

**Title:** The Drafters' Dance: the complexity of drafting legislation and the limitations of 'Plain Language' and 'Good Law' initiatives

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**Abstract:** Can we provide legislative drafters with tools to simplify and clarify legislation, and make it more accessible? In the UK, USA, Canada, Australia and EU, through strategies such as the 'Plain Language' and 'Good Law' (PL/GL) initiatives, it is claimed that the answer is 'yes'. Though many of the normative intentions underlying such initiatives are commendable, we argue that the pursuit of legislative and legal simplicity, clarity, and accessibility ignores the distinctly 'complicated' and 'complex' role of legislation and legislative drafters. This leads to a range of contradictory and paradoxical outcomes that undermine these goals. Following a review of the role of legislative drafters and PL/GL initiatives, we use a complexity tool, the Stacey Diagram, to demonstrate and visualise the inherent tensions in the PL/GL position. We show how legislative drafters negotiate their complex environment in a much more subtle, human way than is commonly recognised in PL/GL discourse.

**Key words:** Complexity theory; legislative drafting; plain language; public policy; rule of law; Stacey Diagram

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# **The Drafters' Dance: the complexity of drafting legislation and the limitations of 'Plain Language' and 'Good Law' initiatives**

Thomas E. Webb and Robert Geyer \*

## **Introduction**

The cliché of law's complexity is long-established. Yet, the coming of the information age poses new challenges for the law, and especially for legislative drafters. One of the principal consequences of this change has been an expansion in the range of actors capable of engaging directly with the legislative process and its products.<sup>1</sup> As the available audience for the direct consumption of statute law has grown, so too has the potential for complexity in the legislative process. The dominant response to this growing complexity has taken two forms. In Canada, and to a lesser extent the United States (US), the response has been to build upon an established official doctrine of plain language drafting. In other jurisdictions, such as Australia, the United Kingdom (UK) and the European Union (EU), systematic engagement with plain language drafting principles has only occurred more recently via, for example, the Good Law Initiative of the Office of the Parliamentary Council, and the Better Regulation Agenda of the European Commission respectively. Although there are local differences in the characteristics of their implementation, these responses attempt to manage the burgeoning diversity of the legislative process,

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<sup>1</sup> See R. Heaton, 'Innovation and continuity in law-making', *Sir William Dale Memorial Lecture on Legislation and Good Law* (Institute of Advanced Legal Studies, 2014), at <https://www.gov.uk/government/speeches/innovation-and-continuity-in-law-making>.

and to limit the range of possible understandings of statutory texts. In this article, we argue that, although the motives for engaging in such activity are founded in important constitutional principles, approaching the task in this way misunderstands the nature of the challenge.

While the history of ‘Plain Language’ and ‘Good Law’ (PL/GL) initiatives varies, they each express a desire to improve the clarity of the statute book, simplify it, and enhance the accessibility of the law. They work on the assumption that clarifying, simplifying and developing the accessibility of legislation will lead to better law, improve individuals’ understanding of the legal system and the expectations it places upon them, and in so doing reduce the burden of complying with the law. As Richard Heaton, former First Parliamentary Counsel and Permanent Secretary of the UK Cabinet Office, argued, ‘Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government. It undermines the rule of law.’<sup>2</sup> However, despite the presence of these official views and their commendable goals fundamental questions remain:

1. Is the problem of complexity a new phenomenon?
2. Are the PL/GL initiatives, responding to this complexity, new?
3. Is the core problem too much complicatedness and/or complexity?
4. Are ‘good’ (simplified, clarified and accessible) laws inherently better than ‘bad’ more complicated laws?
5. Is ‘good’ or ‘plain language’ law generally beneficial, or can it be just as political as ‘bad’ ‘complicated’ law; merely creating different ‘winners’ and ‘losers’?

In this article we examine these questions by using a complexity perspective to explore the distinctly ‘complicated’ and ‘complex’ role of legislative drafters and how they relate to PL/GL initiatives. Following a short introduction to complexity and the distinctive role of legislative drafters, we briefly review and compare recent UK, Canadian, US, Australian and EU initiatives to explore how their

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<sup>2</sup> Office of the Parliamentary Counsel and the Cabinet Office, ‘When Laws Become Too Complex: A Review into the Causes of Complex Legislation (2013), 1 at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/187015/GoodLaw\\_report\\_8April\\_AP.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf)>.

approaches interact with the complex nature of legislative and policy processes, and the implications for the role of legislative drafters. Next, we examine the three, paradoxically complementary and contradictory, core elements of the PL/GL initiatives: clarity, simplicity, and accessibility. Finally, we use a Stacey Diagram,<sup>3</sup> a complexity tool for visualising the consequences of complexity, to explore the implications of, and tensions generated by, these initiatives for legislative, legal, and policy processes.

We conclude, mirroring recent thinking on complexity and pragmatism,<sup>4</sup> and the relational nature of complexity,<sup>5</sup> that legislative complexity and initiatives to manage it are not new; that it is important to differentiate between complicatedness and complexity; that complexity is both part of the problem and the solution; that ‘clarified’, ‘simplified’ and ‘accessible’ laws can provide short term improvements but only if they are viewed as part of a continuous, emergent process; and that PL/GL inspired laws can be just as political as those which they replace, particularly when the political motivation underpinning them lies in reducing business costs. Ultimately, we show that the nature of the drafters’ dance, how drafters negotiate their complex environment, is a much more subtle and human one than is commonly recognised by PL/GL initiatives. Placing too many PL/GL rigidifying constraints on the ‘dance’, may do more harm than good.

## **What do we mean by complexity and how does it relate to law and public policy?**

Complexity, a general term covering a wide range of complex, adaptive, emergent systems and phenomena, has been extensively deployed in the natural sciences since the 1970s.<sup>6</sup> From the 1990s, it

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<sup>3</sup> R. Stacey, *Strategic Management and Organisational Dynamics* (London: Prentice Hall 1993).

<sup>4</sup> C. Ansell and R. Geyer “‘Pragmatic Complexity’ a new foundation for moving beyond “evidence based policy making”?” (2017) 28(2) *Policy Studies* 149.

<sup>5</sup> T.E. Webb, ‘Asylum and complexity: The vulnerable identity of law as a complex system’ in J. Murray, T.E. Webb and S. Wheatley (eds) *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (London: Routledge, 2018).

<sup>6</sup> P. Coveney and R. Highfield, *Frontiers of complexity: The search for order in a chaotic world* (London: Faber and Faber 1995).

also spread across the social sciences into a wide range of policy areas,<sup>7</sup> and has been deployed by a number of governments and international organisations.<sup>8</sup> However, there is no one theory of complexity. It is best thought of as a field, or an approach, with multiple debates over the breadth, definition and implications of complexity.<sup>9</sup> In consequence, for us, complexity is more of a world view than a grand theory, that:

is about connected complex systems, for which the assumptions of average types and average interactions are not appropriate and are not made. Such systems coevolve with their environment, being “open” to flows of energy, matter, and information across whatever boundaries we have chosen to define. These flows do not obey simple, fixed laws, but instead result from the internal “sense making” going on inside them, as experience, conjectures and experiments are used to modify the interpretive frameworks within.<sup>10</sup>

From this perspective complexity argues that, at the meta-theoretical level, physical and social reality is composed of a wide range of continually interacting, orderly, complex and disorderly phenomena. One can focus on different aspects (orderly, complex or disorderly), but that does not mean that the others do not exist. Part of the challenge of complexity is recognising, first, that in order to comment upon or model anything, one needs to draw boundaries,<sup>11</sup> and secondly, that the construction of those

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<sup>7</sup> D. Byrne and G. Callaghan, *Complexity Theory and the Social Sciences* (Oxford: Routledge, 2013); B. Castellani and F.W. Hafferty, *Sociology and Complexity Science: A new field of inquiry* (Berlin Heidelberg: Springer, 2009); R. Geyer and S. Rihani, *Complexity and public policy: a new approach to 21<sup>st</sup> century politics, policy and society* (Oxford: Routledge, 2010); R. Geyer and P. Cairney (eds) *Handbook on Complexity and Public Policy* (Cheltenham: Edward Elgar, 2015).

<sup>8</sup> See Australian Public Service Commission, *Tackling Wicked Problems: a public policy perspective* (Canberra: Australian Public Service Commission, 2007); Department for Education, *The Munro Review of Child Protection: Final Report, A Child-Centred System* Report Cm 8062 (2011); OECD Global Science Forum, *Application of Complexity Science for Public Policy: New tools for finding unanticipated consequences and unrealized opportunities* (OECD, September 2009).

<sup>9</sup> D. Byrne, *Complexity Theory and the Social Sciences: An Introduction* (London: Routledge, 2005); E. Morin, ‘Restricted Complexity, General Complexity’, in C. Gershenson, D. Aerts and B. Edmonds (eds), *Worldviews, Science and Us: Philosophy and Complexity* (New Jersey: World Scientific, 2007), K.A. Richardson and P. Cilliers, ‘What is Complexity Science? A view from different directions’ (2001) 3(1) *Emergence* 5

<sup>10</sup> P. Allen, ‘What is complexity science? Knowledge of the limits of knowledge’ (2001) 3(1) *Emergence* 24, 39-40; see also Morin, n 9 above.

<sup>11</sup> P. Cilliers, ‘Why we cannot know complex things completely’ (2002) 4(1&2) *Emergence* 77, 81-2.

boundaries has implications for our understanding.<sup>12</sup> Similarly, individual components will themselves possess orderly, complex, and disorderly characteristics. The crucial point is that these complex components exist in the presence of other such complex components. They interact with them, and in so doing create emergent meanings, and frameworks of understanding through the boundaries and identities they formulate to make sense of the world.<sup>13</sup> This represents a significant change from more reductionist, closed systems approaches, such as Luhmann's autopoiesis,<sup>14</sup> and other modernist approaches that tend to focus on the qualities, and knowability of individual types of systems, processes, and actors as individual, isolated components.

From a complexity perspective, the process of generating meaning out of interaction is called emergence. Emergence is premised on the idea that all actors, processes, and organisations are able to engage in systemic discourse with a view to increasing their own individual understandings of the world. On the one hand, it is not possible to know everything,<sup>15</sup> or to create a truly predictive model; the informational, quantum and conscious elements of systems make this impossible.<sup>16</sup> Yet, on the other hand, complex systems acquire knowledge via interaction. Explanations which make no sense, or which deviate from the majority of understandings will struggle to interact without modifying their positions. Such an approach promotes consensus, in that reaching collective, or at least majority, understandings around particular concepts is desirable. In this context it is perfectly reasonable for individuals to subscribe to the doctrine of precedent, agree to standard rules of statutory interpretation, and recognise the importance of key legal texts, tests and concepts.

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<sup>12</sup> P. Cilliers, 'Boundaries, Hierarchies and Networks in Complex Systems' (2001) 5(2) *International Journal of Innovation Management* 135, 140; P. Cilliers, 'Complexity, Deconstruction and Relativism' (2005a) 22 *Theory, Culture, Society* 255, 259; T.E. Webb, 'Exploring System Boundaries' (2013) 24(2) *Law and Critique* 131.

<sup>13</sup> P. Cilliers (2001), 141; P. Cilliers, 'Knowledge, limits and boundaries' (2005b) 37 *Futures* 605-613, 610; see also Webb *ibid*.

<sup>14</sup> For example, N. Luhmann, 'The Unity of The Legal System' in G. Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (New York: Walter de Gruyter Publishing, 1988); 'The Coding of the Legal System' G. Teubner and A. Febbrajo (eds) *State, Law, and Economy As Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan: Giuffrè, 1992).

<sup>15</sup> N. Rescher, *Complexity: A Philosophical Overview* (New Brunswick: Transaction, 1998), *xiv-xv*.

<sup>16</sup> P. Cilliers, *Complexity and Postmodernism* (Oxford: Routledge, 1998), 24, 58; Cilliers n 12 above.

Complexity theory does not preach chaos nor entail a situation of ‘anything goes’.<sup>17</sup> Instead, it expects periods of long-running stability punctuated by occasional substantial changes in individual- through to system-level contexts. At the same time, complexity theory thinking expects and encourages diversity. New interactions and information represent a continual challenge to existing frameworks. Moreover, due to this diversity and novelty, multiple interpretive paradigms can coexist. For example, in legal thinking perspectives including positivism and natural law, political and legal constitutionalism, formal and substantive conceptions of the rule of law all interact and compete with each other.<sup>18</sup> This interaction and competition forces adaptation and further interaction. All of this places the capacity for change more in the hands of individual actors, in that they can contribute towards consensus and offer new perspectives to accommodate novelty.

