CHAPTER VII

REASONS FOR COMPLEXITY OF LEGISLATION

Legislation enacted by Parliament is frequently criticised as being difficult for a layperson to understand. The popular view of the law making process is that it is totally incomprehensible to the ordinary man. The principle of the Rule of Law presupposes that those who are affected by a law should be able to ascertain its meaning and effect. A system of language and law understood by only a few, where only a few have the ability to make authoritative statements about what is and is not permitted under the law, cedes power to those few. Lord Simon of Glaisdale wrote: [1]

> "It is important to remember why our statutes should be framed in such a way as to be clearly comprehensible to those affected by them. It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that the law should be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not the Rule of Law."

According to Karl. T .Hudson-Phillips the majority of the people, regardless of the system of government and, therefore, the law making process, tend to be intimidated by the same. Even lawyers consider those of their profession closest to the law making process, the legal draftsman, as rather odd persons indulge in some sort of obscure, at best, esoteric, craft. There is a certain mystique about the legislative process and those involved in it at technical level. This mystique does not escape the very law maker of legislator. Very often the elected representative sitting in the Parliament is no better off than the ordinary man in the street.[2] Due to this there is a demand

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1 Lord Simon, " The Renton Report -Ten Years On", *Statute Law Review*, 133 (1985).

2 Karl. T. Hudson-Phillips "A Case for Greater Public Participation in the Legislative Process", *Statute Law Review*, 76-77(1987). The author cites the following as the reasons for complexity of legislation, namely: -

1. Most people are only concerned with the end product of the legislative process, that is laws and regulations, when they are their interests are directly affected.

from all sections of the public that legislation should be in plain language. There can be no two opinions as to what should be the aim of anyone who drafts legislation which is clarity.[3] In many instances a section or subsection of an Act is written in such convoluted language as to obscure its meaning from those who need to grapple with it. Semantic quagmires unfortunately are so common in our legislation that examples are somewhat otiose.[4]

If the meaning of a provision is not clear, people cannot be sure of complying with it until the courts have interpreted it fuelling litigation. Complaints that laws are hard to understand usually assume one of the following:

(a) they are too long-winded;
(b) they use language that is unfamiliar to most people; or
(c) they are convoluted.

Sir Robert Micklethwaite QC, the Chief National Insurance Commissioner U.K. stated before the Renton Committee that:

> "A statute should not only be clear and unambiguous, but readable. It ought not to call for the exercise of a crossword/acrostic mentality which is able to ferret out the meaning from a number of sections, schedules and regulations."[5]

This interest will therefore arise either before the measure is passed or when the particular individual runs foul of, or has to take account of, the provisions of the law in whatever transaction or set of circumstances.

2. The language and style of drafting is such as to make most laws difficult for the uninitiated to comprehend.
3. In the majority of cases, little effort is taken to explain to the population, particularly in developing countries, either the legislative process or the proposals to be enacted.
4. The law on the interpretation and construction of statutes is quite unsettled. There is a continuing battle between the "ordinary grammatical school" and "the contextual approach" – often with no logical or settled basis for the choice of one or the other.
5. Those parts of status which might be most helpful for a popular understanding of the measure explanatory notes, marginal notes—are not considered in most countries as being of any use whatsoever in interpreting the law.
6. Legislation has become increasingly complex in order to respond to specailised and technical advance. Often a specialist knowledge of technical matters is necessary for any participation in the process. This most people do not have.

3 Rt.Hon The Lord Brightman, "Drafting Quagmires" *Statute Law Review,* Vol. 23 No. 1,1-11(2002).

4 *Ibid.*

5 Renton Report at 28, cited in Drafters Devils by David Hull in *CALC Loophole* (2000).

This concern has also been shared frequently by the Judiciary. Reasons for complexity of legal language are many.

