

**Introduction to Legislative  
Drafting - The Qualities,  
Qualifications & Role of a Legal  
Draftsperson  
By**

**Prof Paul Idornigie, SAN, PhD,  
FCI Arb, Chartered Arbitrator  
Abuja  
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# Outline of Presentation

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- Introduction
- Who is a Draftsperson?
- What is Legislative Drafting?
- Legislative Drafting v Legislative Process
- Qualification/Qualities of a Draftsperson
- Role & Responsibilities of a Legal Draftsperson
- Concluding Remarks

# Introduction

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- I would like to thank the National Institute for Legislative Studies (NILDS) and the Konrad Adenauer Stiftung for inviting me to make this presentation.
- In a democratic dispensation, legislative drafting is a major instrument for the regulation of the economy, administration of justice and advancement of democracy
- Unfortunately, some bills coming out of the National Assembly - especially the private members' bills, have not met international best practice - the basic rules (7C's) - see the ADR Bill, 2019

## .....Introduction

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- In the case of government or executive bills, a more thorough job is usually done at the level of the relevant MDAs and the Ministry of Justice before the approval of the FEC and transmission to the NASS - see Reform Bills from BPE
- Unfortunately as there is no sufficient interface between legislative drafting and legislative process, much damage is usually done to the bills at the NASS even after a public hearing - see Arb & Con Bill
- Incredibly, there is a dearth of government bills in the NASS
- I believe that in a training programme of this nature, attention will be focused on this deficiency

## .....Introduction

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- In this presentation, therefore, we will also focus attention on who is a legal draftsman, what is legislative drafting, the qualifications, the qualities, role and responsibilities of a legal draftsman
- Similarly, why government bills are treated like 'orphans' in the National Assembly (NASS) should be interrogated.
- Why do private members' bills move faster than government's?
- I know government bills like the Ports & Harbours Bill that have been in the NASS since 2002!!!

# Who is a Draftsperson

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- By virtue of our legal training especially undertaking a course on Legislative Drafting and Conveyancing, every lawyer assumes that he or she is a draftsperson
- Historically, the office of the legislative drafter developed in the UK in 1869 using the name of Parliamentary Counsel
- Prior to this, Acts of Parliament were drafted by judges and Privy Councilors many of whom were members of Parliament
- Drafting legislation is the task of the drafter who is also known as legislative drafter, legal draftsperson or parliamentary counsel, depending on the jurisdiction

## ..... Who is a Draftsperson

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- A legislative draftsperson is therefore a person, after appropriate training and experience, engaged essentially in drafting of bills for the legislature at whatever level of government.
- The power of the legislature to make laws shall be exercised by bills passed and generally assented to by the Executive (ss 58 & 100, CFRN, 1999, as amended)
- This underscores the importance of bills.
- In Nigeria, legislative draftspersons are employed in the Ministries of Justice, the National Assembly and State Houses of Assembly though quite a few are in private legal practice

# What is Legislative Drafting?

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- Legislative drafting like any other form of legal drafting is an institutionalised means of communication.
- The essential distinction is that unlike other forms of legal drafting, eg commercial contracts, which may be easily altered or changed, legislative drafting is more of a permanent enactment which stands on its own and speaks for itself without any form of assistance, elucidation or explanation from the drafter or draftsman
- Thus, the legislative drafting process may be said to begin with the receipt of drafting instructions and ends with completion of the draft.
- For there to be a legislative drafting, there must be a legislative draftsperson.

## .....What is Legislative Drafting?

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- It is a form of advanced legal writing which only entails the drafting of legislation
- It is the process by which a legislative proposal is put in a bill form ready for presentation to the Parliament for passage into law
- As in every field, legislative drafting has its **basic rules** that must be observed in order to achieve the objective set by the clients or policy makers
- It is the duty of the draftsman to try as much as possible to adhere to these **basic rules** - The Seven C's of legislative drafting

## .....What is Legislative Drafting?

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- Under these rules, the principal objective of a drafter should be to
  - ✓ **Communicate** - convey the policy maker's intention
  - ✓ **Clear** - using direct, plain and modern language
  - ✓ **Comprehensible** - to the person to whom addressed
  - ✓ **Concise** - no unnecessary repetitions
  - ✓ **Complete** - covering all reasonably foreseeable circumstances
  - ✓ **Consistent** - using the same style throughout, same words, meaning
  - ✓ **Certain** - those affected to know the extent of their duties, etc

## .....What is Legislative Drafting?

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- According to Crabble - legislative drafting is a means of communication -

**An Act of Parliament expresses legal relationships. It is a form of communication. It lays down our rights and obligations, our powers, our privileges and our duties. It is a command or series of commands in many respects. It should not admit of a misunderstanding as to the message that it seeks to convey. It is part of the literature of the people. It will be understood in the same way as language of the jurisdiction is understood. And our aim is that an Act of Parliament should be drafted in accordance with the principles that govern language as a means of communication in our respective jurisdictions.**

