

THE DRAFTING OF STATUTES

Boswell recorded that when he mentioned to Johnson that a friend had advised him against being a lawyer because he would be excelled by plodding block-heads, the great Doctor remarked: "Why, Sir, in the formulary and statutory part of law, a plodding block-head may excel; but in the ingenious and rational part of it a plodding block-head can never excel".¹ Johnson's derogatory remark about the study of statute law may or may not be true at the time it was spoken in 1766. There were, however, no professional parliamentary draftsmen in Johnson's time² and statute law was then quite insignificant in relation to Common Law. If Johnson were alive today is there any doubt that his view would be just the contrary and that he would advise anyone embarking on a legal career to pay particular attention to statute law? I think not. The phenomenal growth of statute law in modern society cannot be ignored by anyone, least of all by a lawyer. In fact it is no exaggeration to say that from the time of his birth to the time of his grave the modern man finds his life regulated by some statutory provision or other. Even after his death there is still the Estate Duty Act to worry about, although of course the burden passes on to his executors or administrators.

Somehow the notion that statute law and the drafting of statutes is dull and pedestrian persists. However those who have had occasion to draft or deal with statutes recognise legislative drafting as intellectually stimulating and rewarding. Thus Macaulay, who spent some time in India in drafting a penal code, wrote from Calcutta to his friend Ellis: "I begin to take a very warm interest in this work. It is, indeed, one of the finest employments of the intellect that it is easy to conceive".³ Macaulay's original draft, after subsequent revisions, became the well-known Indian Penal Code from which our own Penal Code, as every lawyer knows, is derived. Again, Sir Alison Russell, whose book *Legislative Drafting and Forms* has been for many years and still is a standard work for those who have to draft statutes, described legislative drafting as "a high and splendid branch of the art of using language".⁴ And Mr. Justice Scarman, in his Lindsay Memorial Lectures in 1967, expressed the view that the drafting of statute law in U.K. is "brilliantly done", while paying compliment to the Parliamentary Counsel as the "brilliant legal elite".⁵ More recently another parliamentary

1. *Boswell's Life of Johnson*.
2. The U.K. Parliamentary Counsel Office was established in 1869 with the appointment of Lord Thring as the first full-time Parliamentary Counsel to the Treasury.
3. George Otto Trevelyan, *The Life and Letters of Lord Macaulay*, Chapter VI.
4. *Legislative Drafting and Forms* (4th ed.), p. 12.
5. *Law Reform* (1968), pp.51 and 56.

draftsman, G.C. Thornton, pointed out that while there are limitations on the stylistic devices which a parliamentary draftsman may use, "much of the wonder of the language is available — simplicity, economy, directness, orderliness, precision, elegance. He can still devote himself to the high purpose of successful communication of meaning".⁶

It is a common delusion that legislative drafting is simply a matter of putting into proper form and words the substantive proposals which are given to the draftsman. This falsely assumes that there is always a clear distinction between substance and form and that the draftsman's concern is only with form and not with substance. The great American judge, Justice Cardozo, protested against the attempt to distinguish between substance and form when he wrote: "Philosophers have been trying for some thousands of years to draw the distinction between substance and mere appearance in the world of matter. I doubt whether they succeed better when they attempt a like distinction in the world of thought. Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity".⁷ Where does substance end and form begin? What is the dividing line between policy and law? Except in very simple cases there are no clear and definite answers to these questions.

Far from being concerned merely with form it is essential for a parliamentary draftsman to fully understand the substance and policy of any legislative proposal before he can even begin his actual drafting or composition. To do so not only requires hard thinking on the part of the draftsman but also on those instructing him. Where they have failed to do their part of the thinking it is the draftsman's duty to force them to think. To draft without adequate thinking and understanding is to draft without knowing what one is about and is a meaningless exercise. Thornton makes the point neatly: "It is worse than useless to be able to draft with facility and skill if one's thinking on the task is misconceived. Technique without substance is meaningless. It is self evident, but nevertheless worthy of emphasis, to record that a misconceived idea remains misconceived however well it is expressed".⁸

Reed Dickerson, one of the very few outstanding exponents of the modern art of legislative and legal drafting, has pointed out that there are two planes on which the drafting process operates — the conceptual and the verbal. He goes on to explain:

Besides seeking the right words, he [the draftsman] seeks the right concepts. Because the concept is usually grasped verbally, the two planes are easily confused.