Firstly the laws are expressed through the medium of a language and in any language, words do not have a fixed meaning. Usually words and expressions have a core of settled meaning surrounded by a penumbra of unsettled ones. This gives rise to semantic ambiguity. This invariably aggravates the task of the draftsman because same words will convey different meanings to different persons. Ambiguity' is narrower than 'uncertainty' and represents anything written in a sentence which allows that sentence to be interpreted in more than one sense. It may arise when there is ambiguity in the boundaries of reference of words. The one word often connotes a large number of differing concepts: Syntactic ambiguity differs from semantic ambiguity[6]. It is the sentence structure which makes the text equivocal: not the multiplicity of the meanings attributed to the words. The meaning of a sentence is derived from the conjunction of the words in the sentence; but doubts may arise as to the relationship between different words in a sentence. The logical import of a statement is often determined by the close interaction of the words and the syntax. Syntactic ambiguity can easily produce ambiguity of meaning for the entire sentence. Syntactic ambiguity arises not from the range of meanings of single words, but from the location of the words in sentences.

Second problem faced by draftsman centers around finding out to whom the law is meant to be addressed. According to Sir Alison Russell, states that 'The draftsman should bear in mind that his Act is supposed to be read and understood by the plain man.'[7] That may be the ideal but this view is not shared by many. Complicated matters are neither easily understood nor explained. And it is not only experts that have to deal with complicated matters.. According to Elmer Driedger, 'It must not be supposed . . . that statutes can be written so that everyone can understand them . . . It is not the function of legislative draftsmen to write treatises for the education of the uninformed.'[8] According to Bennion problem arises from the fact that in its initial form, as a Parliamentary Bill, legislation has to reckon with the twofold nature of the legislative audience. The same document has to be designed to

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6 PaulConway Syntactic Ambiguity 14 march 2002 accessed on 20-11-06 from http://xml.lawfoundation.net.au/ljf/site/articleIDs/63B6C5E2ABB6A511CA25714C000CFF37/$file/syntactic.pdf.

7 Sir Alison Russel, *LegislativeDrafting and Forms,* 13 (1983).

8 Bennion, *Statute Law*, Part – III, The Need for Processing of Texts-Doubt Factor V: The Fallible Drafter, at 296.

satisfy two distinct legislative audiences: first (in point of time) the Parliamentary audience, mainly composed of laymen, whose primary need is to ascertain, with the minimum of labour and preferably no reference to any document other than the Bill itself, what is the general purpose and effect of each clause or section which they are asked to pass; and secondly, the expert lawyers and other professionals who will seek to find in the Act as passed a specific answer to each specific question upon which they have to advise or decide. One customer wants a picture and the other wants a Bradshaw.[9]

This brings us to the second type of legislative audience and this will differ to some extent according to the type of legislation. In the case of administrative legislation the Act will principally be the concern of the civil servants or government officials responsible for administering it. On the whole, judges and other lawyers will have relatively little to do with the working of this type of legislation while the general public will rely mainly on advertisements and leaflets summarising the effect of the legislation in simple language. The main legislative audience here is therefore the official who will implement the Act. With other types of legislation judges and other lawyers will be more closely concerned. Few, if any, laymen desiring information as to their tax position, for example, will go direct to the Act. They will probably take advice from lawyers or accountants, or at least will look at a textbook. The main legislative audience here is therefore the professional one with the courts in the forefront.

In the ultimate analysis the legislative draftsmen are trying to communicate simultaneously not with two but with five different types of audiences namely: -

(i) the sponsoring ministry which has sponsored the proposal;
(ii) the Legislators who have to pass the Bill;
(iii) the Judges who sit in judgment over the legislation ;
(iv) the officials who have to enforce the provisions of the legislation; and
(v) finally the end user, the common man or the woman whose conduct is directly affected by the legislation.

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9 Noel Hutton, Mechanics of Law Reform, *Modern Law Review* Vol.24, 21 (1961). Bradshaw was the name of the first railway timetable, named after Mr. George Bradshaw who was an English cartographer ,printer and publisher and the originator of the railway time table .His first compilation was known as the Bradshaw's Railway Time Tables and Assistant to Railway Traveling published in 1839 soon after the introduction of Railways in England.

The draftsman has to produce a draft which has to satisfy the conflicting demands, interests and needs of the different stakeholders and the draft reflects these conflicting pulls and pressures. This is one of the major causes for legislation ending up being complex. Balancing the multiple audiences is a challenge for the draftsman.

