

**THE EFFECTIVENESS OF BRUNEI DARUSSALAM
LEGISLATION REQUIRES THE INTRODUCTION OF BETTER
ACCESSIBILITY MECHANISMS**

LLM in ADVANCED LEGISLATIVE STUDIES

INSTITUTE OF ADVANCED LEGAL STUDIES

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Acknowledgments

I would like to acknowledge my appreciation to Dr. Constantin Stefanou and Prof. Helen Xanthaki for the lectures, continuous support and guidance in this LLM, and for always being available to help out and provide advice in any way they can. I am especially grateful to Prof. Helen Xanthaki on the aspect on how to draft legislation in the modern context such as the use of Plain language and Gender Neutral Drafting and also to remind me to always consider the reader which is always the ordinary public. I am also grateful for the lectures and advice provided by all the guest lecturers who were invited to share their knowledge and experience in legislative drafting during the academic year. It has, without a doubt, helped me to understand different perspectives of legislative drafting. I also want to say thank you to the members of staff at the Institute of Advanced Legal Studies (IALS) library, especially with regards to the library training sessions.

The aim of this dissertation is not to criticised the way the legislation is drafted in Brunei Darussalam but hopefully it serves as a catalyst for an improvement for change which will improve the accessibility of legislations for the benefit of every citizen in Brunei Darussalam.

I am also grateful to the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam for funding my studies.

Abstract

Knowing your audience is the most important step in assuring that your text is understandable to current and prospective users. In order to understand audiences, legislative counsel must first ascertain who will read their legislation and how they will use it. Laws addressed to people in general ought to aim at people of average intelligence and average education. It will be different from legislation intended for example for lawyers where the intended user will easily understand more of even complex legal language.

Keywords: Audience, accessibility, plain language, effectiveness.

A. Introduction

It is a fundamental precept of any legal system that the law must be accessible to the public. Ignorance of the law is no excuse because everyone is presumed to know the law. That presumption would be insupportable if the law were not available and accessible to all. The state also has an interest in the law's accessibility. It needs the law to be effective, and it cannot be if the public do not know what it is.¹

It have been supposed that law was the preserve of lawyers and Judges, and that legislation was drafted with them as the primary audience. It is now much better understood that legislations are consulted and used by a large number of people who are not lawyers and have no legal training. Many people refer to legislation in their jobs.

¹ M. Adler, 'In support of plain law: An answer to Francis Bennion' (August 2008) *The Loophole* 15 22 <www.opc.gov.au/calc/docs/loophole/loophole_Aug08.pdf> accessed 2 July 2013.

People who work in the registries of universities and other educational institutions make constant reference to education legislation; the staff of many government departments, many of whom are not legally trained, work closely with the legislation that their departments administer; the staff of local authorities need to access the large quantity of local government legislation; and company officers need to consult company and financial reporting legislation. At other times ordinary people refer to legislation to find the answers to problems that affect them in their personal lives: domestic difficulties may lead to them consulting the family and relationship legislation.²

The writing of most drafters does not communicate easily and clearly. Those who work in law have an obligation to communicate efficiently with clients and the general public. People, in general, ask more questions and are impatient with wording that baffles them, no matter what the source. We can no longer simply rely on old, out-dated precedents. Even many modern precedent books and legislations needs to be revised and the precedents redrafted. If documents are not written in a clear, understandable style, clients may go elsewhere. The law profession might find the scope of their activities diminishing.³

The drafters in Brunei Darussalam I should say still use the traditional style of drafting. They claim their bills required not clarity but more on precision. That justified writing bills in 'legalese', a specialised words that they defended as necessary to achieve precision. They wrote long sentences frequently preceded by 'subject to' or 'provided

² *ibid* 23.

³ R. C. Dick, *Legal Drafting in Plain Language* (3rd edn, Carswell) 1.

that'. In those cases drafters primarily wrote laws not to induce their addressees to change their behaviours, but to guide judicial decisions and judges presumably understood legalese. Throughout the Commonwealth including Brunei Darussalam, many drafters still follow that tradition. Drafters claim to draft primarily not to channel social behaviours, but to state rights and duties. That tends to blind them to their bills' potential for facilitating social change.⁴

Traditional Legal English has traditionally been a special variety of English. Mysterious in form and expression, it is larded with law Latin and Norman French, heavily dependent on the past, and unashamedly archaic. Antiquated words flourish, such as *aforementioned, herein, therein, whereas*- words now rarely heard in everyday language. Habitual jargon and stilted formalism conjure a spurious sense of precision: *the said, aforesaid, the same*.⁵

Drafters bear an obligation to maintain the rule of law. Firstly, without clarity, precision and consistency, the law has no predictability. The rule of law demands that, as much as is possible, people know in advance what the law demands of them, what the law grants to them, and what sort of behaviours they can expect from officials. More specifically, markets impose a similar imperative, for without predictability, entrepreneurs are less likely to invest.⁶ Secondly, the drafter's obligation to produce clear and precise bills arises also due to the demands of democratic governments seeking to induce transformation: to use the legal order to change problematic behaviour.

⁴ A. Seidman, R.B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters* (Kluwer Law International, 2001) 31.

⁵ P. Butt and R. Castle, *Modern Legal Drafting, A Guide to Using Clearer Language* (2nd edn, Cambridge) 1.

⁶ Seidman (n 4) 255.

To ensure predictability, to induce behavior consonant with good governance, and to ensure that government officials in particular conform to the law's commands, the law's addresses which is the ordinary public must have easy access to the law's contents. As accessibility's first requirement, the law's form, the articulation of its overall structure, the specification of who does what, and the clarity, precision and consistency of its legislative sentences must leave its addresses in no doubt about what the law requires of them.⁷

B. Hypotheses and Methodology

This Dissertation try to prove that the legislations that Brunei Darussalam have drafted are not accessible to the user of legislations which is the ordinary public and that the public understanding or accessibility on the legislation that we drafted should not be ignored as it is a fundamental right of the public to know as they are expecting to observe the rule of law. This is especially true since in Brunei Darussalam the legislation seems to be drafted as drafter-based which means public understanding of the legislation is not something which the drafter is concern with. The accessibility of legislations here have two different meanings which is the accessibility in terms of what the user will understand of the contents of the legislations and also the accessibility of the legislations in terms of availability or ease of how the public can get hold of the legislations. The reasons that I give two meanings because there is a connection between the two concepts and both concepts are actually related for the general understanding of the law. In the next chapter I will then show why the legislation needs to be accessible and also its accessibility in terms of publication.

⁷ ibid 256.

In the next chapter I will show how the use of Plain Language will improve the accessibility in terms of the readers' understanding of the law and show the benefit of using Plain Language. In the next chapter I will show that in Brunei Darussalam experiences in the technique use for improving the readability of legislation such as the use of difficult words such as proviso, jargon, legalese, gender-neutral drafting will make the legislations not accessible to the ordinary reader and this will show that we still draft legislation in the traditional style. I will give three sample on the legislation we have drafted including the amendments in the next Chapter and this will prove that our Legislations are inaccessible to the reader and thus in turn show that not only in term of fairness but the effectiveness of legislation requires use of plain language legislations.

In the next two chapters I will show the problems for Plain Language but show that this can be resolved and the initiative by United Kingdom which shows that the move for change for more accessible legislation cannot be done by individual drafter alone but should be done uniformly and these needs the intervention of head of drafting office or government. I will then show in the next chapter what are the reasons why there is a tendency why the legislations were drafted in such way and how public understand the law.

The criteria will be the audience in this dissertation will be the ordinary public which means the legislation which will be focus on will be the legislation intended for the general public and therefore not lawyers, specialist or judges. The test will be whether those legislations drafted comply with the need for the public understanding of those legislations and compatible with the requirement of drafting to improve accessibility to

the reader as advocates by Thornton and others such as using plain and simple language, avoiding use of unnecessary words, archaic words, legalese and jargons and long sentences use and gender-neutral drafting. The next stage will be whether the current style of drafting which is the traditional style is effective in meeting the policy objective underlying in the legislations such as channeling or changing social behavior.

To proof my statement I will then have a survey of 50 people of general public from Brunei Darussalam on how much they understand the law and do they really read the legislation in the government gazette. The survey will give general picture as to how the public understanding of the legislation in Brunei Darussalam. The criteria of the survey is consist of the general public and therefore will be someone who will not well verse in legislations and therefore not lawyers, judges and enforcement officers. My methodology at the end, I will show how effective the increase of accessibility of legislations overall. Effectiveness—how you measure it for example to stop people smoking in public. Is it working or how effective is your law.

C. Accessibility

Access to legislation has at least three meanings according to Burrows. Firstly, Availability of the provision to the public, and especially to users, of hard copies, or copies available electronically (for example, by internet database accessible without charge). Secondly, Navigability involve users being able to find the relevant law without unnecessary difficulty (for example, without having to search several Act through which the law on a subject is scattered). Thirdly involves the law, once found, being readily

understandable to the user.⁸ In this dissertation I will be more focus on the second and third meaning which can be combined as helpful for the understanding of the legislations to the reader and the first meaning on reachability of the legislation to the public. American jurist Lon Fuller suggested a failure to publicise, or at least make available to the affected party, the rules he or she is expected to observe, in one of several ways in which an attempt to create and maintain a legal system can miscarry.⁹

I. Why the legislation need to be accessible?

It is a well known and principle of the law that ignorance of the law is no excuse. Nor this is a mere rebuttable presumption of knowledge of the law: rather, it is the principle that law binds the subject whether he or she be aware of it or not, unless an express excuse of ignorance is provided. In the absence of an express excuse of that kind, knowledge is neither relevant nor presumed.¹⁰ As Goddard L.J. put it in *Bowmaker v Tabor*¹¹-

“It is entirely fallacious to say that everyone is presumed to know the law. That fallacy was exposed once and for all by Lord Mansfield in *Jones v Randall*,¹² when he said: ‘it would be very hard upon the profession, if the law was certain, that everybody knew it; the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.’ The rule is, that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract.’

