislation accessible to the audience, but one fundamental tool that can be used by the drafter to ensure clarity and readability of the legislation is the structure of the legislation. The drafter by use of audience-based drafting can achieve substantive clarity in legislation; the structure can facilitate the understanding and the communication of the content of the legislation and eliminate vagueness and ambiguity.¹⁶⁶

It is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear. To the extent that the law does not satisfy these conditions, the citizen is deprived of a basic right and the law itself is brought into contempt.

It is argued that it is not possible for everyone to understand the law but the drafter has the burden to strive for clarity and effectiveness and should make use of all possible techniques such as the structure of legislation to ensure that the audience of the legislation understand it.

In December 1992, the European Council asked for legislation to be clearer and simpler; on 8 June, 1993, the Council adopted a Resolution on the quality of drafting legislation covering a number of issues, ranging from the wording and structure; and the aim of the Resolution was to make Community legislation more accessible.

E Structure of Legislation and Effectiveness

Legislation is communication and the goal of communication is effectiveness. The transfer of information from the sender to the receiver is effective when the reader understands and responds to the message.¹⁶⁷ Effectiveness of legislation can be seen as the relationship between the purpose and the effects of legislation and the extent to which legislation guides the attitude and behaviour of the target audience to the intent of the legislation,¹⁶⁸ and the legislation's ability to effect this legal change determines its effectiveness.

Effectiveness is an important aspect of quality in legislation; it is an indicator of quality in legislation. Effectiveness is the result of specific choices made when designing and drafting legislation, it is determined by the design and form of the law.¹⁶⁹

Effectiveness of legislation is promoted when the structure of legislation is considered in the process of drafting legislation in relation to the audience which the legislation is addressed to. The structure used in the legislation has a signifi-

166 R. Dickerson, *Legislative Drafting*, Little Brown and Company 1954, p. 10; Thornton 1996, p. 55.

167 C.P. Brantley & Michele Miller, *Effective Communication for Colleges*, South Western, Thompson 2007, p. 4.

168 L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation', *Statute Law Review*, Vol. 22; No. 2, 2001, pp. 119, 126.

169 M. Mousmouti, 'The "Effectiveness Test" as a Measure of Legislative Quality: Equality in Law, Inequality in Practice, and Quality in Legislation', PhD Thesis, IALS 2013, pp. 168-169.

cant impact on the achievement of results.¹⁷⁰ Clearly drafted legislation enhances democratic participation and effective administration.¹⁷¹ The structure of legislation can nurture accessibility which is an important feature of effectiveness; the structure is an important factor that bears on the impact of the legislation. Legislation fails if compliance is difficult because of lack of clarity or precision.¹⁷²

If the legislation is inappropriate to address the problem, if enforcement mechanisms are inappropriate or implementation is inadequate due to the legislation being ineffective by reason of its design and structure then enforcement of the legislation would be ineffective and the subjects of the law would encounter difficulties in interpreting and complying with the legislation.¹⁷³

An inadequately structured legislation makes it difficult for its addressees to understand its substantive provisions and unless the addressees know and understand its contents, they obey its prescriptions only accidentally; and if by chance they obey them, they do so woodenly.

The more logical the structure, the more accessible and therefore the more usable is the legislation.¹⁷⁴

It can also create difficulties in addressing the intended ill which the policy behind the legislation seeks to address; it can therefore create difficulties in addressing an issue through legislation and hinder overall behavioural change.¹⁷⁵

An ambiguous or incomprehensible statute can give rise to significant social cost.¹⁷⁶ When people do not know the law or misunderstand the law, they are less likely to comply with the law or exercise their rights under it.¹⁷⁷ It may be true that members of the public will never read or want to read legislation that applies to them, but the number of persons who want to be able to access legislation is steadily increasing and this should not be discouraged by the practice of difficult structures of legislation.