Third reason why legislation is complex is due to the fact that legislation is not static and large proportion of legislation does not introduce new law but amends the provisions of the existing laws. Amendments are carried out textually. What most users want is consolidated and compiled legislation that is legislation in all relevant amendments applied. Ascertainment of the exact state of law can be difficult when there is a series of amendments to an Act which have not been incorporated in the enactment. Since amendments are carried out textually to the existing provisions of the Acts the ascertainment of the exact state of law becomes difficult when there is a series of amendments to an Act which have not been incorporated in the principal enactment. Unless the principal Act as proposed to be amended would read after such amendment (i.e., consolidated and compiled legislation containing all relevant amendments applied) is made available at the time of the passage of Bills, it is difficult for the Members of Parliament to easily understand the implications of its provisions.

Fourth major cause of the obscurity complained of, and which may not have received sufficient attention, according to Justice Nazareth[10] is the high degree of compression achieved by drafters in some jurisdictions. In terms of craftsmanship and ingenuity, it is deserving of the highest price. But sadly it is only other drafters who can really appreciate the heights attained. For others, the process of unraveling the tightly knotted thread produces only the frustration that accounts for much of the criticism mis-directed at drafters. Mis-directed because few drafters are spared the pressure for brevity and at the same time of detail. As Bennion explains:

> "Where both brevity and detail are demanded the only course available to the draftsman is compression of language. If we add the parameters of certainty and legal effectiveness we tighten the screw further."

Fifth reason for complexity of legislative language is due to the long winding sentences which is characteristics of the statute book. This has a historical

10 Justice Nazareth, "Legislative Drafting: Could Our Statute be Simpler?" *Statute Law Review*, 89, (1987).

lineage and has spilled over from the habits of earlier draftsman who were conveyancers in the medieval times. Long sentences intimidate the readers and the spirit of the legislative direction is lost half way through the sentence. According to many witnesses who gave evidence before the Renton Committee legislative sentences were too long, and complicated by too many subordinate phrases, and that there should be greater readiness on the part of the draftsman to break up clauses into separate subsections.

Sixth reason can be attributed to the use of Latin expressions and medieval phrases which is typical in the early Royal charters and legally meaningless words and phrases, The Statute Law Society submitted before the Renton Committee that the language of the statutes as: 'legalistic, often obscure and circumlocutious, requiring a certain type of expertise in order to guage its meaning.'

Sir William Dale summarized the features that appeared to make for obscurity or length or both in United Kingdom statutes:

(a) long, involved sentences and sections;
(b) much detail, little principle;
(c) an indirect approach to the subject-matter;
(d) subtraction – as in 'Subject to ...', 'Provided that ....';
(e) centrifugence – a flight from the center to definition and interpretation clauses;
(f) poor arrangement;
(g) schedules – too many and too long;
(h) cross-references to other Acts – saving space, but increasing the vexation .

There are other reasons for complexity of legislation which may be summed up as follows:

Firstly complicated ideas are not capable of simple expression, or, put rather more concretely, no one can expect to understand a law about tax, or planning or even companies unless he already understands the operation of the economic activities which the law is intended to circumscribe[11].

Secondly simplicity of expression and certainty of content are fundamentally incompatible, and that, if one has to choose, certainty is more important.[12]

Thirdly, there is a habit of splitting up relatively simple propositions into several pieces, putting them into separate provisions and then making cross references from one provision to another, greatly increasing volume and

11 Sir William Dale -Legislative Drafting English and Continental, *Statute Law Review*, 14-22 (1980).

12 *Ibid.*

unnecessarily increasing complexity.[13]

Fourthly long sentences have unnaturally complicated syntax. Highly complicated clause structures are overloaded with adjectival and adverbial phrases of all sorts. Doubtless very hard to write, such sentences are also extremely hard for the user to unravel. They are far from being normal English, and certainly cannot be read like ordinary prose.[14] To facilitate understanding shorter sentences should be used in legislation. Statutes are easier to understand if the auxiliary and main verbs are not separated. The subject should be kept close to the verb and the verb close to the object. In the traditional legislative drafting style a reader is confronted with unexpected arrangement of verbs. In the words of Richard Wydick,

> "Lawyers like to test the agility of their readers by making them leap wide gaps between the subject and the verb and between the verb and the object."