⁸ JF Burrows and RI Carter, *Statute law in New Zealand* (4th edn) 141.

⁹ L. Fuller, *The Morality of Law* (New Haven: Yale University Press, revised edn 1969) 39.

¹⁰ D Greenberg, *Craies on Legislation* (10th edn, Sweet & Maxwell) 427.

¹¹ [1941]1, 5 CA.

¹² [1774] 1 Cowp. 37, 40.

The result is that it is enormous importance that laws are made accessible to the public as soon as possible. The courts have deprecated difficulties experienced by citizens in obtaining authoritative copies of laws, whether or not the circumstances are such that one of the standard mechanisms for publication is available or apt.¹³

The idea that it is the subject's responsibility to become aware of the law, and that even a reasonable ignorance will offer him no protection from the law's effect, was affirmed by the Court of Appeal even in the extreme circumstances of parts of an Act becoming law and acquiring significant practical significance before it was possible to make a complete text available to the public. In *Z.L. and V.L. v Secretary of State for the Home Department and Lord Chancellor's Department*¹⁴ the Court of Appeal affirmed that 'It is beyond argument that an Act of Parliament takes legal effect on the giving of the Royal Assent, irrespective of publication', But contrasted this with the jurisprudence of the European Court of Human Rights which I am in favour with which laid considerable stress on the importance of laws being made accessible to the public as widely and as soon as possible.¹⁵

The date of commencement is when it is published? For the date of publication do reader knew this. This decision of the Court of Appeal was discussed in the House of Lords in particular whether they would consider making the text of Acts available on the Internet in advance of the publication of the hard copy. The Leader of the House of Lords replied for the Government as follows-

¹³ D. Greenberg (n 10) 428.

¹⁴ [2003] EWCA Civ.25.

¹⁵ D. Greenberg (n 10) 429.

“My lords, all Acts are published simultaneously on the Internet and in print as soon as possible after Royal Assent. It is important to ensure that an accurate approved text is published and that all users have access at the same time to the same text. To do otherwise might raise issue of fairness. When a Bill has been heavily amended during its final stages, there may be some delay between the Royal Assent and the receipt of the final text by the Stationery Office.”¹⁶

The principle of the rule of law: that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts.¹⁷ Among the principles are –

The law must be accessible and so far as possible intelligible, clear and predictable.

Firstly if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what we must or must not do on pain of criminal penalty. One important function of the criminal law is to discourage criminal behavior, and we cannot be discouraged if we do not know, and cannot reasonably easily discover, what it is we should not do.

Secondly, if we are to claim the rights which the civil law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights and obligations are. Otherwise we cannot claim the rights or perform the

¹⁶ HL Deb. February 10, 2003 cc. 464-466.

¹⁷ T. Bingham, *The Rule of Law* (2010) 37-38.

obligations. It is not much use being entitled for an allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it.

Thirdly, the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.¹⁸

In the House of Lords in 1975 Lord Diplock said: 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.'¹⁹

The European Court of Human Rights states 'The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case... a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'²⁰

¹⁸ *ibid* 38.

¹⁹ *Black-Clawson International Ltd. V Papierweke Waldhof-Aschaffenburg AG* [1975] AC 591, 638 D.

²⁰ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, para.49.

Ignorance of the law is not an excuse, but in 1988 and again in 1995 the Italian Constitutional Court ruled that ignorance of the law may constitute an excuse for the citizen when the formulation of the law is such as to lead to obscure and contradictory results.²¹

II. Accessibility in terms of publication

In Brunei Darussalam the publication of laws are made in the Government Gazette and printed by the Government Printing Department. If the Act or Order is silent on the commencement of the Act or Order, under the Interpretation and General Clauses Act (Chapter 4) the commencement will be on the date of signature of the Act or Orders. However, normally the legislations in hard copy printed in the Government Gazette is usually not accessible to the public immediately and will normally take about three months to be available to the public. Is it fair that the legislations already commence and the public is bound to comply with the laws and prohibition even though they are not aware the contents of the legislations.

In Brunei Darussalam some of the legislations can be accessed online by clicking www.agc.gov.bn however the legislations are mostly not up-to-date and there is no clear indication that the legislations is the current law.

It's good when new legislation is published free online and indeed it is hard to see how any government can justify not doing this in today's internet world. But unless the database is kept up to date to reflect amendments, and few governments are able or willing to provide the resources to do that there is a danger, particularly for non-lawyers, that people will assume that they are reading the up-to-date law. Reading an out of date

²¹ E Hondius, 'Sense and Nonsense in the Law', 8 November 2007, 23.

text is of course worse than useless as it is dangerously misleading. Ideally these databases should all come either with an updating guarantee or a clear warning that people should not consult them for a statement of current law.²²

When an Act has been amended over a period of years it can become a task of considerable difficulty to read and comprehend the Act together with its amendments. The amendments may have to be pursued through several annual volumes. When an Act gets into this state it is often revised into a revision and become a revised edition on the given year. This process was known as law Revision and is done by the Legislative drafter in the Legislative Drafting Division who themselves involve in the drafting of legislations.

This produce a “clean” version of the principal enactment, as if it had been enacted in that amended form, for users and these will include all amended legislations. This process of revision is directed by the Attorney General and what is allowed in the law revision is not to change the substance of the law but only editorial changes such as typographical errors, for example spelling mistakes and correction of cross-references. This would allow prompt and significant improvements to the usability of legislation enacted. This law revision does improves accessibility as it will show the current law however the revision is not practice as much in Brunei Darussalam and not all legislations are able to be revised.

²² D.Greenberg, Legislative Drafting Forum <<http://legislatedrafters.blogspot.co.uk/2011/02/publication-of-laws-in-sierra-leone.html>> accessed 30 June 2013, Publication of laws in Sierra Leone.

D. Plain Language

The way to improve accessibility in terms of the reader understanding of the law is to use modern style of drafting which is Plain Language or Plain English style of Drafting. Documents in plain English are described as simplified, in the sense of being rid of entangled and convoluted language. But 'Plain English' is more than that:

“Plain English is language that is not artificially complicated, but is clear and effective for its intended audience. While it shuns the antiquated and inflated word and phrase, which can be readily be omitted altogether or replaced with a more useful substitute, it does not seek to rid documents of terms which express important distinctions. Nonetheless, plain language documents offer non-expert readers some assistance in coping with these technical terms. To a far larger extent, plain language is concerned with matters of sentence and paragraph structure, with organisation and design, where so many of the hindrances to clear expression originate.”²³

The key lies in the phrase 'clear and effective for its intended audience'. Central to the plain English is the assumption that the parties to the document, and not the lawyers, are the audience. Once that is established, the structure and language of the document take on a different form.²⁴

A plain language text is a passage that the intended audience can read, understand and act upon the first time they read it. Plain language takes into account design and layout,

²³ Discussion Paper No. 1 (Melbourne, 1986), 3.

²⁴ Butt (n 5) 113.

as well as language, and means analysing and deciding what information readers need to make informed decisions, before words, sentences or paragraphs are considered²⁵. A plain language document uses words economically and at a level that the audience of the particular text can understand. Sentence structure is tight. The tone is welcoming and direct. The design is visually appealing.²⁶ Although the term plain language and plain English are often used interchangeably, there is a difference between the two. Plain language is perhaps the broader term and more suitable for jurisdictions that are bilingual like Brunei Darussalam.

The plain language movement presents considerable advantages. Firstly, the plain language movement can expose errors in drafting: in attempting to simplify the text, drafters can identify errors of syntax or errors in the choice of words. Secondly, the plain language movement serves efficiency in that it ensures that legal texts are easier and faster to read.²⁷ Queries are therefore reduced. Thirdly, plain language contributes to clarity and therefore serves effectiveness in drafting. Fourthly, it serves democracy and the rule of law.²⁸

I. Consider your reader

That is the secret of plain language in three words. If it is a piece of legislation you are drafting, then regardless of who instructed you to draft the document, your primary audience is the general public, and the general public should be able to understand it.²⁹

²⁵ B.A. Garner, *Legal Writing in Plain English* (Chicago: The University of Chicago Press, 2001) 10-13.

²⁶ H. Xantahaki, 'On Transferability of Legislative Solutions: The Functionality Test' in C. Stefanou & H. Xantahaki (Eds.), *Drafting Legislation: A Modern Approach* (Ashgate Publishing Ltd., Aldershot, 2008) 13.

²⁷ R. Wydick (1998) 4.

²⁸ R. Sullivan, 'The Promise of Plain Language Drafting' 47 (2001) McGill L.J. 97.

²⁹ M. M Asprey, *Plain Language For Lawyers* (3rd edn, The Federation Press) 80.