In regards to policy, complexity is seen as a rejection of the traditional modernist world view of order, causality, reductionism, predictability and determinism that marks the foundation of the more extreme versions of New Public Management (NPM) and Evidence-Based Policy Making (EBPM).<sup>19</sup> It is, ‘a way of thinking ... which can help guide inquiries into the workings of complex social systems ... but not ... verify laws and law-like generalizations’.<sup>20</sup> Similarly, for law the recognition that legal systems possess the characteristics of complex systems – multiple actors and institutions interacting in emergent ways– is relatively recent, but has grown rapidly across a range of areas including social welfare, taxation, regulation, constitutional, and international law.<sup>21</sup>

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<sup>17</sup> Cilliers 1998 *ibid*, *viii*; see also P. Cilliers, ‘Postmodern Knowledge and Complexity (or why anything does not go)’ (1995) 14(3) *South African Journal of Philosophy* 124.

<sup>18</sup> See B. Mauthe and T.E. Webb, ‘In the multiverse what is real?: Luhmann, complexity and ANT’ in A. La Cour and A. Philippopoulos-Mihalopoulos (eds) *Luhmann Observed: Radical Theoretical Encounters* Basingstoke: Palgrave, 2013).

<sup>19</sup> R. Geyer, ‘Can complexity move UK policy beyond ‘evidence-based policy making’ and the ‘audit culture?’ Applying a ‘complexity cascade’ to education and health policy’ (2012) 60 (1) *Political Studies* 20.

<sup>20</sup> G. Morçöl, *A Complexity Theory for Public Policy* (London: Routledge, 2012), 266.

<sup>21</sup> For examples and overviews see N. Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Oxford: Hart, 2013); J. Murray, T.E. Webb, S. Wheatley (eds) *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (London: Routledge, 2018); JB. Ruhl, ‘Law’s Complexity: A Primer’ (2008) 24(4) *Georgia State University Law Review* 885; JB. Ruhl and D.M. Katz, ‘Measuring, Monitoring and Managing Legal Complexity’ (2017) 101 *Iowa Law Review* 191; T.E. Webb, ‘Tracing an Outline of Legal Complexity’ (2014) 27(4) *Ratio Juris* 477-495; A. Vermeule, *The System of the Constitution* (New York, NY: Oxford University Press, 2012).

There are a number of important implications for our approach to understanding and living with the complexity of the policy and legal spheres, and social life more generally. First, we must recognise the shift in our view of the nature of social life entailed by complexity. Legal and policy actors must take a reflexive, flexible approach to the orderly and disorderly foundations of all phenomena. In acknowledgement of this, complexity approaches legal and political systems as fundamentally non-linear, where scale and the nature of cause and effect are not directly related to one another.<sup>22</sup> This does not excuse individuals for the consequences of their actions, far from it. Rather than being able to blame bad data, poor implementation or unforeseen consequences, which implies that a policy or legal intervention would have worked *but for* errors and misunderstandings, the legislator, the policy-maker, and therefore the legislative drafter, must confront the complexity of society and provide means within the law to respond flexibly to negative consequences such that core constitutional values are maintained. If they do not, then they cannot escape ethical responsibility for their behaviour.<sup>23</sup>

Second, in addition to these ontological concerns, complexity also has epistemological implications, particularly in relation to the *limits* of what we can know about society. While there is an exponential increase in the availability of evidence and data across society, there is not a corresponding linear expansion in our ability to deal with the intractable challenges to which that evidence and data is addressed. Instead, there are continual, bounded and emerging limits to human knowledge and public policy due to, *inter alia*, physiological limitations on humans to retain, analyse, and reflect on that data.<sup>24</sup> These limits provide some parameters through which we can both attempt to conceptualise the emergent character of a policy area, and the manner of interaction between it and our proposed policy response.<sup>25</sup> This, in turn, means that while legal and policy actors can achieve some degree of

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<sup>22</sup> J. Webb, 'Law, ethics, and complexity: Complexity theory and the normative reconstruction of law' (2005) 52 *Cleveland State Law Review* 227, 239; see also JB. Ruhl and H.J. Ruhl Jr., 'The arrow of the law in the modern administrative state: Using complexity theory to reveal diminishing returns and increasing risks the burgeoning of law poses to society' (1997) 30(Winter) *University of California Davis Law Review* 405, 426-427; for exposition of the original 'butterfly effect' concept, see E.N. Lorenz, *The Essence of Chaos* (Seattle: Washington University Press, 1993).

<sup>23</sup> *Ibid* Webb.

<sup>24</sup> See, for example, A. Badcock, 'Can Complexity Save Development Theory?' in J. Bogg and R. Geyer (eds) *Complexity, Science & Society* (Oxford: Radcliffe, 2007).

<sup>25</sup> n 11 above, 81-82; P. Cilliers, 'Difference, Identity and Complexity' in P. Cilliers, and R. Preiser (eds) *Complexity, Difference and Identity* (London: Springer, 2010), 8-10.

predictability supported by experimental results they must often combine them with uncertainty and interpretation.<sup>26</sup> Overly prescriptive legislative and regulatory strategies will not, therefore, prevent regulatory failure, crises, and instability.<sup>27</sup> Nor will such an approach protect the state from external or internal vulnerabilities, it merely gives the appearance of doing so, which is altogether more risky.<sup>28</sup>

Third, given the emergent character of social interaction, depth of variation and importance of knowledge gained from experience,<sup>29</sup> only probabilistic and pragmatic assumptions about future behaviour can be made.<sup>30</sup> Consequently, policy and legal actors cannot rely on purely ‘evidence based’ strategies, but must continually adapt to environmental changes and learn to make complexity-informed judgments,<sup>31</sup> since there is no achievable end state or final order.<sup>32</sup> This means recognising the strengths and weaknesses of quantitative and qualitative methodological, evidence-based and interpretive strategies, and balancing them against each other in order to support appropriate public policies. The key is in enabling local actors to maximise their ability to respond to complexity within a stable framework to create the greatest likelihood of healthy evolution and adaptation.<sup>33</sup> From a complexity perspective, the legal-policy process is much more ‘art’ than ‘science’.

Fourth, complexity thinking stresses the difference between simple, complicated and complex systems and strategies.<sup>34</sup> A simple system, like a pendulum, is highly predictable, has clear causal

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<sup>26</sup> For example, Geyer and Rihani n 7 above; Ruhl and Ruhl n 22 above; JB. Ruhl and J. Salzman, ‘Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State’ (2003) 91 *Georgetown Law Journal* 757-850.

<sup>27</sup> J. Murray, ‘Regulating for ecological resilience: a new agenda for financial regulation’ in Jamie Murray, T.E. Webb, Steven Wheatley (eds) *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (London: Routledge, 2018).

<sup>28</sup> T.E. Webb, ‘Asylum and complexity: the vulnerable identity of law as a complex system’ in J. Murray, T.E. Webb, S. Wheatley (eds) *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (London: Routledge, 2018).

<sup>29</sup> But note the caveats in K.A. Richardson, ‘The hegemony of the physical sciences: an exploration in complexity thinking’ (2005) 37 *Futures* 615-653, 623.

<sup>30</sup> n 16 above, 110.

<sup>31</sup> n 25 above, 16.

<sup>32</sup> P. Cilliers, ‘The Philosophical Importance of Thinking Complexity’ in P. Cilliers (eds) *Thinking Complexity* (Mansfield, MA: ISCE Publishing, 2007), 4.

<sup>33</sup> Geyer and Rihani n 7 above; Ruhl n 21 above.

<sup>34</sup> K. Mainzer, *Thinking in Complexity: the Computational Dynamics of Matter, Mind and Mankind* (Berlin: Springer, 4<sup>th</sup> ed, 2004).

attributes and its past and future processes, given clear inputs, can be calculated. A complicated system like a mechanical clock, or even a highly complicated jet engine, are fundamentally similar in that, if data about their operation is robust, then the outputs from the system are quantifiable, and the reductionist scientific method is both applicable and effective for understanding these systems.<sup>35</sup> There are no hidden surprises in complicated systems. They can be understood, modelled, and controlled. On the other hand, complex systems and situations are a combination of structures and boundaries with adaptive and emergent properties.<sup>36</sup> They are neither fully orderly nor random. They are, at best, partially knowable, predictable, and controllable. The mechanical clock and jet engine can run over lengthy periods of time, but they will continue to operate as a clock or a jet engine and respond predictably to specified inputs. A complex system, such as a living organism, does not follow this pattern. In response to their environment, they reproduce and evolve, demonstrating emergent behaviour and adaptations that become increasingly unpredictable as the time-horizon extends. This can be seen in the evolution of, for example, influenza viruses. Biological systems are complex systems living in adaptive and emergent environments. Human beings, through the phenomena of consciousness, social organisation, use of technology, and creation of individual and group meanings and narratives, add an additional layer of social complexity on to their already complex biological existence.

Extending this to the policy realm, an example of a simple/complicated system interpretation of policy-making can be found in the rational, orderly, modernist, ‘Westminster model’ of policy, one of the dominant frames of reference for Western public policy since the Second World War. The framework has been through a number of transformations, most recently the move from ‘new public management’ to ‘evidence-based policy making’ linked to audit and target cultures,<sup>37</sup> but its core foundations have remained untouched. These are, rationalism (we can know a given situation), causality (clear inputs will lead to known, proportionate effects), reductionism (discrete parts of a policy

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<sup>35</sup> n 29 above.

<sup>36</sup> Webb n 12 above.

<sup>37</sup> D. Richards and M. Smith, *Governance and Public Policy in the UK* (Oxford: Oxford University Press, 2002).

can be separated and understood in isolation), predictability (we can know where the policy is going) and determinism (we control the path of the policy).<sup>38</sup> This led to a strong centralising tendency and emphasis on hierarchical, command and control approaches to policy.<sup>39</sup> From this orderly perspective, all policy problems can be studied and understood, broken down into their parts and adjusted so they will work better. In this sense, these issues are treated as being no different from the workings of a mechanical clock or jet engine. As we have discussed above, and will explore below, a complexity perspective is highly critical of the foundation, method, and claims of more orderly/modernist interpretations of the social sciences and policy making.

## Legislative Drafters and Complexity

As is clear from the academic literature and our informal discussions with drafters, the role of the drafters is at the centre of multiple tensions/balances within the legislative process. Though they might lack obvious agency in terms of *initiating* legislative processes – which is properly the prerogative of political representatives – drafters *do* possess agency as regards the construction of the text, and the expert advice given to political representatives on how to achieve their goals.<sup>40</sup> Drafters are highly educated, trained professionals who often work within the field for long periods of time. They are stable actors in a dynamic environment, well-versed in the legislative process, the intricacies of the law, and the need for their work to be comprehensible. However, even given a limited remit to improve access, enhance clarity, and simplify the law, their task is a delicate balancing exercise. As Stanley Edwards wrote:

‘Any legal contract or statute should be written so that a person of reasonable intelligence, reading it in good faith, can understand it. But it should be

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<sup>38</sup> Geyer and Rihani n 7 above, 22.

<sup>39</sup> M. Powers, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997); J.C. Scott, *Seeing Like a State* (New York: Yale University Press, 1999).

<sup>40</sup> Lord Neuberger, ‘General, Equal and Certain: Law Reform Today and Tomorrow’ (2012) 33(3) *Statute Law Review* 323, 330-331

written with such a degree of precision that a person of Machiavellian cleverness, reading it in bad faith, cannot misunderstand it.’<sup>41</sup>

This statement catches both the more technical side of the drafters’ role and the much messier political side. The drafter must consider reasonably intelligent actors acting in good faith (judges, law abiding citizens, public servants), devious ones determined to distort the law (fraudsters, exploitative employers), and the myriad range of interpretive possibilities arising between these two positions. Drafters work at a key point in the legal/policy process, framing legislation that could have huge socio-economic impacts on a range of powerful and not-so-powerful groups.<sup>42</sup> In addition to this, they are supposed to be carrying out the will of their elected leaders who, unsurprisingly given the complex nature of society, often make contradictory and confusing demands on their expertise.

