

LED 601

INTRODUCTION TO LEGISLATIVE DRAFTING



NATIONAL OPEN UNIVERSITY OF NIGERIA

**COURSE
GUIDE****LED 601****INTRODUCTION TO LEGISLATIVE DRAFTING**

Adapted From	Commonwealth of Learning
Adapted by	Ms. Omotayo Obayemi
Programme Leader	Dr. Gowin Ifidon Oyakhiromen National Open University of Nigeria. Victoria Island Lagos
Course Co-ordinator	Ms. Omotayo Obayemi National Open University of Nigeria. Victoria Island Lagos

**NATIONAL OPEN UNIVERSITY OF NIGERIA**

National Open University of Nigeria
Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja Annex
245 Samuel Adesujo Ademulegun Street
Central Business District
Opposite Arewa Suites
Abuja

e-mail: centralinfo@nou.edu.ng

URL: www.nou.edu.ng

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Introduction

This Course is designed to provide you with essential background material. The courses that follow this are concerned in the main with how to draft effective legislation. But in this we look in broader terms at the nature of the task, the typical procedures connected with it and the responsibilities of Legislative Counsel. We can understand better what is expected of us if first we have an understanding of what is entailed and how our functions came to take the form they do. The Course also provides an opportunity for you to find out more about drafting in Nigeria, by comparing our local arrangements with those described in the Units.

It also gives a basic introduction to relevant aspects of the English language, in particular important conventions that lead to sound grammatical writing. To develop your ability to write precisely and unambiguously, you need to have some understanding of accepted grammatical forms. If we are to explain why some drafting practices are to be preferred to others, we need sometimes to use technical terms to refer to parts of speech and the way that sentences are structured.

Course Objectives

By the end of this Course, you should be able to:

- (i) describe the nature of legislative drafting in the Commonwealth tradition and how that tradition developed;
- (ii) explain the duties and responsibilities of Legislative Counsel;
- (iii) present an overall picture of why legislative drafts take the form they do;
- (iv) having reinforced your capacity to write English grammatically, to use the correct expressions to describe the main features of grammar; and
- (v) explain the importance, requirements and organization of a drafting office.

Working Through This Course

To complete this Course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course, there is a final examination. The course should take you about 17 weeks to complete. You will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

Course Materials

The major components of the course are:

1. Course guide
2. Study units
3. Textbooks
4. Assignment File
5. Presentation schedule

Study Units

We deal with this Course in 8 study units:

- Unit 1 - Drafting and Drafters
- Unit 2 - Writing legislation
- Unit 3 - Types of Legislative Instruments
- Unit 4 - Classification of Statutes
- Unit 5 - Development of legislative drafting
- Unit 6 - Principal characteristics of Commonwealth drafting
- Unit 7 - Importance of grammar
- Unit 8 – Drafting Office

We recommend that you treat this Course as laying the foundations for your subsequent work on writing legislative sentences, which will be dealt with in a later course.

Each study unit consists of two weeks' work and includes specific objectives; directions for study, reading material and Self Assessment Exercises (SAE). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the Course.

Textbooks And References

Certain books have been recommended in the course. You should read them where you are so directed before attempting the exercises.

In comparison with later Courses, this uses Self Assessment Exercises rather sparingly. We are more concerned to provide information and broad guidelines as to main tasks with which you will be concerned in preparation for your subsequent study. You will undertake only one Drafting Project in connection with this Course. So you should be able to push along with these units at a reasonable pace, though we recommend that you go over ground that is new more than once. You may find that to be necessary for parts of units 5 & 6.

For those who find that grammar as discussed in unit 7 is a particular source of concern, perhaps because you have not previously studied matters covered there, we strongly recommend that you give extra time to the topic. In the reference we have included references to primers on grammar that you may find helpful.

Assessment

There are two aspects of the assessment of this course; the Tutor Marked Assignments and a written examination. In doing these assignments, you are expected to apply knowledge acquired during the Course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the *Assignment file*. The work that you submit to your tutor for assessment will count for 30% of your total score.

For this course, we are more concerned to provide information and broad guidelines as to main tasks with which you will be concerned in preparation for your subsequent study. We propose that you undertake only one Drafting Project in connection with this Course. So you should be able to push along with these units at a reasonable pace, though we recommend that you go over ground that is new more than once.

Tutor Marked Assignment (Tma)

There is a Tutor Marked Assignment at the end of every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best 3 performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a (tutor-marked assignment) form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination And Grading

The duration of the final examination for LED 601 - Introduction to Legislative Drafting is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self- assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You

should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your self -assessment exercises and tutor marked assignments before the examination.

Course Score Distribution

The following table lays out how the actual course marking is broken down.

Assessment	Marks
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments, marked out of 10% Totaling 30%
Final examination	70% of overall course score
Total	100% of course score

Course Overview And Presentation Schedule

Unit	Title of Work	Weeks Activity	Assessment (End of Unit)
	Course Guide	1	
Module 1	Drafting and Drafters	1	Assignment 1
Unit			
1			
2	Writing Legislation	2	Assignment 2
3	Types of Legislative Instruments	2	Assignment 3
4	Classification of Statutes	2	Assignment 4
Module 1	Development of legislative drafting	2	Assignment 5
Unit			
1			
2	Principal characteristics of commonwealth drafting	2	Assignment 6
3	Importance of grammar	2	Assignment 7
4	Drafting Office	1	Assignment 8
	Revision	1	
	Examination	1	
	Total	17	

How To Get The Most From This Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, your study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Tutors And Tutorials

There are 15 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress, and on any difficulties you might encounter and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self assessment exercises;

3. You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face-to-face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Summary

This contains foundation material which we consider should be studied as a preliminary to working on drafting skills. This Course contains rather more descriptive material than most of the subsequent ones. It gives an account of what is entailed in legislative drafting in Commonwealth systems particularly in Nigeria, in order to provide a context for your future work on this Course. It also contains guidelines about how to proceed when drafting and the general approach that you may wish to develop. Later Courses concentrate on the actual tasks in connection with legislative writing and structuring.

Some of the material in this Course will already be familiar to you from your earlier legal studies and professional work. Those of you who have acquired a little experience of legislative drafting will find rather more with which you are already conversant. However, take this opportunity to confirm your knowledge and understanding. Much that follows in later Courses assumes that you are thoroughly comfortable with what is covered in this Course.

We wish you success with the course and hope that you will find it both interesting and useful.

**MAIN
COURSE**

Course Code	LED 601
Course Title	Introduction to Legislative Drafting.
Adapted From	Commonwealth of Learning
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Headquarters
14/16 Ahmadu Bello Way
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Lagos

Abuja Annex
245 Samuel Adesujo Ademulegun Street
Central Business District
Opposite Arewa Suites
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MODULE 1

Unit 1	Drafting And Drafters
Unit 2	Writing Legislation
Unit 3	Types Of Legislative Instruments
Unit 4	Classification Of Statutes

UNIT 1 DRAFTING AND DRAFTERS

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1.0 INTRODUCTION

This Unit aims to give you a general background to the work of legislative drafting and to the task of writing legislative rules. We introduce some general themes which arise throughout the Course, not least in relation to the responsibilities of Legislative Counsel. We include seven precepts which you should think about in that respect.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) explain what legislative drafting entails and how it is typically provided in Commonwealth jurisdictions particularly Nigeria; and
- (ii) describe the basic responsibilities of Legislative Counsel and how those can be fulfilled.

3.0 MAIN BODY

3.1 What Is Legislative Drafting?

For many people, legislative drafting is about *writing* the text of a document that is to be made into legislation through some formal legal procedure. This view puts the emphasis on the form and style of legislation; it implies that drafting skills are concerned with using language effectively, choosing the most appropriate expressions and presenting them in a clear and unambiguous way. An important function of the drafter is to communicate the content of legislation to those who will use it. Without question this is a central feature of legislative drafting. But it is by no means the complete picture.

Legislation deals with legal rights and duties, and with powers and liabilities - that is, with legal relationships between various classes of persons in the community and between the State and the members of the community. Drafting, then, is about settling these relationships in written law, so that those affected can conduct their activities in legal security. What those relationships are to entail in a particular context is a matter of policy. The choice of policy is usually made by the client sponsoring the legislation and has to be confirmed or "validated", sometimes with modifications, by the body authorized to give the instrument the force of law.

Viewed from this standpoint, drafting is the act of *translating* a policy into formal written rules. As with any translation, it may be achieved in a variety of alternative ways. Drafting then is about making choices of approach, in the light of experience of legislative solutions, to obtain the most effective and acceptable way by which the policy can be given legal effect. It calls for an understanding of what has to be provided for *by law*, if a new scheme is to be implemented with certainty and without legal challenge.

As legal requirements become clearer in the course of translating, so the policy itself is often refined or even rethought. Drafting then is about the testing of the policy against the manner of its implementation. Will it work? How best can it be made to work? What are the likely legal consequences? Are these desired or should they too be modified? And so on.

New legislation is not prepared in isolation. It has to be made to fit with the existing body of law (both written and unwritten), without causing conflict of the new with the old and with proper regard for the interests of those who regulated their affairs on the basis of the existing law. Drafting then is about producing a smooth fit and transitions. The

policymaker may have given little attention to what may be needed for these purposes and how best to bring it about. It is an integral part of the drafting process. A drafted text has no legal force until it is validated by the appropriate law-making authority through the recognised law-making process. Drafting is about producing instruments in the form that satisfies the requirements of the relevant process and facilitates their passage. Typically, this requires too the monitoring of the instrument as it passes through the process to prevent legal or formal errors creeping in.

Legislative drafting, then, takes place at the stage when legislative policy is converted into legal rules. It is concerned with the preparation of the legislative text in the appropriate form so that it gives effect to the policy as a coherent part of the written law of our legal system. The way in which it is written determines how effectively it communicates its requirements to those affected. It has to be drafted to comply with the local house-style, which in some systems is formally set out in written conventions or practice directions. But drafting is concerned with what is to be communicated, as well as with the way in which it expressed.

Dick (***Legal Drafting***, p.1) suggests that drafting is "legal thinking made visible". We can suggest that legislative drafting is legal policy made visible.

3.2 Importance of Legislative Drafting

In the modern state, much social and institutional change has to be made through written law. This is both a democratic expectation and a practical necessity, confirmed by the Constitution, particularly the Fundamental Freedoms provisions enshrined in Chapter IV of the 1999 Constitution of Nigeria. We can no longer look to courts or to custom to adjust the system to the fast changing demands made upon it.

Legislation today is central to the process of change, for example, in a move from one form of economic system to another or from one form of government to another such as the Electoral Act 2004. It is the vehicle by which countries respond to the increasing demands that arise from membership of the international order, as for example, the changes introduced through the WTO (World Trade Organisation) and international agreements on environmental protection.

Legislation, and the institutions created under it, are the principal instruments through which planned development is undertaken. Development calls for new legal institutions; these must be appropriate to the needs and circumstances of the particular society. This process is undoubtedly affected by the quality of the instruments and by the speed

with which they are drawn up and put into effect. Success may be dependent upon:

- (i) the quality of input from persons with specialist legal skills and knowledge;
- (ii) the excellence of the prior research into the legal and practical implications of the policy options;
- (iii) the satisfactory integration of the new legislative scheme with the overall legal system.

The task of legislation is to provide in a constantly changing environment a framework for settled legal relationships, to reduce the potential for conflict, as well as to establish effective machinery for resolving the disputes that inevitably arise. Success rests in part upon the quality of the legislation. That in turn depends upon the competence, skills and expertise of those responsible for its preparation.

Yet many States are handicapped in making the legal changes they require by their lack of the personnel and procedures needed to produce innovative legislation. Commonwealth countries, especially Nigeria, repeatedly report the scarcity of persons with skills in legislative drafting.

3.3 Who Should Undertake The Drafting Of Legislation?

Most of the Commonwealth including Nigeria, has inherited the British practice of separating legislative drafting from policy-making. Policy is for the Ministry responsible for the subject area. Drafting is treated as a distinct legal activity, to be carried out, typically, by a cadre of specialist legal officers assigned primarily or exclusively to this work.

Outside the Commonwealth, such a sharp distinction is not common. There, the Ministry team charged with formulating the policy for new legislation typically undertakes the drafting too. The team includes lawyers from the Ministry who are expected to take on this work as part of their duties. In many systems the process is eased by the fact that many public administrators have legal qualifications. In such a system, legislative drafting is a form of legal writing in which some of the Ministry lawyers may develop special competence; it is not a separate function performed by a specialist cadre from outside the sponsoring Ministry.

However, a central drafting office servicing the needs of the Government at large is now a settled feature of Commonwealth drafting. It has become a necessity in many countries because of a paucity of lawyers in public administration, especially in the individual Ministries.

The system of preparing legislation is geared to a central drafting office (in particular the practice of drafters working to instructions prepared by the policy-makers) rather than as a member of the Ministry Bill team. In Nigeria, all Executive Bills are drafted by the various Ministries of Justice.

3.3.1 Advantages of a Central Drafting Office

The advantages are those that flow from any expert service:

- (i) All drafting will be undertaken by a cadre of government lawyers who can be expected to bring knowledge of the existing statute law and extensive expertise and experience in solving legislative problems in the ways with which the Legislature and the Judiciary are familiar;
- (ii) The service is operationally independent of other Ministries; drafters can offer opinions on effectiveness or practicality of legislative proposals that are not coloured by the commitment to particular solutions that tends to develop in client Ministries;
- (iii) It enables high standards of drafting to be set and leads to greater consistency and better quality in the legislation and to the adoption of legislative approaches that are grounded in well-tryed precedents; and
- (iv) Since drafting is seen as a specialist skill requiring lawyers of high quality, centralizing the activity makes the best use of limited resources and ensures that the task is in the most competent hands.

3.3.2 Disadvantages of a Central Drafting Office

The following drawbacks may arise, though by no means all in every service:

- (i) Ministries complain that drafters' lack of specialist knowledge of particular legal results in legislative solutions that do not satisfy specialist requirements as well as they might;
- (ii) The separation of policy-making from drafting makes heavy demands on departmental instructions. In many systems instructions are often inadequate, especially when they are not prepared by lawyers. In those circumstances, drafters have to develop the policy, despite their lack of specialist knowledge.

This may lead to the adoption of precedents from other jurisdictions that are not wholly suited to the present case;

- (iii) As drafters are few, it is rarely practicable for them to be brought in whilst the policy is being worked out, although an input at that stage can be invaluable and time-saving;
- (iv) A distinct cadre of specialists may begin to see themselves in elitist or superior terms. Legislative Counsel may maintain what has been called an "arcane and somewhat inflexible craft tradition" - which may lead to a reluctance to innovate or to deviate from established precedents; and
- (v) The concentration of demands made on a single drafting office can impose serious time pressures on Legislative Counsel who then have too little time to deploy their specialist skills to full effect; they may have to accept unsatisfactory compromises and expedient solutions in order to complete the task according to the time-table.

More than one commentator has remarked upon the apparent paradox that the Commonwealth practice of using a specialist drafting service is widely held out as a model to be emulated, yet their work is subject to constant and serious criticism. The complexities of preparing much modern legislation are so demanding that specialist drafters are probably inevitable. Arguably, the widespread acceptance that the preparation of legislation and especially its drafting are expert functions may have distracted attention from the need to reform the procedures for preparation and enactment. It may also have contributed to a reluctance to consider changes to existing drafting practices.

3.4 How Is Legislative Drafting Viewed By Users Of Legislation?

Most criticisms relate to the way in which legislation is expressed. Those who are looking at legislation for an answer to a legal problem may be critical if:

- (i) They do not quickly find their way to the part of the statute that is relevant;
- (ii) They find difficulty in understanding quickly what the provisions are stating;
- (iii) They are given unclear or ambiguous guidance by the provisions that apply to their case;
- (iv) They have to read large portions of the legislation to be sure that they have not overlooked some element that is relevant.

From time to time, drafters are excoriated by judges, practitioners and interest groups for failures of these kinds. However, there is a growing awareness that these faults may sometimes be unavoidable under the preparation procedures imposed upon drafters.

A drafter may be under considerable pressure to prepare legislation which members of the Legislature concerned may consider fundamental to the policies of their party. The members would have made promises during electioneering campaign and would not be easily deterred from seeking to introduce legislation on what they may regard as cardinal to their party's policies. No matter whatever may be the draftsman's opinion as to the constitutional position on legislative competence.

The principal pressure on the drafter however, seems to flow from late instructions, short deadlines and sudden and quite elaborate policy changes.

Another major cause of complaint concerns the style in which legislation is drafted. This is a recurring theme with respect to all forms of legal writing. Rodell devised a series of ironic but witty *Principles for Legal Writing* ((1936) 23 **Virginia Law Review** 38-41). When he returned to the subject 25 years later he found little cause to change them ((1962) **Virginia Law Review** 286-290). More than 40 years on, we can suggest in a similar form the following humorous, but outrageous, *Principles for "Good" Legislative Drafting*, which reflect the same implicit criticisms:

Principles of "Good" Legislative Drafting

1. Never use one word where you can use a larger number of others to achieve the same meaning.
2. Never use a short word where more elaborate terminology can be substituted.
3. Never use a simple statement where the same proposition can be propounded that will culminate in the same connotation.
4. Never use direct language when the same proposition can be expounded in as convoluted and pretentious manner.
5. Add a modifier to practically each and every utilised expression, if you can.