Taking into cognisance that clear and simple legislation helps businesses and citizens to comply with the law without imposing excessive burdens and facilitates the task of authorities who have to enforce it.¹⁷⁸ Errors in format and layout can therefore affect the interpretation of an enactment and can be costly if litigation is required to settle the meaning of an enactment.

The drafter has to recognise that people read rules to gain information, and the difficulties readers have when information is hard to find, and understand the obscurity creates anxiety and leads to non-compliance, increases transaction costs, and causes inefficiencies; drafters should therefore make use of every

170 J.F. Burrows & R.I. Carter, *Statute Law in New Zealand*, 4th edn, Lexis Nexis 2009, p. 129.

171 *Ibid.*

172 J. Black, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy*, Vol. 27, 2002, p. 3.

173 *Ibid.*

174 Seidman 2001, p. 209.

175 *Ibid.*, p. 208.

176 P. Salembier, *Legal & Legislative Drafting*, Lexis Nexis 2009, p. 4.

177 D. Kelly, 'The Victorian Experience of Plain Drafting', *Legislation and Its Interpretation, Discussion and Seminar Papers 1988*, p. 54.

178 Commission Staff Working Paper entitled *Making Single Market Rules More Effective, Quality in Implementation and Enforcement*.

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means at their disposal to communicate rules clearly,¹⁷⁹ design the structure of the legislation with the audience in mind, making use of a structure that is easily accessible.

I Benefits of an Effective Structure

The drafter's investment of time and resources on the structure of legislation is easy to identify but difficult to quantify.

An effective structure of legislation would lead to:

- i Improved compliance rates. Every well-written and functionally well-structured document will result in greater compliance with the rule.
- ii Greater efficiency. Good structure means that readers can find their way around the document more quickly, not just once, but every time every reader seeks information from the document.
- iii Greater respect for the rule. Better written rules mean they are better understood, which in turn gives the rule greater credibility.
- iv Reduced administrative costs. Well-written rules reduce the need for explanatory information or the need to answer questions about the rule.
- v Improved access to the law. The substance of the legislation is not impeded by difficulty in understanding it.
- vi The rule of law because it decreases the risk of unintentional contravention of the law.¹⁸⁰
- vii Compliance by the audience to take advantage of benefits provided for in the law, or in the case of obligations; discharge their obligations.

Among other benefits, it reduces the cost of administration since it is clear and understood by the audience. People also participate more in the life of the community because they understand the laws, and because they understand the legislation and comply with the objectives of the legislation, the government programme is consequently effective.

In recent times many jurisdictions have come to recognise the relationship between the form of legislation to accessibility and effectiveness of the legislation and have taken measures to address this.

Australia through its Law Reform Commission has prepared a manual aimed at helping drafters prepare legislation which communicates their message effectively and efficiently, looking at the organisation and formatting of legislation to enable the contents to be more readily understood.¹⁸¹ Canada has legislative conventions geared towards standardising the way statutes are drafted in Canada and advocate that legislation should be written to suit the intended audience.¹⁸² In the United Kingdom, the European Council of Ministers Resolution (1990) on quality of drafting of European Community legislation recommends making community legislation more accessible. New Zealand in simplifying the content of the law and improving access to legislation introduced a format of legislation and

179 Elliot 2004, p. 27.

180 *Ibid.*

181 *Ibid.*

182 Uniform Law Conference of Canada, <www.ulcc.ca>, accessed on 11 August 2014.

encourage clear and simple drafting.¹⁸³ The Ministry of Justice in South Africa is not left out; it began a drive to have laws drafted in a simple accessible form.

F Conclusions

The objective of this paper is to assess whether the structure of legislation can nurture accessibility and effectiveness of legislation. There are good arguments for an audience-based structure to aid accessibility but these have to be considered with the prevalent structure and practice in the particular jurisdiction.