At the same time, society and the law itself are in flux. The law must respond to changes in social norms (for example, attitudes to abortion, sexuality, religion), technology (the internet, health, big data), and political persuasions (new governments, political parties and movements). Though superficially reactive and lacking legislative initiative, drafters are more than just skilled craftsmen responding to a brief, delicately using words to help those of ‘good faith’ and hinder those of ‘bad faith’. They actively advise on *how* to achieve a government’s objectives, and respond to legislative concerns over provisional language.<sup>43</sup> They also have a principled, indeed constitutional, role to play in offering counsel on the constitutional probity of legislative proposals.<sup>44</sup> And, more than anything else, they write, shape and are in direct contact with the text itself.<sup>45</sup> They are tightly linked to a range of other governmental and non-governmental actors who have their own interests and needs (good or bad; reasonable or unreasonable) in the legislative process and will try to shape and improve bills as they

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<sup>41</sup> S.E. Edwards, ‘Drafting Fiscal Legislation’ (1984) *Canadian Tax Journal* 727, 728

<sup>42</sup> See R. Cormacain, ‘Legislation, legislative drafting and the rule of law’ (2017) 5(2) *The Theory and Practice of Legislation* 115; D.L. Revell, ‘Enhancing the Legislative Process: The Value of the Legislative Drafter’ (2011) 32(2) *Statute Law Review* 149.

<sup>43</sup> Revell *ibid*, 151-152.

<sup>44</sup> Cormacain, *above n 42*; *ibid*, 157-158.

<sup>45</sup> See S. Höfler, M. Nussbaumer and H. Xanthaki, ‘Legislative Drafting’ in U. Karpen and H. Xanthaki (eds) *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Oxford: Hart, 2017), 146-152.

pass through that process. Given these complicated (interacting with a large number of ‘parts’) and complex (managing emergent and unpredictable demands and interests) aspects to their position, they are a fascinating case study for complexity thinkers.

## **Plain Language/Good Law Initiatives: Past and Present**

Given the nature of the drafters’ role, and the long-established cliché of law’s complexity, it should come as no surprise that the desire to meet the goals of clarity, simplicity and accessibility are not new. As early as the 16<sup>th</sup> and 17<sup>th</sup> centuries in England, Edward VI (r.1547-1553) and James I (r.1603-1625) both expressed concerns regarding legal complicatedness.<sup>46</sup> In the 18<sup>th</sup> century, Thomas Jefferson, US President, lamented the ‘verbosity ... endless tautologies ... involutions of case within case and parenthesis within parenthesis’ of the law which rendered it ‘incomprehensible, not only to common readers but to the lawyers themselves.’<sup>47</sup> Later, in 1835 the Commissioners appointed to inquire into the consolidation of statute law in England reported that:

‘We apprehend that the mere extirpation of all such enactments as are obsolete and superfluous, the rejection of repetitions of terms of frequent occurrence, and the extrication of material words from the superfluity of language by which the law is often obscured, would greatly reduce the bulk and consequent costliness of the Statute Book, and would render it more accessible and intelligible to the generality of your Majesty’s subjects.’<sup>48</sup>

These concerns are echoed, as we have indicated above, not just elsewhere in the historical record,<sup>49</sup> but in more recent attempts within various jurisdictions to respond to legislative complexity.

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<sup>46</sup> The Renton Committee, *The Preparation of Legislation*, Report Cmnd 6053 (1975), 2.8.

<sup>47</sup> *Ibid*, 2.10

<sup>48</sup> Royal Commission on the Consolidation of Statute Law, *Report of the Commissioners Appointed to Inquire into the Consolidation of the Statute Law*, HC 406 (1835), 5.

<sup>49</sup> eg Lord Simon of Glaisdale, HL Deb vol 366 cols 945-946 10 December 1975.

### *Recent Plain Language/Good Law Initiatives*

In the UK the Good Law Initiative (GLI) of the Office of the Parliamentary Counsel has produced a number of documents targeting clarification, simplification and accessibility, chief among which is the *When Laws Become Too Complex* review.<sup>50</sup> The GLI recognised three core problems with the statute book; ‘... the volume..., the quality of legislation, and the perception of disproportionate complexity.’<sup>51</sup> Some of the responses to these concerns align closely with the business-orientated simplification agenda. For example, the Red Tape Challenge aims to reduce the *amount* of legislation, especially secondary legislation, and in some cases primary legislation as well.<sup>52</sup> Elsewhere, the concern with volume focuses on quantification (eg word count, formatting, readability indicators, complexity indicators)<sup>53</sup> to improve the clarity of legislation by treating it as a mathematical problem.<sup>54</sup> Both of these responses suggest that, if the clarity, simplicity and accessibility of law is to be improved, then the complexity of law must be reduced; hence the GLI’s goal is ‘to avoid generating excessively complex law ... to act positively to promote accessibility, ease of navigation, and simplification.’<sup>55</sup> Simplification of the statute book, along with the format of legislation and the ability of individuals to access that legislation is seen as the route to improving understanding of the law and reducing difficulties around engagement and compliance. While on the one hand there is a clear desire in the GLI to improve accessibility for citizens as a way of better aligning with the tenets of the rule of law, the wider governmental concern when looking at statutory complicatedness has been to focus on the burden of complexity on business.<sup>56</sup>

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<sup>50</sup> n 2 above.

<sup>51</sup> Ibid 2.

<sup>52</sup> ibid 4, 17.

<sup>53</sup> For example, see Office for Tax Simplification Project, ‘Tax Complexity Collection’, at <https://www.gov.uk/government/collections/tax-complexity#recent-documents>

<sup>54</sup> n 2 above, 14; see also R. Heaton, ‘Good Law’, (TedX, UK Parliament, 2013), at <<https://youtu.be/p8GUG0S9esU>>.

<sup>55</sup> n 2 above, 29.

<sup>56</sup> ibid, 4.

Similarly, the desire to reduce legal complexity in the US has been driven by concern around regulatory burdens and economic considerations on the one hand, and public access on the other. There are examples at both the federal and state levels. The Administrative Conference of the United States (ACUS), an independent federal agency, provides an overview of the history of PL work at the federal level; for example, an Executive Order made in 1998 by President Clinton which called for future regulations to comply with plain language standards.<sup>57</sup> As ACUS indicates, Clinton's Order encouraged the plain language revision of existing legislation in part to increase governmental accountability to citizens, but also to '[save] the Government and the private sector time, effort, and money.'<sup>58</sup> More recently, in December 2017, ACUS recommended that all federal agencies should follow the Federal Plain Language Guidelines.<sup>59</sup> The Guidelines provide, *inter alia*, direction on appropriate use of vocabulary, sentence and paragraph structure, and other formatting that can aid readability,<sup>60</sup> all of which are familiar concepts associated with the PL movement. At the state-level, the PlainLanguage.gov website provides numerous examples of state-level plain language regulations.<sup>61</sup> One such provision is the Plain Language in Consumer Contract Act 1993 passed by the Pennsylvania General Assembly.<sup>62</sup> The Act expressly legislates against contracts that are 'designed in a way that makes them hard for consumers to understand.'<sup>63</sup> Though in the next breath the Act implies that part of the motivation for incorporating this protection is connected with economic factors, in particular aiding competition between businesses.<sup>64</sup>

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<sup>57</sup> ACUS, 'Plain Language in Regulatory Drafting' (Recommendation Number 2017-3), at <<https://www.acus.gov/recommendation/plain-language-regulatory-drafting>>.

<sup>58</sup> President Clinton's 1998 Executive Order (63 FR 31885 Plain Language in Government Writing); see also the Paperwork Reduction Act 1980 Pub L No. 95-511, 94 Stat 2812 preamble and first section of the 44 USC 3501; amendments made by the Paperwork Reduction Act 1995 Pub L No. 104-13, 109 Stat 163; and the Plain Writing Act 2010, Pub L No. 111-274, 124 Stat 2861 (2010). These materials are supplemented by the Plain Language Action and Information Network (PLAIN), *Federal Plain Language Guidelines* (2011), at <<https://www.plainlanguage.gov/guidelines/>>; and Office of the Federal Register, *Guidance on Drafting Legal Documents*, at <<https://www.archives.gov/federal-register/write/legal-docs>>.

<sup>59</sup> n 57 above, Recommendation 1; see also PLAIN *ibid*.

<sup>60</sup> PLAIN *ibid* Section III.

<sup>61</sup> See PLAIN, at <<https://www.plainlanguage.gov/examples/regulations/>>, <'State Statutes'>.

<sup>62</sup> Plain Language Consumer Contract Act 1993 PL 128, No. 29, s 1; partially amended in 2006 by PL 1563 No. 176.

<sup>63</sup> *Ibid* s 1(a).

<sup>64</sup> *Ibid*.

In Australia, the goal is to use plain English to reduce the complexity of legislation. However, the recognition that there must be a balance between simplification and clarification is more firmly stated than in the UK and US.<sup>65</sup> The Australian Office of Parliamentary Counsel recognises that some degree of complicatedness in legislation is unavoidable, and that ‘it is unrealistic to assume that complex subject and policy areas ... regulated by legislation can be reduced to rules that can be understood by the public generally.’<sup>66</sup> Here then, the view is that what is desired is certainty about what the law means without clouding that meaning by attempting to make that certainty too granular – clarity without complexity. The Australian approach is not about brevity. There is a balance to be struck by drafters who should ‘weigh up whether the simplicity gained by using coherent principles drafting is worth the loss of precision that results.’<sup>67</sup> The focus is on thinking about what tools are available to the drafter to make the text more accessible to an audience with a good technical knowledge of the field to which the law applies.<sup>68</sup> At the same time, there is some realism about what is achievable in the context of the operating environment of the drafter,<sup>69</sup> albeit counterbalanced by a belief that complexity *can* be controlled.<sup>70</sup>

Whereas the PL/GL drafting movement has only recently come to official notice in the UK and Australia – though its presence in the literature long-precedes this – Canada is said to have a much longer history of plain language drafting. Krongold, arguing in the early 1990s that the Canadian drafters produced more readable legislation, relayed a quip from the eminent British jurist Sir Robert Megarry that the Canadian Statute book is:

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<sup>65</sup> But note Cabinet Office and the Office of the Parliamentary Counsel, *Guidance on Good Law*, at <<https://www.gov.uk/guidance/good-law>>.

<sup>66</sup> Office of Parliamentary Counsel of Australia, *Reducing Complexity in Legislation* (Canberra: Australian Government, 2016), [7].

<sup>67</sup> *Ibid* [18].

<sup>68</sup> *Ibid* [14-26], [32-33], [41].

<sup>69</sup> *Ibid* [145].

<sup>70</sup> *Ibid* [146].

‘... too plain. I have read many, many pages of them; and found that I could understand all that I read... That is not the sort of thing that one ought to find in any well-mannered statute book.’<sup>71</sup>

In view of the bilingual, bijural, multi-cultural and geographically diverse nature – the presence of multiple languages, civil and common law legal traditions, First Nations and western-colonial perspectives, and tremendously densely and extremely sparsely populated areas – of Canada’s national, provincial, and territorial legal systems, there has arguably been a pressing practical need for clarity in law making to ensure that, at a federal level all Canadian citizens are treated equally despite the operation of different provincial traditions.<sup>72</sup> This may explain the much earlier official interest in developing drafting techniques, including those associated with PL. The Uniform Law Conference of Canada/ Conférence Pour L’harmonisation des Lois au Canada (ULCC/CHLC), which is an independent organisation that brings together various Canadian provincial bar associations, government drafters, and others,<sup>73</sup> and which receives government support in other respects, recommends in its *Drafting Conventions* that:

‘An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language.

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<sup>71</sup> S. Krongold, ‘Writing Laws: Making them Easier to Understand’ (1992) 24(2) *Ottawa Law Review* 495, 508.

<sup>72</sup> Numerous texts on bijuralism and legal harmonization are available from the Department of Justice (Canada), at <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/>>; see also history of this thinking in Uniform Law Conference of Canada/ Conférence Pour L’harmonisation des Lois au Canada (ULCC/CHLC), Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada, *Report: Uniform Acts Drafting Conventions* (Canada., undated), at <<http://www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act>>.