6. A proposition is clearer if it can be repeated; for it is easier to understand when stated again.
7. Never use English where a Latin phrase can be used *mutatis mutandis*.
8. Use archaic phrases whensoever and wheresoever possible in order to ensure that the aforesaid phrases shall duly bear witness to the efficacy of styles used hitherto.
9. In every sentence, use punctuation, (as, for example, commas, and, also, brackets), and Capital Letters, at every, possible Opportunity.
10. You make your meaning clearer if you include as many cross-references as you can to the practices recommended in Fowler's **Modern English Usage**, in Thornton's **Legislative Drafting**, and in articles in the **Statute Law Review**.
11. A good drafting style is achieved if it:
to all the world a literary cadence shows, with ne'er a thought for those who have to read the prose.
12. Strive to produce sentences which, because of the way in which they are structured and on account of the number of words, phrases, terms and expressions that are deployed in them, and in consequence of the obfuscation which may be occasioned by using syntactical formulations that are unfamiliar to those who are not accustomed to them, are capable of leading to misconstruction of, or uncertainty as to, their purported meaning.

Much of this Course is aimed at reducing these principles to a source of laughter.

3.4.1 Responsibilities of Drafters

Legislative Counsel (to give drafters a title more fitting to their importance) are pivotal players in the legislative process. If legislative drafting is important, those who practice it must play a central role. If legislation of high quality is essential, those who have the capacity to produce it must be crucial figures.

In one sense, drafting is a technician's job, because it involves practical writing skills. But it is far more than that. It is creative work of the kind that makes demands on the intellect and analytical skills rather than

functional talents or artistic flair. It depends upon a foundation of legal knowledge and ability and a capacity to use and develop legal concepts and to foresee and counter legal problems.

In the Course on Drafting Process, we look more closely at the procedures for preparing legislation and the part that the drafter plays in them. For the moment, it is sufficient to outline the drafter's functions and to underline the range of tasks to which they give rise. These are set out in the following chart.

Responsibilities of Legislative Counsel

<i>Function</i>	<i>Associated tasks</i>
Analyse	understand the policy and proposals, by examining the instructions in detail
	carry out the background research
	clarify the instructions
	initiate consultations to refine the policy and proposals
Design	advise on practicability
	decide on the legislative approach
	work out the legislative scheme and requirements
	prepare the plan for the overall structure of the legislation
Compose	draft the legislative text
	revise and redraft following consultations
Scrutinise	check each draft for accuracy, certainty and consistency
	remove errors of substance and ambiguities of syntax and expression
Manage	meet deadlines in the legislative timetable
	monitor progress of the Bill through the Legislature
	draft amendments required as the Bill proceeds
	check all versions of the printed text
	prepare the enacted text for Assent and publication

3.4.2 How Drafters Should Fulfill Their Responsibilities

Again, we shall return to this theme throughout the Course, as we suggest the standards and procedures which contribute to the good drafting practice. For our present purposes, it is sufficient to suggest 7 precepts (guiding principles) to bear in mind.

Seven precepts for Legislative Counsel

1. You owe duties to: your client your Government (who is your employer) but also to: your profession as a lawyer and Legislative Counsel the statute book the law and its underlying values.
2. Take nothing for granted: test others' proposals with your own analysis.
3. Do not reject proposals that appear unacceptable; find and offer a better way forward.
4. Be prepared to listen and question and accept valid criticism and helpful suggestions.
5. Keep at it but sleep on it. (Concentrate fully on the task, but leave time for further reflection).
6. Only your best will do, but perfection is rarely possible in the time available.
7. Remember the lessons of experience; keep your best precedents but don't try to memorize the details of your earlier work.

4.0 CONCLUSION

In conclusion, legislative drafting is about writing the text of a document that is to be made into legislation through some formal legal procedure. Legislation is not prepared in isolation. It has to fit into the existing body of laws (*corpus juris*) of the society.

5.0 SUMMARY

In this Unit, you have been introduced to a range of preliminary issues that describe the nature of legislative drafting and, in broad terms, your duties and responsibilities as Legislative Counsel. You should now have an overview of the subject. It should provide a framework, though a rather open-textured one, into which you can begin to place your own knowledge and experience of what legislative drafting is and should be about.

You should now be able to explain what legislative drafting entails and how it is typically provided in Nigeria; and also describe the basic responsibilities of Legislative Counsel and how these can be fulfilled.

6.0 TUTOR MARKED ASSIGNMENT

Explain how Legislative Drafting is viewed by users of Legislation in Nigeria.

7.0 REFERENCES / FURTHER READINGS

1999 Constitution of the Federal Republic of Nigeria.

Dick, Robert C. (1972) Legal Drafting: The Carswell Coy. Ltd.

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Thornton, G.C. (1996) Legislative Drafting 4th ed., London: Butterworths.

UNIT 2 WRITING LEGISLATION

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- 4.0 Conclusion
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- 7.0 References / Further Readings

1.0 INTRODUCTION

This Unit contains guidelines as to how to approach the task of writing legislation, which you should try to follow, where they are relevant, when you are drafting for the purposes of this Course. If you develop good working practices during your study of legislative drafting, they will stand you in good stead in your professional practice.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) determine to whom to address particular legislation;
- (ii) recount the factors that influence the way legislation is expressed, especially in contrast with everyday communication;
- (iii) decide what practical steps you can take to facilitate the task of legislative drafting.

3.0 MAIN BODY

3.1 To Whom Should Legislation Be Addressed?

We often hear complaints that legislation is drafted in a complicated and unnecessarily detailed way, that it is difficult to read quickly and is not easy, especially for the layman, to understand. These criticisms are sometimes valid; some statutes are drawn up with too little thought for those who have to use them. But this fact should not lead us to conclude that legislation can always be expressed so that it can be understood at a glance by a person of ordinary education.

Complex concepts are an inevitable part of any developed legal system. We cannot simplify inherently complicated concepts, or their application or extension to new circumstances of them, without losing essential legal characteristics. Nor can we avoid using the standard legal language in which the concepts are conventionally stated.

That said, we have to keep in mind that legislation is the way in which authoritative rules of law are *communicated*. In order to communicate we should keep in mind the interests of those to whom we are communicating. When writing a letter or a memorandum, we usually have its recipient in mind. We try to express ourselves in ways that are familiar to the recipient; we use a style and vocabulary with which they are likely to be comfortable; we take account, often subconsciously, of their experience and general knowledge of what we are writing about. Factors such as these influence our mode of writing. Legislative drafting should be no different in this respect.

In principle, we *could* write legislation with any of the following classes of persons in mind as the persons to whom we are addressing legislation:

1. the person-in-the-street or the sections of the community that are the principal users of the particular legislation;
2. the Government, and in particular the client Ministry, who are putting forward the policy;
3. members of the Legislature, who are concerned in its making;
4. judges, who must decide on disputes as to its meaning or application;
5. those who must advise as to its requirements (e.g. legal practitioners or other professions);

6. those who are to administer (e.g. public authorities) or enforce the legislation (e.g. the police);
7. those who are to comply with the legislation (e.g. the general public or particular classes of the public or commercial enterprises);
8. those who will be protected by the legislation or will benefit from it, and so have an interest in its enforcement.

Complete TMA Question 1

If the purpose of drafting is to communicate legislative requirements, logically the legislation should be addressed to its principal *users*. The principal users are not those who make the legislation; they are the persons who will have the most frequent recourse to it. It should set out the legal requirements in the way which they, as users, are likely to find most helpful.

Different legislation may have to be addressed to different audiences. For example, legislation on sale of goods should be directed towards the commercial community; but legislation creating an Institute of Legislative Drafting will probably mainly concern those running it. On the other hand, different parts of a complex statute may have to be addressed at the same time to different audiences. For example, one part of the legislation on environmental protection may be directed to those who have to alter their activities to comply with its new requirements; another part may be concerned with the way that an official inspectorate is to carry out its functions. Though both groups may read both parts in order to understand the legislative scheme, the individual parts should be written with the interests of the primary group of users in mind.

The style of drafting may be significantly affected by the decision as to who is the principal user to which the legislation is to be addressed. The more that a Bill impinges upon the affairs of members of the public, the greater the case for stating the legal requirements in detail, so that the Bill affords the maximum guidance to those affected. But a Bill on administrative processes that does not affect individual rights may be drafted in broader terms, leaving considerable latitude of action to those responsible for carrying it out. As the Hansard Society Commission suggested (para.218):

To achieve the best drafting style it is almost as important to be clear for whom you are drafting as it is to decide what should be in the bill or instrument.

3.1.1 Drafters' Aims

The drafters who are preparing new legislation to implement policies decided upon by Government usually endeavour to draft it in terms which are as direct, logical and clear as their skill and expertise can ensure. But their *primary* aims are to be certain and unambiguous. Legislative Counsel must do their best to ensure that –

- (a) the intentions of the policy-makers are exactly met; and
- (b) as far as possible, both those general policy aims and the particular applications of the new policy are realised.

In principle, counsel should choose language that admits of no doubt as to what is demanded. That is far from easy. Indeed, it is impossible to eliminate all doubt and attempts to do so may lead to excessive detail and only complicate the legislation. In some instances, it is sensible to use expressions that deliberately leave issues of exact meaning to, e.g. the courts that have to apply the legislation to unpredictable fact situations.

3.1.2 Constraints On The Drafter

The common law system works upon the principle that the judges may not vary, qualify, add to or diminish requirements laid down by an Act of a sovereign Parliament. In consequence, if statutory rules are to be subject to exceptions or limitations, for example, these must be set out in the legislation. The result is that even quite straight-forward legal regulations may have to contain detailed qualifications or other terms that put beyond question the exact scope of their application. Policy-makers or members of the Legislature may insist upon the inclusion of such provisions.

In our nascent democracy, in particular, legislation is often prepared under a most demanding timetable, during which the requirements of concerned Government departments and other interested bodies must be established and fully provided for. Complicated situations have to be covered comprehensively in the draft legislation with an *exactness of expression* that aims to prevent doubts concerning foreseeable contingencies to which the rules may be applied.

Yet time constraints may mean that drafters have to draft broadly expressed rules because there is insufficient time to explore every conceivable detail. However, when the legislation is examined by those who must administer it, the intentions of the law-makers as to its application in given circumstances should be ascertainable without recourse to the courts, even though close study may be necessary.

3.2 How Does Legislative Expression Compare With Other Forms Of Communication?

If we want to avoid ambiguity in legislation, typically we have to use more elaborate forms of expression than are found in ordinary speech or writing. In commonplace communications, a person states what he or she requires another to do or not to do in quite simple terms. These are readily understood because they are uttered against a background of shared experience upon which both parties draw in expressing or discovering what is meant. Short-cuts can often be taken since uncertainty can be clarified by requests for further information.

For example, an instruction from a father to a son, "Fetch the car", will be completely understood by both. Both know which car is being referred to, where it is, that the son is expected and has authority to drive it and so on, without those matters being expressly mentioned by either.

Legislation, however, must be expressed in generalized language of a more abstract nature. The context in which its requirements are to apply must be *made* apparent from its terms and the scope of its application must be ascertainable from an examination of the words *actually used*.

The point can be illustrated by another simple example. The biblical commandment -"Thou shall not kill" - prohibits the termination of human life but is not intended to refer to the slaughter of animals or the destruction of insects or flowers. We know this because of the context in which the commandment was originally made and continues to be used.

We also know that it is not concerned with deaths caused by someone in circumstances over which he or she had no control. We also feel instinctively that it does not fully apply to killing that is the only way to preserve one's own life or to prevent another from being killed. Whatever our beliefs, we are also likely to conclude that the commandment provides incomplete guidance on such questions as killing during war or public disorder, or under extreme provocation or mental illness, or in cases of abortion, capital punishment or euthanasia or of deaths following medical negligence or in traffic "accidents".

But the legal system must provide guidance for all these cases. The law must attempt to differentiate between the many varied circumstances in which the death of one person is caused by another (whether in breach of the biblical precept or not or whether murder or not) and to deal with the attendant consequences in ways that the community finds acceptable. The result inevitably is an elaborate series of prescriptions, exceptions and extenuations. Many may find this *body* of rules to be complicated or not easy to assimilate because of its detailed nature. This

may be so even though the *individual* rules are stated as directly and in as straight-forward language as is possible.

3.2.1 What Are The Differences Between Every-Day And Legal Commands?

The difference between a simple command or direction, that is effective for every-day use and a statutory provision upon which legal action may be grounded can be further illustrated by the following example.

Imagine that you board a public bus and see the following notice facing you:

**NO STANDING
ON THE BUS
PENALTY ₦500.00**

Very probably you would understand at once what is required. Yet a prohibition in this form is not suitable for legal purposes. In fact, it is a simplified summary of the statutory provisions. It is those provisions that would be relied upon if any legal proceedings were brought for non-compliance.

Complete TMA Question 2.

On reading the prohibition, you are very likely to conclude that it is directed to you as you board that particular bus as a passenger. You may also conclude that you cannot be carried by that bus if there are no empty seats and that, if there is an empty seat, you must take it and remain there while the bus is in motion. These conclusions result from:

- (i) a commonsense reading of the notice;
- (ii) the setting in which the notice is posted and is intended to be read;
- (iii) your knowledge and experience of riding on buses.

The law cannot take so much as understood. In the criminal law, in particular, there is a strong principle that individuals should be given the benefit of any ambiguous legal provision. As Lord Esher stated in *Tuck & Sons v. Priester* (1887) 19 QBD 629, at 638:

If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the most lenient one.

The Nigerian Courts also adopt this view. See the case of *The State V. Disu Bakare* (1985) HCNLR p.466 at 470.

3.2.2 What More Is Needed To Meet The Legislative Requirements?

The statutory provisions must:

- (i) State the precise terms and limits of the prohibition in generalised language; and
- (ii) Prescribe the exact classes of persons who are subject to the prohibition and the legal context in which, and the circumstances when, the prohibition applies.

By inference we can then deduce when the prohibition does *not* apply. The notice does not deal with these matters.

We need to know *why* the prohibition is imposed. We have already seen that the intention of the notice may be to require passengers to remain seated whilst the bus is in motion. If so, the prohibition is principally to protect the passengers against injury. But it may also be there to reinforce the authority of the person in charge of the bus (e.g. the driver, if there is no conductor) to direct persons not to enter the bus if there is no seating-space available. By asking these questions we may conclude that for legal purposes more than one type of behaviour must be regulated. Each type may require separate legislative treatment.

The reader of the notice connects it to the particular bus on which it appears by seeing it there. The statutory rule applies to buses in *general* and so the rule itself must direct to which types of public transport it applies and, by implication, which are to carry the notice. For similar reasons, the rule must prescribe, in general terms, the occasions when the rule applies (or does not apply). For example, it is unlikely to be needed when the bus is out of service or perhaps when chartered for a private function (when the use can be regulated by the terms of the hiring). In consequence:

- (i) the rule must be integrated with the general body of regulations governing public transport undertakings; and
- (ii) if the penalty is to be enforced by criminal prosecution, the prohibition must be drafted to be part of the criminal law and enforceable through the conventional criminal processes;

- (iii) the language used to express the particular prohibition must follow that used to describe public service passenger vehicles in those regulations.

3.2.3 Choosing The Right Expression

In the actual drafting of the statutory prohibitions, great care is taken to avoid language forms and grammatical structures that are ambiguous or are capable of more meanings than are intended. As we have seen "No standing *on* the bus" is inherently ambiguous.

In expressing the legislative rule, the drafter must decide what approach is most effective. For example, should it be stated as a legal prohibition? Should it make standing on a bus a criminal offence? Should it command passengers as to what positively they must do? The drafter might have to add so many qualifications or exceptions to any prohibition that it is easier to draft a positive command as what *must be done*, rather than *not* done, in the particular circumstances. The offence is then committed by those who do not do what the rules require.

In composing statutory rules, therefore, the drafters must fit them to the existing body of law, by using terms and a legislative form that are consistent with it. In the following draft, for example, it must be assumed that the terms "passenger", "public transport vehicle" and "scheduled service" have the meaning given to them in other parts of the legislation containing the rule. Other terms such as "summary offence" and "penalty" link the rule with the general criminal law, which gives substance to those concepts.

The following version gives effect to the policy that we concluded underlies the notice in the bus. It bears little resemblance to the original notice, but it provides the essential legal basis for using a notice in those terms.

Example Box 1

1. A passenger being carried in a public transport vehicle on a scheduled service must remain seated while the vehicle is in motion, unless he or she is in the course of embarking or disembarking.
2. If all the seats provided on a public transport vehicle on a scheduled service for the use of passengers are occupied:
 - (a) no person shall enter the vehicle; and
 - (b) a person without a seat shall disembark from it with all reasonable speed, if so directed by the driver of the vehicle.
3. A person who contravenes section 1 or 2 commits a summary offence and is liable to a penalty of ₦500.00.

Legislative Counsel prepare legal rules to provide guidance as to the conduct expected or permitted of prescribed classes of people in particular circumstances. The rules must contain precise indications as to who is affected, when and under what circumstances they apply and how behaviour is influenced. Although drafters generally try to express those rules in as uncomplicated form as they can, inevitably they are fuller and may appear more complicated than ordinary expression, principally because they must be complete and exact.