It should be kept in mind that the choice of the audience is not usually that of the drafter, but is instead by the instructing officials. As Sullivan observes in “The Promise of Plain Language Drafting”:

In my view, drafters do not really choose the primary audience, but rather identify the primary audience chosen by Parliament. They do this by interpreting their instructions, a task that is central to a drafter’s day-to-day job.³⁰

Identification of a primary audience can be more a political question than a legal one, because choosing whose concerns about meaning are to be preferred is a decision about whose rights are more important. In my view I feel that fairness dictates that laws should be drafted for the most vulnerable affected group, however instructing officials and the government they represent are more likely to be concerned about which group has the most to lose if the statute is misinterpreted or which group has the power and influence to protect its position. Because a drafter is retained to draft by, and is obliged to reflect the interests of, his or her client, he or she is obligated to draft in a way that will ensure that the meaning intended by the client is the meaning that the text will be given at the end of the day.³¹

The U.K. Inland Revenue’s Tax Law Rewrite Project took an approach, drafting without any particular audience in mind, but aiming “to redraft all the legislation in the clearest and simplest terms we can achieve”. Whilst such an approach may not meet with the approval of advocates of the strong plain language approach, it is arguably the safest.³²

³⁰ R. Sullivan (n 28) 112.

³¹ P. Salembier, *Legal & Legislative Drafting* (Lexis Nexis) 424.

³² *ibid* 426.

There may be many audiences that the drafter has to consider. So, for the purposes of effectiveness, the court of ultimate appeal is the drafter's most important audience-the ultimate user. Every drafter is ultimately seeking to introduce a provision that is clear enough for even opposing parties to understand it in the intended sense without unnecessary litigation, and its attendant costs for litigants and the economy generally. If an Act is going to work well, to be understood and accepted in the form of widespread compliance and to be implemented and operated efficiently and economically, it is necessary to ensure that the different needs of the other different audiences are also all met as far as possible.³³

Plain language is about making texts easier to understand by those who might want to read them. It involves choices about what a document can convey to readers and what context can or must be assumed. The objective is to improve the way the legal system operates, not to revolutionise it.³⁴

For legislation, the potential audience is much broader, encompassing:

the legislators who enact the legislation;

the public administrators who will be responsible for implementing the legislation; and
their legal advisers;

members of the public who are affected by it;

the police or other enforcement officials charge with enforcing it; and

³³ S. Laws, 'Drawing the Line', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach* (Ashgate Publishing Ltd., Aldershot, 2008) 24.

³⁴ J. M. Keyes, 'Plain Language and the Tower of Babel: Myth or Reality?' (2001) 4 *Legal Ethics* 15, 16.

the courts.³⁵

Though legislation might be potentially be used by any of these groups, it has not traditionally been written with all of them in mind.

Susan Krongold echoed this view:

“Drafters have traditionally geared their writing to the professional reader, that is the courts who interpret the law, the lawyers or other professionals who advise those who are personally affected by the law, the parliamentarians who examine and pass the law, and the public officials who administer or enforce the law”.³⁶

Some public officials even write with only themselves in mind. Most drafters have experience situations in which public officials acting as instructing officers on a bill will request that certain types of jargon be used, even though that jargon is unknown to the users of the statute and may have no fixed meaning in law. In such a situation, those officials are really writing the law only for themselves.³⁷

Some areas of the law are inherently more complex than the others and it can be argued that there is a limit to how simply a complex idea can be expressed, that does not mean that any statute should be harder to understand than necessary. As Christine Mowat points out, the fact that the subject-matter of a statute is complex does not demand the use of complicated syntax or legalese.³⁸

Moreover, as Susan Krongold observes:

³⁵ P. Salembier (n 31) 411.

³⁶ S. Krongold, “Writing Laws: Making Them Easier to Understand” (1992) 24 *Ottawa L.Rev.* 495, 552.

³⁷ P. Salembier (n 31) 412.

³⁸ C.Mowat, *A Plain Language Handbook for Legal Writers* (Toronto: Carswell, 1998) 150.

It is precisely because policy is complicated that the words, syntactic structures and format used to express that complex policy should not add to the complexity. We must be careful to distinguish between complex subject matter and complex presentation.³⁹

Ruth Sullivan states that ‘It is not surprising that access to law for most people is impossible without the assistance of lawyers or other professionals. These professionals not only locate the law and explain it, but also apply it in a way that benefits their clients to the greatest possible extent. They are both expected and obliged to use their knowledge and skills to develop interpretations that favour the client’s position. For those who can afford a professional to look after their needs and interests, dealing with a statute book is not a problem: the professional acts as intermediary between the client and the text. For the rest of the public, however, the statute book remains an intimidating and impenetrable fortress. Most supporters of plain language drafting find this arrangement unacceptable. They believe that legislation should speak directly, without the need for intermediaries, to the very people whose lives it affects’.⁴⁰

II. The benefit of using Plain Language

The first benefit is increased efficiency and understanding as Plain Language documents are easier to read and understand. Although the evidence for increased efficiency and understanding seems conclusive, some lawyers still have reservations on the ground that is the prospect of a lower fees. But, the efficiency of this kind is not the threat to their income as it may seem, for there is no direct correlation between expertise and efficiency. A related reservation might be the time taken to draft plain language

³⁹ S.Krongold (n 36) 504.

⁴⁰ R. Sullivan (n 28) 100-101.

documents. For many lawyers, especially those new to the techniques, drafting in plain language may take longer than drafting in the traditional style. While the reader receives the benefit of the drafter's effort, the drafter may have spent considerably more time preparing the document than if it had been lifted from the computer. However, if plain language documents become the norm, the legal profession as a whole benefits. Moreover, if the draft is in plain language, the drafter can absorb and deal with amendments more easily than if the document is in traditional form.⁴¹

A related bonus of a plain language style is the potential for reducing mistakes. Traditional legal language tends to hide inconsistencies and ambiguities. Errors are harder to find in dense and convoluted prose. Removing legalese helps lay bare any oversights in the original. If plain language helps reduce errors it should also help reduce litigation about the meaning of documents as it seems unlikely that plain language documents will produce court lists as lengthy as those produced by documents drafted in the traditional style.⁴²

Another advantage of plain language In Brunei Darussalam where it has bilingual legislation will be it is easier and cause fewer error for the translation of the English text of the legislation. The text of the legislation usually originate in the English text and after the final draft then it will be translated in the Malay text. This is especially important not to have errors as under our Constitution the Malay text which is the translated version will prevail if there is a conflict between the two texts.⁴³

⁴¹ Butt (n 5) 117.

⁴² *ibid* 118.

⁴³ Except in Syariah Legislation where the Malay text will be the original text legislation.

Modern, plain language is capable of precision as traditional legal English. It can cope with all the concepts and complexities of the law and the legal process. The few technical terms that the lawyer might be compelled to retain for convenience or necessity can be incorporated without destroying the document's legal integrity. The modern English of a legal document will never read like a good novel, but it can be attractive and effective in a clean, clear, functional style.⁴⁴ There is long-standing evidence that plain language improves comprehension. Additional research shows that readers prefer plain language over traditional style. Readers prefer it by a wide margin; they find it substantively more persuasive.⁴⁵

E. How to draft more accessible legislation.

The best way to improve accessibility is to know what the drafter should avoid. It is not difficult to identify characteristics of traditional legal documents that should be avoided. Here are the words still being widely used which shows that Brunei Darussalam still adopt the traditional style of drafting.

shall

In Brunei Darussalam the words "shall" is still widely use in legislation. The primary objection to shall is not merely that it is archaic but that its use can lead to confusion. Judicial authority on shall centres around two prime areas. The first concerns the difference between futurity and a precondition. The second concerns the difference between an obligation and a direction.⁴⁶

⁴⁴ *ibid* 126.

⁴⁵ E. Donelan 'Improved Regulatory Management: A Framework for Improved Governance and Economic Development' OECD sigma.

⁴⁶ Butt (n 5) 133.

It is preferable to use ‘must’ instead of ‘shall’ to impose an obligation. After all, legislation is inherently compulsory. This is more in line with ordinary speech and avoids the confusion that the use of ‘shall’ may introduce. The declaratory use of ‘shall’ in contexts that are neither temporal nor obligatory, although quite common, should be avoided.⁴⁷

The imperative mood is not feasible for legislative documents. However, the use of shall and must has been found to be largely unavoidable for the creation of obligations and prohibitions. The result of this, however, has been that the language of legislation used to express obligations and prohibitions is not habitually encountered by the ordinary reader, and ordinary readers are unlikely to ever be completely comfortable with either shall or must in legislative commands. Encountering shall or must in the form of a command therefore give rise to a certain cognitive dissonance that the reader must overcome in order to make sense of a legislative requirement or prohibition.⁴⁸ Actually ‘shall’ and ‘must’, neither is necessary as legislation is supposed to be imperative anyway.

Being

The word *being* is often used in legislation to introduce a relative clause. In normal English usage, *being* introduces a non-restrictive relative clause. Being non-restrictive, the clause introduced by *being* adds parenthetical information about the antecedent-information that is not necessary to identify the antecedent. Legislation does not normally include parenthetical information, however, because parenthetical information

⁴⁷ Prof. H. Xanthaki, *Thornton's Legislative Drafting* (5th edn, Bloomsbury) 115.

⁴⁸ *ibid* 156.

is by definition not necessary to make sense of the sentence in question, including such information in a statute breaches the presumption against tautology- that the legislature “does not include unnecessary or meaningless language in its statutes: it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice”.⁴⁹ In Brunei Darussalam the words ‘being’ is still widely used in legislation.

hereby

Drafters in the traditional style have a particular affinity with it. Nothing is ever simply done; it is ‘hereby’ done. Presumably, the drafters consider that ‘hereby’ adds precision. But this is not always the case- ‘hereby’ can in fact introduce ambiguity. It is true that ‘hereby’ can give a particular emphasis to an action but even then it is usually legal surplusage.⁵⁰ The words hereby is still widely used in Brunei Darussalam.