A statute is the ultimate instrument of state intervention.¹⁸⁴ Legislation is a basic tool of government and an expertly crafted legislation is fundamental to democracy.¹⁸⁵ Legislation drafted in conventional legal English is often difficult to understand, and those who draft legislation in plain language seek to overcome these failings by using the structure of the legislation to communicate to the target audience.¹⁸⁶

A government that values clearer law must support clarity as a policy. Drafters should broaden the concept of whom the legislative audience is. A user who is familiar with the subject matter of a provision should be able to make sense of it in relation to a given set of circumstances. The design of a legislative document has important political and legal implications.

It is important that the drafter considers quality of legislation, accessibility, and the audience being addressed in relation to the structure of the legislation. Because these have an overall impact on the effectiveness of the legislation, it is important that the audience of legislation understand the legislation which affects them and that one of the qualities of good law is accessibility. The structure of legislation can nurture accessibility or lead to difficulty in accessing legislation.

The traditional structure has consistency due to long-term use by various jurisdictions and therefore reduces uncertainty. But in the past two decades, there have been complaints about legislation, which includes the structure, and there is a recent trend of people wanting to read the laws that govern them which is made difficult by the traditional structure of legislation.

Also the types of structure, the telescoping, thematic, and chronological, that can be applied to the drafting of legislation, which structure best communicates information to the audience of legislation, is considered. The telescoping structure of legislation is preferred as it communicates information to the audience easily by placing all relevant provisions at the beginning of the text; therefore, this structure can nurture accessibility and effectiveness of the legislation. The

183 New Zealand's Parliamentary Counsel Office, <www.pco.parliament.gov.nz> accessed on 11 August 2014.

184 R.C. Bergeron, 'Globalisation of Dialogue on the Legislative Process', *Statute Law Review*, Vol. 23, 2002, p. 89.

185 S. Arkio, 'Assessment of Draft Legislation in Finland', in Kellermann *et al.*, *Improving the Quality of Legislation in Europe*, Kluwer, The Hague 1998, p. 228.

186 P. Butt, 'Plain Language in Property Law: Uses and Abuses', *AIJ*, Vol. 73, 1991, pp. 807, 808.

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structure which nurtures accessibility also fosters effectiveness of the legislation which ensures good quality legislation.

The audience is considered because the audience determines the perspective and organisation of the structure. To a large extent the accessibility of the legislation is dependent on whether the drafter chooses to follow the tradition and practice in the particular jurisdiction or to draft legislation adopting a structure that would communicate directly to the audience and make the legislation effective.

The legislative text should be able to communicate to the targeted audience what is required because the rule of law demands that the audience understand what is expected of them and what the law grants. The rule of law dissipates if its official audience fail to obey the law.¹⁸⁷

The legislative drafter is encouraged to engage in how much more they can do as a professional to help their audiences access their product. The acceptability of legislation may depend on how much they can draft in the style that best suits the readers' needs, with the aid of structure of legislation to produce a useful rule.

The drafter sticking to the traditional structure may be problematic, because in most cases the message is delayed, sometimes for several pages, and may hinder communication to the audience.

There is a global move towards simplifying laws, making them accessible to the audience, so as to ensure that the laws have the intended legal effect and cause the required behavioural change.

The legislative drafters work or objective is basically the same in all jurisdictions.¹⁸⁸ The responsibility of drafting legislation which is of good quality is to a large extent dependent on the drafter.¹⁸⁹ Effectiveness is the contribution of the drafter to the efficacy of the drafted legislation.

Drafters are in the communication business and therefore need their products accessible.¹⁹⁰ The rule of law must also be upheld in the course of drafting legislation and the law be made accessible to the addressees.¹⁹¹

The drafter is expected to draft legislation with the detail and consistency of architecture for it is law architecture,¹⁹² creating a rule that is legally certain, and to do it in a way that is functional. When the subject-matter is complex, or a process is difficult to follow, drafters should seek additional ways of improving clarity, by the use of a clear structure of legislation.

In carrying out their duty to uphold the rule of law, drafters must take care that the structure of the legislation nurtures effectiveness, that it upholds the features of clarity, precision, and consistency.