3.2.4 **Facilitating The Task Of Writing**

Here are some suggestions as to your physical or practical requirements for the work of legislative drafting. Some may not be attainable. But they, and the seven practical precepts that conclude this part, represent best practice.

1. Provide yourself with plenty of space, a large flat desk with a lot of room for your papers, good light and ventilation and, if possible, protection from interruptions.
2. Allow yourself plenty of time; do not leave preparation to the last moment.
3. Have your reference material close to hand - in particular:
 - i. the Constitution of Nigeria and related documents;
 - ii. the Interpretation Act;
 - iii. an up-to-date set of the Laws of the Federation of Nigeria 2004. (If possible acquire your own set, and keep the volumes up to date by regular and complete annotations);
 - iv. a good dictionary and thesaurus;
 - v. a book on printing styles.
4. Keep your research notes and the overall design for your draft handy for constant reference. (Research and planning should have been largely completed before the task of composing begins).
5. If you are working on paper, you will need plenty of drafting paper. Do not cram too much on a page; give yourself room on each page for second thoughts which can be inserted in a legible form. You may find it easier if you:

- i. use wide lined paper;
 - ii. work in double spaced lines;
 - iii. start each new section on a separate sheet of paper;
 - iv. draft in pencil; this enables you to make changes by using an eraser.
6. If you are accustomed to working on a computer, you may prefer to draft using a standard word-processing package. In these cases:
 - i. ensure that each page of text carries a distinctive directory/ file reference (e.g. in a footer), so that you or others can readily retrieve it from the computer;
 - ii. be sure to back up your work to a secondary source (e.g. a flash disk or floppy disk) at the end of each working session; make sure that it carries an appropriate label, and keep the source safely in another place;
 - iii. do not confine your scrutiny to the text on screen. Print your drafts and check the text from the printed copy. It is easier to overlook flaws on screen.
 - iv. do not rely exclusively on an electronic spell or grammar check. Always carry out a personal scrutiny too.
 - v. make use of any templates that have been developed to provide standard formats for your legislation;
 - vi. if the instrument will go directly to the Printer after it leaves your computer, ensure that it complies with the Printer's requirements.
7. Make sure that each page of your draft and each separate provision is appropriately numbered, so that the text can be kept in an order.
8. As points strike you that will require to be attended to at a later stage, make a written note in a notebook or file kept for the purpose, so that the point is not forgotten.
9. If your text is in manuscript, when you are reasonably satisfied with it, word process it or have it typed. A printed version helps to draw attention to places where improvements can be made.

Proof-read the type-script of your final version rigorously for typographical and substantive errors.

10. Keep all your drafts, papers and notes relating to a particular exercise systematically filed in a working folder until it is completed. Number each draft and date all the documents (whether paper or electronic) that you produce. This enables you to recover any of the material promptly, particularly matter that you may have discarded and later think may be useful.

Seven practical precepts

1. Analyse and plan, and prepare an overall design, *before* composing.
2. Start writing *early* and produce as many drafts as are needed and time allows.
3. Be systematic in your approach and your procedures.
4. Strive for:
 - i. certainty in application and accuracy of effect;
 - ii. logical presentation of the policy and the legislative scheme;
 - iii. clarity, directness and conciseness of expression;
 - iv. ease of use.
5. Scrutinize your drafts at every stage, checking constantly for:
 - i. ambiguities in syntax, grammar or use of words; and
 - ii. inconsistency with other legal provisions.
6. Make time for a further consideration of a completed draft and for second thoughts.
7. *Invite* criticism of your draft from yourself and from colleagues.

4.0 CONCLUSION

In conclusion, legislation can be written and addressed to various classes of persons. Different legislation may have to be addressed to different people. The style of drafting may be significantly affected by the decision as to who is the principal user to which the legislation is to be addressed.

5.0 SUMMARY

You have learnt from this Unit,

- the various classes of persons to whom to address particular legislation;
- the factors that influence the way legislation is expressed, especially in contrast with everyday communication; and
- the practical steps you can take to facilitate the task of legislative drafting.

Read through the questions you have been considering in this Unit. By reminding yourself of what was dealt with under each, ask yourself whether you have met the objectives of this Unit.

This introductory material has been designed to bring out issues that influence the day-to-day work of drafters but to which we rarely have time to give thought when we are actually on the job. It is helpful from time to time to remind ourselves of the qualities we should be trying to develop and the standards we should be setting for ourselves. For that reason, you may find it profitable to look occasionally at the Seven Precepts for Legislative Counsel (in Unit 1) and the Seven Practical Precepts (in Unit 2). You might consider extracting these for easy reference. Similarly, you can use the Principles of "Good" Legislative Drafting (Unit 1) as a way of recalling the kinds of drafting that you should *avoid*. Later courses show you how this can be done.

6.0 TUTOR MARKED ASSIGNMENT

1. Is it feasible to address all legislation to the person-in-the street (no.1)?
 - a. Can you think of any drawbacks in addressing all legislation principally to the Government (no.2) and to Members of the Legislature (no.3)?
 - b. In what ways might legislation that is addressed to an administrator (no.4) be written differently from if it had been addressed to a professional adviser (no.5)?
2. Note down why the notice is an inadequate way of expressing a legal rule that could be relied upon, e.g. in legal proceedings. Approach this task by asking yourself what purpose the prohibition is to serve, and therefore what matters the legal rule

must provide for. Remember that legal rules of this kind are expected to give precise guidance to those affected as to how they are to behave.

7.0 REFERENCES AND FURTHER READINGS

Hansard Society Commission (1992), *Report on the Legislative Process*, London: Hansard Society.

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UNIT 3 TYPES OF LEGISLATIVE INSTRUMENTS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 What is Legislation?
 - 3.2 Bodies that have power to make primary legislation
 - 3.2.1 Forms primary legislation take
 - 3.3 Bodies that have power to make subsidiary legislation
 - 3.3.1 What forms does subsidiary legislation take?
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

This Unit looks at the basic characteristics and types of legislation, the terms that are used to describe different kinds of legislative instruments and the typical components of individual instruments.

2.0 OBJECTIVES

By the end of this Unit, you should be able to describe the various types of legislative instrument in use in Nigeria.

A good deal of this Unit deals with matters that you have come across in your earlier legal studies and practice of law. Remember, however, that here as elsewhere in the Course, we are asking you to look at these matters from the standpoint of Legislative Counsel. You need to confirm your present knowledge of the topics discussed and in particular the extent to which the practice in Nigeria mirrors or differs from that described in this Unit. A number of Self Assessment Exercises are designed to allow you to look at local practice.

The Unit is quite short and relatively straight-forward. You should be able to complete it quite quickly. But do give extra time to aspects that are new to you.

3.0 MAIN BODY

3.1 What is Legislation?

We shall use the term "legislation" generally to refer to written rules of law made by a body that has:

- i. the necessary legislative power conferred upon it by or under the Constitution; and
- ii. followed a legally prescribed or recognised process of law-making.

The factor that distinguishes legislation from other kinds of rules or decisions is the source of the authority to make them. Only those bodies that have the legislative power conferred upon them can make legislative instruments.

3.2 Bodies That Have Power To Make Primary Legislation

Constitutions invariably state which body or bodies have the power to make the highest level of legislation ("primary legislation").

In a unitary state, this is typically vested in the national legislature (e.g. Parliament, National Assembly).

In a federal system, the power is shared between the national (federal) and the state (provincial) legislatures, according to a division of authority set out in the Constitution.

In a dependent territory, a legislative power to make primary legislation on local matters rests with the local legislature (e.g. Legislative Council), but it may also be exercised, or overridden, by the legislative authorities in the metropolitan country.

In a military regime, the legislative power as provided for in the Constitution has usually been usurped by a Military Council and is exercised by the authority of its own decree.

There are other cases, such as the United Kingdom, where the legislative power of Parliament rests upon a basic principle of Parliamentary sovereignty in the absence of a written Constitution.

Self Assessment Exercise 1

In the spaces provided, note down for Nigeria -

- (1) the body (or bodies) in which the power to make primary legislation is vested at present:
- (2) references to the provisions of the 1999 Constitution (or other law) which confer that power and regulate its exercise.

3.2.1 Forms Primary Legislation Take

The power to make primary legislation is exercised by making legislative instruments in accordance with required procedures - a process which can be referred to as "**enactment**". That term may also be used to refer to the instrument itself, or even to a legal proposition contained in a single sentence in the instrument. Those instruments may be referred to collectively as "**statutes**", as well as "**primary legislation**".

The Constitution typically prescribes the basic features of the enactment process, referring to an individual instrument before enactment as a "**Bill**", and after it as an "**Act**".

In federal systems, a different term may be used to refer to State instruments after enactment, to distinguish them from federal enactments (e.g. "**Law**").

In dependent territories, a different term may be used to refer to local instruments after enactment, to distinguish them from metropolitan enactments (e.g. "**Ordinance**").

In military regimes, a different term may be used to refer to instruments made by the Military Council after enactment (e.g. "**Decree**" or "**Edict**").

Self Assessment Exercise 2

In the space provided, note down for Nigeria, with reference to the relevant provision of the Constitution, or other applicable law, the term or terms used to describe *individual* instruments made by the body (or bodies) in which the power to make primary legislation is vested:

(a) before enactment:

(b) after enactment:

In this Course, we use "Bill" and "Act", as well as "primary legislation" to cover all these forms.

3.3 Bodies That Have Power To Make Subsidiary Legislation

The legislatures typically have full powers to make laws on all matters, subject to the limitations stated in the Constitution (e.g. in federal jurisdictions, where certain exclusive powers may be reserved to the federal or state legislatures). See Section 4(2) of the 1999 Constitution of Nigeria. This is generally expressed as:

the power to make laws for the peace, order and good government of Nigeria.

This power permits the delegation of a limited legislative competence to other bodies, even when, as is usually the case, the Constitution is silent on the matter. Those bodies may exercise that power, within the limits permitted, by issuing their own legislative instruments, commonly referred to as "**subsidiary legislation**" or "**secondary legislation**". A term often used to describe an individual piece is "**instrument**". Other terms describing this form of legislation in general use include:

"**delegated legislation**";
"**legislative instruments**";
"**subordinate legislation**";
"**statutory instruments**";
"**subsidiary instruments**".

In this Course, these are referred to collectively as "**subsidiary legislation**" and individually as "**legislative instrument**".

Delegation of the legislative power is typically to a wide range of bodies, e.g. the President, Ministers of the Government, statutory authorities, local government councils. In the usual case, the delegation

is to enable subsidiary legislation to be made to supplement a body of rules on a specific matter that are already set out in primary legislation. But more general powers may be granted to bodies performing a governmental role over a limited area or activity (e.g. local government councils). But in both instances, the delegation and the limits upon it are found in primary legislation, which takes precedence.

3.3.1 What Forms Does Subsidiary Legislation Take

Individual instruments are typically said to be "**made**" rather than "**enacted**". There is no special term in common use for the instrument before it is made. It is generally referred to as a "**draft**" instrument. The formal terms that you should use in your drafts to describe instruments, either collectively or individually, are indicated by the terminology adopted in the Interpretation Act/Laws. See the provisions of Section 37 subsection (1) of the Interpretation Act, Cap. 192 Laws of the Federation of Nigeria 1990, for the definition of Subsidiary Instrument.

Example Box 1

The following is an example taken from the **Model Interpretation Act 1992, section 25 (1)**:

"subsidiary legislation" means proclamation, regulations, rules, rules of court, byelaws, order, notice or other instrument made under a written law and having legislative effect.

The term "**written law**" is defined in the same section: "written law" means the provisions of the Constitution, an Act or subsidiary legislation for the time being in force.

Types of subsidiary legislation

Particular terms describe instruments when used for the following purposes.

Proclamation: the formal public announcement of legislation that is likely to be important or have significant consequences.

Regulations: subsidiary legislation of general application, especially that containing provisions of substantive law.

Rules:	an instrument that prescribes procedural requirements rather than provisions of substantive law.
Rules of court:	an instrument that prescribes procedural rules relating to court proceedings.
Bye-laws:	subsidiary legislation made by statutory bodies to have local or specific application.
Notice:	a formal announcement of subsidiary legislation unlikely to have major significance for the general public.
Order:	an instrument that applies provisions contained in the parent Act to specific persons, or classes of persons, or to specific cases or places.

We consider which is the most appropriate term for particular cases, in a later Course.

4.0 CONCLUSION

In conclusion, we discussed that particular terms describe instruments. The factor that distinguishes legislation from other kinds of rules or decisions is the source of the authority to make them. Only those bodies that have the legislative power conferred upon them can make legislative instruments.

5.0 SUMMARY

In this Unit, you have confirmed your knowledge of the nature of legislative instruments, in particular Bill. You should now be able to describe the various types of legislative instrument in use in Nigeria and the forms primary/subsidiary legislation takes.

6.0 TUTOR MARKED ASSIGNMENT

1. Note down references to any provisions of the 1999 Constitution that authorise or regulate the delegation of the legislative power to other bodies.
2. Note down with references to the Interpretation Act the terminology used in legislation for the following:

- i) subsidiary legislation collectively;
- ii) a general reference to individual pieces of subsidiary legislation; and
- iii) the different types of subsidiary legislation.

7.0 REFERENCES / FURTHER RERADINGS

1999 Constitution of the Federal Republic of Nigeria.

Interpretation Act, Cap 192 Laws of the Federation of Nigeria, 1990.

Model Interpretation Guide No. 2 of 1992.

UNIT 4 CLASSIFICATION OF STATUTES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Statutes in Common Use
 - 3.2 Terms and Functions of the Characteristic Features of a Bill
 - 3.3 Conventional Arrangement of the Contents of a Bill
 - 3.4 How do Legislative Instruments differ?
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

This Unit considers the structure of primary legislation (i.e. Bills). The range of matters that primary legislation may deal with is limitless. However, there are certain kinds of statutes that are enacted in most jurisdictions for similar purposes and are referred to by similar terms. We use these terms in this Course.

2.0 OBJECTIVES

By the end of this Unit, you should be able to describe the:

- (i) features of primary legislation that are conventional in Nigeria;
- (ii) conventions relating to the structure of Bills and their standard components.

In particular, you should be able to use the appropriate technical terms to describe the characteristic features of Acts and Bills.

Pay particular attention to Self Assessment Exercises 2 & 3 which are concerned with the terminology used to describe particular features of a statute. In our experience, many lawyers are not conversant with all these features. Take time to study the specimen Act which we have provided for this purpose, in order to ascertain the particular parts which are identified in the Course text. You will be asked to use this Act again in a later Course.

3.0 MAIN BODY

3.1 Statutes In Common Use

The following kinds of Bills are frequently prepared for the following purposes:

An Amending Bill: a Bill with the principal purpose of making alterations to existing primary legislation.

The Appropriation Bill: an annual Bill to state the amounts of public expenditure authorised for the following financial year, as determined by the heads of expenditure in the estimates approved by the legislature. A Supplementary Appropriation Bill may be called for if additional expenditure must be authorised in a given year.

A Codifying Bill: a Bill to provide a comprehensive and coherent set of written rules for a major area of law.

A Consolidation Bill: a Bill to gather together into one statute existing written rules on a given matter, especially those rules that are scattered between an Act and several other Acts that amended it.

A Declaratory Bill: a Bill with the principal purpose of stating what the law is, and has always been, on a particular topic, and so removing doubt or uncertainty.

An Enabling Bill: a Bill with the principal purpose of conferring powers to do something which otherwise cannot be lawfully done or would otherwise be unlawful.

The Finance Bill: a Bill, usually annual, with the principal purpose of providing for the raising of revenue to meet public expenditure and, therefore, to change existing taxing laws.

A Money Bill:	a Bill containing only provisions dealing with specific financial matters as specified under the Constitution.
A Government Bill: (Executive Bill)	a Bill introduced into the National Assembly by or on behalf of Government to give effect to Government policy on the subject of the Bill.
A Private Member's Bill:	a Bill introduced into the National Assembly by a member who is not a member of the Government on a matter of general importance though often of special interest to the member or to some group with which the member is concerned.
A Public Bill:	a Bill that is of importance to the community, though not necessarily applying to the entire jurisdiction; it may be introduced as a Government Bill or as a Private Member's Bill.
A Private Bill:	a Bill (sometimes requiring to be enacted by a special Parliamentary procedure) to make special rules for a particular locality or particular persons, or group of persons, at their request.
An Indemnity Bill:	a Bill to remove legal liability, usually from some specified person or persons, for a breach of law.
A Validation Bill:	a Bill the sole purpose of which is to declare valid some action, omission or procedure that, as the law stood at the time, was invalid or legally defective and therefore, to rectify the legal consequences.

Self Assessment Exercise 1

<p>Find out whether any of the Bills just described are common in Nigeria by looking in your statute book or asking an experienced colleague. Note down in the last column any different term that is used.</p>			
Statute	Yes	No	Different term
1. Amending Bill 2. Appropriation/Supply Bill 3. Codifying Bill 4. Consolidation Bill 5. Declaratory Bill 6. Enabling Bill 7. Finance Bill 8. Money Bill 9. Government Bill 10. Private Member's Bill 11. Public Bill 12. Private Bill 13. Indemnity Bill 14. Validation Bill			

3.2 Terms And Functions Of The Characteristic Features Of A Bill

This part is to help you to remind yourself of the terms used to describe the main features of a Bill, and the functions they generally perform. We use a model Act to enable you compare typical features with those in recent statutes in Nigeria.