Notwithstanding; subject to

Where one provision is inconsistent with another provision in the same law or some other law, the drafter ought to make it clear which provision is to prevail. ‘Despite’ is an alternative word to ‘notwithstanding’ and in many contexts a more attractive and less starchy one. It is desirable to specify precisely the law over which the provision is to prevail. The generic provision ‘Notwithstanding any law to the contrary,...’ is unacceptable for three main reasons where it is vague, it simply repeats an existing presumption of statutory interpretation that applies to any provision anyway and thirdly the words may be the subject of an implied repeal by a later statute and this will not be

⁴⁹ P. Salembier (n 31) 171.

⁵⁰ Butt (n 5) 148.

readily apparent to users after that occurs. Failure to take the time to identify the inconsistent provision is not a legitimate reason for its use.⁵¹

Such

While condoning the lawyer's use of the defining 'such' as a useful device. Fowler says that for the 'ordinary writer' more often than not 'such' is a 'starchy substitute' for 'that' or for using a pronoun. While lamenting but understanding the inescapable implication that Fowler felt constrained to regard as lawyers as something other than 'ordinary writers', the lesson is clear. The lawyer's use of 'such' is a deviation from common speech and therefore suitable only in a context where it is justifiable. 'Such' used adjectively to refer back to a noun already used can undoubtedly be useful but care and restraint are needed. It is common to find 'such' used when 'the' or 'a' or 'this' would be simpler and more elegant.⁵²

foreign words and phrases

Foreign words which usually Latin words have long since disappeared from ordinary English speech and writing. Examples are:

Force majeure, inter alia, mutatis mutandis, ultra virus are best abandoned, for three reasons. First, the average reader will not understand them. Second, their foreign origins convey a sense of precision and technicality which they simply do not possess. Third, they are not true legal terms of art. Almost always they can be discarded for an equivalent in modern English.⁵³ Fortunately in Brunei Darussalam the latin words have

⁵¹ Prof. H. Xanthaki (n 47) 113.

⁵² *ibid* 118.

⁵³ Butt (n 5) 142.

been abandoned in the recent legislations even though these words can still be found in the old legislations.

unduly long sense-bites

Another characteristic of traditional legal drafting is long slabs of unbroken text- long 'sense-bites'. When combined with a deliberate absence of punctuation and a lack of paragraphing and indentation, this produces impenetrable text, confounding comprehension.⁵⁴

Matters have improved somewhat in recent years. The best way is to break text into digestible slices such as use of shorter sentences where there should be much more paragraphing, sub-paragraphing and indentation.

Eliminating unnecessary words

One of the more obvious ways to reduce sentence length, and hence increase comprehension, is by simply removing unnecessary words. Legislation is particularly prone to the use of excess verbiage, as evidence by the common use of doublets such as *null and void, and legal and valid*. Aside from rendering legal text less ponderous, another reason to avoid using two words to say the same thing is that it could give an affected party to argue and a court an opening to decide that one of the words in fact means something different.⁵⁵ Fortunately in Brunei Darussalam the use of excess verbiage has stopped in legislation.

⁵⁴ *ibid* 142.

⁵⁵ P. Salembier (n 31) 90 and 92

Avoid long sentences

Studies in linguistics show that a sentence of above 15-20 words is incomprehensible. An Australian jurisdiction has a rule of practice that aims for legislation sentences with a maximum of around 30 words and suggests that a sentence of more than 5 lines should be regarded with suspicion as being too long. The justification for this approach is that the short-term memory of users cannot cope accurately with a large quantity of material.⁵⁶

Readers find long, complex sentences difficult to comprehend because they strain the limits of short-term memory. The average person can keep at most seven different items or discrete ideas in short-term memory at one time. Studies in language comprehension indicate that if a sentence has more representational elements (words, phrases, propositions, or thematic or grammatical structures) than the reader can maintain in short-term memory, then some of them are likely to be displaced or forgotten by the time they are needed to make sense of the sentence.⁵⁷

The long sentence can be reduced by paragraphing. Paragraphing is a typological device for arranging legislative text. It involves dividing a sentence into grammatical units and arranging parallel units as separate blocks of text, usually preceded by a letter or number. In legislation, parallel units of text are all indented the same distance from the left margin and are numbered in the same series.⁵⁸

Paragraphing has three basic functions:

⁵⁶ Prof. H. Xanthaki (n 47) 60.

⁵⁷ P. Salembier (n 31) 80.

⁵⁸ *ibid* 97.

1. It helps the reader understand a lengthy or complex sentence by exposing its structure, particularly by showing which grammatical units are parallel to each other;
2. It more clearly indicates how different parts of a sentence relate to each other, avoiding ambiguity about the objects of modifiers such as prepositional phrases, relative clauses and adverbial clauses; and
3. It can be used to shorten a text by avoiding repetition.⁵⁹

legalese and jargon

Allied to legalese is jargon, by which we mean language peculiar to a profession. Jargon abounds in legal and quasi-legal documents. Jargons may be acceptable in a document that a lawyer drafts solely for another lawyer, but it is not acceptable in a document that a lawyer drafts for a client. Almost certainly the client will find the language stilted, and may well have difficulty understanding it. Rarely can there be any justification in drafting a document that the client finds difficult to understand. Lawyers habitually use words that have long since disappeared from ordinary speech. These words give legal writing a distinctive voice, but are quite unnecessary for legal efficacy. Usually they can be discarded entirely, or at least replaced by modern equivalents.⁶⁰

One of the most telling criticisms of the language of the law is that it habitually wraps its meaning in a mist of unnecessary jargon. This obscures the matter so far as the non-lawyers are concerned and is a cause of irritation. Of course some legal concepts are not capable of being communicated briefly and efficiently without the use of the lawyers'

⁵⁹ *ibid* 98.

⁶⁰ Butt (n 5) 147.

jargon, but that is quite a different matter. The jargon to which the critic justifiably objects is the result of unnecessary deviation from words in general use to words and expressions commonly used only by the legal profession. Words like ‘aforementioned’, ‘aforesaid’, ‘herein’, ‘hereby’, ‘hereto’, ‘hereunder’, ‘hereafter’, ‘herewith’, ‘thereof’, ‘thereto’, ‘therein’, ‘therefor’, ‘thereunder’, ‘whereas’ are all in this class. They have a stiff, rather archaic flavor which some would say befits the law admirably.⁶¹

The danger is that the archaic language flow too readily from the lawyer’s wordprocessor. Linguistic bad habits may be a problem. Just as language is personal, so too is the development of style and it is not unusual for a drafter, without knowing it, to develop an unfortunate habit of repeating a favourite word or expression. Words such as ‘such’, ‘said’, ‘relevant’, ‘hereby’, ‘deem’, and phrases such as ‘as the case may be’ are often culprits. It is good practice to acquire the habit of asking oneself whether the language of a draft might have been chosen equally well by a non-lawyer. Drafters have a special obligation to avoid archaic words.⁶²

In Brunei Darussalam these words even nowadays have been used extensively and really these kinds of words are really not easy for the public to understand and I have come across some ministry officials enquire about what the provision means when the provision start with “notwithstanding”. How can the ordinary public understand the law if even the enforcement officer does not even understand the law.

term of art

⁶¹ Prof. H. Xanthaki (n 47) 101.

⁶² *ibid* 101.

A typical example is the phrase ‘without prejudice to’. The phrase is commonly used to preserve the force of one provision while at the same time expressing another contrasting or overlapping provision. An example:

Without prejudice to section.....

In this context, ‘without prejudice to’ has no legal magic demanding its use. Where it appears in this example, it can be replaced by a simple English word such as ‘despite’, where it second appears, it can be replaced by a phrase such as ‘without affecting’.⁶³

The use of provisos.

The proviso is a relic which usually succeeds in lengthening a clause or paragraph and creating obscurity. Coode attacked the proviso.⁶⁴

“The present use of the proviso by the best drafters is very anomalous. It is often used to introduce mere exceptions to the operation of an enactment, where no special provision is made for such exceptions. But it is obvious that such exceptions would be better expressed as exceptions, if particular cases were excepted, if particular conditions were to be dispensed with, to be expressed in the condition. This would make, in all cases, the definition of the case, condition, subject, or action, complete at once, that is to say, it would show in immediate contact all that is included and all that is excluded.....”

Fortunately in Brunei Darussalam the use of proviso is rarely seen in the recent legislations.

Use cross-references with restraint.

⁶³ Butt (n 5) 150.

⁶⁴ R. C. Dick (n 3) 96.

Some cross-references between provisions are essential to achieve certainty and to assist readers. Some cross-references may be desirable as signposts to assist readers of a long and complex statute. A cross-reference should only be included if it is either essential or useful. Some drafters have been inclined to use them far too readily. A law replete with countless cross-references may be technically correct but its ‘legal’ appearance will irritate ordinary readers. Precision is admirable but over-precision is painful.⁶⁵

It is not unusual for the relationship of subsections within a section to be spelled out with quite unnecessary cross-references. This can be particularly tiresome when subsections that complement an earlier subsection refer back to it needlessly. For example, suppose subsection (1) provides for the appointment of inspectors, there is no need for subsequent subsections to refer repeatedly to ‘an inspector appointed under subsection (1)’. It would be necessarily implied that in the remainder of the section ‘inspector’ meant an inspector appointed under that subsection.⁶⁶ Moreover, cross-referring creates further ambiguity and meticulous drafting technique when the cross-referring text is amended or repealed.