# Legislative Drafting v Legislative Process

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- Dr Kole Abayomi explains the difference thus:
- The drafting process begins when formal instructions are given by the sponsor of the legislative proposal to the legislative draftsman and ends when he puts them in the usual form under our jurisdiction usually called Bills before the legislative body
- The legislative process then begins upon the receipt of the Bill by the appropriate body through the various stages it must go through beginning from the first reading till the Bill receives the Assent of Mr President (see ss58 & 100 of the CFRN, 1999)

## .....Legislative Drafting v Legislative Process

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- While the drafting process requires adequate legal drafting skills, the legislative process is more related to constitutional and legislative rules and orders
- Similarly, while the personnel required for the drafting process are professionals - private and public officers, the personnel required for the legislative process are politicians from diverse backgrounds whose basic qualifications may be schooling up to school certificate level (s318(1) CFRN, 1999, as amended)!!

## ....Legislative Drafting v Legislative Process

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- I believe in the principle of separation of powers but how can we ensure that the quality of the bills is sustained against the background that the Legal Drafting Department of the National Assembly is only involved with the bill after the concurrence of the two chambers?
- How can the Legal Drafting Departments of the Ministries of Justice collaborate with the Legal Drafting Departments of the Legislatures to ensure that the enactment is what was intended?

# Qualifications & Qualities of a Draftsperson

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- In addition to a law degree and a postgraduate diploma or degree in legislative drafting, the draftsperson should have sound knowledge of:
  - ✓ Constitutional Law
  - ✓ Statutory law - Treaties (Making.....) Act, Legislative Houses (Powers & Privileges, Act, etc
  - ✓ Rules & Procedure of the Parliament
  - ✓ Rules of interpretation and procedural laws adapted by the courts as well as judicial decisions
  - ✓ The custom and usage having the force of law in the jurisdiction
  - ✓ Arts, Social Sciences and Natural Sciences

## ..... Qualifications & Qualities of a Draftsperson

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- The qualities include possession of good command of English language
- The draftsperson should also be able to communicate effectively with precision and in simple, clear and precise English language.
- He must be patient, meticulous, analytically minded, critically minded, and research-driven.
- He must be familiar with the interrelationships of the various departments of government; and a good knowledge of the political, sociological, psychological and economic system/society of which he is drafting the law.

## ..... Qualifications & Qualities of a Draftsperson

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- He must develop interest and flare for the subject of legislative drafting and exhibit a high sense of tolerance, commitment and dedication in the drafting process.
- He must be ready to carry out researches; and must know where and how to find the law.
- He must be a very simple and humble person with a good spirit of team workmanship.
- He must be committed and fully devoted to his work as a legal draftsman.

## ..... Qualifications & Qualities of a Draftsperson

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- He must have the ability to work under pressure.
- Have a clear mind and mental capacity to draft laws.
- Ability to understand policy issues
- He should be able to work with little supervision and exhibit willingness to accept criticisms in good faith
- Good knowledge of politics, sociology, psychology and time management

# Role & Responsibilities of a Legal Draftsperson

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- The main role and responsibility of a legal draftsperson starts with the drafting process - receives the drafting instruments from instructing officers or sponsors and ends when the draft Bill is completed ready for presentation to the legislative house.
- Responsibility for formulating policy for new legislation and deciding upon the institutional and administrative arrangements and financing is normally that of the relevant Ministries, not that of the draftsperson
- **The draftsperson translates policy into legislation but cooperation is critical**

## ..... Role & Responsibilities of a Legal Draftsperson

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Thornton classifies the drafting process into five stages, namely:

- ✓ **Understanding the Drafting Instructions**
- ✓ **Analysing the Drafting Instructions received**
- ✓ **Designing the outline - the layout**
- ✓ **Composition of the draft**
- ✓ **Scrutiny and testing**

## .....Understanding the Drafting Instructions

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- In some developed jurisdictions, the law or convention or practice stipulates clearly the exact form and substance of what a sponsoring agency must state in its brief regarding legislative proposals being sent to the draftsman
- This applies essentially to government bills
- According to Thornton, drafting instructions will be of great assistance if the drafting instructions provide adequate information on the following;

## .....Understanding the Drafting Instructions

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- ✓ Sufficient background information
- ✓ Principal purposes of the law proposed
- ✓ Principal means by which to achieve those purposes
- ✓ The impact of the proposals on existing circumstances and law
- Meetings or conferences before and after the receipt of the drafting instructions are important and necessary
- In case of doubt, the draftsman should continue to seek clarifications of the instructions

## .....Analysing the Drafting Instructions Received

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- We have stated that a draftsman should be research-oriented
- This is the research phase of the exercise
- In ascertaining the purpose of the law to be drafted, the draftsman subjects the instructions to careful analysis in relation to **existing laws, potential danger areas and practicality**
- The starting point at this stage is the existing laws - enactments, common law and case law including comparative laws