Self Assessment Exercise 2

<ol style="list-style-type: none"> 1. Glance through the Second-Hand Dealers Act 1992. (This closely follows an Act of that name in Nigeria). Make yourself familiar with its overall structure and the gist of its contents. 2. Various features of the Act are given numbers and are described in the text that follows. Once you have an idea of the contents
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of the Act, look at the numbered features in more detail with the description.
--

Some features are common both to Bills and Acts; some are exclusive to Bills.

A. Features that appear both in Bills and in Acts

1: Citation (year and number)

Typically, the *year* is the year in which the enacting process is completed; the *number* represents the order in which the Bill is given Assent. The number is entered when the Act is published after enactment.

2: Arrangement of Sections

The table of contents, often provided only for longer Bills. It is made up from the section numbers and section notes. It is sometimes referred to by a different name (e.g. "Analysis").

3: Coat of Arms

The national insignia, commonly printed to signify the formal authority of the statute. But it has no legal significance and is automatically added by the Government Printer.

4: Long title

The formal statement of the scope of the Bill and the main ways in which the Act is intended to have future effect.

5: Commencement date

The entry is left blank in a Bill. The date is entered on publication of the Act if it is known to commence on a specific date. Otherwise, it remains blank and will only be printed if the Act is re-published after commencement.

6: Enacting words

A standard formula that indicates that the Act has completed the formal process of enactment. The styles of these formulae vary widely.

7: Short title

The label or name that the Act will carry; it facilitates its citation.

8: Commencement provisions

Typically, only required if the Act is to come into force on a day *other than* the date it receives Assent.

9: Section note

An editorial aid to the contents of the section to which it attached. It is also known as a "**shoulder note**". If printed in the margin, it is known as a "**marginal note**" or "**side note**".

10: Section

The principal component of a Bill. It comprises a numbered sentence, or sequence of sentences (each constituting a **subsection**), dealing with a distinct legal proposition in the legislative scheme of the Bill. Related sections may be grouped into distinct **Parts** or, within Parts, into **Divisions**, each with a descriptive **heading**.

11: Interpretation section

A section containing meanings given to terms used in the Bill or explaining how expressions in it are to be interpreted.

12: Defined term

A term or expression used in the Bill to which a particular meaning (**definition**) is attached, usually in the **Interpretation section**.

13: Definition

The meaning given to a defined term. It is also used to refer to both **defined term** and **definition**.

14: Subsection

A division of a section (numbered by a number in brackets) that deals with an element of the legal proposition dealt with by the section.

15: Inducing words

Words used to indicate that related matter is contained in a specified Schedule to the Bill.

16: Paragraph

One of a series of components of a legislative sentence (in a **section**, **subsection** or **Schedule**), each given a bracketed letter in sequence. A similar feature *within* a paragraph is termed a **sub-paragraph**, but is typically numbered with bracketed roman numerals. In some jurisdictions, the terms “clause” and “subclause” are used.

17: Schedule

A collection of rules or items, set out as an annex to the Bill, which are extensions of the rules in the section which contains the **inducing words**. If there are several, Schedules are set out, in a numbered sequence, in the order of their inducing sections.

Self Assessment Exercise 3

For this Activity, have available:

1. The model **Second-Hand Dealers Act 1992**;
2. Two or three recent Acts, each of no more than a few pages.

In the following table, tick column 1 if the feature is in regular use in Nigeria. In column 2, note down any differences in terminology or use of the feature.

Feature	Yes	Differences
1. Citation (year and number)		
2. Arrangement of sections		
3. Coat of Arms		
4. Long title		
5. Commencement date		
6. Enacting words		
7. Short title		
8. Commencement provisions		
9. Section note		
10. Section		
11. Interpretation section		
12. Defined term		
13. Definition		
14. Subsection		
15. Inducing words		
16. Paragraph		

17. Schedule		
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B. Features that appear only in Bills

In many jurisdictions, additional features may be found in Bills.

Modified long title

Typically, the long title is preceded by the words - "A Bill for".

Line numbering

Each page of the Bill carries, in the outside margin, line numbering for that page, usually at intervals of 5. These are inserted by the Government Printer and facilitate debate.

Explanatory memorandum

This is a statement attached to the front of a Bill, explaining the general purpose of the Bill and the legal effects of the individual Parts and sections. In some jurisdictions, it finishes with a note on the financial implications of the legislation. This is also known as a statement of **Objects and Reasons**.

Self Assessment Exercise 4

For this Activity, have available a copy of a recent Bill of no more than a few pages.

In the following table, tick column 1 if the feature is in regular use in your jurisdiction. In column 2, note down any differences in terminology or use of the feature.

Feature	Yes	Differences
Modified long title		
Line numbering		
Explanatory memorandum		

3.3 The Conventional Structure of a Bill

From your reading of the Second-Hand Dealers Act and your local legislation, you are aware that drafters tend to follow a conventional order when arranging the sections in their Bills. Of course, the actual sequence of the sections in an individual Bill is dictated by the treatment of the particular subject matter.

Most jurisdictions have their own house-style for the conventional arrangement of Bills. But house-styles throughout the Commonwealth have much in common.

What is the conventional arrangement of the contents of a Bill?

The Chart on the next page outlines a model widely used. It indicates the order in which the various types of legislative matter are typically set out, when they all occur in the same Bill, and the main functions that they perform in the statute. (These matters are given headings in the Chart for purposes of explanation. They would not necessarily be contained in formal Parts with those headings). This order reflects the relative importance of the matter in particular sections. The principles that are in play here are discussed in detail in the Course on Legislative Style (structure of legislation). The Chart is followed by a brief explanation of the statutory features. Those items indicated by * are features that may not be found frequently, although some of them are valuable when the proper circumstances for their use arise. We look at that matter in depth mainly in the Course which deals with preliminary and final provisions later on.

Non-statutory material	-	Explanatory memo Arrangement of sections
Introductory apparatus	-	Long title Preamble Commencement date Enacting words
Preliminary provisions	-	Short title Commencement Interpretation Objects Application Duration Road map
Principal provisions	-	Substantive matter Administration
General/Miscellaneous	-	Penal Evidence & process Delegated legislation
Final provisions	-	Amendments Repeals

Savings & Transitionals Schedules

A. NON-STATUTORY MATERIALS

1. **Explanatory Memorandum** A statement of the general aims of the Bill and **(Objects and reasons)** its individual sections, usually for the information of Parliament. Typically, not printed with the Act.
2. **Arrangement of Sections** A table of contents for all users of the Act, made up from the section notes and any headings to Parts.

B. INTRODUCTORY APPARATUS

1. **Long title** A statement of the scope of the Bill and the main ways in which it is intended to have effect. (This feature has been dispensed with in some jurisdictions.)
2. **Preamble*** A recital of the circumstances and reasons leading up to the enactment.
3. **Commencement date** The date when the Act comes into operation.
4. **Enacting words** The formula that shows that the Bill has completed the enactment process.

C. PRELIMINARY PROVISIONS

1. **Short title (Citation)** The name or label by which the Act will be known and cited.
2. **Commencement** Particular provisions stating when the Act will come into operation if not on the date of its Assent or other date required by general legislation.
3. **Interpretation** Provisions stating how terms and expressions in **clause** the Act are to be construed.
4. **Objects clause*** A statement of the policy objectives of the Act.

5. **Application provisions*** An extension or restriction of the standard rules governing the application of the Act (e.g. to apply to part of the jurisdiction only or to have extra-territorial effect).
6. **Duration provisions*** Imposing some limitation upon the life of the Act.
7. **Road map clause*** Directions to users on how to find their way around the Act.

D. PRINCIPAL PROVISIONS

1. **Substantive provisions** The main body of rules relating to the subject matter of the Bill.
2. **Administrative provisions** Operational rules in support of the substantive provisions.

E. GENERAL/MISCELLANEOUS

1. **Penal provisions** Offences and penalties in support of the principal provisions.
2. **Evidence & process** Rules relating to proceedings arising out of the principal provisions.
3. **Delegation of legislative to powers** Powers to make secondary legislation supplement the principal provisions.

F. FINAL PROVISIONS

1. **Amendments and repeals** Alterations to existing law consequent upon the principal provisions.
2. **Savings & transitional provisions** Temporary provisions made necessary by the alterations to existing law made by the Act.
3. **Schedules** Annexed provisions that supplement the principal provisions.

This model is not universally followed. In some jurisdictions, the first three preliminary provisions (short title, commencement and interpretation) are contained in the final provisions. They are then typically placed at the end of the final provisions, with interpretation before the other two.

3.4 How Do Legislative Instruments Differ?

Subsidiary legislation shares many features of primary instruments, notably in the substantive parts. However, since the makers and the making process are different, the technical apparatus in these instruments is different. For example, there is no long title, enacting words or explanatory memorandum; section notes are uncommon. Instead, they typically contain a heading, authorising words indicating the maker and the authority for making, provision for the maker's signature and its date and an explanatory note.

SECOND-HAND DEALERS ACT 1992 1 (No.25 of 1992)

ARRANGEMENT OF SECTIONS 2

Section

1. Short title.
2. Interpretation.
3. Licences for dealers.
4. Application for licence.
5. Licence to be posted.
6. Retention of certain goods.
7. Power to amend Schedules.
8. Keeping of registers by dealers.
9. Power of inspection.
10. Information by police.
11. Persons found in possession of second-hand goods.
12. Penalty.
13. Regulations.

First Schedule

Second Schedule

SECOND-HAND DEALERS ACT 1992

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Licence to be posted.

5.-(1) Each licensed dealer shall keep his licence posted in a conspicuous place in his shop or other establishment.

(2) Each licensed dealer shall always keep exhibited at or over the entrance to his shop, yard or other establishment, a sign-board of such size and type as may be prescribed and in such position as the licensing authority shall direct which sign-board shall have printed thereon in the English language the words "Licensed dealer in second-hand goods".

(3) Any person failing to comply with the provisions of this section shall be guilty of an offence.

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Retention of certain goods.

6.-(1) Every licensed dealer who acquires otherwise than from another licensed dealer any second-hand goods specified in the Second Schedule to this Act, shall retain such goods in his possession for a period of not less than one month before disposing of or in any way altering the condition or appearance of such goods.

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(2) Any person failing to comply with the provisions of the last preceding subsection shall be guilty of an offence.

Power to amend Schedules.

7. The Minister may, by notification in the *Gazette*, amend, add to or delete from the goods or classes of goods specified in the First or Second Schedules to this Act.

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Keeping of registers by dealers.

8.-(1) Every licensed dealer shall keep registers in the prescribed form properly written in the English language and shall record therein such particulars as may be prescribed in respect of all second-hand goods as he may from time to time be possessed of, and the time at which and the person from whom he purchased or received such goods, adding in respect of every such last-mentioned person a description of his address and business.

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(2) Any person failing to comply with the provisions of the last preceding subsection shall be guilty of an offence.

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Power of inspection.

9.-(1) Every dealer shall, whenever so required by a police officer, produce for the inspection of the police officer all second-hand goods in his possession or subject to his control and all books or documents relating thereto, and in default thereof shall be guilty of an offence.

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(2) Any dealer who has in his possession any second-hand goods at any place other than such place as may be specified in a licence issued under the provisions of this Act as places in which such goods are authorised to be stored shall be guilty of an offence.

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Information by police.

10.-(1) Information as to any stolen property or as to any property which has been lost may be furnished to the police by any licensed dealer, with lists and descriptions of the same.

(2) If any property answering such lists and descriptions is, or has since the theft or loss been, in the possession of any licensed dealer or is thereafter offered to or shown to any licensed dealer, the dealer shall, without unnecessary delay, give information to that effect at the nearest police station or to a police officer, with the name, address and description of the person in whose possession the property was found, and in default thereof he shall be guilty of an offence.

Persons found in possession of second-hand goods.

11.-(1) Any person transporting or having in his possession or keeping any second-hand goods without a lawful excuse shall be guilty of an offence.

(2) For the purposes of this section, second-hand goods shall be deemed to be in the possession of any person if he knowingly has them in the actual possession of himself or of any other person in any street, house, building, vehicle, vessel or boat, field or place, open or closed, whether or not he is himself the owner of such goods and whether such second-hand goods are so possessed or kept either for his own use or benefit or for the use or benefit of another person.

FIRST SCHEDULE

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(Section 2)

Books, magazines and newspapers;
 Furniture;
 Gunny bags, sail cloth, canvas;
 Bottles;
 Old iron and metals, other than gold, silver, platinum, brass, bronze, copper, lead, pewter, zinc, block tin or any combination of any such metals;
 Kerosene tins, oil drums, and other similar empty receptacles;
 Wooden and tin lined boxes and cases;
 Motor vehicles;
 Ships, vessels or boats;
 Refrigerators.

SECOND SCHEDULE

(Section 6)

Articles to be retained for one month:-

Articles of gold, silver, platinum, brass, copper, lead, pewter, zinc or block tin, or any combination of any such metals;
 Bicycles and spare parts and accessories thereof;
 Cameras;
 Clocks and watches;
 Computers, and apparatus and articles used in connection therewith;
 Field glasses and other optical instruments of any kind;
 Film projectors;
 Furs;
 Gramophones and radiograms;
 Jewellery and jewels and all articles of personal adornment;
 Lawnmowers and motor mowers;
 Musical instruments other than pianos;
 Radio and television receiving and transmitting equipment and all parts thereof, and apparatus and articles used in connection therewith;
 Scrap gold, silver, platinum, brass, copper, lead, pewter, zinc or block tin, or any combination of those metals;
 Tape recorders and other recording apparatus;
 Tools of trade;
 Tools, parts and accessories of motor vehicles of all kinds;
 Travelling rugs;
 Typewriters;
 Wire or cable, made of, or containing, copper.

4.0 CONCLUSION

We conclude that there are various kinds of bills which are prepared for various purposes. You should now know the kinds that apply to Nigeria and the way in which they are classified.

5.0 SUMMARY

At the end of this Unit, you can now describe the conventions relating to the structure of Bills and their standard components.

In particular, you are now acquainted with the use of appropriate technical terms to describe the characteristic features of Acts and Bills. Read through the questions you have been considering. Remind yourself of what was dealt with under each, asking yourself whether you have met the Unit's objectives.

You should have found little difficulty in familiarising yourself with the matter in this Unit. If you are unsure about any item covered in this Unit, re-read the appropriate part and the material you have added in a connected Exercise. You will meet again much of what you have studied here, in later Courses; it should soon become standard.

6.0 TUTOR MARKED ASSIGNMENT

What is the conventional structure of a Bill in Nigeria? Note whether the listed items are generally included in the preliminary or in the final provisions in Bills. By giving appropriate numbers, show the order in which they usually appear.

7.0 REFERENCES/FURTHER READINGS

Dick, Robert C. (1972) Legal Drafting: The Carswell Coy. Ltd.

Rodell, A. (1936) Principles for Legal Writing, 23 Virginia Law Review 38-41.

Soetan, Olusiji A. (1997) Elements of Legal Drafting, Lagos: Dredew Publishers.

Thornton, G.C. (1996) Legislative Drafting 4th ed., London: Butterworths.

MODULE 2

- Unit 1 History and Development of Legislative Drafting
- Unit 2 The Principal Characteristics of Commonwealth Drafting
- Unit 3 Importance Of Grammar
- Unit 4 Drafting Office

UNIT 1 HISTORY AND DEVELOPMENT OF LEGISLATIVE DRAFTING

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 How did legislative drafting develop?
 - 3.1.1 Early Drafting
 - 3.1.2 19th Century Developments
 - 3.1.3 Colonial Developments
 - 3.1.4 19th Century Improvements
 - 3.1.5 Subsequent Developments
 - 3.1.6 Mid – 20th Century Developments
 - 3.1.7 Principled Drafting
 - 3.1.8 Plain Language Movement
 - 3.2 How have these developments influenced the way in which we draft?
 - 3.3 What foundations did they lay?
 - 3.3.1 Theoretical Underpinnings
 - 3.3.2 Principles of Legislative Syntax
 - 3.4 What are the effects of this approach?
 - 3.5 Coode's guidelines for forming sentences
 - 3.6 How were Coode's foundations built upon?
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Drafting styles in Nigeria, like the common law itself, have their roots in the English legal system. Again like the common law, legislative drafting has evolved over a long period of time and through the

experience brought by drafters working in many jurisdictions. Practices that are now taken for granted are often best explained by their historical origins. In learning how to go about the task today, it helps to have an understanding of the factors which have led to present practices.

We need to think critically about the way that legislation is drafted in order to see where sensible improvements can be made to inherited drafting practices. If we are to do that, we must have a clear idea as to the objectives which we should be seeking to achieve whenever we are drafting a piece of legislation.

2.0 OBJECTIVES

By the end of this Unit, you should be able to describe the way that legislative drafting developed in the Commonwealth and how that development has influenced the way that we draft today.

3.0 MAIN BODY

3.1 How did Legislative Drafting Develop?

Commonwealth drafting has its origins in English practice, which was exported, usually as part of the colonial legal system; it remains strongly influenced by that practice, no doubt because of the extensive range of experience and tradition.