<sup>73</sup> Including organisations in other jurisdictions, eg United States Uniform Law Commission; Mexican Center of Uniform Law / Congreso Internacional Derecho Uniforme.

Simplicity and conciseness of language can be made to exist with precision in a well organized text. It is important not to exaggerate the degree of precision that is required.<sup>74</sup>

The view of ULCC/CHLC is that not only can simplicity and clarity be achieved without compromising precision or certainty, but that this can be done in the context of a bilingual, bijural legal system; though the organisation does avoid politically contentious areas of the law.

This conclusion is shared by the Canadian Department of Justice which has made a commitment to ensure ‘that the [legal] guidelines it provides be written in clear and plain language.’<sup>75</sup> This is accompanied by a guide which views the readability of legislative texts as being essential to providing ‘clarity and predictability of regulation for business.’<sup>76</sup> As with other jurisdictions, while the wider PL/GL movement is concerned with questions of clarification, simplification and accessibility for individual citizens, a driving political force behind these initiatives is a concern for the regulatory burden of legal complicatedness for business.

It is not just common law jurisdictions which are taking this kind of approach. In the European Union, for example, one aspect of the Better Regulation Agenda is the Regulatory Fitness and Performance Programme (REFIT), which aims, *inter alia*, ‘to make EU law simpler and easier to understand.’<sup>77</sup> It should be noted, however, that in contrast to the efforts in the UK, US, Australia and Canada (notwithstanding the tendency in those jurisdictions for government to express a concern about

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<sup>74</sup> ULCC/CHLC n 72 above, [2]; see also Department of Justice (Canada), *Legislative Drafting* (updated January 2015) at <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/index.html>>, which deals with, *inter alia*, the complexity and organization of sentence structure.

<sup>75</sup> Department of Justice (Canada), *Information on Regulations* (updated June 2015) at <<http://www.justice.gc.ca/eng/trans/ar-lr/ior-icr.html>>.

<sup>76</sup> Department of Justice (Canada) *Guide to fostering the readability of legislative texts* (updated February 2018), at <<http://www.justice.gc.ca/eng/trans/ar-lr/rg-gl/pl.html>>.

<sup>77</sup> European Commission, *REFIT – Making EU law simpler and less costly*, at <[https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en)>.

the impact of regulation on small businesses), the focus of the European Commission is *solely* on ‘small businesses, which can be disproportionately affected by the burden of implementing EU rules.’<sup>78</sup>

Whereas other jurisdictions consider the appearance of the text and how it can be interpreted, the European Commission is primarily focussed on the reduction in volume of legislation via, for example, codification, repeal, the use of sunset clauses, and a reduction in the use of binding regulations by self-regulation and similar initiatives.<sup>79</sup> This approach appears, therefore, to be less focussed on improving the clarity of regulations, than it is on reducing the volume of legislation so that – purportedly – the remaining law takes less time and energy to understand and comply with. Similarly, while one of the objectives of the Better Regulation Agenda is to ‘ensure citizens and stakeholders can contribute throughout the policy- and law-making process’,<sup>80</sup> the potential for increasing accessibility has no corresponding objective to increase the accessibility of the end-product for citizens. Priority 7 of the REFIT Scoreboard for 2017, for example, concerns ‘[u]pholding the rule of law and linking up Europe’s justice systems’, but is predominantly concerned with perceived positive changes in the impact and implementation of the law and any associated economic savings, rather than on the ability of citizens to understand the regulations themselves.<sup>81</sup>

## **Plain Language/Good Law Initiatives: Clarity, Simplicity and Accessibility**

What unites these different approaches is the modernist outlook which underpins them. There is a shared belief that if the text can be made to be ‘just so’, if the variables can be controlled, then we will have reached the best iteration of the law possible. In consequence, efforts towards clarification focus on improving the readability and structure of a text to make key terminology and obligations clearer to

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<sup>78</sup> Ibid

<sup>79</sup> Ibid; see also European Commission, *REFIT Scorecard 2017* (Report, October 2017), at <[https://ec.europa.eu/info/files/regulatory-fitness-and-performance-programme-refit-and-10-priorities-commission-scoreboard-summary-2017\\_en](https://ec.europa.eu/info/files/regulatory-fitness-and-performance-programme-refit-and-10-priorities-commission-scoreboard-summary-2017_en)>.

<sup>80</sup> European Commission, *Better regulation: why and how* <[https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en)>

<sup>81</sup> n 79 above, 391-442.

specified audiences based on a belief that a final appropriate interpretation of the text can be articulated. Similarly, the goal of simplification is unapologetically reductionist in its efforts to lessen the volume and complicatedness of the statute book. The expectation is that the wording of the statute book can be distilled and, properly done, this will make appropriate interpretation of the text – legislative intention – self-evident. Sometimes political considerations, such as a belief that regulation is burdensome, may overlay this mechanical approach, but it does not change the way the simplification operation is carried out. Lastly, accessibility, although *prima facie* a principled political objective with roots in the rule of law expectation that people should be able to know the law by which they are governed,<sup>82</sup> also expects to improve legislation by increasing access to it, such that, at some point, accessibility will be optimised.

The difficulty with a reductionist approach is that it tends to only focus on some of the indicators of *complicatedness*,<sup>83</sup> while at the same time ignoring the emergent, *complex* characteristics of law and politics.<sup>84</sup> There are at least three problems with this. First, it neglects to consider the numerous socio-political obstacles to achieving the kind of agreement that only Rousseau's General Will could hope for. Secondly, it downplays context. As has been identified in the literature on law and complexity, devoting a 'myopic attention' to individual rules – or, by extension, particular methods for optimising *all* rules – is unwise because the operation and interpretation of individual rules is contextual;<sup>85</sup> both in terms of the interpreter's perspective and the operational context of the rule.<sup>86</sup> Third, the operation of rules is not fixed in time.<sup>87</sup> Changes in socio-political, ethical and operational context mean that the pursuit of perfectly balanced rules is unrealistic. At best, as Ruhl and Salzman argue, one should attempt to '[build] adaptive structures,'<sup>88</sup> that, ideally, respond to normal change.

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<sup>82</sup> Evident in both formal – eg J. Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195 – and substantive, eg Lord Bingham, 'The Rule of Law' (2007) 66(1) CLJ 67 – accounts of the rule of law.

<sup>83</sup> Office of Tax Simplification, 'Complexity Index' (June 2015) <<https://www.gov.uk/government/publications/office-of-tax-simplification-complexity-index>>

<sup>84</sup> See again Ruhl and Katz, n 21 above.

<sup>85</sup> n 26 above, 764.

<sup>86</sup> Cilliers (2005a), n 12 above.

<sup>87</sup> n 26 above, 764.

<sup>88</sup> *ibid*; see also Ruhl (2008), n 21 above, 903.

As we have already made clear, this does not mean that there are not justifications for pursuing the aims of PL/GL. The most obvious is that, if you expect someone to abide by the law, then the legislature should try to guarantee that they can know *what* the law is. The absence of this type of understanding makes a mockery of the idea of the rule of law.<sup>89</sup> At the same time, it is important to recognise that, given the complex nature of society and the legislative process, not only is it impossible for the statutory drafter to perfect their art, and arrive at a final, agreed upon language, there is more to law than statute alone. The physical text of the statute and the legislative process which crafts it undeniably plays a part in shaping our understanding of the law, but – as has long been the mantra of socio-legal approaches to law – we need to think more deeply about the context in which statute exists. Feldman’s characterisation of constitutional texts, in this case related to devolution, as only a framework for starting discussion recognises the centrality of context to discourse around legislative meaning:

‘... the text only provides a focus for discussion, and a way of legitimizing conclusions by presenting them as the outcome of an interpretation of an authoritative text. The text itself provides a way of formulating and approaching the questions, but (even in a purportedly codified constitution) does not always provide the answers: these tend to lurk in the gaps between the terms of the text, or between form and reality.’<sup>90</sup>

### *Clarity*

With Feldman’s observation in mind we can turn to consider each of the goals of the PL/GL movement in detail. Those seeking clarity either want to enable a specific group of specialists, such as those operating within or regulating a particular industry, to better know what the rules are, or they want to make the law clearer for society at large. These two interpretations of clarity are not compatible since the nomenclature of a professional body is unlikely to be comprehensible to the public at large, and

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<sup>89</sup> Lord Simon of Glaisdale, 'The Renton Report - Ten Years On' (1985) 6(1) Stat L Rev 133, 133; Lord Neuberger, 'General, Equal and Certain: Law Reform Today and Tomorrow' (2012) 33(3) Stat L Rev 323, 325.

<sup>90</sup> D. Feldman, 'None, one or several? Perspectives on the UK’s Constitution(s)' (2005) 64(2) CLJ 329; for a similar expression concerning ordinary legislation see, R. Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 3<sup>rd</sup> ed, 2016), 38-39.

conversely the absence of such technical detail may make the manner in which the rules are to operate unclear in specialist contexts.<sup>91</sup> It should also be acknowledged that the public is not a homogenous group. The public is diverse, comprised of a variety of ‘semiotic groups’,<sup>92</sup> and this will impact upon how different elements of the public interpret law. This indicates both an overlap and a potential contradiction between the drive towards clarity, and the pursuit of accessibility.

The problem faced by the PL/GL discourse is that the law does not just need to be clear to the public and/or a specific group of regulated professionals. It also, at the very least, needs to be clear to regulators and those having oversight of the regulatory environment, the judiciary.<sup>93</sup> For example, under the constitutional arrangements of the UK, Parliament is sovereign. This means that the judges, in order to act constitutionally, should be able to justify their interpretation of the law as being an accurate reproduction of Parliament’s notional intention. In other jurisdictions the intentions of a legislature might be substituted for, or supplemented by, the wording of a founding constitutional document, though this too would require interpretation. In such circumstances the legislature’s intentions might be viewed as unconstitutional and the statute struck down. In any case, determining legislative intention is not simple. Indeed, how one should interpret the intention of Parliament in relation to the powers granted to government ministers for the purposes of deciding whether ministerial action is unlawful has a long history in UK public law discourse.<sup>94</sup> In essence, there is disagreement about how judges should construe the intention of the legislature derived from the words of statute. In practice, even if there were agreement as to the methodology to be employed in interpreting statute, when faced with challenges of interpreting ambiguous legislation in general, or its application in particular contexts, Feldman and Sullivan’s observations remain apposite.<sup>95</sup> Disagreements over interpretation, and interpretative methodologies reveals the myth of determining legislative intention,

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<sup>91</sup> Lord Stow Hill, HL Deb vol 366 cols 1013-1014 10 December 1975.

<sup>92</sup> B.S. Jackson, ‘Legislation in the Semiotics of Law’ in H. van Schooten (ed) *Semiotics and Legislation: Jurisprudential, institutional and sociological perspectives* (Liverpool: Deborah Charles Publications, 1999) cited in R. Sullivan, ‘The Promise of Plain Language Drafting’ (2001) 47 *McGill Law Journal* 97, 117.

<sup>93</sup> See further, *ibid*.

<sup>94</sup> For an indication of the debate, see; C. Forsyth (ed) *Judicial Review & the Constitution* (Oxford: Hart, 2000).

<sup>95</sup> n 90 above.

and thus the possibility of ascertaining *the* meaning to be given to words in the statute book (or a constitutional text) because though they might speak through a single document, legislatures are a collective body of many voices.<sup>96</sup>

Not only is it sometimes difficult to determine what Parliament intended a statutory provision to mean, judges have also demonstrated a propensity to enhance, reduce, ignore or restructure the words of statute to secure what, in their view, is the most appropriate constitutional construction of an answer to a legal question.<sup>97</sup> This approach, too, has strong support in jurisprudential circles. For example, consider Dworkin's discussion in his seminal *Law's Empire* of the judge and the legislature as participants in the development of a chain novel.<sup>98</sup> The argument is that, not only is statutory intention a nebulous concept, but to establish the meaning of legislation today, and the next chapter in the interpretive story, it is important to look both back at (socio-)legal history up to the passage of a given statute, and beyond the law to what society expects legislation to mean. Our point is that the PL/GL movement's understanding of statutory clarity focusses too much on the text itself. It assumes that the meaning of the components of the statute are self-evident, or can be made to be so. On this view, the emergent quality of the text, which, even if it is not explicitly recognised in debate around statutory interpretation, is forgotten. Our view is that the meaning of statute is not a product derived by deploying the right words in the right order, but is emergent,<sup>99</sup> and arises out of the interaction of the text with, *inter alia*, the judiciary. It is, therefore, important to be frank about the limits of what can be achieved by enhancing the clarity of the text itself.