However shorter sentences too, present their own difficulties, as Sir John Fiennes, a former First Parliamentary Counsel, explained to the Renton Committee:

> "Shorter sentences are easier in themselves and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence, is really done for you by the draftsman".

In the event that Committee concluded that "there should be no general about drafting in short sentences...." Nonetheless given more time and a clear message from the legislators that that is what they want, drafters should be able to find some additional scope for simpler language and shorter sentences.[15]

Attempts to Simplify the Legislative Language

A Committee was appointed by the Lord President of the Council, May 1975, called the Renton Committee[16]. The Committee's term of reference were:

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13 Timothy Millett, "A Comparison of British and French Legislative Drafting (with particular reference to their respective Nationality Laws)" *Statute Law Review*, 130-160 at130 (1986).

14 *Ibid.*

15 *Supra* note 10 at 90.

16 The Preparation of Legislation, Report of a Committee Appointed by the Lord President of the Council, May 1975, Cmnd 6053, at 43.

> "With a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for parliamentary procedure; and to make recommendations".

The Committee made far reaching recommendations. The Report of the Renton Committee on the Preparation of Legislation said that it had received evidence from judges, bodies representing the legal and other professions, from non-professional bodies and from prominent laymen, that much statute law lacked simplicity and clarity. Renton Committee categorized the problem into four main categories:[17]

(a) *Language.* It was said that the language used was obscure and complex, its meaning elusive and its effect uncertain. Sentences are long and involved, the grammar is obscure, and archaisms the preference for the double negative over the single positive, abound.

(b) *Over-elaboration.* It was said that the desire for 'certainty in the application of legislation leads to over-elaboration. The parliamentary draftsman tried to provide for every contingency. The committee said that this was because of concern on the part of the legislature to ensure against the possibility that the legislation will be construed by someone, in some remote circumstances, so as to have a different effect from that envisaged by those preparing the bill in question.

(c) *Structure.* The internal structure of, and sequence of, and sequence of clauses within, individual statutes was considered to be often illogical and unhelpful to the reader.

(d) *Arrangement and amendment.* The chronological arrangement of the statutes and the lack of clear connection between various Acts bearing on related subjects were said to cause confusion and made it difficult to ascertain the current state of the law on any given matter. This confusion was increased by the practice of amending an existing Act, not by altering its text (and reprinting it as a new Act) but by passing a new Act which the reader had to apply to the existing Act and work out the meaning for himself:

The effect of the Renton Report is summarized by Sir David Renton himself in the following passage:[18]

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17 Renton Report at 24.

18 The Rt.Hon. Lord Renton QC, "Current Drafting Practices and Problems in United Kingdom" *Statute Law Review* Vol. 11, 11-17 (1990).

> It was the first inquiry of its kind for 100 years. After two years' hard labour, we recommended 81 improvements. Of these 39 have been accepted by our governments and have been wholly or mainly put into practice. Also, successive governments have acknowledged that our detailed recommendations on methods of drafting reflect the best drafting practices. The most important change accepted has been the regular use of the 'textual' method of amending previous legislation. This has been of value to users of statutes and has eased consolidation, which we recommended should be greatly increased. However, although there has been much more consolidation in the past 12 years, the vast amount of new legislation in the past five years has frustrated efforts to keep the statutes up to date. As a result the official publications known as 'Statutes in Force', which is intended to contain a complete collection of our primary legislation amended up to date, no longer does so. Indeed, the volume and complexity of legislation in recent years has even baffled the computer!"

Other recommendations which have been accepted include the following:

(1) The drafting strength of the Law Commission, which is responsible for consolidation as well as for recommending law reforms, has been increased.
(2) Various detailed improvements in the style of drafting have been made.
(3) Consultative documents, called 'Green Papers', are now often published well in advance of legislation, and government proposals for intended legislation are sometimes published as 'White Papers' a few months before Bills are introduced.
(4) Explanatory material is now more informative and is more freely available to legislators, including Notes on Clauses.
(5) A new Interpretation Act was passed in 1978, but it fell far short of what was recommended.