3.1.1 Early Drafting

Early legislative drafting in England (from the 15th century) was largely undertaken by Judges and conveyancers; they brought to it the wordy and legalistic style they used in the deeds and court instruments of the time - a practice encouraged by payment by the length of the document. These features were accentuated from the 17th century when, in the struggles between the King and the Parliament, the judges cut down the generality of statutory language (which tended to favour the Crown) by strict construction. In response, Parliament sought the same objectives by specifying in detail, and repeating at length, the particular matters that would have been covered by rules drafted in broad terms.

By the 19th century, lay readers especially found the contents of most statutes unintelligible. Legislation generally suffered from poor arrangement and structure, an inconsistent and elaborate mode of expression, a dense and unhelpful format and obscure language. Blocks of unbroken text contained lengthy sentences in which many matters were compressed (for a process of separate enactment was needed for each sentence); they were written in artificial and legalistic language.

3.1.2 19th Century Developments

The 19th century was one of great legal change; drafting was caught up in that process. A better style was deliberately developed to counter the shortcomings in legislation, which Jeremy Bentham trenchantly criticised in the early years of that century. It was facilitated by the gradual professionalisation of the work, which began with the creation of the Office of Parliamentary Counsel, in the United Kingdom, in 1869.

In this period, we may mention four influential figures:

- (i) **George Coode**, a barrister in private practice, who undertook a major revision of the poor laws, which led to *On Legislative Expression* (1845 & 1852) (This is reprinted in E A Driedger, *The Composition of Legislation*, 1976).
- (ii) **Sir Henry Thring** (later Lord Thring), a barrister who drafted for the Home Office from 1861 and by whom the Office of Parliamentary Counsel was founded. He wrote *Practical Legislation*, 1877, 1902.
- (iii) **Sir Mackenzie Chalmers**, who drafted major commercial statutes in the later part of the century, such as the Sale of Goods Act 1893, which were adopted widely outside the United Kingdom.
- (iv) **Sir Courtenay Ilbert**, also of Parliamentary Counsel, who wrote *Legislative Methods and Forms*, 1901.

All made significant contributions to a much improved approach in common law drafting in the later 19th and the early 20th centuries. Their writings and legislative drafts had considerable influence throughout the then British Empire.

3.1.3 Colonial Developments

Drafting was often undertaken by law officers who had gained their training in English law, and who looked to English drafting practices. Some improvements in drafting occurred independently in colonial jurisdictions, although they were not usually followed in England. For example, the Indian Penal Code 1860, Indian Evidence Act 1872, Indian Contract Act 1872, Code of Civil Procedure, Code of Criminal Procedure 1898, demonstrated that a complete body of common law could be reduced to lucidly written rules that were accessible to those without a legal training. The drafters of that time also devised ways which enabled legal principles to be enunciated and, by the addition of

explanatory material and examples, their application to be understood. Neither trend carried over into the 20th century.

3.1.4 19th Century Improvements

Sound groundwork was provided by Coode. As a result of his efforts, theoretical underpinnings to drafting practice were provided for the first time. In particular, he formulated a framework for composing legislative sentences, asserting that each should contain standard components and showing how they should be consistently deployed. We shall take account of those ideas in this Course.

Coode made many suggestions that were designed to produce more reliable drafting practices. They included:

- i. the prime virtues in drafting are **simplicity and directness** of expression. **Common patterns of English** should always be used.
- ii. **sentences** should follow each other **in a logical sequence**, for example, in accordance with the chronological order of the events to which they relate.
- iii. **separate legal sentences** should be used to provide for different rules relating to different persons or different events. There should be one sentence for each class of case, in which a distinct person is subjected to a distinct legal provision.
- iv. if a legal person is engaged in several actions in the same set of circumstances, the **series of actions** should be gathered **in a single sentence**, in the order in which they will occur.
- v. **artificial or arbitrary definitions** of terms should be **avoided**. Instead of providing certainty of meaning they can conceal important effects.
- vi. **definitions** should challenge attention by being **placed before**, not after, the matter to which they relate. Terms that are defined should be identified, when used in legal rules, by some distinguishing mark.
- vii. **provisos** should be **avoided**. Their only legitimate use is to create an immediate exception to a general proposition.

3.1.5 Subsequent Developments

Later drafters, Lord Thring in particular, pioneered a number of practices that complement Coode's proposals. These included:

- i. legislative **sentences** should be **short**, with only **one sentence to a section** (or, if the section is divided into subsections, to each subsection). This was facilitated by the statutory permission in 1850 to use sections and subsections.
- ii. there should be a **unity of purpose** between the **subsections** of the same section. The **main proposition** in a section should be contained in the **first subsection**; qualifications and exceptions should be contained in subsequent subsections.
- iii. lengthy Acts should be **divided** into Parts and headings ascribed.
- iv. **distinct matters**, which have no connection with each other, should **not** be dealt with **in the same Act**.
- v. the **simplest expressions** found in ordinary composition will generally be adequate.
- vi. **Latin terms** and unnecessary technical expressions should be **avoided**.
- vii. the **same term** should be used to describe the **same thing**; a **different term** should be used to describe a **different thing**.

3.1.6 Mid-20th Century Developments

The major common law jurisdictions seemed to lose touch with many of these basic precepts of sound drafting, at least in the second half of the 20th century. A number of the features earlier criticised re-appeared, such as long-winded and complex statutes using compressed sentences, elaborate detail, poor structure, and obscure language and terms. This was undoubtedly brought about by the increasing demand for wide-ranging legislation to regulate new activities or to introduce fundamental social change. These shortcomings may have been a little less apparent in some Commonwealth jurisdictions, where sound practices developed by Attorneys-General during the colonial era often continued to be influential (Alison Russell, *Legislative Drafting and Forms* (4th ed. 1938)).

3.1.7 Principled Drafting

To counter these trends, it has been proposed that legislation should move away from the traditional styles. So, it has been urged, greater prominence should be given to statements of principle, rather than a detailed elaboration of rules to regulate the legal relationships of those concerned with or affected by the legislative scheme (e.g. Sir William Dale, *Legislative Drafting: A new approach* (1984)). There is little evidence that such a radical shift will be adopted. Two principal reasons are commonly given:

- i. This approach may produce less detail in the legislation as to responsibilities of those affected, but in consequence:
 - (a) that detail might have to be settled by the courts or by Executive direction or decision;
 - (b) this could lead to a reduction in the authority of the Legislature, which constitutionally and traditionally is the body expected to settle such matters.
- ii. The costs and burdens to the user of unfamiliar methods of working with legislation are likely to outweigh any benefits of improved intelligibility from a greater use of statements of principle.

3.1.8 Plain Language Movement

Instead, there is now a welcome trend to return to the principles put forward by Coode and Thring (pioneered by E A Driedger, *Composition of Legislation*, (2nd ed, 1976)). In particular, there have been serious efforts in some countries to:

- i) work out how those principles can once more be applied to the legislative circumstances and drafting requirements of today; and
- ii) eliminate those recent practices that have tended to defeat the aims behind those principles.

This is particularly evident in Australia, where the impact of a "plain language" movement upon drafting has been considerable. This followed from a wider anxiety about the clarity of legal documents, especially those intended for direct use by members of the public. The most thorough examination of the matter to date is that of the Law Reform Commission of Victoria (Report on *Plain English and the Law*

(1987)). As part of this exercise, the Commission prepared a *Manual for Legislative Drafters* which aims:

to help people involved in legislative drafting to prepare Acts which communicate their message efficiently and effectively.

Proposals on this matter have not been limited to the composition of legislation. Others have been made with respect to the organisation and formatting of legislation to enable the contents to be more readily understood (Law Reform Commission of Victoria, Report on *Access to the Law: the structure and format of legislation* (1990)). Other sources are mentioned in the Reference.

These initiatives have been accompanied in Australia by general directions on drafting from Attorneys-General to legislative drafting offices, which have themselves begun to develop contemporary drafting techniques to improve the legislative expression and the structure and presentation of legislation. This Course takes account of these developments.

3.2 How Have These Developments Influenced The Way In Which We Draft?

The early developments established theoretical underpinnings for the common law approach. They also provided a coherent body of principles with respect to legislative syntax (i.e. the way that legislative sentences should be written), and generally relating to legislative expression. The later developments built upon these foundations.

3.3 What Foundations Did They Lay?

Since the groundwork for our current approach was done by Coode, it is valuable to look briefly at his analysis. Coode believed that a more acceptable style would be practised if certain principles were followed in writing all legislative sentences. The following summarises, first, the theoretical premises upon which he built and then the principles themselves.

3.3.1 Theoretical Underpinnings:

Coode's thesis contained these premises:

i. The aim of legislation

The overall aim of legislation is to regulate relationships between legal persons (i.e. those recognised by law as capable of carrying

legal rights) and, in doing so, "to secure some benefit to some person or class of persons".

ii. **The methods of securing benefits**

There are two alternative ways of securing benefits:

- (a) confer an appropriate **right**, **privilege** or **power** directly upon the person or class of persons that is to benefit; or
- (b) impose an **obligation** or **liability** upon a different person or class, so that a corresponding benefit results, indirectly, in favour of the person or class that is to benefit.

iii. **The basic structure of a legislative sentence**

Typically, a legislative sentence should provide specifically for one or other of these alternatives, but not both, since express provision of one normally gives rise to the other by implication. But "no single sentence in a law can do anything else than one or both of these."

iv. **The functions of the legislative sentence**

Typically, a legislative sentence, as well as defining one of the necessary elements of the relationship between persons or classes by these means, should:

- (a) prescribe the limits to the stated right, privilege, power, or duty and liability; and
- (b) designate the circumstances in which it arises and the conditions under which it operates.

Example Box 1

Consider this simple legislative sentence:

12. Where a court awards the custody of a child over the age of 14 years to any grandparent of the child, that grandparent is liable to maintain the child until the child reaches the age of 18 years or unless the child is in full-time employment.

The rule confers a benefit upon certain children by imposing a **liability** on their grandparents. The sentence also determines when the liability arises and when it ceases, by stating the **circumstances** and **conditions** in which the rule operates.

3.3.2 Principles Of Legislative Syntax

To fulfil these general objectives, Coode made proposals concerning the components of legislative sentences and offered a number of other guidelines about the way sentences should be structured.

The components of every legislative sentence

Coode asserted that legislative sentences ought to have two **core components**, and may have two **optional components**:

i) The core components

(a) A legal subject:

A rule in a sentence must be directed to a subject who can respond to it. So, the subject must be one recognised by the law as a person upon whom a right, privilege or power can be conferred or an obligation or liability imposed. So the person to whom the rule is directed is its *legal* subject. Grammatically, the legal subject takes the form of a noun, modified as required to add greater precision; it is typically made the *grammatical* subject of the sentence.

(b) A legal action:

The legal action states what the legal subject **may** or **may not**, or **must** or **must not**, do, in order to confer the intended benefit. Grammatically, this takes the form of a verb, with an auxiliary verb that directs how the subject is to be affected: "**shall**" (or "**shall not**") or "**may**" (or "**may not**"). The verb too may be modified (e.g. by the addition of an adverb) to give greater precision. This constitutes the *principal predicate* in the sentence.

Example Box 2

The subject and the action (predicate) are highlighted in the following:

10. *A police officer* [= **subject**] *may arrest a person* [= **action/predicate**] if the officer reasonably suspects that the person has committed an indictable offence.

ii. Optional components

If a legislative sentence contains only a subject and an action, it constitutes a universal rule. Legal rules, however, are usually intended to have effect in particular circumstances or when

particular conditions arise. So, if the rule is not to have universal effect, one or both of the following must be added:

(a) The case:

This prescribes the circumstances to which the rule is confined or in which the rule has its effect. Grammatically, this may take the form of a subordinate clause, beginning with "where" or "when" and having its own subject and predicate.

(b) The condition:

This prescribes actions which, when performed, cause the legal rule to take effect or not take effect. Grammatically, this may take the form of a conditional subordinate clause, beginning with "if" or "unless" and having its own subject and predicate.

Example Box 3

12. Where a police officer has cause to suspect that a person is loitering with the intention of committing an offence in a public park [=case], the officer may request the person to leave the vicinity of the park, unless the person provides the officer with a reasonable explanation for his or her presence [=negative condition].

3.4 What Are The Effects Of This Approach?

It is scarcely surprising, with this general approach, that common law legislation is made up of a series of detailed and specific provisions directed towards required or permitted behaviour of persons or classes of persons identified in the legislation. The absence of expressed general principles in the legislation is understandable. Any reader of statutes drafted in Commonwealth countries will find these features familiar.

3.5 Coode's Guidelines For Forming Sentences

Coode's guidelines on how to select the components of legislative sentences should also be familiar to users of Commonwealth legislation, although a number of them have been modified by later practice.

(i) Selecting the legal subject:**a. The subject should be a legal person**

The legal subject must be a legal person (individual or body) that the law recognises as capable of bearing rights, privileges, powers, liabilities or obligations. It can, therefore, never be, e.g. an animal nor an inanimate thing. For rules are intended to affect the behaviour of persons; they cannot be directed to dogs or disorders.

b. The legal person should be the grammatical subject of the sentence

Typically, the legal subject should be the grammatical subject of the sentence. But an inanimate thing can be made the grammatical subject, if the legal person affected is obvious from the sentence.

c. There should be only one legal subject in any sentence

Typically, there should be only one legal subject to each legislative sentence.

d. The subject should be placed in a prominent position in the sentence

The subject should occupy a distinctive position in the sentence, preferably at or near the beginning of the sentence and before the verb (predicate).

Example Box 4

A person shall not use a guard dog at any premises unless the dog is under the control of that person at all times while it is being so used.

The grammatical subject of the sentence is a legal person (applying to everybody with legal personality); it is in one of the two most distinctive possible positions in the sentence - at the beginning (the other would be at the end).

e. The subject should not be obscured

The legal effects of the rule will be less clear if the legal subject is obscured, e.g. because an inanimate thing, rather than the legal person, is made the grammatical subject.

Example Box 5

It is unlawful to use a guard dog on any premises unless the dog is under the control of a person at all times while it is being so used.

No guard dog shall be used on any premises unless the dog is under the control of a person at all times while it is being so used.

These two versions of the same rule obscure the precise persons to whom the prohibition applies. (Is it the owner of the premises, the handler, the user or the owner of the dog?). No legal person is identified. The grammatical subjects are the inanimate "it" (sometimes termed a "false subject") and a non-person "guard dog". A sounder approach is that in **Example Box 4**.

(ii) Selecting the legal action:**a. The action should contain a specific auxiliary verb**

The legal action should contain a verb which is qualified by one or other of the following **auxiliary** verbs:

"**shall**" or "**shall not**" for: commands to act or not to act (duties);

"**may**" or "**may not**" for: rights, privileges, and powers (or absence of them);

"**shall be**" or "**may be**" for: liabilities.

b. The verb should be in the active voice

The verb should, wherever possible, be used in the active voice; this facilitates making the legal subject into the grammatical subject and expresses the effect on the legal subject more positively. However, if the rule is to require the legal subject to submit to, or to be subjected to, some action or liability, the passive voice may be used, so long as it is clear, or if it is irrelevant or unnecessary to state, by whom that action is to be taken.

Example Box 6

A person trespassing on land occupied by an Oil Company *may be prosecuted*.

A person arrested under this Act *shall be brought* before a magistrate as soon as practicable.

c. The action can contain several verbs

More than one verb (with the appropriate auxiliary) may be used in a legislative sentence to provide for the performing of a series of related legal actions, as long as the *same* legal subject is to perform them all.

Example Box 7

The police officer *may* arrest a person whom the officer suspects to have committed an offence, but *shall* bring that person before a magistrate as soon as possible.

(iii) Selecting the case

a. The case should take the initial position in the sentence

Where the rule is to operate in specific circumstances only, those circumstances should be described *before anything else* in the sentence, as they provide the context for everything that follows in the sentence.

b. The case should always be speaking

The verb in a case clause should be expressed as always speaking (i.e. describing a current, rather than a future, state of affairs). It should *not* use the auxiliary verbs "shall" or "may", which must be reserved for the legal action.

c. The case should be in the present tense, or when required, a past tense

The present tense should be used, if the circumstances described **are** concurrent with the legal action. The perfect tense should be used if the circumstances described are to have occurred before the legal action.

d. The case should begin with an appropriate introductory term

A case clause should usually be introduced by the conjunction "**where**" (where it describes circumstances) or "**when**" (when it describes a time at which or by which circumstances occur).

Example Box 8

The following sentence contains two cases and illustrates both the recommended uses of verbs and introductory terms.

When a police officer *sees* a person committing an indictable offence or *where* a reputable person *has reported* to the officer that a person has committed an indictable offence, the officer may arrest that person.

(iv) Selecting the condition

- a. The condition should usually be a condition precedent**
If the rule will only take effect if some person has performed some action that triggers it off, this is a condition precedent.
- b. It should be placed towards the beginning of the sentence**
It should precede the legal subject/legal action, since the rest of the sentence has effect only if the condition is met.
- c. It should always be speaking and, typically, in the present tense**
Again, the auxiliaries "shall" and "may" should not be used. If the condition occurs at the same time as the rule is triggered off, the present tense should be used. Only if the action has already happened, is a past tense needed.
- d. More than one condition should be set out in a logical order**
If there are several conditions, they should be set out in a logical sequence (e.g. in the chronological order of their occurrence or of their performance).
- e. The condition should begin with an appropriate introductory term**
A condition clause should be introduced by the conjunction "if", unless the clause takes the form of an exception or states a condition under which the rule does not take effect; then "unless" is needed.