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<sup>96</sup> See also *R v Secretary of State for the Environment Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 396.

<sup>97</sup> Consider the majority judgment of Lord Neuberger in *R (on the application of Evans) v Attorney General* [2015] UKSC 21; or the creation of new statutory concepts, as in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), per Laws LJ, at [59-64].

<sup>98</sup> R. Dworkin, *Law's Empire (1986)* (Oxford: Hart, 1998), especially Chapter 9.

<sup>99</sup> See Webb, n 12 above, 141-145; n 21 above, 478; also J. Murray, T.E. Webb, and S. Wheatley, 'Encountering Law's Complexity' in J. Murray, T.E. Webb, S. Wheatley (eds) *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (London: Routledge, 2018).

### *Simplicity*

If the problem is linguistic complicatedness, and it is not possible to achieve both clarification for specialists, and accessibility for lay people, can the text be simplified as a way of resolving both the clarity and accessibility concerns outlined above?<sup>100</sup> Here again we see the same type of contradictory aims that prevent the idealistic solution of drafting and passing law which is simultaneously clear, simple, and accessible. A legal text which is simple, is economical with words, or which uses the most basic language, rather than precise, specialised terminology cannot convey the same clarity of meaning as a more detailed text.<sup>101</sup> Indeed, text which is too spartan might leave very significant questions unanswered, produce confusion later, and thus be dealt with outside of politically representative structures by the courts.<sup>102</sup> The great irony, of course, is that a text which assiduously considers all circumstances to which the law might be addressed, thus producing nominal certainty, is unlikely to be clear or accessible to either specialists or lay people. We suggest that any certainty achieved through granular detail is only nominal because legal, indeed social complexity is incompressible. It is not possible to account for all future situations in the text of generally applicable statutes. If emergence is a nonlinear process predicated on the dynamic interaction of an incredibly large number of individuals, processes, and institutions,<sup>103</sup> and if there is also a lack of certainty about where to draw the boundary of the legal system,<sup>104</sup> how can we account for all outcomes? To account for every outcome, we would need to produce a model – in this case, a statute – that was *at least* as complex as the subject of that model.<sup>105</sup>

As a consequence of this observation, we can also express some concerns about associating PL/GL with economic efficiency. It is argued by some proponents of PL/GL that a balance must be

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<sup>100</sup> See E.A. Driedger, 'Legislative Drafting' (1949) 27 *Canadian Bar Review* 291, for an example of improved drafting driven by improved linguistic expression, for a contemporary view, see H. Xanthaki, *Thornton's Legislative Drafting* (London: Bloomsbury Professional, 5<sup>th</sup> ed, 2013).

<sup>101</sup> Baroness Bacon, HL Deb vol 366 col 971 10 December 1975.

<sup>102</sup> Daniel Greenberg, 'Extra words go wrong... and not enough words go even wronger' (2017) 38(1) *Statute Law Review* v, v.

<sup>103</sup> n 16 above, *ix*.

<sup>104</sup> Webb, n 12 above; also n 25 above; Paul Cilliers, 'What Can We Learn From a Theory of Complexity?' (2000) 2(1) *Emergence* 23, 28-30.

<sup>105</sup> *Ibid*; see also n 11 above, and Cilliers (2005a) n 12 above, 263-264.

struck between definitional rigour, and the economic burden that comes with the law which that process produces. Simplification of the law, a reduction in definitional rigour, is said to be needed in order to lessen the economic cost of complying with the law.<sup>106</sup> This claim, like the wider simplification aim, relies on two flawed assumptions. First, as challenged above, that simplifying legal language improves accessibility. Secondly, that simplification eliminates complexity. We would argue that the contrary is more likely. Reductions in regulatory compliance requirements do not eliminate the complex interplay between the regulators, regulated, public, and the state, they just conceal it. As such, simplification may have the effect of increasing uncertainty by making regulatory relationships and industrial obligations unclear to the regulated, regulators, judicial bodies and citizens.

The focus on simplifying the law for either economic or wider democratic aims misses the point. For example, consider the academic debate over legal complexity in the United States. As an aspect of the simplification and reduction in economic burden agendas, Epstein argues against increases in the volume of legislation – the purported source of complexity<sup>107</sup> – because this also tends, it is asserted, to result in a commensurate economic burden. To combat the perceived increase in the volume and complexity of law, and in particular to halt the increasing volume of law as a source of complexity, he argues that we should ‘insist that every new legal wrinkle pay its way by some improvement in the allocation of social resources.’<sup>108</sup> This implies that there is a balance to be struck between the degree of legal specificity, and the associated costs of legal implementation, compliance and enforcement.<sup>109</sup> This argument rests on the belief that we should manage legal volume, ie complicatedness, as a way of dealing with legal complexity. Ruhl and Katz view this construction of legal complexity as incorrect. As an example, they argue that:

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<sup>106</sup> Office of Parliamentary Counsel (Australia), *Causes of complex legislation and strategies to address these* (Canberra: Australian Government, 2011), 1; see also the Cabinet Office, *Red tape challenge*, <<http://webarchive.nationalarchives.gov.uk/20150319091528/https://www.redtapechallenge.cabinetoffice.gov.uk/about/>>.

<sup>107</sup> R.A. Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard University Press, 1995), ix.

<sup>108</sup> Ibid 307.

<sup>109</sup> See L. Kaplow, ‘A model of the optimal complexity of legal rules’ (1995) 11(1) *Journal of Law, Economics & Organisation* 150; V. Fon and F. Parisi, ‘On the optimal specificity of legal rules’ (2007) 3(2) *Journal of Institutional Economics* 147.

‘The [US] Tax Code is not complex because of its costs of compliance, difficult readability, number of rates and special provisions, or the complexity of tax compliance software. Rather, the Tax Code imposes costly compliance burdens, is difficult to read, has lots of rates and special provisions, and poses a challenge to software developers because it is complex.’<sup>110</sup>

By extension, while cost, readability and volume might be indicators of complexity, they do not allow conclusions to be drawn about whether that complexity is appropriate in that context. Reducing costs, improving readability, and decreasing the number of rates and provisions will only impact those metrics, it does not deal with the underlying complexity of the subject matter, or the *possible* problem that complexity *may* pose.<sup>111</sup> This conclusion is made even more emphatically in the closing pages of the paper where Ruhl and Katz write that ‘there is no *a priori* basis for asserting that all legal complexity is structurally or normatively bad.’<sup>112</sup> This implies that the goal of simplifying, clarifying, and increasing the accessibility of the law as a means of reducing legal complicatedness rather misses the point. The law is not merely complicated, it is *complex*. Moreover, and regardless of how exactly you construe the boundaries of law,<sup>113</sup> it is nested within society, which *is also* complex. The insights which complexity theory offers suggest that it is not a question of dealing with the *indicators* of complexity, at least not as a primary objective, but rather of establishing a way of thinking about the complex nature of law and society that is equipped to work with that complexity.

### *Accessibility*

Accessibility is central to the thinking of many drafters within the PL/GL movement.<sup>114</sup> In the first place it is concerned with changing the way the legislation is presented on the page and the ease with

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<sup>110</sup> Ruhl and Katz, n 21 above, 197.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, 240.

<sup>113</sup> Webb 2013, n 12 above.

<sup>114</sup> For discussion, see Y. Roznai and N. Mordechay, ‘Access to Justice 2.0: Access to Legislation and Beyond’ (2015) 3(3) *The Theory and Practice of Legislation* 333.

which the text can be viewed by the user. Innovations, such as the work of the UK's Office of the Parliamentary Counsel and the National Archives on the legislation.gov website, which aims to provide a complete database of all live primary legislation in the UK, along with historic records of amendments to the text, is an example *par excellence* of the successful implementation of this type of accessibility. Not only is this type of thinking likely to produce increased accessibility *per se* for the general public, it intended to make it easier for specific groups of non-lawyers, such as those working in a particular industry, to access the law regulating their work. In this respect, clarifying the law for a specific group, such that the language is comprehensible to them, is likely to make it more accessible for that group. This shows how the affinity between clarification and accessibility is dependent on the particular target the drafter is aiming at.

The idea of increasing the ease with which statute can be accessed is wholly unobjectionable. However, access *per se* does not increase access in terms of understanding. As we have said, we think that the PL/GL movement, in focussing primarily on the text of the statute itself, devotes insufficient attention to how the statute will operate in the context of the wider socio-legal system. It is for this reason we argue that the PL/GL outlook is modernist; it relies on perfecting the construction of the text. It attempts to reduce legal meaning to a quantifiable, stable output.<sup>115</sup> Complexity thinking indicates that social systems tend not to be amenable to such measures. Even laws with ostensibly plain meanings only retain this appearance until they encounter an unanticipated counterfactual, or when the social context changes. The conclusion that the meaning of statute can be conclusively ascertained outside of a court, such that providing access to statute is equivalent to providing access to *the* understanding of the law in a given context is, therefore, problematic.

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<sup>115</sup> For problems with this approach, see Ruhl and Ruhl n 22 above, 426-427; JB. Ruhl, 'The Fitness of Law: Using Complexity Theory to Describe The Evolution of Law and Society and Its Practical Meaning For Democracy' (1996) 49 *Vanderbilt Law Review* 1407, 1474-1475; Webb n 21 above, 478; and also J. Murray, 'Complexity Theory and Socio-Legal Studies, Coda: Liverpool Law' (2008) 29 *Liverpool Law Review* 227.

In some respects the observation that there is more to law than statute is acknowledged in PL/GL discourse.<sup>116</sup> This can be seen, for example, in the idea that judge-made law, the common law, constitutes a significant part of the law in force in the UK and other jurisdictions,<sup>117</sup> and that statute law exists alongside constitutional principles like the rule of law.<sup>118</sup> However, in other respects the movement, in seeking to achieve the competing aims of improving clarity, simplicity and accessibility of the statute book does so only if a peculiarly limited interpretation of what constitutes ‘law’ and legal questions is adopted. It might be argued that this is more a problem with how PL/GL is presented, indeed the UK’s GLI recognises the ‘ghostly absence’ of case law in the PL/GL age,<sup>119</sup> but accuracy of presentation is something which the PL/GL movement purports to address. It is difficult to square this narrow view when it is considered, for example, in relation to the construction of statutory intention, judicial interpretation of statutes, and the requirements of constitutional principles, since it implies that, among other things, case law is of little consequence in a common law system.

The American Bar Association (ABA), for example, has cautioned against blindly pursuing PL/GL objectives.<sup>120</sup> The ABA is not alone in its concern that simplicity may produce,<sup>121</sup> *inter alia*, imprecision – where appropriate technical language is not employed, or an inappropriate increase in administrative discretion is permitted – if the legal problem is thought too knotty to articulate simply in legislation, such that responsibility for working out the detail is passed to administrators.<sup>122</sup> The complex nature of socio-legal relationships does not go away simply because we make the statutes regulating them ostensibly simpler.<sup>123</sup>

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<sup>116</sup> See R. Heaton, 'Making the law easier for users: the role of statutes' (London: Institute of Advanced Legal Studies, speech, 2013), transcript at <<https://www.gov.uk/government/speeches/making-the-law-easier-for-users-the-role-of-statutes--2>>

<sup>117</sup> Ibid.

<sup>118</sup> Revell, n 42 above, 157-158.

<sup>119</sup> n 116 above.

<sup>120</sup> See American Bar Association (ABA), Section of Administrative Law and Regulatory Practice; State and Local Government Law; Environment, Energy and Resources; *Recommendation* (1999), <<https://www.americanbar.org/content/dam/aba/migrated/adminlaw/plain99.authcheckdam.pdf>>.

<sup>121</sup> See, for example, Australia, discussed above at 000.

<sup>122</sup> See n 20 above.

<sup>123</sup> Ruhl and Katz n 21 above, 197.