## .....Existing Laws - consider the following and determine if you need a new law

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- **Data Protection Bill** - data collecting and processing agencies - **INEC, NPC, NPF, CBN, NIS, FRSC, NIMC, NCC, NITDA**
- **Proceeds of Crime Bill** - asset management agency or management and prosecutorial powers - consider the United Nations Convention Against Corruption (UNCAC), 2003, National Action Plan (NAP) of the Open Government Partnership (PGP) - conviction-based or non-conviction based provisions - Advanced Free Fraud & Other Related Offences Act, Corrupt Practices & Other Related Offences Act, EFCC Act, NDLEA Act, Customs & Excise Act, Failed Banks (Recovery of Debts) & Financial Malpractices in Banks Act, Trafficking in Persons (Prohibition) Enforcement & Administration Act, etc

## .....Analysing the Drafting Instructions Received

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- The Constitution is supreme
- Nigeria is a federal structure - must be borne in mind
- Powers are shared by the three arms of government
- The legislative powers are shared between the federal and state governments - the exclusive and concurrent legislative lists - residual for the states
- Chapter Four of the Constitution is sacrosanct - fundamental rights are guaranteed
- No retrospective criminal legislation
- Consider whether the enactment can be effectively executed - enforceable

## .....Designing - the legislative plan

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- According to Thornton, the first step here is to consider whether further legislation is in fact necessary or whether the desired ends might not be capable of achievement wholly or partly either by administrative means or under existing legislation
- If a legislation is enacted that is not needed, that is a clear waste of time and therefore money and swells the volume of statute book unnecessarily.

## .....Designing - the legislative plan

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- If a new legislation is imperative, its structure must be designed taking into account the drafting convention of the jurisdiction
- At this stage, the draftsman creates a skeletal concept of the law which will be developed further - like the drawings of an architect which forms the basis of the building plan on which the contractor uses to build
- In drafting it is called a **legislative plan**

## .....Designing - the legislative plan

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- Most bills drafted in Nigeria have four main segments arranged in the following logical order, depending on the nature of the bill:
- **Preliminary Matters** - long title, preamble, short title, enacting clause, application, interpretation, etc
- **Principal Matters** - substantive and administrative provisions - establishment of a statutory body, memberships, functions, finance,
- **Miscellaneous Matters** - offences, penalties, regulations, rules
- **Final Matters** - transitional provision, savings, repeal, schedule

## .....Composition of the Draft

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- According to Adem, composing the text of a bill is some form of a science
- Like all forms of science, it has been developing
- A drafter 'composes' the same way a musician composes, a poet and an author writes his work to get across to his audience - making of language from series of words
- Modern drafting emphasizes simplicity, lucidity and intelligibility

## .....Composition of the Draft

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- The draftsman will find great assistance in the use of precedent books specifically written for the purpose of drafting legislation
- Local statutes on the same subject matter within the same common law jurisdiction often provide a good guide
- Can we copy and paste from another jurisdiction especially where a similar bill has been enacted?
- Precedents and copying and pasting must be done with caution

## .....Composition of the Draft

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- According to Imhanobe, legislations are no longer meant for the understanding of lawyers only, other users of the legislations, most of whom are non-lawyers, want to understand the legislations that govern them without recourse to lawyers

## .....Scrutiny & Testing

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- This is the last stage of the drafting process
- At this stage, the draftsman seeks excellence and perfection by calling on an independent colleague to take a look at the draft
- An independent mind can quickly detect serious and not too serious drafting faults
- Sharing the draft does not mean that the colleague is brighter or better
- Critical question: Have we observed our Seven C's?

## Concluding Remarks

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- Legislative drafting, like any other form of legal drafting, is an institutionalised means of communication.
- The essential distinction is that unlike other forms of legal drafting which may be easily altered or changed, legislative drafting is more of a permanent enactment which stands on its own and speaks for itself without any form of assistance, elucidation or explanation from the drafter or draftsman
- Care should be taken, therefore, in drafting a bill

## ..... Concluding Remarks

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- Legislative drafting lays down our rights and obligations, our powers, our privileges and our duties.
- It is a command or series of commands in many respects.
- It should not admit of a misunderstanding as to the message that it seeks to convey.
- Although resort can be had to legislative aids like marginal notes and interpretation act, it should be comprehensive and comprehensible

## ..... Concluding Remarks

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- One of your challenges is ensuring that the instructions that you received is well understood, analysed, designed, composed and translated into an enforceable bill
- At the end of the exercise, we should ask ourselves the relevant questions - the Seven C's - **communicated - clearly, comprehensibly, concisely, completely, consistently and with certainty?**
- Thank you for your attention.

# THE END

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BEING A PRESENTATION AT THE CAPACITY  
BUILDING FOR THE DEPARTMENT OF LEGAL DRAFTING,  
FEDERAL MINISTRY OF JUSTICE, ABUJA: JULY 2-3,  
2021

Email: [prof@paulidornigie.org](mailto:prof@paulidornigie.org)

Web: <https://paulidornigie.org>

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