187 H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press 1961.

188 Moran 2012, p. 169.

189 A. Kellermann, 'Proposals for Improving the Quality of European and National Legislation', *European Journal of Law Reform*, 1999, p. 12.

190 C. Stefanou, 'Is Legislative Drafting a Form of Communication?', *Commonwealth Law Bulletin*, Vol. 37, No. 3, 2011, pp. 407-416.

191 Xanthaki 2008, p. 5.

192 A.R. Menard, 'Legislative Bill Drafting', *Rocky Mountain Law Review*, Vol. 12, 1950-1951, p. 127.

Drafters, who are serious about enhancing democracy and promoting the rule of law, must write for the audience that has the best claim to assistance, which is not necessarily the audience that is most likely to read what they have written.

If effective communication is the goal, there are no universals and endless adaptation that is unavoidable. Statutes that confer benefits on vulnerable groups in society must be drafted differently from statutes that deal with corporate tax. Codes of conduct for specialists must be drafted differently from statutes like highway codes. As communication technologies change and evolve, as audiences develop new expectations, drafting will have to change and evolve to accommodate these changes. The drafter ought to invent ways of writing rules that improve clarity.

Turnbull¹⁹³ envisages the day when a rule is composed of multiple layers – so that a reader can obtain as much or as little information as he or she needs: a time when we move beyond the fruitless debate over the ‘right’ drafting style, common law or civil law, and move towards a capacity to draft in the style that best suits the readers’ needs, with all the aids necessary to provide a useful rule.

Legislation being an instrument of state intervention¹⁹⁴ that nurtures the easy running of the state, the society therefore expect the drafter to give attention to the way in which legislation is drafted, for a more productive, effective, and efficient result. A user-centred approach to structure as opposed to a logic-centred approach to structure is preferred and will produce the goal of the drafter which is effectiveness.

Altering inefficient structure of legislation is not an easy task since such drafting structure is influenced and governed by tradition. But with a well-thoughtout plan, the drafter can develop the right structure for a particular legislative proposal to achieve clarity and in so doing nurture accessibility and consequent effectiveness.¹⁹⁵ There is therefore a need for drafters to be more original in their drafting,¹⁹⁶ drafting a structure that is legally effective and certain, thereby nurturing quality of legislation.¹⁹⁷

Thornton challenges the drafter by saying that the way to greater intelligibility in drafting is for the drafter to be obsessed with drafting so as to be understood, but without the sacrifice of precision and accuracy: a continuing questioning, evaluation, and improvement of stylistic and other drafting practices, readiness to accept change where a benefit is demonstrated.¹⁹⁸ The needs of the users of legislation must never be allowed to escape from the mind of the drafter.¹⁹⁹

193 Turnbull 1990, p. 39.

194 R. Bergeron, ‘Globalisation of Dialogue on the Legislative Process’, *Statute Law Review*, Vol. 23, 2002, p. 89.

195 Sullivan 1992.

196 V.C.R.A.C. Crabbe, ‘The Ethics of Legislative Drafting’, *Common Wealth Law Bulletin*, Vol. 36, 2010, p. 22.

197 P. Salembier, ‘Designing Regulatory Systems: A Template for Regulatory Rule Making’, *Statute Law Review*, Vol. 23, 2002, p. 172.

198 Thornton 1996.

199 Xanthaki (45)VI.

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The drafter's task is a herculean one which must not be underestimated; it entails nurturing accessibility and effectiveness of legislation by the use of an effective audience-based structure. The structuring of legislation that is effective is an essential aspect of legislation and the adherence to the rule of law; it is very vital because it is accessible by the public²⁰⁰ and fosters effective implementation of the legislation thereby.

Based on this, it could be said that the structure of legislation can to a large extent nurture accessibility and effectiveness of legislation, and it is a task which is worth embarking on.

200 Vanterpool 2007, p. 186.