## The Stacey Diagram: the drafters' role and implications of clarity and simplicity

Complexity and complex systems approaches can appear to be esoteric and meta-theoretical, but they are, as our consideration of statutory drafting above demonstrates, surprisingly simple and can easily be applied to everyday human situations. One of the most parsimonious and effective tools of complexity thinking for public policy and management is the Stacey Diagram.<sup>124</sup>

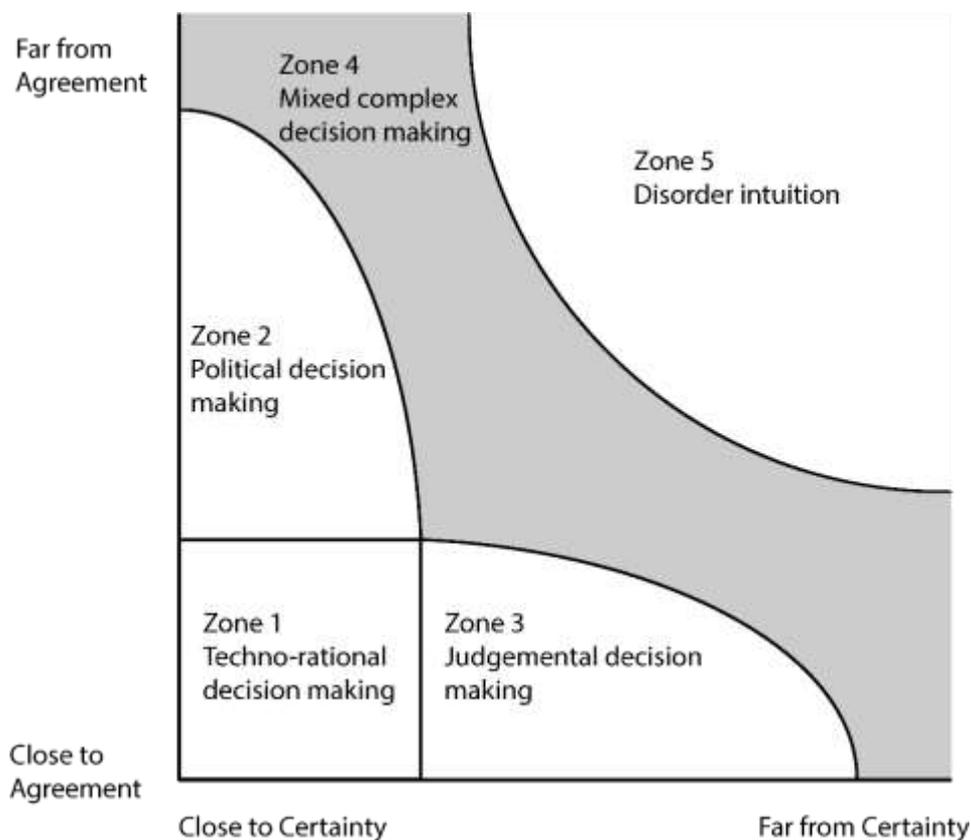


Figure 1: Modified Stacey Diagram

As seen in Figure 1, the diagram combines just two axes based on the degree of certainty and the degree of agreement for a particular policy area. High levels of certainty indicate that the issue is

<sup>124</sup> n 3 above. Stacey developed the diagram or matrix in the early 1990s. However, he later distanced himself from it over concerns that it was too limiting in reflecting the fully reflective nature of management processes; see R. Stacey, D. Griffin and P. Shaw *Complexity and Management: Fad or Radical Challenge to Systems Thinking?* (London: Routledge, 2002). However, the diagram remains popular for a number of complexity related academic areas.

well known and easily understood, while low levels of certainty imply that it is unknown/unknowable and that there are great differences in opinion over the issue, even among experts. Meanwhile, high levels of agreement denote substantial public agreement over the nature of, and solution to the issue, while low levels of certainty imply substantial public debate and disagreement.

These two axes create five main zones of decision-making:

*Zone 1: high certainty-high agreement.* In this zone, the issue is well understood, and the policy/legal response agreed between the majority of key stakeholders. Data on the issue is clear, abundant and easily accessible. Repetitive techno-rational decision-making based on evidence-based actions, audit, and targeting strategies works well here. Bureaucratized and formalised responses and structures are optimised in this zone (eg NPM).

*Zone 2: high certainty-low agreement.* In this zone, there is clear and abundant data and the experts/actors understand the problem. However, the stakeholders disagree over how to respond to it. In this case, more evidence is of little use and political bargaining and consensus building become key decision-making tactics.

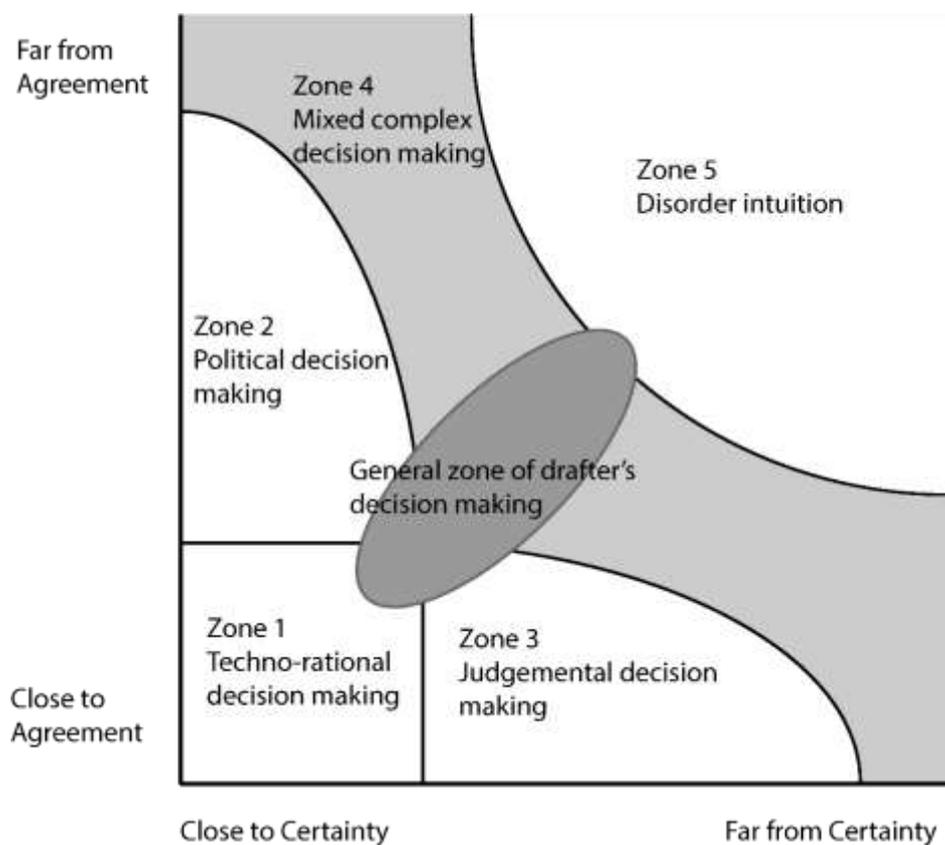
*Zone 3: low certainty-high agreement.* In this area, all of the main actors agree about the nature of the issue, but there is no simple answer or policy response to the problem. Available data may be partial, incomplete, or contradictory. Even experts do not know how to properly respond to it and/or there is significant debate over the best response. Here, multiple strategies may be required, and discretionary decision-making becomes increasingly important. More data may be helpful. However, if the problem is intractable then it may only reaffirm uncertainty.

*Zone 4: mixed certainty-mixed agreement.* This is the most common zone of policy and legal decision-making. Data may be uncertain and contested. It is an area in which stakeholders and experts disagree, to varying levels, over the nature of, and responses to the issue. This requires

a flexible response that blends political decision-making with evidence-based processes and discretionary decision-making and can include a range of decision-making approaches.

*Zone 5: low certainty-low agreement.* This is the most difficult area where everyone disagrees and no one has a clear answer. Evidence is very poor or limited and may be continually shifting. Moreover, the issue may be highly emotive and politicised effectively nullifying evidence-based strategies. Here, incremental steps are important, and intuitive responses may be just as important as evidence-led thinking.

Using the modified Stacey diagram, we can now visualise the position of the drafters' role in the legislative process.



*Figure 2: Modified Diagram of Generalised Drafter Decision-Making*

As we see in Figure 2, the position of the drafters is one that cuts across a range of zones. On the one hand, much of the day-to-day work of drafters is relatively stable and repetitive. The core actors in the system are largely stable (public servants on long-term contracts, and repeatedly engaged independent contractors). There is a clear structure of legislative processes, traditional styles and cultures for drafting legislation and detailed procedural norms. Aspects such as these fall within Zone 1. Orderly, bureaucratic processes function well in this zone. Detailed data on these processes can be accumulated and analysed, and evidence-based improvements can be implemented; evidence-based techno-rational decision-making is the optimum tactic. The pursuit of clarity in this zone should be achievable, at least as regards agreement on meaning between drafters and the main group to whom the legislation is addressed, because of the high degree of stability and predictability found in this zone.

However, the drafters' role is clearly not that simple. Even given a high degree of certainty over the cause/nature of a particular issue (for example, pollution in urban areas, obesity), the various stakeholders involved will generally have very different interpretations and responses to it. Hence, the pursuit of clarity and simplicity are evidently problematic in this context. In these Zone 2 areas, groups/interests may be militantly opposed to each other for a mix of interest-based, social or ideological reasons. More data, evidence, or technical analysis will have little impact in finding solutions in this Zone because the differences are qualitative. Here, drafters must take account of political nuance and bargaining and reflect this in their work.

At the same time, drafters may be confronting issues that have substantial public agreement/support behind them (traffic reduction, public health initiatives, security measures) but that are technically challenging, and could be implemented via a range of possible solutions. Greater evidence and data may help. However, different technologies and approaches could be used to lead to a variety of improved outcomes; for example, encouraging more public transport versus increasing bicycle lanes; promoting more sports versus healthy eating campaigns; putting more police 'on the streets' versus targeted policing. Hence, in Zone 3, drafters will need to call upon the leading experts, but in the end will have to rely on discretionary decision making, guided by their political instructors.

In drafting the legislation, should they suggest that ministers endorse language which pins down a single implementation methodology for clarity and (relative) simplicity in the short term, or should they delegate greater discretion to the civil servants and junior ministers tasked with implementing the policy? The former option is good for the rule of law, those subject to the rules should know what the situation is, and the public know that the minister is democratically responsible for the implementation method selected. The latter option has the potential to be more responsive to unforeseen eventualities. However, it lacks the democratic and rule of law credentials of the former approach because the parameters of the powers granted, and thus the lines of accountability, are less clear.

Zone 4 is the most common zone for legislative decision-making, where complex issues involving a multitude of actors with different interests, facing a range of technical difficulties and uncertainty (tax issues, business regulation, drug regulation) require a variety of complex decision-making processes. Data collection and evidence-based decision-making can be useful, but so are political skills and discretionary decision-making based on a range of technical expertise. The instructions received by the drafter will ask them to balance these various factors and actors as best as she can, to produce compromises that can never be perfectly optimised, but which may be stable and satisficing.<sup>125</sup> Again, the Zone 4 context is not conducive to the types of clarity and simplicity proposed by the PL/GL discourse. Nevertheless, the involvement of multiple actors, including the public, may make the principled basis of the legal rule which permits balancing action plainer to a wider range of people, improving the accessibility of, and legitimacy of the law.