Example Box 9

The following sentence contains a condition precedent and an exception (negative condition). This too illustrates both the recommended use of verbs and introductory terms.

If a court, after dismissing a case, *considers* that the charge was frivolous, it may order the complainant to pay to the accused person a reasonable sum as compensation for the expense to which the accused may have been put as a result of the charge, *unless* the accused *has incurred* no expenses.

3.6 How Were Coode's Foundations Built Upon?

Later drafters have built upon these approaches. Two factors helped in this respect.

- i) Coode's approach assumed that subject, action, case and condition would be contained in the same sentence, almost certainly influenced by the requirement that each section of an Act could contain only one sentence. After sub-sectioning was authorised, drafters:
 - a) found less need to compress both the main proposition and its exceptions and qualifications into the same sentence;
 - b) gained more flexibility by being able to compose related sentences in the subsections of a section.

These trends were strengthened by the use of **paragraphs** to divide the contents of individual sentences.

- ii) Coode tended to use his own terms to describe components of legislative sentences. Later drafters have rightly relied upon standard grammatical terms. This emphasises, as Driedger insists, that "there is no special language for statutes". As a result, drafters now tend to use the following terms:
 - a) a sentence, in grammatical terms, includes a **principal subject and predicate** (conforming to Coode's "legal subject" and "legal action");
 - b) **modifying clauses** can be used in sentences (as "**sentence modifiers**") to describe the **context** or **fact situation**, or both, in which the rule operates. (There is no *grammatical* difference between the "case" or "condition" as Coode's distinction might suggest).

The following are some of the principal ways in which later drafters built upon the foundations laid in the Coode approach.

1. The principal subject can be a non-personal subject

It is too restrictive to require the grammatical subject of every sentence to be a legal person (as Coode himself recognised). In a larger number of cases an inanimate or impersonal grammatical subject may be used with the principal predicate:

- **declaratory statements**
- **definitions, interpretation or explanatory provisions**
- **application or referential provisions**
- **where it is obvious which legal persons are affected**
- **to provide continuity with a matter dealt with in an earlier sentence.**

Subjects of these kinds should be used only so long as they give rise to no uncertainty as to the legal persons who are to comply with the provisions in the sentence.

Example Box 10

The following sentences illustrate the cases listed.

declaratory:

(1) *The Companies Act 1968* is repealed.

definition:

(2) In this Act, *the expression "complaint"* means an allegation that some person known or unknown has committed an offence".

application:

(3) *Section 25 of the Penal Code* applies to persons convicted of an offence under this Act.

obvious subject:

(4) *Applications for a dealer's licence* are to be made to a local government council.

continuity:

(5) *A warrant for arrest under this section* may be issued by any Judge or magistrate.

2. The principal predicate can be used more flexibly:

i) To state conclusions of law, as well as to provide for actions

Principal predicates are no longer concerned solely with actions. They are used to declare legal status or consequences.

ii) Making fuller use of passive verbs

Principal predicates are now more frequently in a passive tense than Coode suggested. The decision should be dictated by ease of use, but, as Coode insisted, only if there is no ambiguity about the legal persons who are to comply with the rule.

iii) Employ a wider range of auxiliary verbs

The verb in the principal predicate is not limited to verbs using the auxiliaries "may" or "shall". This can be too restrictive. Some jurisdictions have accepted that "shall" is not used in common speech to impose obligations, and is unnecessarily legalistic. For example, it may be more appropriate to:

- a) express an obligation by using "must", rather than shall;
- b) express a right by "**is entitled**" rather than "may", which could be construed as conferring a power;
- c) use a present tense to make a statement of legal consequence or legal status.

Example Box 11

The following sentences illustrate the use of other verb forms.

On receiving a complaint alleging a corrupt practice by a public officer, the Commissioner *must* investigate the conduct of that officer and of any other person who appears to the Commissioner to be concerned in the alleged corrupt practice.

A person *commits* an offence who knowingly obstructs a police officer when performing any function under this Act .

There *is established* by this Act an Institute by the name of Nigerian Institute of Advanced Legal Studies.

The tort of detainee *is abolished*.

3. Context clauses can be used more flexibly than the case and condition

i) Different kinds of context clause

Though both are sentence modifiers, analytically, we may still distinguish:

- a) a clause that states the **fact situation** in which the rule operates; and
- b) a clause that states an **action that triggers off** the rule (a condition).

ii) Different uses of introductory words

Drafters tend now not to use “**where**” to introduce a context clause as this connotes locality rather than conditionality or circumstance in general usage. Instead they increasingly prefer:

- a) “**if**” to introduce a context clause that describes the factual setting or general circumstances in which the rule operates or one describing an action or event that **causes** the rule to operate;
- b) “**when**” to introduce a context clause that describes an **action or the event** on the happening of which the rule takes effect.
- c) “**unless**” to introduce a clause describing an action, event or state of affairs that precludes the operation of the rule.

iii. Flexible positioning in the sentence

Context clauses are not now routinely placed *before* the principal subject and verb in the sentence. That was necessary when sentences tended to be complex and detailed in order to allow readers to see whether the provision applied to their circumstances before going further into the sentence. Sentences today are typically shorter. The order of the sentence components is dictated by sense and ease of understanding. So, it is often clearer to put the subordinate clause *after* the main proposition. If the rule can operate in several alternative fact situations, it may be more convenient to set these out *after* the principal subject and predicate.

Example Box 12

A police officer may arrest a person if a reputable person reports to the officer that the person has committed an indictable offence.

An elected member of the council shall vacate his or her seat -

- (a) *when* the notice for the election for the council is issued;
- (b) *if* the member fails to attend 3 consecutive meetings of the council, without obtaining the prior permission of the council;
- (c) *if* the member is appointed to a public office;
- (d) *if*, in the case of an appointed member, the appointment is revoked by the Minister.

4.0 CONCLUSION

We conclude that legislative drafting in Nigeria has its origin in English practice, imported as part of the colonial legal system. It continues to evolve as it is being developed in the commonwealth.

5.0 SUMMARY

In this Unit you have been establishing a framework for the work to come on drafting skills and techniques. You should now have a clearer picture of how current practices have been influenced by the approaches evolved and developed over the last 150 years. In particular, you should understand the influence of Coode's analysis and system.

You should now know the way legislative drafting developed in the Commonwealth particularly in Nigeria and how that development has influenced the way that we draft today.

6.0 TUTOR MARKED ASSIGNMENT

Trace the historical development of legislative drafting in Nigeria.

7.0 REFERENCES / FURTHER READINGS

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UNIT 2 THE PRINCIPAL CHARACTERISTICS OF COMMONWEALTH DRAFTING

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1.0 INTRODUCTION

This Unit probably contains a good deal that is new to you. In particular, it describes the systematic approach developed in the 19th Century to composing legislative sentences and structuring legislation. This still underlies much of what we do today. We shall work with these matters again in the Course on Legislative Syntax and Expression, when we look at them in much more depth. At this stage, it is sufficient for you to understand the essential approaches described here, rather than that you are able to put them into practice. You will have plenty of opportunities for that later on. You need to see how these approaches have influenced current practices and given rise to the distinctive characteristics of drafting in Nigeria.

This Unit looks at the qualities that we should be trying to incorporate into our drafts. Again, these considerations, and the ways in which they can be best secured, re-occur throughout the Course. Again, you will have many opportunities in the Courses that follow to develop techniques for these purposes. Studying this Unit is designed to provide you with an initial frame of reference for your subsequent work and with a clear perception of what standards you should be trying to achieve.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) provide an overview of the principal characteristics of legislative drafting in Nigeria; and
- (ii) establish the principal objectives for which drafters should work and the fundamental practices that are most likely to contribute to achieving them.

3.0 MAIN BODY

3.1 The Principal Characteristics Of Commonwealth Drafting

The account you have just studied in the last Unit suggests some of the principal characteristics of drafting approaches in the Commonwealth. The following are features which are particularly marked in contrast with approaches in other systems of law, such as civil law systems, which are said to be cast in broad and generalised language that puts considerable emphasis on statements of principle.

i) Policy objectives are implicit

Legislative instruments rarely articulate the policy objectives to which they give effect. Typically, these are left to be deduced from the terms of the legislation, Legislative Counsel having drafted its provisions appropriately so as to convert the policy into legal rules.

ii) No statement of general principles

Legislation rarely contains general principles governing legal relationships, from which particular requirements or applications have to be deduced. Since the function of the courts is to apply and interpret, and not make, legislation, the Legislature must provide, and be seen to provide, a body of particularised rules covering all foreseeable cases or at least to authorise the making of secondary legislation for that purpose.

iii) Specific and detailed rules

Legislation provides **specific rules** to govern or regulate the actions of persons whose behaviour is to be subject to the legislative scheme. In consequence, they contain a good deal of **detail**, designed to provide precise and certain guidance about the application of the rules.

iv) Compression of matter

To minimise the number of legislative sentences, the same sentence may contain the complete rule and its context, and sometimes an exception to it. In addition to making the sentence long and detailed, such compression can lead sometimes to a complex structure.

v) Drafting devices

In order to minimise the adverse effects of this particularisation in legislation, drafters make frequent use of such devices as:

- a. definitions and interpretation provisions;**
- b. concepts created uniquely for the statute.**

vi) Technical legislative rules

Special rules governing the structure, operation and construction of written law are typically stated in an Interpretation Act and, to a much lesser extent, by the common law. Where these are silent or unsuitable, each legislative instrument has to provide its own technical rules on those matters.

vii) The relationship between provisions

Each proposition in a statute is treated as a separate enactment. Therefore, the exact relationship between different propositions on related matters must be made very clear. If that is not obvious from the context, linking words and cross-references must be provided (e.g. "subject to section 5"; "without prejudice to section 6").

viii) Legalistic language

Since they provide legal rules, legislative sentences follow the language used in legal practice, as well as the terms used to describe established legal concepts. But in addition, sentences tend to have a more formal style and vocabulary than is found in ordinary usage; they can become tortuous and convoluted and reliant on unnecessary legal jargon.

These features continue to be central to much Commonwealth drafting. It is our task to build upon them but not at the expense of the objectives of good legislative drafting. As will be evident from what has just been described, they can give rise to excesses and abuse. In this Course we shall work on ways of avoiding those.

3.2 Drafting Objectives

3.2.1 How Do We Establish A Drafter's Objectives?

A drafter provides legal documents for the use of others. Therefore, a drafter's objectives should take account of the expectations of users when they approach this task. In this respect, legislation has much in common with other types of legal documents.

Self Assessment Exercise 1

Before we look at some ideas on this, give thought to what qualities a typical user might be looking for from any legal document to which they are referred. Suggest 5 expectations to which users are likely to give priority.

- 1.
- 2.
- 3.
- 4.
- 5.

3.2.2 What Do Users Look For From Legal Writings?

When users of official written documents are asked this question, most say that they favour those documents that:

- i) tell them what they want to know;
- ii) are easy to read and understand;
- iii) are not obscure;
- iv) use the shortest space;
- v) deal with all the necessary points;
- vi) contain no contradictions;
- vii) leave no doubts.

3.2.3 How Can Drafters Meet These Expectations?

Drafters should strive to produce instruments that satisfy these expectations. By those standards a good legislative draft is one that **communicates** to users, in terms that are:

- **capable of being Complied with;**
 - **Clear;**
 - **Comprehensible;**
 - **Concise;**
 - **Complete;**
 - **Consistent**
 - **Certain;**

Our task, then, is to give effect to all these objectives. Think of yourself as setting out to:

Navigate the Seven C's
of Drafting

3.2.4 Are These Objectives Equally Important?

Most lawyers put the last of these objectives, *certainty*, as their first priority, as they are looking for answers from legislation to their particular legal problems. They become concerned if they find ambiguity or a possibility of conflicting interpretations, or no answer at all. In fact, failure to give effect to the other objectives often contributes to uncertainty. For example:

- i) if the policy of the legislation is not communicated clearly, it may be construed in unintended ways, leaving those affected uncertain as to how they may act.
- ii) if an Act does not cover the complete ground, it will be uncertain as to how matters not dealt with should be approached.
- iii) legislation that is not concise, e.g. because it is wordy, long-winded and repetitious, may increase the likelihood of uncertainty about its meaning and application.

But contradictions sometimes occur between these objectives. For example:

- i) in order to be certain, we may not be able to be very concise;
- ii) the more detail that we have to provide in the interests of completeness or certainty, the greater the threat to comprehensibility;
- iii) the more that we must cover in dealing a complex legislative scheme, to be certain and complete, the greater the problem of communicating clearly the essential nature of the scheme and of ensuring that it can be fully complied with.

Despite these contradictions, your principal aim should remain constant: do all you can to give effect to each of these objectives.

3.2.5 How Can We Best Achieve These Objectives?

This Course is dedicated to encouraging trainees to adopt practices that contribute to these objectives. But there are seven basic practices that constitute its foundations.

1. Analyse and plan

When you start composing your legislative sentences, make sure that you already have a sound idea what you are setting out to communicate. This calls for:

- i) a clear grasp of the *factual* background and the existing *law*;
- ii) a good understanding of the *policy* behind the legal change to be made;
- iii) a decision on the *options* available to give effect to that policy;
- iv) a preliminary view of what *items* need to be covered by the new legal rules;
- v) an outline *plan* of how the instrument should be *structured* to present the legal rules most effectively.

2. Provide a rational structure

Organise the contents of an instrument deliberately to reveal the basic structure and logical development of the legislative scheme and to make it as easy as possible for users to find what they may be looking for. This will be made more likely if:

- i) the *key features* of the legislation are prominent;
- ii) there is a *logical relationship* between the parts and the whole;
- iii) related matters are put into a *rational sequence* that emphasises the nature of their interconnection.

3. Follow the standard style of drafting

Follow the drafting practices in use in Nigeria ("the **house-style**") and in your treatment of the subject-matter, draft consistently with similar approaches in other legislation. Users' expectations have been formed by their past use of statutes. It is not for the trainee drafter to experiment or innovate. An opportunity for that may arise when you are in a position to influence the direction of your drafting service!

4. Use an effective writing style

You should aim to make your text as easy to read as possible. This means:

- i) write in *standard and grammatical English*;
- ii) address the issues *directly*;
- iii) use language that is *not pretentious or archaic*;
- iv) use sentence structures that are *not overloaded or complicated*.

5. Choose good presentation

Set out your drafts so that, when printed, the text is easy to work with, by ensuring that:

- i) plenty of "*white space*" appears on each page of the legislative text (i.e. the text is not densely packed);

- ii) sentences are *short*, or use *paragraphing* to display component parts;
- iii) longer instruments are *divided* into Parts or Divisions;
- iv) instructive *visual aids* are used, such as formulae, maps and diagrams.

6. Provide aids to finding and using

You can help users by providing devices which make it easier for them to find their way around the instrument. These can include:

- i) intelligent *section notes* (or side-notes/shoulder notes);
- ii) *helpful headings* for Parts, divisions and Schedules;
- iii) *road-maps* (i.e. provisions indicating where matters are dealt with in the Bill);
- iv) a *table of contents*/arrangement of sections;
- v) *footnotes* and marginal cross-references.

7. Check and scrutinise

As you complete each version of your draft instrument, look back at it through the eyes of someone coming to it for the first time. Once the Bill is in an advanced stage of drafting it is unlikely that you will have time to make radical alterations to its form and organisation, but there are always opportunities to make useful improvements.

This task is easier if you put your draft on one side overnight and come back to it the next day for a fresh look. These are some changes that you should consider:

- i) *break long sentences* into two or even more sentences, with the main topic in the first subsection, and the supporting elements in those that follow;
- ii) *format sentences* to make them easier to read quickly, e.g. by using paragraphing;

- iii) *reduce unnecessary detail*, by substituting broad terms or transferring the detail to definitions and interpretation provisions;
- iv) *remove superfluous words*;
- v) *substitute shorter expressions* for those that are unnecessarily long;
- vi) *substitute modern forms of expression* for archaic and obscure terms.

We shall work with all these techniques in the Courses that follow.

4.0 CONCLUSION

In conclusion, drafters should strive to produce instruments that are: easy to read and understand; short; unambiguous; and capable of being complied with.

5.0 SUMMARY

In this Unit you have been establishing a framework for the work to come on drafting skills and techniques. You now have a clear grasp of the qualities which well-drafted legislation exhibits and the principal ways by which Legislative Counsel can provide them. You should now be able to provide an overview of the principal characteristics of legislative drafting in Nigeria; establish the principal objectives for which drafters should work and the fundamental practices that are most likely to contribute to achieving them.

Read again through the questions discussed in this Unit. Are you satisfied that your work with them has enabled you to achieve the Unit's Objectives?

Do not expect to be able to use all that you have just learned when drafting new provisions. However, you should feel confident that you now know what it is that you should be endeavouring to put into practice when working on the later Courses. In particular, you should be able to recall the Seven C's and the seven principal approaches by which they can be secured. If you cannot, take time to confirm them by re-reading the appropriate parts.

Once you finally leave this Unit, you are unlikely to need to look back at the first three parts, as the ground is covered again in more detail later.

But there is much to be said for reminding yourself from time to time about your Drafting Objectives and the methods for achieving them. Consider making a check-list of them, which you can post close to your desk.