Part of the problem may also lie in the traditional practice of drafters, which depends very heavily on cross-reference between provisions in a number of different Acts, making it necessary for the reader to pursue what may be a long paper-chase through a series of legislative provisions. The biggest loser is the ordinary person who wants to try and find out, probably with professional help, what the law is.⁶⁷

⁶⁵ Prof. H. Xanthaki (n 47) 71.

⁶⁶ *ibid* 71.

⁶⁷ T.Bingham (n 17) 41.

Reference to “minister”

In its review of the Interpretation Act 1901, the Australian Office of the Parliamentary Counsel made note of a problem that arises where statutes confer powers and duties on particular Ministers and a government reorganisation leads to changes in names of department and ministerial titles. If the Minister is defined in each statute, then a large number of statutory amendments might have to be made each time the government reorganises.

One possible solution identified in that review was to replace references to particular Ministers with ‘the Minister for the time being responsible for the Act’. Whilst this might solve the amendment problem, it is not particularly informative, since it does not tell the reader who that Minister is or how to find that out.⁶⁸

I gave example in Brunei Darussalam we have the Broadcasting Act (Chapter 180), and the reference to the Minister can be found in section 2 in the definition, where the Minister means the Minister responsible for broadcasting. There have been two occasions where the Minister responsible for broadcasting has changed and in 2010 the Minister responsible for Broadcasting has changed from the Minister in the Prime Minister Office to the Minister of Communication and where prior to that it was held by the Minister of Home Affairs. Whilst this practice does not require amendment to the Broadcasting Act and help the drafter however this does not help the reader of the Act and it is better to specify in the Act who the Minister responsible is, such as the Minister of Communication and to amend it accordingly, if the Minister responsible has changed.

⁶⁸ P. Salembier (n 31) 403.

The reader of the Act will find it difficult to find out who the Minister to go to for example for the application of licence in the Broadcasting Act.

Organisation and ordering of legislations

Organise material logically, and chronology wherever appropriate, at every level (ie the whole statute, Parts, sections, Schedules). However dull the subject-matter, and even the most enthusiasts of drafters must admit it, if the material is dealt with in a planned manner and in logical sequence, and the chronological sequence where appropriate, the writing will flow and be more readable and thus more readily comprehensible. The drafter's goal in arranging a statute is to order its contents so that they can be located, read and referred to as easily as possible. The organisation of a statute affects the ability of the readers to locate provisions in it and, equally importantly, to determine in the first place whether the statute in question addresses the circumstances of interest to the reader.⁶⁹

To understand how to achieve a logical and efficient organisation in any particular case, a number of principles have been suggested:

1. Put general provisions before specific ones.
2. Put more important information before less important information.
3. Put provisions in chronological order.
4. Place substantive provisions before administrative or technical ones.

⁶⁹ *ibid* 282.

5. Put permanent provisions before temporary ones.⁷⁰

Gender-neutral language

A number of drafting jurisdictions have moved to the use of gender-neutral language in the drafting of their laws and Brunei Darussalam in the English text legislation is one of the exception. They have replaced gender-specific nouns and have moved from the traditional use of he as the singular pronoun, adopting instead expressions such as *he or she* or finding alternatives to the use of singular pronouns altogether.⁷¹ As equality before the law is, in most jurisdictions, a constitutional principle, legislative drafters should treat men and women equally. Therefore gender-neutral legislation must become the general rule.⁷²

Since grammatical gender has no place in the English language, it is often possible to write in an entirely gender-neutral way. However, any communication dealing with people is likely to be expressed in gender-specific terms. This led to the introduction of a presumption that words importing the masculine, include the feminine as can be found in the Interpretation and General Clauses Act (Chapter 4) of Brunei Darussalam. However, substance and style may be two very different things; and, as a matter of style, modern sensibilities in relation to sexual equality are not easily satisfied by reliance on a presumption of interpretation. Thus, many jurisdictions (including the United Kingdom since the beginning of the parliamentary year 2007-2008) practice explicitly gender-neutral expression.⁷³

⁷⁰ *ibid* 283.

⁷¹ *ibid* 141.

⁷² Prof. H. Xanthaki (n 47) 80.

⁷³ I. Mcleod, 'Principles of Legislative and Regulatory Drafting' Hart Publishing, 2009, 76.

Moreover, how many people know and have read the Interpretation Act. The drafters tendency which rely too much on the Interpretation Act will have affect on the level of understanding of the reader which consist normally members of the public who not only have read the Act but also have not heard or know about the existing of the Act and its functions.

A drafter should not use the rules of interpretation as crutches but should be capable of drafting without having to rely on or resolve difficulties in meaning through the use of the rules. Unless this is observed the drafter may invite court interpretation. Also, it should be kept in mind that interpretation always takes place in a given context and a court may interpret a rule in a different light as applied to a particular draft.⁷⁴ In Brunei Darussalam however there is a tendency to rely not only on the provision of gender-neutral which means he includes she but also all other provisions of the Interpretation Act when drafting legislation which really is not a good idea as it is not very helpful to the reader.

In French and German the situation is quite different since those languages are inflected and so do the Malay text in Brunei Darussalam and therefore the Gender-neutral is not a problem. Gender is not equated to sex; masculine is not necessarily male, feminine is not necessarily female, and an inanimate thing could be masculine or feminine instead of neuter. On solution for drafting in English might be to provide that words importing one gender include all other genders. This is not a perfect solution. The problem of reference is inherent in English language unless they are bold enough to invent new modes of

⁷⁴ R. C. Dick, (n 3) 17.

reference⁷⁵. An example will be the word chairman is nowadays the public will understand if for the same thing the word ‘chair’ is used. However if there is indeed a new mode of reference created in English it should be widely and universally used such as the use of ‘chair’ so as to avoid confusion to the public.

As a further illustration to the words should be used for the better understanding of the reader which is the general public, in addition not to use the legal jargon and legalese just use simple alternative words as below (not the full list here, I only put some of the words that I have come across in Brunei Darussalam). However, the preferences expressed are not meant as absolute prescriptions. Individual tastes differ, usages vary, and terms of art often must be honoured. The point is that the following the “say” column will in general produce a result that is easier to read than following the “Don’t say” column⁷⁶:

Don’t say	say
accorded or afforded	given
cease	stop
commence	begin, start
consequence	result
deem	consider
during the course of	during
endeavor	try

⁷⁵ R. C. Dick, (n 3) 165.

⁷⁶ R. Dickerson, *The Fundamentals of Legal Drafting* (Little, Brown and Company, 1965) 117, 125 and 126-130; R. Dickerson, *Materials on legislative Drafting* (West Publishing Co.1981) 291. More of these lists can be found on tax-law rewrite and OPC Drafting Manual in Plain English manual.

expiration	end
for the duration of	during
forthwith	immediately
give consideration to	consider
give recognition to	recognise
have knowledge of	know
have need of	need
inform	tell
in lieu of	instead of, in place of
in the event that	if
is applicable	applies
Is authorised	may
is dependent on	depends on
is in attendance at	attends
make an appointment of	appoint
make application	apply
make payment	pay
make provision for	provide for
obtain	get
prior to	before
pursuant to	under
render	make, give or need
specified	named
subsequent to	after
to the effect that	that

under the provisions of under

Note the drafters should not change a term of art merely because it contains words on the “Don’t say” list.

F. Legislations which are inaccessible.

I will give three example of the legislations which shows that the legislations drafted are generally not accessible to the ordinary people in the Constitution, Amendment provisions and in the Notification.

I. Article 83(A)(2) of the Constitution.⁷⁷

“83(A)(2) At the expiration of a period of 6 months beginning with the date on which a Proclamation of Emergency made after the 16th day of Muharram 1425 Hijriah corresponding to the 8th day of March 2004 ceases to be in force, any Proclamation, Order, Instrument, Act, Enactment or other written law made under Article 83 during any such period of emergency and, to the extent that it could not have been validly made but for Article 83, any Proclamation, Order, Instrument, Act, Enactment or other written law made while the Proclamation was in force, shall cease to have effect except as to things done or omitted to be done before the expiration of that period.”

Firstly, the sentence runs far too long and there are a lot of repeated words. For drafting, a reasonable rule of thumb limits sentences to somewhat say four or five lines. Drafters

⁷⁷ Constitution of Brunei Darussalam can be accessed http://www.agc.gov.bn/agc1/images/LOB/cons_doc/constitution_i.pdf 61.

should consider ways of breaking any sentences longer than that into a series of shorter sentences. Secondly, the sentence contains far too many subjects. A legislative sentence ought to contain one idea and no more. If a section must contain a number of related ideas, include them as individual subsections that is, individual legislative sentences or tabulate.⁷⁸ For this Article 83(A) (2) which is amended in 2004 and inserted a new Article it is even difficult even for lawyers to understand the contents of the provisions and have to be read several times to understand it. What are the chances of ordinary public to understand the provision of this Article and it can be said that the legislations drafted is not for the general public understanding in mind.

I have seen similar style of long sentences drafting in the recent draft of Syariah Criminal Procedure Code. In Brunei Darussalam, the people can be charged for crime under the Civil Courts or Syariah Courts. The argument given to maintain that style of drafting so that it is consistent with the Civil Courts “Criminal Procedure Code” which is drafted more than 50 years ago and have old style of drafting. Actually the way forward is to modernise the draft of both legislations and not just to follow the old style just to maintain consistency. The Criminal Procedure Code is useful not only for defence lawyers, prosecutors or judges but also for the person charged. This is especially important as not all people can afford to hire a defence lawyer and in Brunei Darussalam it is only free for crimes with capital punishment. The person has the right to know what part of the law if any might be able to protect them.