Finally, occasionally drafters are forced towards issues in Zone 5, the zone of greatest uncertainty and disagreement. Examples include the need to rapidly respond to large scale events (Brexit, Trump) and moments of national crisis (unprecedented disasters – human or natural) and highly divisive issues where simple technical answers are unavailable (edge of life decisions, issues of large scale racial and ethnic hatred). In this zone, data and evidence are only marginally useful, trying to

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<sup>125</sup> n 4 above.

manage these situations is like ‘walking through a maze whose walls rearrange themselves with every step you take’.<sup>126</sup> Incrementalism may be the best approach, but it is still very uncertain due to potential ‘butterfly effects’, the unforeseen, unintended, and nonlinear consequences of decisions.<sup>127</sup> Often the best one can do is fall back on experience, trial and error, and intuition. The law required to authorise such an approach will struggle to deploy the prescriptive language available for Zone 1 challenges, and must place a higher degree of trust in political accountability mechanisms outwith the law. It involves a high degree of discretion being accorded to front-line decision-makers while asking political representatives abstracted from those decisions to accept political responsibility for perceived ‘failures’ of policy. Given the nature of the problems legislative actors face in Zone 5, the law is likely to fall back on more flexible concepts to assess legality that judge the behaviour of decision-makers on whether it was reasonable or proportionate in that context,<sup>128</sup> which poses constitutional questions regarding the proper remit of judicial action.<sup>129</sup>

## **The tendency towards disorder in complex systems**

As noted at the beginning of this article, human complex systems are interconnected with, and open to, a multitude of other systems and their larger environment. Hence, they are fundamentally dissipative, continually requiring new energy, inputs, and adjustments to adapt, thrive and meet their wants and needs in an incessantly evolving, interconnected network of systems. Within this setting of constant change and adaptation, there is a persistent tendency towards disorder and obsolescence. For example, privacy laws designed to deal with the era of print media are clearly inadequate to respond to the changing dynamics of privacy in the internet age in the same way that traditional financial regulation

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<sup>126</sup> J. Gleick, *Chaos* (London: Sphere Publishers, 1987), 24.

<sup>127</sup> L. Pal, ‘Assessing Incrementalism: Formative Assumptions, Contemporary Realities’ (2011) 30(1) *Policy and Society* 29.

<sup>128</sup> Likely much closer to proportionality as articulated in *Kennedy v Charity Commission* [2014] UKSC 20 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19 than the unreasonableness threshold of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>129</sup> For example, see M. Arden, ‘Proportionality: The way ahead?’ [2013] *Public Law* 498, 513-516; T. Hickman, ‘Problems for Proportionality’ [2010] *New Zealand Law Review* 303; cf P.P. Craig, ‘The nature of reasonableness review’ (2013) 66(1) *Current Legal Problems* 131, 140-142.

has been slow to deal with the rise of crypto-currencies. Fundamentally, and similar in operation to the concept of entropy where all systems eventually tend towards disorder without new inputs,<sup>130</sup> all social systems, rules, and structures must be continually renewed and revised in order for them to have a chance to adapt, survive and satisfy the wants and needs of their constituents. Renewal is essential, but it does not guarantee the success or survival of a social system. Practical examples of the failure of system renewal and the tendency towards disorder can be seen in the extreme cases of state and societal breakdown in the face of civil war and internecine conflict, or when overly rigid political systems actively inhibit societal adaptation and renewal.<sup>131</sup> Visually, this can be captured by the Stacey diagram in the following way.

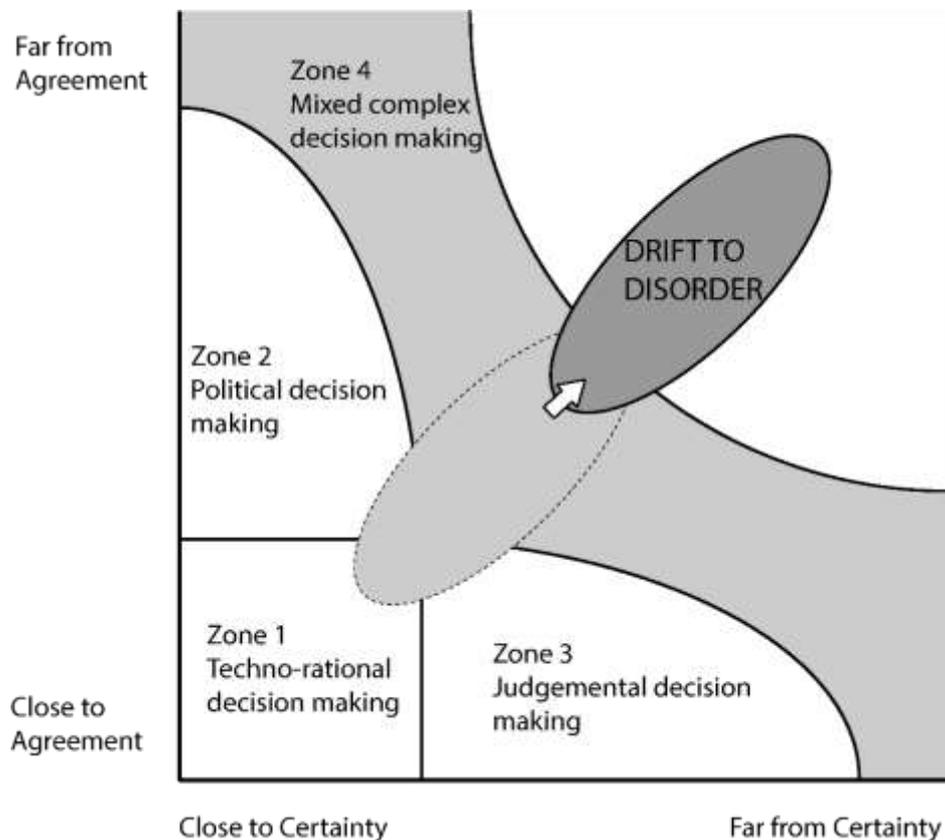


Figure 3: The Tendency Towards Disorder

<sup>130</sup> R.L. Flood and E.R. Carson, *Dealing with complexity: An introduction to the theory and application of system science* (London: Plenum Press, 1988), 13-14; Geyer and Rihani n 7 above, 17.

<sup>131</sup> Webb, n 22 above, 239.

If this is recognised as a reasonable approximation of the decision-making reality for drafters, then the implications for drafters resemble those for policy-makers discussed above. Similarly, as was also noted above, one of the driving tendencies in the post-WWII era was a push towards greater certainty and ‘evidence-based’ order in public policy, often held up as the gold standard to which all policy actors should strive.<sup>132</sup> Moreover, as our review of recent PL/GL initiatives shows, this desire for greater clarity, simplification and accessibility continues. On the one hand, these are healthy responses to the underlying tendency of all complex policies and societies to drift towards disorder and reflect the continued development and complexity of the law and legislative process which inevitably requires clarification and simplification. On the other hand, there are also reflections of this tendency towards, and beliefs in greater order and control which hold that, with enough evidence, expertise, and effort, a ‘perfected’ policy or legal system can be created. This belief in, and desire for some form of ‘end state/final order’ is often the contested territory occupied by populist movements and a mask for powerful stakeholder interests. With these concerns in mind, what does the Stacey Diagram complexity analysis reveal about the implications of PL/GL initiatives?

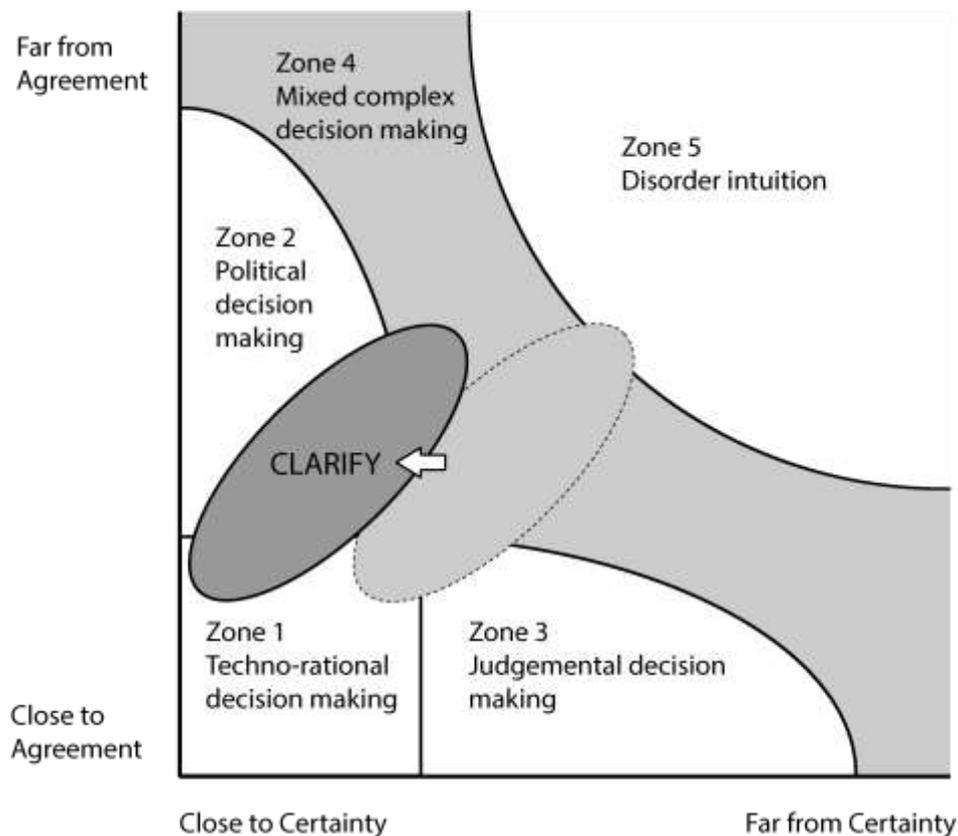
## **The implications for PL/GL Thinking**

As noted earlier, one of the main foci for PL/GL drafters is to ‘clarify’ the law. This move towards greater clarity is associated with a range of positive outcomes for policy and law. It would enable them to be more precisely applied by experts and used by lay people, reduce uncertainty by limiting the range of reasonable judicial interpretation, and through these achievements increase respect for law and the policy process in society at large.

We do not dispute that these are potential outcomes of greater clarity. However, even if these benefits were all possible, as demonstrated in Figure 4, clarity comes at the cost of increasingly politicised discretionary decision-making.

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<sup>132</sup> n 39 above.

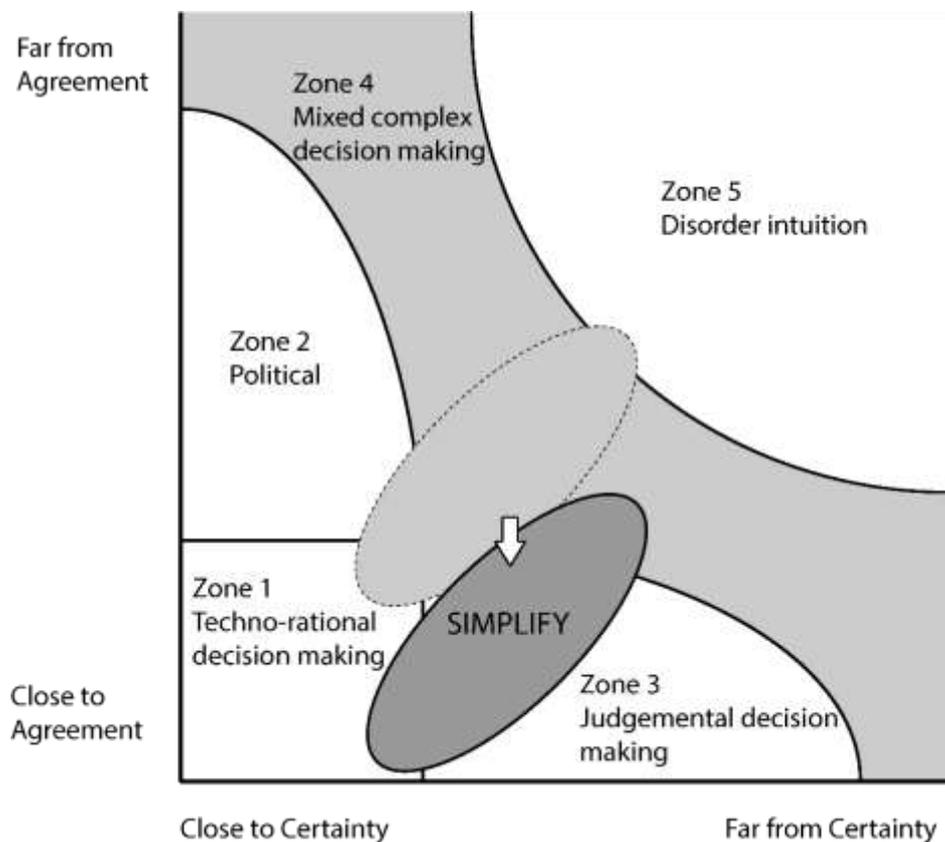


*Figure 4: The Implications of Clarification*

With this in mind, if we return to the list of benefits of clarification, it is not difficult to see that each has an underlying political element. For example, greater precision implies that there would be much clearer winners and losers, exacerbating political tensions in any particular policy area. Similarly, an increased ability to deploy the law by non-experts broadens the range of actors and groups that could easily engage in the drafting process. While this increase in input possibilities is both potentially invigorating to the system, and democratically attractive, we need to think about how the system will accommodate this diversity in a way that maintains its legitimacy while containing political and, later, legal disputes as to the constitutionally acceptable modes of resolving them; judicial review, free and fair elections based on universal suffrage, protest and free speech. Meanwhile, reducing the scope for judicial interpretation could significantly amplify the political pressure on the drafting process to lock down definitions and anticipate disputes. Finally, it is clearly problematic to conclude that greater clarity

and, by implication, politicisation of the drafters' context would lead to a greater respect for the drafting process or its products.