KENNANISATION

In May 1985 the Attorney-General of the State of Victoria, Mr.Jim Kennan, made a statement in the Victorian Legislative Council to the effect that new rules would be introduced to simplify the language and structure of Victorian legislation. He said that the format would be "Kennanised".[19] By

19 Duncan Berry, "Legislative Drafting: Could Our Statutes be Simpler?" *Statute Review*, 92-103 at 92 (1987).

this he meant to convey that legislation would be "easier to understand, free of pomposity and verbiage, lean and hungry in approach and full of informed common sense". He envisaged the following changes to the format of Acts:[20]

(a) there would be no long title;;
(b) no Latin words would be used;
(c) there would be no longer be a reference to the year of the monarch's reign;
(d) the enacting words would be abbreviated to "The Queen and Parliament enact...";
(e) the short title clause would be replaced by a statement of the title at the beginning of the Act;
(f) the first clause would state the objects of the Bill;
(g) the provisions of a Bill would be identified by "decimalized" numbers;
(h) repetitions and "superfluous" words and phrases would be eliminated.

Drafting by Fear

Mr. Kennan, was critical of an over-qualified and over-cautious style of drafting. He described the then prevailing approach to legislative drafting as "drafting by fear". He implicitly blamed Parliamentary Counsel rather than the courts and the lawyers and indicated that Parliamentary Counsel should not be concerned with the possibility that a perverse judge would adopt an argument for an unintended meaning.[21]

Ellipsis

Dickerson criticizes the use of surplus words in drafting as obesity which consists in the use of unnecessary words and phrases which add nothing to the meaning. On the other end of the spectrum is the use of the device by the Parliamentary Counsel which involves the use fewer words which is called ellipsis. Ellipsis involves leaving the "obvious" to be inferred.[22] The problem is that what may be obvious to Parliamentary Counsel may not be obvious to the reader. While the use of ellipsis in preparing legislation is frequently resorted to by Parliamentary Counsel, it is a device that must be used with care and only in those instances where no doubt as to the meaning of particular provisions will be left in the minds of legislators and users of statutes.

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20 *Id.* at 93
21 *Id.* at 98.
22 *Id.* at 94.

AVOIDING REFERENTIAL LEGISLATION

Last but most important reason is the evils of referential legislation. Referential legislation, or legislation by reference, is a favourite subject of invective with critics of Parliamentary procedure.[23]

The practice (of legislation by reference) seems to be increasing, and when carried out to excess makes the statute so ambiguous, so obscure, and so difficult of comprehension that the judges themselves can hardly assign a meaning to it, and the great mass of people, for whom of course it is primarily intended, are unable to follow it without legal advice. Such a mode of legislation has been described as a Chinese puzzle.[24]

But the phrase has more than one meaning, and it may be worthwhile to consider the different senses in which it is employed. In its widest sense it includes any reference in one statute to the contents of another. In a narrower sense it means the application, not by express reenactment, but by reference, of the provisions of one statute to the purposes of another.[25]

It was suggested by a former Parliamentary draftsman, that Ministers and departments like legislation by reference for two reasons. First, the public cannot understand the Act, so the department has a pretty free hand. Secondly, the Bill is very difficult to amend in committee, as our legislators cannot follow out its inferential details.[26]

All legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law. It involves references, express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject

Incorporation by reference is a drafting technique for providing that a legislative text (whether in primary legislation, such as a statute, or subordinate legislation, such as a statute, or subordinate legislation, such as a regulation) includes material (text, information, concepts) expressed elsewhere. The material is included without reproducing it word-for-word within the legislative text. The material is not only referenced, it is also incorporated into the text. Incorporation by reference was developed for reasons of economy in drafting legislative texts. It is used to avoid repeating provisions already contained in the text being drafted or in some other text.

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23 Illbert, *Legislative Methods and Forms*, Oxford at the Clarindon Press 254 (1901).

24 *Supra* note 3 at p 2.

25 *Supra* note 23 at 254.