II. Indirect textual amendment.

⁷⁸ Seidman (n 4) 269.

I give another example where the legislation is not accessible when amendment is made especially indirect textual amendment.

In Brunei Darussalam we do not have explanatory notes at all. In cases of amendment I give example to amendment to the definition of “permanent residence”. In the Interpretation and General Clauses Act (Chapter 4), in section 13 provides that by putting in the schedule, the amendments in effect will also amend the other provisions of all the legislations in Brunei Darussalam. In this case when the definition of “permanent residence” are put in the interpretation Act and General Clauses Act other definitions of “permanent residence” in other legislations.

In the Interpretation and General Clauses Act (Amendment) Order, 2006⁷⁹, has only two sections including the citation and section 2 as shown below-

“Amendment of section 3 of Chapter 4.

2. Section 3 of the Interpretation and General Clauses Act is amended, in subsection (1), by inserting the following new definition immediately after the definition of “party”-

“ “permanent residence” means a person to whom a Residence Permit has been issued under sub-section (1) of section 67 of the Immigration Enactment, 1956 (Enactment No. 23 of 1956) or to whom an Entry Permit has been issued under section 10 of the Immigration Act (Chapter 17);”.

Actually this is an indirect amendment where in Brunei Darussalam, under the Interpretation and General Clauses Act (Chapter 4), when the definition is added to it will also affect the definition of “permanent residence” throughout all other legislations

⁷⁹ can be accessed on http://www.agc.gov.bn/agc1/images/LAWS/Gazette_PDF/2006/EN/S018.pdf.

in Brunei Darussalam. Looking at the amendment the reader will not know the background of the amendment and whether it will affect all other legislations. Even if the reader acknowledge that it will affect other legislations it will be very difficult to find out which legislation will be affected. The advantage of this amendment is that it will catch all the legislations however in truth only the drafter and the ministry officials who are also enforcement officers will be aware which legislation will be affected. The relevant legislations which are affected are the Immigration Act, Passport Act and other relevant legislations.

The same apply to direct textual amendment. In Brunei Darussalam when textual amendment is made, only the text what is amended is published in the Government Gazette. As a result the reader of the amended legislations have to read together with the Principal legislation which is amended in order to understand it. However as it is normally the case without the explanatory notes the reader will be difficult to see what the amendment is all about and what is affected. This will certainly not very helpful to the reader. Some countries like Canada have updated laws of the current legislations available online for the public which is very good and this can be achieved in Brunei Darussalam without difficulty as works have been done in producing mark-up copy however the updated text of the laws are not available online. In Brunei Darussalam the textual amendment published online is separate from the Principal Act and therefore not helpful to the reader as it does not show the current law.

III. Tobacco (Prohibition in certain places) Notification, 2007⁸⁰

⁸⁰ can be accessed on http://www.agc.gov.bn/agc1/images/LAWS/Gazette_PDF/2007/EN/S035.pdf.

The third example will be Tobacco (Prohibition in certain places) Notification, 2007, under the Tobacco Order, 2005 which is amended by the Tobacco (Prohibition in Certain Places)(Amendment) Notification, 2012⁸¹ which not only shows it is inaccessible but also prove ineffectiveness.

The relevant provisions are below:

““premises” includes a building, tent or other structure, whether permanent or otherwise, and any adjoining land used in connection therewith, and also includes a vehicle;

“government premises” means any premises owned or occupied by the Government or any statutory body;

Smoking not permitted in certain places.

3. Smoking is not permitted in the buildings or part thereof, specified in the First Schedule and in the public service vehicles specified in the Second Schedule.

First Schedule

Buildings

1. Government premises.
2. Office premises.
3. Any area in an educational institution or higher educational institution.

Second Schedule

Public Service Vehicles

⁸¹ can be accessed on http://www.agc.gov.bn/agc1/images/LAWS/Gazette_PDF/2012/EN/s023.pdf.

1. Any motor omnibus.
2. Any private bus.
3. Any taxicab.”

This is another good example where the accessibility of the legislation to the reader is not taken into account in legislation. This is a Notification of the place under the Tobacco Order, 2005 where it is an offence to smoke in some places and the notification was amended in 2012. There was a question whether it is an offence to smoke in the car park area of the Government department which usually outside the building. In the first schedule under 1. Government premises so it is intended to be included. However, we have to look at the definition of “government premises” and also “premises” which includes a building, tent or other structure, whether permanent or otherwise, and any adjoining land used in connection therewith, and also includes a vehicle. Looking at the definition of the premises it is definitely not clear to the ordinary public whether it is an offence to smoke in the car park area.

The use of the words “other structure” and “adjoining land used in connection therewith” is very confusing and very difficult for the ordinary public to understand. In Plain Language style it will be better just put the simple words ‘car park area’ and this will be understood by everybody. Actually the question was raised by the enforcement officer under the Tobacco Order and if they are in doubt about whether there is an offence then they will not enforce the offence and hence the effectiveness of this legislation is better served by improving its accessibility. Even though it is actually intended to be an offence to smoke in a car park area. If the enforcement officer is not clear about the provision what are the chances that ordinary public will understand it.

The other criticism of the definition of premises is “also includes a vehicle”. As there is no way general public would know that premises which is in the body text of the legislation also include a vehicle and putting it in the definition is misleading and better to put it clearly as in Schedule 2. As a result there will be lack of enforcement even though this is not intended and therefore effective legislation can be said to arise by using better accessibility legislations.

G. Problems for Plain Language

I have to raise the problems that may be encountered in using Plain language drafting which can be solved. An issue raised time and again by drafters in discussions of plain language drafting is that there is virtually never enough time to develop supplemental plain language features like orienting provisions, examples and notes, let alone time for testing different drafts on various audiences. Ian Turnbull describes how time pressures can undermine a drafter’s efforts at employing even standard principles of good drafting. Drafters are obsessed with the problem of shortage of time. Government are notoriously impatient, and they frequently make impossible demands on their drafters. The result is that drafters are constantly faced with the dilemma whether to deliver a quick Bill or a good Bill.⁸²

Adding supplemental plain language features such as flow-charts and examples in such circumstances is therefore often simply out of the question, and many plain language advocates who are also legislative drafters recognise this fact:

⁸² I. Turnbull. ‘Problems of Legislative Drafting’ (1983) 13 Queensland Law Society J, 225, 227

Plain language writing take time. Lack of planning and unreasonable expectations often having drafting offices straining desperately to produce any text at all. The rewriting or extra editing necessary to make the draft communicate better is hardly ever possible.⁸³

Good drafting takes time. As a result, preparation of a statute in plain language must be planned for, and adequate time must be provided for the extra work involved in developing supplemental plain language features. The portion of the United Kingdom's Tax Law Rewrite Project that led to the Capital Allowance Act 2011 took five years, Given the amount of time involved, a complete spectrum of plain language features will therefore seldom be feasible in a statute that must be drafted within tight time constraints.⁸⁴ However it can be said that the problem is only short term in long run better use plain language as drafter become more expert as they become experience.

It is often difficult to use plain English in complex matter. For one thing, legislation often has to deal with concepts that are far from plain to most people and which cannot be made plain by the use of a reasonable number of words. A provision in a Financial Bill for example, has to address concepts which combine the unreal world of accountancy and the unreal world of law and has to find some points of contact between those two and the real world. The result is inevitably something that will make no sense to anyone acquainted only with the real world.⁸⁵

Clearly, when dealing with a relatively simple concept and imposing rules of relative simplicity, the draftsman ought to draft in a manner which will be easily penetrable by

⁸³ S. Krongold (n 36) 550.

⁸⁴ Legal And legislative drafting (Plain Language Drafting) 479.

⁸⁵ D. Greenberg (n 10) 390.

any class of reader. But when writing about matters of technical complexity, or imposing in relation to simple concepts rule of complexity, the draftsman will be forced to aim for clarity only in so far as he can assume his primary audience to be familiar both with the substantive area concerned and with the construction of legislation.⁸⁶

Having said all that, the draftsman of legislation must bear in mind the advice given by Sir Alison Russel K.C.⁸⁷ -

“The simplest English is the best for legislation. Sentences should be short. Do not use one word more than is necessary to make the meaning clear. The draftsman should bear in mind that his Act is supposed to be read and understood by the plain man. In any case, he may be sure that if he finds he can express his meaning in simple words all is going well with his draft: while if he finds himself driven to complicated expressions composed of long words it is a sign that he is getting lost, and he should consider the form of the section. Of course, in Acts of a technical kind, he may find it necessary to use technical expressions: but such Acts will usually only affect readers who are qualified to understand them.”

H. Initiative to modernise the language of statutory instruments

I just want to use example in United Kingdom how the use of modern style of drafting is introduced. In 2005 the UK Government issued an instruction to its lawyers involved in the drafting of statutory instruments to implement certain modernisations, following correspondence between the Joint Committee on Statutory Instruments and the Minister for the Cabinet Office. The fundamental requirement is that-

⁸⁶ *ibid* 391.

⁸⁷ *Legislative Drafting and Forms*, London 1938, 12-13.