Now complete Drafting Project 1, which gives you an opportunity to apply some of the ideas mentioned in this Unit by asking you to recast a piece of legislation that fails to measure up to the standards examined in this Unit. That Project should reinforce the message which you should have received from this Unit.

6.0 TUTOR MARKED ASSIGNMENT

COMPLETE DRAFTING PROJECT 1

DRAFTING PROJECT 1

Damage by Rioters

Most legislative drafters would consider the following section (taken from a 19th century Act) to be poorly drafted by modern standards.

25. If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, or pull down or destroy, any church, chapel or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, barn, granary, shed or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned belonging to the State, or to any county, city, parish, or place, or devoted or dedicated to any public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or wind-mill or water-mill, or other engine or mill for the purposes of manufacture, or for making sugar, or for preparing coffee or other produce, or any building or erection used in conducting the business of such manufacture, or for the preparing of such produce, or any bridge, waggon, or truck for conveying any manufacture whatsoever from the place where it was prepared, every offender shall be guilty of an offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude¹ for life, or for any term not less than three years, or to be imprisoned for a term not exceeding two years, with or without hard labour.

¹ Penal servitude was a special regime of imprisonment, with more onerous conditions than ordinary imprisonment. Ordinary imprisonment could be ordered with the additional punishment of "hard labour". These features have now been abolished almost everywhere.

1. Give reasons (not more than 5) why the section might be considered to be poorly drafted.

2. Assume that you are to produce an improved version of this section (continuing its application to precisely the *same cases*) without altering the original level of specific detail. List the kinds of improvement you would make to remove the shortcomings you have just identified.

7.0 REFERENCES / FURTHER READINGS

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UNIT 3 IMPORTANCE OF GRAMMAR

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1.0 INTRODUCTION

Legislative drafting, as any other form of official writing, must respect the standard conventions relating to grammar and usage. There is no grammar that is exclusive to legislation. The way legislative sentences are structured and the way that words, expressions and parts of speech are used in them must reflect what is considered to be correct written English.

At the same time, as we saw in the last Unit, particular approaches have developed as to the way legislative sentences are written. If we are to examine these, we must use the correct technical expressions to describe what is involved (e.g. noun, verb, adjective, adverb, subject, object, modifier, and so on), and you need to be familiar with the way the concepts they refer to operate in a sentence.

This Unit does not set out to teach you grammar. This Course is written on the assumption that you are already familiar with good grammar and that you write grammatical English. So, the purpose of the Unit is to ensure that you are familiar with the language of grammar which we shall use in this Course. But it should help you to find out whether you need to do some preliminary work on the subject.

The Unit also draws attention to some common mistakes to which, in our experience, some trainee drafters are prone.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- i) explain the basic terms used to describe the features of grammar and the concepts to which they refer; and
- ii) avoid a number of common errors of grammar.

The amount of work you may need to put into this Unit will depend upon the extent to which you feel that you are competent in correct grammatical forms and in working with written English.

If this subject is largely unfamiliar to you (and this should become clear as a result of Self Assessment Exercise 1), time spent working through an elementary grammar will be fruitful. You will also need to study closely the Example Boxes in the Appendix, which explains the principal terms used in this Course. You will come across references to grammar and syntax in later Courses. That may be the time to remind yourself of what is entailed by referring to appropriate parts of this Course. In that way you can steadily build your familiarity with the conventions.

If you feel that you are already comfortable with sound grammar and the terms used to refer to particular grammatical features, you should be able to proceed quite quickly through this Unit. But do not persuade yourself that you are at home with the subject without having first worked on the Unit.

This topic may not seem to be central to legislative drafting. But in our experience, trainees' drafts, though containing sensible legal answers, are too often spoiled by shortcomings in grammar and syntax.

3.0 MAIN BODY

3.1 Is Grammar Important For The Drafter?

Drafters then must master the grammatical practices that are conventionally followed for official documents and avoid those that are considered to be errors in that context. Because legislation is especially formal, these conventions tend to be less flexible than in other settings, or at least compliance with them is routinely insisted upon. The requirements are commonly those we associate with traditional grammar.

3.2 What Do Drafters Need To Understand To Write Grammatically?

In order to write grammatically, we need to understand grammatical principles and especially *why* we should write in the particular ways dictated by those principles. The central component of all legislative text is the sentence. Drafters then must have a sound understanding of how sentences are correctly structured, i.e. the principles of syntax, in order to compose legal propositions that are grammatically exact. Accordingly, we must be comfortable with the function of subjects, predicates and objects, of nouns and pronouns, of modification (by adjectives and verbs), of phrases and clauses, of subordinate clauses, and their correct incorporation into sentences. This Course assumes that you are familiar with standard grammar and that you already use grammatical English in your professional work.

3.3 How Do We Find Out What Is Sound Grammar?

If you need to extend or refresh your understanding of what sound grammar entails, make the effort to consult a short primer for this purpose. (*The Reference* contains several suggestions.)

3.4 What Grammatical Terms Do We Need To Know?

When we are dealing with the writing of legislative sentences, we need to take account of features of grammar that are of particular relevance to drafters. So you need to know the terms that are in general use to describe those features.

**COMPLETE SELF ASSESSMENT EXERCISE 1 AND THEN
COMPARE YOUR ANSWER WITH ANSWER BOX 1 AT THE
END OF THIS UNIT.**

Self Assessment Exercise 1

Test your present knowledge of grammatical terms by the following exercise. If you have difficulties, you may find it useful to spend a little time working with this Appendix.

Read the following legislative sentence, and then underline at least one example of the following, adding the appropriate number:

1. the principal **predicate** in the sentence;
2. the grammatical **subject** of the sentence;
3. an **adjectival clause**;
4. an **adverbial phrase**;
5. an **active verb**;
6. an **auxiliary verb**;
7. a **conjunction**;
8. a **dependent (or subordinate) clause**;
9. an **indefinite article**;
10. an **infinitive**;
11. a **passive verb**;
12. a **preposition**.

Where a magistrate has dismissed a complaint and is of the opinion that the complaint was frivolous, he may, with the consent of the defendant, order the complainant to pay to the defendant a reasonable sum, not exceeding ₦10,000.00 as compensation for the expense to which the defendant may have been put by reason of the complaint.

In the Appendix to this Unit, we set out terms used in the Course, with a short explanation for each. If you are uncertain about a grammatical term used in the Course, consult this Appendix first.

READ THROUGH THE APPENDIX TO THIS UNIT.

3.5 What Common Grammatical Mistakes Should We Look Out For?

This Unit describes the most common mistakes that trainee drafters tend to make. At the end of the Unit, we provide a Checklist of these. Use this when checking your drafts, at least until you are confident that these mistakes are not occurring in your drafts.

i. The verb in a predicate is missing or incomplete.

Every legislative sentence must have a principal predicate that states what the subject of the sentence may do, must do, etc or how the subject is affected. Without a verb to state this, the rule is incomplete.

Example Box 1

A person who in a public park -

- (a) sells newspapers, journals or other publications;
- (b) lights a fire;
- (c) rides a bicycle; or
- (d) damages any property belonging to the park.

There is no principal predicate in this sentence. All the verbs in the paragraphs belong to the dependent clause beginning with "who" (which is spread over three paragraphs). There is no independent clause stating how the subject ("A person") is affected when engaging in any of the listed activities. The subject should be followed immediately by a verb, e.g. "commits an offence".

In the same way, if the sentence contains a dependent clause (e.g. "who rides a bicycle") or a subordinate clause, that clause too needs its own verb to complete the predicate in the clause.

Example Box 2

Where a police officer about to search a person, the police officer must conduct the search at a police station if requested by that person.

A verb is missing from the introductory subordinate clause (i.e. "is" should be added before "about"). On the other hand, the omission of a verb from the concluding *phrase* is acceptable practice; that is *not* a clause, which needs a subject and its own predicate.

ii. The verb does not agree with its subject in number

When the sentence subject is in the singular, the verb must be in the singular too. In the same way, a plural subject needs a verb in the plural.

Example Box 3

A transcript of the shorthand notes that have been taken of the proceedings at the trial of a person before the High Court *are* to be made if the court so directs.

The subject “transcript” is in the singular, as should be the related verb (“is”, not “are”). The relative clause (“that have been taken....”) modifies “shorthand notes” and therefore has a verb in the plural.

But certain words, though in a singular form, refer to collective cases (e.g. "committee", "Board", "Force", "Government"). Properly, these are linked to a singular verb, but drafters do use a plural verb in cases where they wish to emphasise that an action concerns the component parts, rather than the unit.

Example Box 4

If the Board *reaches* a unanimous decision, the Secretary must inform the Registrar immediately, but if the Board *are* not in agreement after one hour of deliberation, the Chairman shall adjourn the meeting.

A case that commonly causes inaccuracy concerns the word "none", when used as a subject. This word, which is a contraction of "no-one", is a singular word that requires a singular verb. A singular verb is needed too when "either or" or "neither nor" are used to distinguish two subjects both in the singular.

Similarly, the modifier “any” is properly attached to a singular noun that is accompanied by a singular verb.

Example Box 5

1. Members of the committee are to receive an attendance allowance, but *none* is entitled to the allowance if the meeting is adjourned for want of a quorum.
2. Neither the owner nor the occupier of land is liable to pay compensation.
3. No payment is to be made to any member of the Board who resigns from that office.

Note that in the last example, as in many cases, the indefinite article (here “an”) is usually preferred to “any”.

iii. A pronoun is vague or ambiguous or missing.

Pronouns (e.g. "he", "she", "him", "her", "it", etc.) generally refer back to a specific noun that appears in an early part of the sentence or in an earlier sentence. Uncertainty can arise if a pronoun is not provided when it is needed or if the pronoun does not clearly relate back to the noun intended. A pronoun is generally treated as referring back to the nearest appropriate noun, but that may not be quite what the drafter intended.

Example Box 6

1. The police officer shall require the driver to produce *his* or *her* driving licence at a police station, which *he* or *she* shall designate.

"his or her" clearly relates to the driver; but does "he or she" refer to the driver or the police officer?

2. A person commits an offence who, having come into possession of information that has been unlawfully acquired, fails to report *it* to the Commissioner.

What precisely is the person required to report - the fact of having come into possession of the information or the information itself?

iv. A modifier is misplaced or ambiguous.

English is such a flexible language that it is possible to put a modifier in several alternative places with a definite, but different, meaning in each. Inappropriate placing can produce unintended or even ambiguous results. Avoid two particular cases:

- a) where, because of its position in the sentence, the precise effect of the modifier is unclear (i.e. it is so loose that it could modify more than one expression);

- b) where the modifier could equally well apply to an expression before or after it.

Example Box 7

1. The Board may make a grant to any person from its general fund or from any of its other funds *with the approval of the Minister*.

Does the modifier "with the approval of the Minister" relate only to the second type of grant or to both types? It is ambiguous.

2. The police officer shall request the driver *within 24 hours* to produce his identity card and driving licence.

Does "within 24 hours" qualify the request or the production? It is ambiguous.

v. A preposition is incorrect or missing.

English has a large number of prepositions. Some of them by convention are linked to particular verbs (e.g. to comply *with*, rather than *to*, a regulation).

Several prepositions need to be used with precision; otherwise, ambiguous or unexpected consequences may follow. So, *before*, in relation to a date, covers any time *up to*, but **not including**, that date. Similarly, *after*, in relation to a date, covers time *subsequent to*, but **not including**, that date. Again, *between*, in relation to two numbers, means that both those numbers must be **left out of** the calculation.

In a legislative sentence where a verb is attached to a series of nouns by a preposition, it may be necessary to repeat the preposition before each noun to avoid ambiguity.

Example Box 8

1. Each council is responsible *with* providing litter bins *at* its area.

The correct prepositions are "for" and "in".

2. Applications for a dealer's licence are to be made *after* 1 January 1994.

This means that applications cannot be made earlier than 2 January.

3. A record is to be kept of all property belonging *to* the Police Force or a member of the Police Force or the Prison Service.

Does this apply to property of the Prison Service, or to the property of their members? Either "of" or "to" is required before that term.

vi. An article (definite or indefinite) is wrong or missing.

Most nouns carry an article. "The" (the definite article) is specific, usually indicating that the noun carrying it has already been used earlier or is known. The indefinite article "A" (or "an" before a word beginning with a vowel) is used where the noun does not relate to a specific case. If the article is missed out altogether, it may be unclear whether the noun is intended to be specific or unspecific.

However, the article is left out before a singular noun that is used unspecifically in the abstract (e.g. "food", "drink") or before plural words that refer to a class that is described in the plural (e.g. "cattle", "men").

Example Box 9

For the purposes of protecting *endangered animals* in areas prescribed as *designated areas* under section 10, an authorised officer who, in *a designated area*, finds a person doing anything which, in the officer's opinion, may harm or disturb *an endangered animal* may order the person to leave *the designated area*.

Articles are not needed for the first two expressions highlighted as they refer to classes expressed in plural terms. An indefinite article is needed for the next two expressions, as these do not refer to specific cases. But a definite article is required for the last as it refers back to a case just mentioned.

vii. Punctuation is incorrect.

Accurate punctuation in legislative sentences is important. This is discussed more fully in a later Course. Not only does it make sentences easier to read, but wrongly used it may confuse or even result in an unintended result. The following punctuation mistakes are among the most common. (An incorrect mark is shown by "[]"; a correct mark by "{ }").

- **a comma dividing subject from verb in a predicate.**

Example Box 10

A person who contravenes this section [,] commits an offence.

No punctuation mark should be used; the subject must not be separated from the predicate.

- **omission of a comma after an introductory clause or phrase.**

Example Box 11

In this Act{,} "dog" includes wolf.

A comma marks off the introductory words from the main part of the sentence.

- **omission of punctuation for dividing a compound sentence.**

Example Box 12

A person aggrieved by the decision of a council may appeal to the Minister{;} the Minister's decision is final.

A semi-colon indicates where two linked propositions in the same sentence are to be separated.

- **omission of the second comma at the end of an explanatory expression.**

Example Box 13

A person who drops litter, except into a litter bin{,} commits an offence.

The second comma indicates the end of a qualifying phrase that has been inserted into the sentence, here between the two parts of the subject-predicate.

- **adding an apostrophe in the possessive "its".**

Example Box 14

The chairman of the Board shall convene the meetings of {its} [it's] members.

"it's" is a colloquial abbreviation of "it is", not a possessive; it is never used in legislation.

- **no comma, or an unnecessary comma, in a series of words.**

Example Box 15

In this Act, "animal" means a cat{,} dog{,} sheep{,} goat[,] or cow.

A comma is not usually provided immediately before the conjunction (here "or") in a series.

3.6 Grammatical Checklist

This Checklist summarizes the common mistakes we have just examined. Use it as a reminder of grammatical flaws you should avoid. As an extra reminder, each question in this Checklist is written to illustrate the case with which it is concerned.

1. Is the verb in every predicate complete?
2. Does every verb agree with its subject in number?
3. Are all pronouns present, and are they unambiguous?
4. Are all modifiers placed accurately in the sentence so that none gives rise to ambiguity?
5. Are all prepositions correct and in the places they should be?
6. Are the articles (definite and indefinite) all present and correct?
7. Is all the punctuation correct? In particular:

- (a) have you ensured that no comma separates[,] the subject from its verb?
- (b) where there are introductory clauses and phrases, have you added a comma at the end of each?
- (c) have you added a comma between the principal predicates of compound sentences, or did you use a semi-colon?
- (d) have you, at the end of an explanatory expression that begins with a comma, added a second comma?
- (e) is the possessive in its correct form, i.e. without an apostrophe?
- (f) have you added commas after each word, term or expression in a series, except immediately before the final conjunction?

3.7 Appendix: Grammatical Terms and Usage

The following notes are designed principally to provide a reminder, and reference source, about the terms commonly used in relation for English grammar and their proper usage.

A. Some basic terms

grammar: the rules and practices governing the use of language and the relation between words as they are used in speech and writing in a language.

syntax : the arrangement of words in sentences.

Sentence : a set of words, grammatically complete, expressing a statement of some kind. It always has a grammatical **subject** and a **predicate**. A legislative sentence always begins with a Capital letter and ends with a full stop.

subject : the person or thing about which the sentence makes a statement. It takes the form of a **noun** or **pronouns**, to which descriptive **modifiers** may be added.

Predicate: makes a statement about the subject (e.g. what the subject does, is or may or must do). It therefore contains a **verb**.

noun : a word that names or identifies a person, place, concept,

act or thing.

pronoun : a single word that refers to a noun (often the **subject** or a person or thing) that has been earlier mentioned, and is used as a substitute for it.

modifier : a **word**, **phrase** or **clause** that limits the scope of the word, phrase or clause to which it is attached.

verb : a word or group of words that expresses the action or state of the **subject**.

clause : a distinct part of a **sentence** that contains a **subject** and a **predicate**.

phrase : a small group of words that functions as a unit but lacks either a subject or a verb or both.

Example Box 16

The following **sentence** is analysed below.

When a magistrate commits an accused person for trial before the Supreme Court and a sitting of the Supreme Court is in progress, the magistrate, with the consent of the Director of Public Prosecutions, may commit the accused person for trial on such day during that sitting as he shall fix.