Part of the draftsman's concern for concepts is with ascertaining and perfecting the substantive policies of his client, and part is with soliciting the most appropriate means for carrying out those policies. Both parts underlie the attempts at verbalization usually identified with drafting. Drafting, therefore, is first thinking and second composing.⁹

6. *Legislative Drafting* (1970), p. vi.

7. *Law and Literature*.

8. *Legislative Drafting*, p. vi.

9. *The Fundamentals of Legal Drafting* (1965), p. 7.

In fact one can state the cardinal principle of legislative drafting in one short sentence: *Think clearly what is to be said and say it as clearly as possible.* This may sound simple but in practice, like so many other things, it is far from simple. The “thinking” or as Dickerson calls it the “conceptual” aspect of the drafting process generally precedes the “saying” or the “verbal” aspect. However the two aspects are not necessarily independent of each other and need not be functionally divorced. Because we think in words it may be difficult for our thoughts to be independent of the words we use. Clear writing does assist in clear thinking just as slovenly writing impedes clear thinking. George Orwell in a well-known essay emphasised this when he said that our language “becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts”.¹⁰

Thornton has elaborated on the conceptual and verbal planes of legislative drafting by further dividing them into five stages which he similarly cautions should not be regarded as watertight compartments. These five stages are (1) understanding, (2) analysis, (3) design, (4) composition, and (5) scrutiny. He goes on to make an apt analogy with the game of snakes and ladders in describing the drafting process:

The process of drafting a law has much in common with the children’s game of snakes and ladders. The aim is the same of proceeding uninterrupted from start to finish, preferably with bursts of acceleration. In both cases the aim is rarely realized. The player lands on a snake and slithers down to a position he hoped he had passed for good. The draftsman encounters problems — perhaps he gains a clearer understanding of his instructions or realizes his draft just will not work — and he too must slither back to an earlier stage, perhaps back to begin again. One must not press the analogy too far. Snakes and ladders is a game of chance. Drafting legislation is a game of skill.¹¹

The process of thinking and composing may indeed have to be repeated many times before a complicated proposal is finally in an acceptable form to the great relief of the draftsman and his instructors.

Bearing in mind that substance, form, policy and law are considerations which are not necessarily distinct and independent, we shall consider briefly the duties of a draftsman. On receiving his instructions the first duty of the draftsman is to make sure he fully understands the substantive ideas and policies embodied in the instructions. “A draftsman”, says Reed Dickerson, “who allows himself to be less than fully informed on both the underlying policies to be expressed and their background is not discharging his central responsibility.”¹²

Except in a very simple Bill, time and effort is required in digesting and understanding the instructions. Where the draftsman has special knowledge and experience of the subject-matter it will come in useful and save considerable time. Very often, however, because his work involves the whole range of law and human affairs he cannot call upon his own fund of knowledge and experience but will have to rely upon those instructing him for information and guidance.

10. *Politics and the English Language.*

11. *Legislative Drafting*, p. 96.

12. *The Fundamentals of Legal Drafting*, p. 8.

Almost invariably there will be considerable gaps in the instructions which the draftsman receives. The draftsman must be alert for such gaps in his instructions and also for any possible misconceptions. He may have to hold numerous discussions with those instructing him to clarify matters of detail or problems and difficulties which may have been overlooked.

Sometimes the draftsman may find that no new legislation is necessary and that the matter at hand can be taken care of under some existing law. Or he may find that it is preferable to adopt an entirely different approach to deal with the matter from the approach which has been adopted by his instructors. For example instead of a proposal to amend a particular Act, he may find that it is more appropriate to amend another Act or to have a new Act.