“Drafters are expected to consider the entire text critically with a view to make it easy as is reasonably possible to read. At times complexity is unavoidable because sufficient precision to give effect to the intended policy cannot be achieved otherwise. But that does not justify excessively long or complex sentences or use of surplus material, archaisms or unnecessarily formal terminology purely to follow precedent.”⁸⁸

The specific issues addressed by the 2005 circular are-

- (a) shorter and clearer preambles;
- (b) omitting “above” and “below”, etc;
- (c) omitting archaisms “hereafter”, etc;
- (d) avoiding Latin unless important technical terms;
- (e) shorter sentences;
- (f) avoiding proviso;
- (g) sub-dividing complex multiple propositions.⁸⁹

I. Reason for traditional drafting style

I think the main reason Brunei Darussalam still use the traditional style is because we do not have the Post-legislative scrutiny at all where we can measure the effectiveness of the legislation and we can know that the message of the legislations that we are trying to convey to the public get across and we can also measure the effectiveness of the legislations. I think this is the main reason that we still do not use plain language drafting at all as the general public also not clear that nowadays the legislations is supposed to be easily read by them and they think that it is all right for the legislations to

⁸⁸ Statutory Instrument Practice, Circular No.4 (05) (September 19, 2005) Modernising SI Drafting (published by Her Majesty’s Statutory Office).

⁸⁹ As per the 14th Report for Session 2003-2004 of the Joint Committee on Statutory Instruments.

have complex wordings. Consequently the public would think that the legislations which is published in the Gazette is not for them and they would not bother to see or read it and think these documents are to be used for lawyers only.

In Brunei Darussalam also we do not have a purpose clause or explanatory material to help assist the reader. If a statute has a purpose clause (also known as an object clause), it is normally found after the definition section and application section, if any. A purpose clause provides a direct statement of primary goals of the statute or of the policies it is intended to implement. Although some thinking that purpose clause are not generally needed however look at the example of the amendment shown above and in Brunei Darussalam this is not used at all in legislation. Moreover lack of court cases in interpreting of legislations is misleading in showing there is no problem with drafting in traditional style.

J. How public understand the law

Part of the resistance to the notion that legislation can only be properly understood in the context of case law and statutory interpretation, and hence with the advice of a lawyer, seems to reside in the inherent unfairness that this creates. Mark Adler is among those who reject the notion that the capacity to read legislation should be available only to those who can afford a lawyer, something out of the reach of most citizens. The implication that we ought to keep legal texts more obscure than necessary to protect the public from itself is politically unacceptable. The practical argument seems even more

telling. The idea that all (or even many) of those who need advice can receive it from a competent lawyer is a utopian dream.⁹⁰

Ruth Sullivan has expressed her doubts in this regard:

I personally doubt that the techniques of plain language drafting can make law accessible to the public at large. I doubt that the official text of legislation is the best way to communicate legal messages to persons affected by law.⁹¹ Non-expert readers prefer to find out about the law through intermediaries rather than by reading legislation. It is obvious that no one (not even a lawyer) reads statutes for pleasure.

As Lon Fuller observes in the *Morality of Law*:

In many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many.⁹²

Unfortunately, the imperfections of the real world often prevent drafters from performing this task as fully as they, and everyone else involved, would wish, with the result that the best that can be achieved is the creation of instruments which are capable of supporting the smallest possible number of interpretations. The factors which give rise to this conclusion include the nature of language, the fallibility of drafters, the realities of the political process, the complexity of the subject-matter with which legislation deals and the fact that many of the aspects of life, commerce and technology

⁹⁰ M. Adler (n 1) 23.

⁹¹ R. Sullivan (n 28) 116 and 210.

⁹² L. Fuller, *The Morality of Law* (n 9) 51.

to which law relates are constantly evolving, which means that drafters may be trying to hit moving targets. If it is thought that the instruments should be accessible to the public at large without the benefit of expert advice, it becomes necessary to add the further constraint of the limited literacy of many people.⁹³

K. Analysing Questionnaire and findings

Below are the questionnaire and the findings on accessibility of legislations in Brunei Darussalam. The questions and result are as follows:

1. Have you seen or read Brunei legislations in the Government Gazette? Yes-18/No-32
2. If answer to 1 is yes, do you think that the Brunei legislations is easy or difficult to understand? Easy-19/Difficult-31
3. If answer to 1 is no, is there another way of knowing the contents of legislations example roadshow, presentation or Media? Yes-40/No-10
4. Do you know how to get access to the Government Gazette? Yes-21/No-29
5. Are you aware that some laws of Brunei are also available on-line but it is not up to date? Yes-15/No-35
6. Are you aware that Brunei Legislations are available in Malay and English Language? Yes-31/No-19
7. Are you aware that legislations should be written in simple and plain language so it is easily understandable? Yes-44/No-6

⁹³ I. Mcleod (n 73) 1.

8. Are you aware that if criminal offence is to be introduced the person ought to know whether it is an offence or not? Yes-31/No-19
9. Are you aware that if your rights are being affected you ought to know about it example ban from driving as a result of demerit point? Yes-9/No-41.

Figure.1 percentage in questionnaire of understanding of legislation

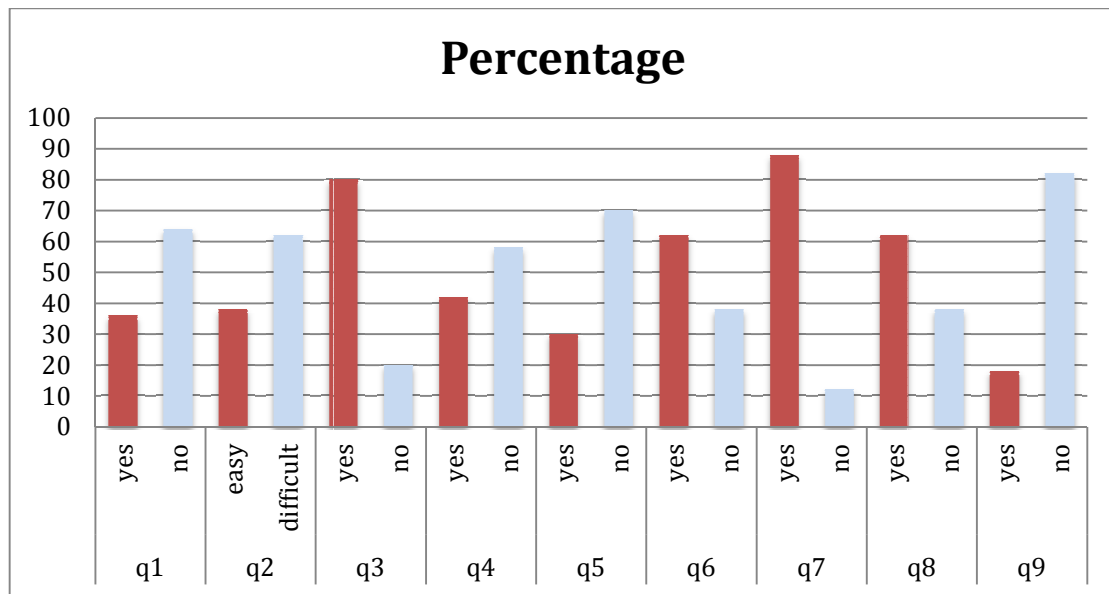
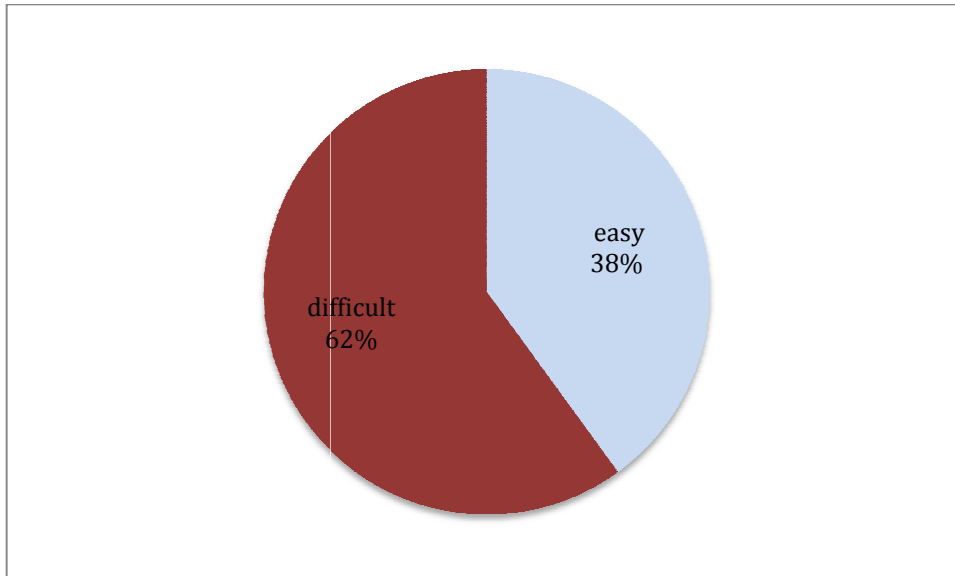


Figure. 2 Percentage of accessibility of legislation



The survey

What does it prove from the survey and also shown in Figure1. I can deduced that -

The first question regarding whether the people have access to the legislations and it proof that most people which is 64% have not even seen the Brunei legislations in the Government gazette which means they are not bothered or lack of knowledge or they have not come across something which might cause them to see legislations such as work and business.

The third question shows 80% are more inclined to know the contents of legislations through roadshow, presentation or Media such as television and newspapers. This might be that the contents of the legislations are difficult to understand than in the Media for example and that's why some people have not seen the Government Gazette.