Likewise, as demonstrated in Figure 5, below, the strategy of 'simplification' creates similar contradictions. Proponents of legislative simplification argue that similar benefits to clarification could be created such as reducing the volume of legislation, simplifying the language used, agreeing to core rules and structures when drafting legislation, and reducing the effort and cost for the public to comply with the law.

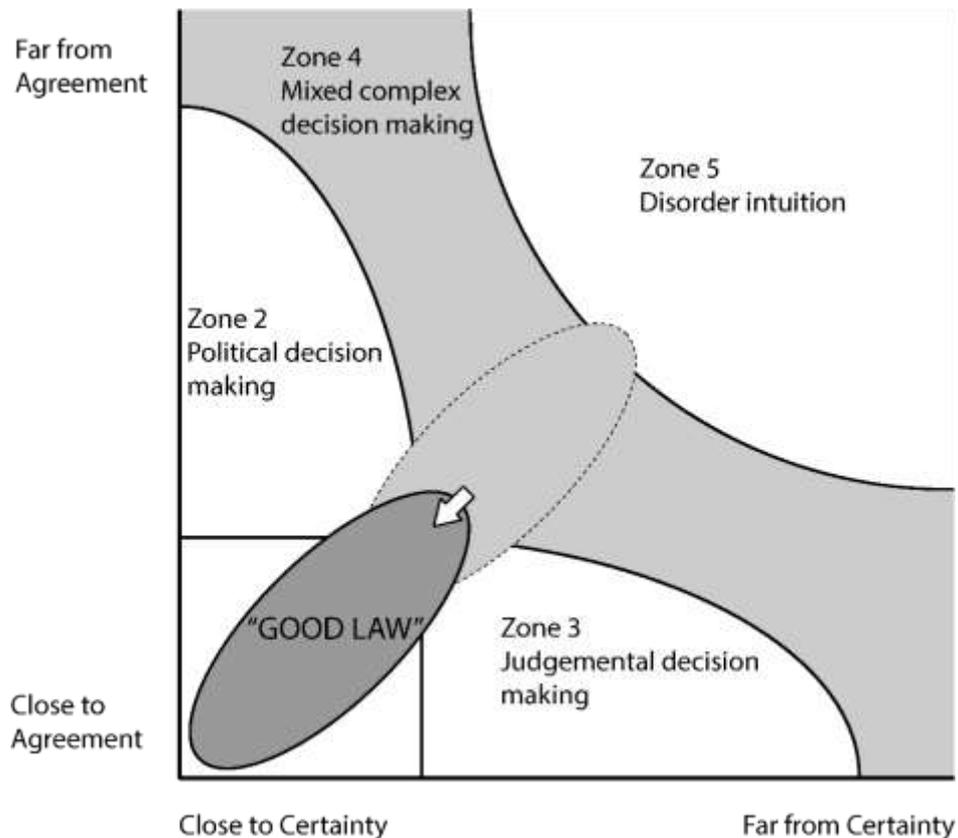


*Figure 5: The Implications of Simplification*

In essence, simplification seeks to lessen the complicatedness of the drafting process and its outputs such that there is a greater level of public understanding and agreement over what the policy or legal rule is. However, as noted in Figure 5, even if this attempt at using simplicity to increase public agreement about the legislative drafting process and its outputs did work, it would immediately increase

the level of technical uncertainty surrounding it. For example, if the volume of legislation was reduced, and simpler, less technical language used, this would merely transfer the more complicated and complex aspects of any policy issues towards the policy implementers (civil service, local government), to the less scrutinised arena of secondary legislation, or the judiciary as normal societal complexity began to interact with the simplified rules. This would have the effect of requiring civil servants implementing policy, and the judiciary adjudicating upon the appropriateness of that implementation, to make overtly political judgments about how to resolve the types of disagreement that, constitutionally, are best dealt with at the legislative stage. A similar outcome would arise if rigid rules regarding the types of terminology, length, and style of legislation were implemented. Simplification does not remove technical uncertainty or political disagreement from law, it merely moves it outside of the legislative process. This has interesting political implications particularly in relation to who gains most from simplicity which generates a lack of clarity, and who is best placed to use the wider legal system to protect their interpretation of ambiguous, simplified legislation.

The combined drive for greater clarity and simplicity in recent PL/GL initiatives clearly parallels aforementioned, NPM and evidence-based policy initiatives to create more rational, stable and orderly policy outcomes that can be based on the gold standard of policy making – Zone 1 techno-rational decision-making. This is visualised in Figure 6.



*Figure 6: Plain/Good Law and the Stacey Diagram*

From a complexity perspective, as illustrated by the Stacey diagram, given the dominant orderly framework of policy-making in the rational ‘Westminster’ model, it is no surprise that legislative drafters, and proposals surrounding the drafting process, are continually attracted to strategies aimed at pushing the process into the more orderly zone of techno-rational decision-making. The pursuit of simplicity, clarity and, partly as a consequence of these efforts, accessibility, facilitate this. If, as is the implication of the PL/GL movement, there is always a better – clearer, simpler – version of the text to be written, and a better way of allowing public and specialist users to access that text, then the proponents of PL/GL are essentially saying that they can convert the art of drafting into a techno-rational science. In essence, the art of balancing mixed stakeholder requirements articulated through potentially contradictory ministerial instructions can be converted into a scientific methodology.

Articulated in this way, it seems unlikely that drafters would wish to pursue the clarificatory, simplifying and accessibility mantra of the PL/GL movement to the bitter end. Nonetheless, as

recognised by complexity thinking, due to the continuing tendency towards policy disorder over time, in some respects efforts towards greater simplicity and clarity are essential in keeping the drafting, policy and legal process in a healthy, balanced state. This is because the on-going, reflexive re-examination of the operation of the legislative process, and its relationship to the socio-legal context in which it operates, is an essential aspect of maintaining relevance and legitimacy to that context. The exact position of this 'balanced state' will vary over time and in relation to local, national, regional and international contexts. Hence, the pursuit of a final end state of 'good law' is a fundamentally flawed and potentially dangerous concept, if pursued too vigorously, on too narrow a methodological, epistemological, and ontological basis. PL/GL initiatives are part of a continuing balancing process and, to a degree, are an indication of a healthy and robust response of drafters and policy and legal actors against the tendency towards disorder. The danger results from the belief that PL/GL processes can produce answers that deal perfectly with competing, contradictory, politicised positions.

## **Conclusion**

Returning to the five main questions that we outlined in the beginning of this article, the problem of complicatedness and complexity in law and legislative drafting is not new, and variations on this problem and attempts to respond to it are centuries-old. In their more pragmatic guises, the current PL/GL initiatives are merely the latest form of this historical process and they reflect new technologies (internet, search engines, computerisation), new policy frameworks (NPM, evidence-based policy making), distinctive legal cultures (common, civil, multi-jural), and a range of specific political and social dynamics. As we argue above, we are not fundamentally opposed to these initiatives. In fact, they are an essential part of the necessary renewal and revitalisation that all social systems must manage when confronting the inevitable change and disorder that life entails. Our concerns are focused on the tendency of these initiatives to fall into the hubristic trap of certainty and a belief in an underlying order to society, and hence the law. As we have shown, those working towards clarification, simplification and accessibility of statute law often appear to be seeking an unattainable goal - a means of reducing,

perhaps eliminating, what are essentially political disagreements about the terminology and structure of a text, such that agreement over the technical understanding of that text can be arrived at.

Following this, in response to question Three, we do not think that complicatedness or complexity is the core problem for law, policy or drafters. It is an inherent part of the process. Learning how to recognise and manage it is of primary importance. Creating a balanced drafting system that combines elements of structure and openness that fits with the relevant political and social contexts is one of the greatest drafting skills of all, hence our use of the term the ‘drafters dance’. It is an art form which combines knowledge, skill, nuance, experience, intuition and a range of decision-making strategies. This does not mean that more complexity will improve the process. Boundaries, structures professional norms, and historical processes are essential to the maintenance of any social system. However, since most of the PL/GL initiatives are focused on creating more order in the legislative process and system, and downplaying or ignoring the various tensions, we are forced to emphasize the problems and threats that come from an overreliance or hubristic belief in order. As we mentioned earlier, this has been a dominant tendency in policy making in much of the 20<sup>th</sup> and early 21<sup>st</sup> centuries.

On the other hand, it would be a mistake to reason that because complexity theory is deeply sceptical of final answers to socio-legal questions, we should abandon the attempt to accommodate novelty. This is not our point. Instead, as the example of the statutory drafter demonstrates, we argue that there will always be new versions of these challenges to deal with. The risk of rigidly pursuing the particular conception of the principled, but potentially misguided goals of clarification, simplification and increased accessibility of the law followed by the PL/GL movement is that such an approach naturally anticipates an end to these intractable problems.

Regarding Questions Four and Five, from a complexity perspective, ‘plain’ and ‘good’ laws are not necessarily better than ‘normal’ complex ones. Again, we support the general position that laws should be as clear, simple and accessible as possible. However, clarity, simplicity and accessibility all come with various trade-offs and are not inherently better than more complicated and complex laws or

policies. If law is required to be complicated, such that one would quite reasonably be concerned that the ordinary lay person, or indeed specialist non-lawyer, would struggle to grasp the meaning of the law to them at first glance, then we need to think about the accessibility of legal advice. The requirements society imposes on the law – in particular that the law is sufficiently rigorous as to allow it to be observed and enforced as intended – should not yield to the goal of simplifying and clarifying the law for lay people if this ultimately harms the interests of those very same people; for example, by weakening environmental protections or food safety standards. Moreover, as was evident in most of the examples that we explored, PL/GL initiatives are often focused on the needs of business and can be used as a cloak for de-regulatory political agendas that other stakeholders (consumers, workers, etc.) would be strongly opposed to, or certainly would wish to actively consent to before they were advanced. Hence, claims that simple laws are inherently beneficial and somehow less political than ‘normal’ complex laws are clearly overstated, perhaps even disingenuous.

Finally, returning to the metaphor of the drafters’ dance, drafters are an important part of a delicate legislative and legal process. There are a wide range of institutional structures, historical traditions, and structured relationships that set the stage of the dance. There are also many legal, policy, and political ‘partners’ interacting with the drafters, often pulling them in contradictory directions. Drafters are not in control of the location, tempo, or rhythm of their system, but they do have agency and play an essential role in the shaping of the *style* and *staging* of law and policy. PL/GL initiatives, even when well-intended, seem to imply that the dance can be made easier, simpler, and produce a better outcome. Given our complexity perspective, we fundamentally disagree with this assumption. In fact, we fear that, in addition to acting as a cloak for certain political groups, it unnecessarily constrains drafters, legislators, and the law in responding to the normal complexity of everyday life. This limits the adaptability, flexibility, and viability of the legal system and legislative process, and could lead to a distancing of the law and legislative process from the very people that PL/GL initiatives claim to be interested in connecting with. It also implies that, if drafters follow certain core rules regarding clarity, simplicity, and accessibility, then their work will be improved. When linked to quantitative indicators (formatting guides, word totals, readability indicators) this has the ability to make drafters more

accountable (do they follow the target indicators or not?) but undermines their fundamental constitutional responsibility to the legal and policy outcomes that they are instructed to enable. This tendency towards accountability but not responsibility is echoed throughout the current rationalist, evidence-based, and target-oriented, dehumanised policy framework where the child was lost, the patient died, or the system crashed, but procedures were followed, and targets met.<sup>133</sup> Our hope is to encourage drafters to avoid this and keep dancing!

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<sup>133</sup> n 4 above.