26 Sir Mackenzie Chalmer, *Edinburgh Review*, 1924, cited in Brightman, *supra* note 3.

It also promotes harmonization by fusing texts from different places into a single text.[27]

First of all, a provision of a legislative text may incorporate another provision from the same text. For example, a statute dealing with transportation safety might deal with different transportation modes separately in different parts. However, there may be many provisions common to two or more modes. Rather than repeat them, provisions from one part might be incorporated by reference in others.[28]

A second type of material consists of provisions from some other legislative text enacted in the same jurisdiction. For example, a statute dealing with public service management might incorporate by reference an industrial relations statute that applies to the private sector. This too avoids having to repeat a large volume of text.[29]

A third type includes legislative texts of another jurisdiction, and a fourth type involves non-legislative texts, such as technical standards or international agreements.[30]

If there are benefits to incorporation by reference in terms of economy and harmonization, there are also disadvantages for those who must read and understand legislative texts. Incorporation by reference requires them to go beyond the legislative text to find the incorporated texts and then to read them together. This can sometimes be an onerous task.[31]

Static and Ambulatory References

One of the most significant and often contested aspects of incorporation by reference concerns whether a reference extends to material as it exists at a particular time (a 'static' reference) or, alternatively, as it may exist from time to time (an 'ambulatory' reference).[32]

With static references, changes made to the material (including repeal) after its incorporation by reference do not affect the operation of the incorporating legislation. It continues to incorporate the original version despite the subsequent changes.[33]

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27 John Mark Keyes "What is Incorporation by Reference? Incorporation by Reference in Legislation", *Statute Law Review*, Vol. 25 No. 3, 180 (2004).

28. *Id.* at 181.
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. *Id.* at 183.
33. *Ibid.*

With ambulatory references, subsequent changes made to the incorporated material by the person or body responsible for making it are incorporated as well and take effect from the time they are made.[34]

Advantages[35]

(a) Incorporation by reference reduces amount of legislative text that has to be published;
(b) It promotes harmonization with laws of other jurisdictions/standards/agreements;
(c) it might avoid having to translate the incorporation material;
(d) it might avoid updating the incorporated material (if ambulatory incorporation by reference); and
(e) the incorporated material might already be familiar to those who are governed by it.

Disadvantages[36]

(a) The law is fragmented between legislative text and incorporated text published elsewhere, particularly when the incorporated text contains successive references to other texts,
(b) the incorporated material might not be in an official language,
(c) the legislator has less control over the content of its legislation since the incorporated text is made by someone else (especially in cases of ambulatory incorporation by reference since the text can be changed without any further action by the legislator),
(e) the drafting style or terminology of incorporated material might be incompatible with the legislative text that incorporates it,
(f) the incorporated material might be subject to interpretation in some external forum,
(g) it might be hard to obtain the incorporated material, particularly if there are multiple versions, and
(h) the incorporated material might be subject to copyright and charges for copies.

The EU Practice

The Guidelines for the Drafting of Community Legislation, set out as a general principle namely that amendments shall take the form of a text to be

34. *Ibid.*
35 *Id.* at 194-195.
36 *Ibid.*

inserted in the act to be amended. Preference shall be given to replacing whole provisions... rather than inserting or deleting individual sentences, phrases or words.[37]

Conclusion

There is the problem faced by draftsmen in probably all legal systems: the tension between simplicity and clarify on the one hand, and certainty of meaning on the other. This conflict its compounded by the requirements of the parliamentary process. In many fields our Parliament will not accept generalities in relation to the rights of citizens but will demand detailed exposition on the face of the Bill.[38] Hence the question whether the goal of plain language drafting can realized in the near future will remain unanswered for sometime since attitudinal changes not only on the part of the drafters but also on the part of many stakeholders are required.[39]

37 Guidelines promulgated on 22 December, 1998 under the Treaty of Amsterdam; Brightman states that " Our European cousins have not fallen for the evil of which Mr Keeling and his colleagues complained." *supra* note 3.

38 The Rt Hon. Sir Patrick Mayhew QC, "Can Legislation Ever Be Simpler, Clear and Certain ?" *Statute Law Review*, Vol. 11, 1-10 (1990).

39 See also the Chapter VI on Draftsman and His Equipment.