On the fourth question on how to get access to the government Gazette only 42% know how to get it which can be bought in the Government Printing Department and in the

fifth question only 30% of the people knew that the legislations are also available online even though it is not up-to-date.

On the sixth question regarding the availability of the text in Malay and English Language of the legislations 62% knew about this.

On the seventh question regarding the legislations ought to be written in Plain and Language the majority which is 88% is aware of this. This shows that people are more aware that the quality of legislation would be improved if they understand it more.

On the eight question regarding the rule of law 62% of the people know that for criminal offence the person ought to know whether it is an offence or not as ignorance of the law is not an excuse.

On the ninth question regarding if the people rights are affected only 18% knew that they ought to know and in Brunei Darussalam, the demerit points which could result in driving ban was introduced this year and also related to the rule of law.

Therefore from the survey on the question 2. as can be shown in figure 2. most of the people 62% find the legislation hard to understand. Do they understand the legislation they read or is it too complicated. As a result of the use of traditional style of drafting most people find the legislation hard to understand. It is hardly surprising with the use of jargons, legalese, long sentences and difficult words and over-reliance on the Interpretation Act. Even though the number of literacy people in Brunei Darussalam is quite high which is more than 90% the people ask still find it hard to understand.

L. Conclusion.

The argument put forward that the traditional style of drafting is maintained because we aim for precisions. Of course, drafters must aim for precision. But plain language is actually an ally in that cause, not an enemy. Plain language lays bare the ambiguities and uncertainties and conflicts that traditional style tends to hide. At the same time, the process of revising into plain language will often reveal all kinds of unnecessary detail. In short, you are bound to improve the substance even difficult substance if you give it to someone who is devoted to being intelligible⁹⁴.

In many jurisdictions such as New Zealand, South Africa, United Kingdom, Canada and Australia have adopted the modern style of drafting such as Plain Language and gender-neutral which improve accessibility of the law to the general public. In England, Martin Cutts, a writing consultant, redesigned and rewrote an act of Parliament, the Timeshare Act 1992. He cut it by about 25% and improved the comprehensibility. In Australia, a four-member task force, including a legislative drafter and a plain-language expert, has rewritten part of Australia's Corporations Law under an express mandate to simplify it. Among many other things, their new version cuts one main section from 15,000 words to 2,000 words, eliminates many unnecessary requirements, and redesigns and reorganises the entire text for easier access. And the proposed bill was submitted for public comment before it was introduced.⁹⁵

In recent times, the calls for laws to be drafted in 'Plain English' have become clamorous. Most jurisdictions have now, at least in principle, accepted the challenge and accepted 'Plain English' as a policy objective. A small number of drafters have adopted a defensive attitude to the implied criticism inherent in such calls and consider it unfair

⁹⁴ E. Donelan (n 45).

⁹⁵ Ibid.

and frequently simplistic. All competent drafters subscribe to the golden rule of the plain English movement ‘write clearly for your audience’.⁹⁶

Some drafters are trained to believe in something they like to call ‘drafting language’. The practical consequence of this belief is that they are reluctant to use ordinary words where their predecessors (and perhaps their current senior colleagues) have established a practice of using a conventional alternatives. However, the reality is that drafting seldom, if ever, requires the use of anything other than ordinary language, except where technically complex subject-matter requires the use of its own vocabulary.⁹⁷ A Role for the Head of Legal Drafting, The Legal Draftsman to change in the shift to target legislation to a particular group, but it would rarely be considered appropriate for an individual drafter to make such a decision and it need uniformity and clearly intended as can be shown in United Kingdom circular.

⁹⁶ Prof. H. Xanthaki (n 47) 52.

⁹⁷ R. Sullivan (n 28) 81.

The legislation drafted do not have to be convoluted or incomprehensible as American Donald Hirsch states in *Drafting Federal Law*:⁹⁸There is a limit to how simply a complex idea can be expressed. That a statute is hard to understand is not always a compelling criticism; what shames the draftsman is a statute that he or she has made unnecessarily hard to understand.⁹⁹

The challenge for drafters is therefore to produce clear documents in an expert and efficient manner. This means expressing even complicated ideas in the most comprehensible fashion possible. Complexity alone should never be an excuse for poor drafting practices. One question drafters face is whether they are obligated to express complex ideas in a way that every citizen can understand or if this is even possible.¹⁰⁰

In the simplest of terms, the drafter's task is to convert policies into provisions which comply with the relevant formal conventions and are capable of being applied in practice. Complying with the relevant formal convention is seldom, if ever, problematic; but creating provisions which can be interpreted in only one way is another matter. The task of the drafters in an ideal world would be to create provisions which not only have single and unequivocal meanings but which also communicate those meanings unfailingly to every reader.¹⁰¹

The other criticism include the argument that the laws should be written with more emphasis on making readers understand what the law commands and with less emphasis on controlling the judges by rigid grammatical constructions. Judges are more likely to be controlled by clear

⁹⁸ P. Salembier (n 31) 14.

⁹⁹ D. Hirsch, *Drafting Federal Law* (Washington, D.C.. Office of the General Counsel, Legislation Division, 1980), 32.

¹⁰⁰ P. Salembier (n 31) 14.

¹⁰¹ I. Mcleod (n 73) 1.

statements of purpose. Or that one of the things that annoys readers in legal writing is the tireless repetition of words that do not need to be repeated. Or that legislation that is unnecessarily difficult to understand is a derogation from the democratic right of the citizen to know by what law he or she is governed. That some of the typical sections of modern Acts are a veritable cobweb of words and in their forest of their verbosity, the reader dare not to enter, or, if he enters, he is apt to get lost in no time. That many statutes emerge from the parliamentary process obscure, turgid, and quite literally unintelligible without a guide or commentary.¹⁰²

The time has passed, you'd think, when legislative drafters should argue that their only audience or even primary audience, is the legislator who requests a law or the judge who may interpret it. What about those who have to read it because they are directly affected, such as administrators and professional groups? What about citizens who might wish to read it because it affects their lives? Do we discount them as merely secondary matters?¹⁰³

The better view is expressed by the Parliamentary Counsel of New South Wales: "The ordinary person of ordinary intelligence and education should have a reasonable expectation of understanding of legislation and of getting the answers to the questions he or she has. This is of critical importance." Certainly, we have to recognise the political and employment realities that drafters face. Yet we can fairly ask them to be informed and open-minded and to consider what steps they could take together to begin changing old attitudes about in-group drafting.¹⁰⁴

Based on the survey, the general public are asking questions. They are demanding a change of attitude towards more accessible legislations as they are expected to observe the law it is only fair what kind of actions are against the law and what kind of rights which they become entitle

¹⁰² Prof. H. Xanthaki (n 47) 53.

¹⁰³ E. Donelan (n 45).

¹⁰⁴ Ibid.

to which they can claim. The rule of law and fairness indicate that our legislations have to be drafted in more accessible language. To improve accessibility of the legislations to the general public, it is not sufficient just to improve it in terms of the readability of the legislations as if it cannot reach the general public and unavailable then it is just not useful. The government ought to invest in providing the up-to date legislations on-line to the public for its citizen such as in Canada and nowadays more people not just lawyers access the legislations online normally all over the world.¹⁰⁵

Quality of legislation is commonly attached to effectiveness which can be viewed as the drafter's contribution to the efficacy of the drafted legislation. It is widely accepted that drafters aim to be effective and efficient, 'effective' meaning that the norm produce the desired effects, should not have perverse effects and should guide conduct as to achieve the desired objective. Parkinson describes effective legislation as reasonable legislation. Mader defines effectiveness as the extent to which the observable attitudes and the behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.¹⁰⁶

Thus effectiveness seems to reflect the relationship between the effects produced by legislation and the purpose of the statute passed. One could distinguish in general between the two prevailing models of effectiveness, often described as the positivist and the socio-legal models. In his positivist approach Jacobson links effectiveness to implementation and compliance. In his socio-legal model of effectiveness, Jenkins relates the statutes to the social reform attained. Irrespective of which of the two models one favours, the fact of the matter is that drafters are in pursuit of effectiveness of the measure that they draft. And, although stating that a drafter can

¹⁰⁵ In UK the Legislation.gov.uk have been accessed about 2 million hits every month.

¹⁰⁶ H. Xantahaki (n 26) 5.

single-handedly achieve effectiveness in legislation would signify a complete ignorance of the interrelation between actors in the policy process, the truth of the matter is that the drafter can, and must seek, achieve attainment of the purpose and objectives set in the statute under construction.¹⁰⁷ I have proof that the effectiveness is served by using better accessibility mechanisms such as the enforceability of criminal provisions as can be shown in the lack of enforcement of smoking in the Tobacco Order.

It is, therefore, evident that the highest virtue pursued by the drafter around the world is effectiveness. The identification of effectiveness as the common value of drafters leads to the acknowledgement of a common concept in the definition of quality in legislation. This common concept of quality in legislation, with effectiveness as its flagship, is promoted by drafters around the world.¹⁰⁸ Now it is proven that the use of more accessibility legislation which consider more on the reader who is the ordinary public will result in more effective legislation. It is not an excuse to say that Brunei Darussalam is from commonwealth country with small jurisdictions of only ten drafters to still stick with the traditional style of drafting which have been abandoned by most countries. Even though it may be difficult in the short term but once become an expert in the long run it will be easier and definitely very helpful to the ordinary public and to sum it up when drafting legislation consider your audience.

¹⁰⁷ *ibid* 6.

¹⁰⁸ *ibid* 17.

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