Examples of each of the features just mentioned are shown below. Not every one is identified (e.g. the **subject** and the **predicate** of the **clause** are not shown).

clause = When a *magistrate* [= **noun**] commits *an accused person* [= **modified noun**] for trial before the Supreme Court and a sitting of the Supreme Court is in progress,

subject = the magistrate

phrase = , with the consent of the Director of Public Prosecutions,

predicate = *may commit* [= **verb**] the accused person for trial on such day during that sitting as *he* [= **pronoun**] shall fix.

B. Terms used with respect to sentences

Compound: a sentence that contains two or more **principal clauses** that **sentence** : are linked by a **conjunction** (e.g. "and" or "or").

Principal a clause that contains the main **subject/predicate** of the **clause** : sentence.

Dependent a clause that supplements and is subordinate to a **principal** or **subordinate clause**. It usually explains conditions or circumstances in **clause** : which the **principal clause** takes effect or it lays down limitations, exceptions or qualifications to it.

Example Box 17

The following is an example of a **compound sentence**.

Where an examining magistrate has begun to enquire into an offence, he may adjourn the hearing at any time and, if he does so, he shall remand the accused person.

subordinate clause = Where an examining magistrate has begun to enquire into an offence

principal clause = he may adjourn the hearing at any time, and [= **conjunction**]

second subordinate clause = if he does so,

second principal clause = he shall remand the accused person.

C. Terms used with respect to nouns

article : a form of **adjective** to particularise a **noun**. The most common are the **definite article** "the" and the **indefinite article** "a" or "an" (before a word beginning with a vowel).

relative a **pronoun** linking a **dependent clause** to the rest of the **sentence pronoun** : (e.g. "which" or "who").

Example Box 18

The following **sentence** includes these terms, although not all cases are identified.

A [= **indefinite article**] person *who* [= **relative pronoun**] is charged with treason shall not be admitted to bail except on *the* [= **definite article**] order of a *Judge* [= **proper noun**].

D. Terms used with respect to verbs

- active voice :** a **verb** that indicates that the **subject** is acting rather than being acted upon. It often has an **object**, i.e. the thing that the **subject** acts upon.
- passive voice:** a **verb** that indicates that the **subject** is acted upon rather than acting. It is often followed by a **preposition** and a **noun**, e.g. stating the person or thing *by* which the subject is acted upon. It is always made up by an auxiliary verb from the verb *to be*, followed by the past participle of the main verb.
- object :** a **noun** or **pronoun** that is affected by the action in an **active verb**.
- infinitive :** the basic form of the **verb** which is not attached to any **subject**. It normally begins with "to".
- Auxiliary** a **verb** that combines with the basic form of another **verb** to **verb**:express the **tense** of the latter. (e.g. "may", "shall", "is", "has").
- tense :** the form a **verb** takes to indicate the time when it has effect (e.g. in the past, present or future).
- Participle :** an adjective made from a **verb**. It may be a **present** or a **past participle** (e.g. "receiving"; "received"). It can be added to an auxiliary verb from *to be* to make a verb in the **present** or **passive voice** (e.g. "is receiving"; "has received").

Example Box 19

The following **sentence** includes examples of the use of these terms.

A person who has been committed for trial by a magistrate and who wishes to plead guilty shall serve a notice upon the Registrar; section 25 applies with respect to that person as if that person were committed for sentence.

A person who

[**verb in passive voice and past tense** =] *has been* [= **auxiliary verb**] committed [= **participle**] for trial
by [= **preposition**] a magistrate

and who

[**verb in active voice and present tense** =] *wishes to plead*
[= **infinitive**] guilty

[**verb in imperative mood** =] *shall serve a notice* [= **object**] upon the Registrar;

section 25 *applies* [= **indicative mood**] with respect to that person as if that person *were committed* [= **subjunctive mood**] for sentence.

E. Terms used with respect to modifiers

adjective : a word that explains, describes or qualifies a **noun**, giving it a more precise or limited meaning.

adjectival noun.
phrase : a **phrase** that explains, describes or qualifies a

adjectival noun.
clause : a **clause** that explains, describes or qualifies a

adverb : a word that explains, describes or qualifies how a
verb takes effect, giving it a more precise or limited meaning.

adverbial verb.
phrase : a **phrase** that explains, describes or qualifies a

adverbial clause : a **clause** that explains, describes or qualifies a **verb**.

Example Box 20

The following **sentence** includes examples of the use of some of these terms.

A magistrate *before whom an application for bail is made* [= **adjectival clause**] may require the *accused* [= **adjective**] person to bring before him persons *willing to enter into recognisances on behalf of the accused* [= **adjectival phrase**], *as soon as practicable* [= **adverbial phrase**].

F. Miscellaneous terms

preposition : a term which links a **noun** (or **pronoun**) with another expression, indicating a particular relationship (e.g. of time or space) between them.

conjunction : an expression that links words, **phrases**, **clauses** or **sentences** (e.g. “and”; “or”).

number : the form of a **noun**, **pronoun** or **verb** which indicates whether it is in the singular or the plural.

Example Box 21

In the following **sentence** -

An award of compensation or damages to a complainant under this Act releases the defendant from all other civil proceedings for the same cause.

the following are **prepositions**: *of, to, under, from, for*;

the following is a **conjunction**: *or*;

and the form of the **subject** of the sentence (“*an award of compensation or damages*”) is in the same **number** (singular) as the **verb** by which it is affected (“*releases*”).

Answer Box 1

1. the principal **predicate** in the sentence =
he may, with the consent of the defendant, order the complainant to pay to the defendant a reasonable sum, not exceeding ₦10,000.00 as compensation for the trouble and expense to which the defendant may have been put by reason of the complaint.
2. the **grammatical subject** of the sentence = *he*
The pronoun refers back to "*magistrate*", which becomes in practice the subject of the sentence.
3. an **adjectival clause** = *not exceeding ₦10,000.00*
4. an **adverbial phrase** = *with the consent of the defendant*
5. an **active verb** = *has dismissed; may order; was*
6. an **auxiliary verb** = *has; may; may have been*
7. a **conjunction** = *and, that, to which*
8. a **dependent (or subordinate) clause** =
Where a magistrate has dismissed a complaint and is of the opinion that the complaint was frivolous,
9. an **indefinite article** = *a, an*
10. an **infinitive** = *to pay*
11. a **passive verb** = *may have been put*
12. a **preposition** = *to, for, of, with, by reason of.*

You may wish to repeat the **Exercise** to confirm that you no longer have any of the uncertainties that you may have experienced when you first completed it. This will help ensure your familiarity with grammatical terms.

4.0 CONCLUSION

We conclude that there is no grammar that is exclusive to legislation. The way legislative sentences are structured and the way words, expressions and parts of speech are used, must reflect what is considered to be correct written English. Drafters then must have a sound understanding of how sentences are structured..

5.0 SUMMARY

Your work in this Unit should have brought home to you the importance of following prevailing conventions relating to grammar and syntax. You should be more aware of the kinds of mistake that you need to watch out for and where to look if you are uncertain about standard practice.

In particular, at the end of this Unit, you should now be able to explain the basic terms used to describe the features of grammar and the concepts to which they refer; and avoid a number of common errors of grammar.

Read again through the questions you have considered in this Unit. Are you satisfied that you have met the Unit Objectives?

The Example Boxes in this Unit illustrate many of the required features of sound grammar and syntax. If you have not done so already, use these to confirm your understanding of the correct way to put the rules of sentence structure into effect.

You may not have all the terms examined in this Unit at your finger tips. Don't feel that that is necessary, as long as you are reasonably sure about most of them. When you come across any of the terms again in later Courses, ask yourself whether you know what function it performs. If you are unclear, then check the matter in this Unit. Similarly, if in working with later Courses you do not understand why a particular grammatical point is made, check this matter too by reference to this unit or a standard work on grammar.

In the Drafting Projects keep in mind the questions in the Checklist of common mistakes. If you make a practice of looking for these when you scrutinise your drafts, you will soon find that you automatically avoid falling into them.

You should find that your work in this Unit contributes to your understanding of the Course on Legislative syntax & expression later on.

6.0 TUTOR MARKED ASSIGNMENT

Each of the following statements has a grammatical flaw that makes its meaning ambiguous. Each has two possible meanings. Rewrite the 5 statements setting out both of the alternative meanings, but so that neither is ambiguous. This means that you must give two different answers with respect to each statement. Make only such changes to the original wording as are needed in order to remove the ambiguities. If one meaning is obviously that intended, put it first.

1. A person owning a motor vehicle who fails to register commits an offence.

(1)

(2)

2. Persons engaged in a registered business of share-dealing, financial advising or selling real property shall make the prescribed return.

(1)

(2)

3. The Board may make a grant to any person from its general fund or from any of its other funds with the approval of the Minister.

(1)

(2)

4. When charged with a criminal offence, an Inspector of Police shall notify the nearest relative of the arrested person.

(1)

(2)

5. Every dog must be under the control of it's handler with a chain attached to a collar around the neck.

(1)

(2)

7.0 REFERENCES / FURTHER READINGS

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UNIT 4 DRAFTING OFFICE

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1.0 INTRODUCTION

Lawmaking is the heart of a nation's democracy. It represents the expression and reflection of a Country's understanding and acceptance of democracy. Where a nation is governed by laws, it can be assumed that the laws are held in high esteem, being the fabric which holds the State together. It follows that those who prepare the laws (just like those who debate them) must be given the necessary tools to work with and the requisite comfort.

2.0 OBJECTIVES

By the end of this unit you should know the requirements of a drafting office, how to organize it and also the importance of a drafting office. The level of provision of infrastructures for a drafting office reflects how important the office is regarded in the scheme of things.

3.0 MAIN BODY

3.1 Importance Of A Drafting Office

Just like the importance attached to a legislative chamber where members of the legislative house debate and pass Bills, the office of the legislative drafter and counsel is also of immense importance.

The office of the legislative drafter must be separate and distinct and adequately equipped with the required facilities. An expanded federation like Nigeria with 36 States, each with its legislative house and bicameral legislative chambers for the federal government, requires a large number of drafters and legislative counsel.

Except deliberate efforts are made to retain the services of existing drafters and to attract new ones into the fold, the legislative houses may suffer shortages of experienced and competent drafters. The implication and consequential effects of such shortages can be rather imagined. The few available may find themselves over-worked with adverse consequential effect on their performance and the quality of legislation to be found in our statute books.

Apart from the attendant confusion, bad drafting may open the floodgate of litigation. A legislation that is badly drafted will leave the people it is to administer with avalanche of troubles and litanies of woes.

3.2 Requirements of a Drafting Office

Note that a poor working environment can impair job satisfaction and lead to rapid depletion of personnel.

In a democratic set-up with separation of powers, drafting service is provided at two levels viz: the legislative and the executive levels. This is because the legislature can introduce bills on their own through a sponsored member's bill or one comes from the executive. This process applies at all three levels of government i.e Federal (National Assembly), States (House of Assembly) and Local government (Legislative Council).

The need of each State for drafting service at two levels (State House of Assembly level and State Ministry of Justice level) could be stressful on the little skilled manpower available within the country.

Since law or legislation constitutes the hub of the nation, little need be said of the importance of infrastructures, which must be put in place to create the enabling environment to facilitate the drafters in efficient performance of their work.

Apart from providing adequate facilities and very good working condition for the drafter, a good drafting office must satisfy a number of requirements.

- (i) Personnel: This can be divided into two.
 - a. Legal Personnel – these are the core of experienced drafters and group of understudies.
 - b. Clerical Personnel – these should be efficient and able to cope with overtime work without disrupting regular office schedule.
- (ii) The Office: A good office allows for concentration which is vital in the drafting process. Each drafter ought to have privacy and freedom from interruptions. The entire physical infrastructure which goes with an office must also be provided. The furniture must be standard and the cooling system adequate and efficient.
- (iii) Conference Room: This is necessary for regular meetings of drafters. Drafting offices normally consist of a reasonably large team of usually not less than twenty lawyers. Therefore it is normal to have a conference room where the drafters and legislative counsel can hold conferences, seminars and meetings which are sometimes necessary in the efficient performance of their job.
- (iv) Information Technology: A drafting office must be equipped with modern technological facilities. Each drafter must be computer literate and have a computer to work with. The office should be automated with modern telecommunication facilities such as a digital telephone and Internet, e-mail facilities, photocopying machine, etc.
- (v) Well-Trained Supporting Staff: These include secretaries, clerks, office assistants, editors, etc. The staff strength depends on the size of the office and the volume of work. Staff members are employed either as employee of the public service; on contractual basis; full-time; part-time; or secondment.
- (vi) Library: A good library is an essential aid to the drafter. The drafting office must have a well-stocked library. A large collection of precedent books including standard precedents from other jurisdictions should be provided on the shelves. Texts on legislative drafting should form part of the collection. The drafters must have direct access to all laws of the country whether Federal or State laws to enable them work efficiently. The library

must have law reports, law journals, periodicals and standard legal and legislative dictionaries.

It is essential that the library is fully computerized so that the drafters right inside their different offices can access the library through their computers.

3.3 Organising a Drafting Office

Majority of drafting offices worldwide are attached to the various parliaments or Ministry of Justice as the case may be. Canada and Nigeria are good examples of this. However, in countries like United States of America and United Kingdom, the office (of the parliamentary counsel) is independent. Where the office is attached to the Parliament and Ministry or Department of Justice, like the case of Manitoba Drafting Office in Canada, drafters of the office draft both government (executive) and private members' bills.

In Nigeria, the Drafting department attached to the Federal Ministry of Justice is only responsible for drafting government bills. Similarly, the Drafting departments attached to the various States' Ministry of Justice only handle government bills.

Also the Legal Services department of the National Assembly assists in amending government bills. It is also responsible for putting finishing touches to government bills for onward transmission to the President for his assent. The Department equally drafts Members bills and private members' bills.

Similarly at the State level, the Legal department attached to the various States' House of Assembly is responsible for drafting Members' bills and Private members' bills. They also put finishing touches to government bills for onward transmission to the Governor for his assent.

Reporting Structure

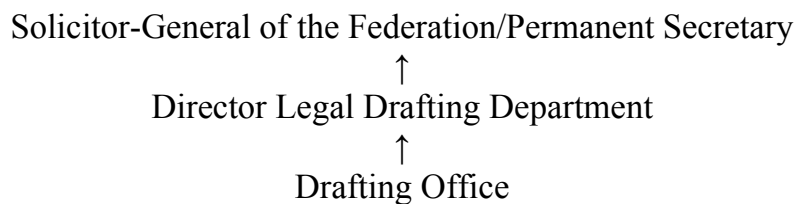
In some legislative drafting offices, the Chief Legislative Counsel is the head. He supervises the staff and reports to the Assistant Deputy Attorney General (Legal Services branch) administrative and to the Deputy Attorney General on the legislative programme (Canadian reporting structure).

In Nigeria, the drafting offices attached to the Federal Ministry of Justice and the States' Ministry of Justice are headed by Directors. They report to the Permanent Secretary and Solicitor-General of the

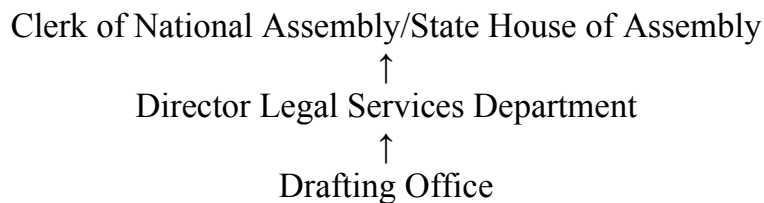
Federation (at the federal level) or to the Permanent Secretary (at the state level).

Also, the Drafting offices (Departments) attached to the National Assembly or State Houses of Assembly are headed by Directors. They report to the Clerk of the National Assembly or of the State House of Assembly as the case may be.

Reporting Structure Federal/State Ministry of Justice



Reporting Structure National Assembly/State Houses of Assembly



Qualification of Drafters

The following are qualities required of legislative drafters.

- (i) Law Degree
- (ii) Member of the Bar
- (iii) Any formal drafting training or apprenticeship programme
- (iv) Any special skills, such as linguistic capabilities or computer training.

3.4 Drafting Instructions

Drafting instructions are received in the form of - memoranda to cabinet, draft bills or request by members of the legislature.

Authority to draft bills can come in different forms and could come in any of the forms above. This will be considered in detail in the next course.

3.5 Functioning of the Drafting Process

Drafters consult with instructing officers by phone, at meetings and through exchange of annotated drafts.

In some jurisdictions, instructing officers are present throughout the drafting process. In other jurisdictions, the presence of the instructing officers depends on several considerations. These are, the nature, complexity and urgency of the bill; whether the policy is well defined and what stage the drafting is. Sometimes their presence would be determined by the drafters, officers' preferences, workload and schedule.

In some jurisdictions, drafters work alone but may be supervised by senior drafters. In Nigeria, legislative drafters work as a team.

4.0 CONCLUSION

In conclusion, a well equipped drafting office is a pre-requisite to having good laws being drafted. If laws are good laws, the citizens easily obey them and this makes the members of the society live in an atmosphere of peace and tranquility which creates development.

5.0 SUMMARY

In this unit you have learnt the importance, requirements and organisation of a drafting office. You should now be able to evaluate the situation in Nigeria to see whether these requirements are being met.

6.0 TUTOR MARKED ASSIGNMENT

How are the requirements of a drafting office being fulfilled in your State?

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