Since a Bill has to be considered in the broad context of the whole corpus of the law it is essential for a draftsman not only to have a competent knowledge of the directly applicable law but also a sound knowledge of statute law and common law in general. Administrators who are only concerned with a particular area of the law are usually ignorant of the law outside that area. Their proposal may have legal implications in other areas of the law which they may not be aware of and it is the draftsman's duty to ensure that no violence is done to these other areas of the law.

In addition to a competent knowledge of the law the draftsman must bring to his task an imaginative foresight. He must try to visualise all possible situations and circumstances which may arise and consider the provisions necessary to deal with them.

Although he is not responsible for the ultimate decision on policy matters, a seasoned draftsman can and ought to play his part in the policy-decision process by submitting the substantive proposal to a critical analysis. Often he will be able to show that the proposal requires some modification because of problems or difficulties which have been thrown up by his analysis and which have not been foreseen by those instructing him. Where he is able to do so the draftsman may even assist in finding solutions to these problems and difficulties.

Once he is in a position to do so, the draftsman prepares a draft Bill which is sent to the Ministry or department instructing him for their consideration and comments. In the case of a complicated Bill discussions will invariably ensue. The draftsman and the Ministry or departmental officials will examine the draft Bill clause by clause and make any necessary alterations. A revised draft is prepared by the draftsman after the discussions and the whole process of examination may have to be repeated again and again until both the draftsman and his instructors are fully satisfied both as to the content and form of the draft Bill. When the Bill has reached this final stage as a finished product it passes out of the draftsman's hands and it becomes the responsibility of the Ministry concerned to obtain the approval of the Cabinet for the introduction of the Bill in Parliament.

It is possible, however, for a Bill to be amended even after it has been introduced in Parliament and the draftsman will have to prepare the necessary notice of amendments if any amendments are considered necessary.

It is important to emphasise that a draftsman should not be expected to operate entirely on his own. True, the verbal or writing part of the drafting must be left entirely to him. However, as I have stressed earlier, drafting is not merely a verbal exercise. A draftsman is not a juggler of words. Close collaboration is essential between the draftsman and those instructing him to ensure that what is produced is exactly what is required-

Perfection is in the nature of things unattainable in legislation and it occasionally happens that even after the most intensive effort and infinite care on the part of the draftsman and the Ministry or departmental officials instructing him defects come to light when the Bill becomes law. A good draftsman may be able to minimize the area of doubt which gives rise to the possibility of differing interpretations but when he is dealing with a complicated piece of legislation such as the Income Tax Act he cannot remove all possible doubt and provide for all possible circumstances. If notwithstanding the draftsman's best effort defects appear, he can only take comfort from the well-known words of Lord Denning in *Seaford Court Estates v. Asher*:¹³

Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman.

Turning to the language and style in which statutes are drafted, it cannot be doubted that there are peculiarities which, as Sir Ernest Gowers has pointed out, may be attributable to the paramount need for unambiguity and precision.¹⁴ The draftsman's obsession with unambiguity and precision is understandable. In the oft-quoted but nevertheless still quotable words of Mr. Justice Stephen, statutes require a high degree of precision because "although they may be easy to understand, people continually try to misunderstand, and... therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."¹⁵

13. [1949] 2 K.B. 481 at p. 499.

14. *The Complete Plain Words* (1st ed.), Chapter II. Unfortunately this chapter has been omitted in the 2nd edition.

15. *Re Castioni* [1891] 1 Q.B. 149 at p. 167. At the time Stephen J. spoke these words, and indeed until well after the advent of the welfare state, judges and lawyers who were bred in the Common Law tradition did not show much sympathy for and understanding of the true spirit of modern welfare legislation. They tended to regard statute law as an undesirable encroachment on the virtues of the Common Law. Today courts are more alive to the need to interpret modern legislation reasonably having regard to its purpose and intent. Nevertheless the emotional attachment of lawyers to the lady of

A draftsman does not waste words. He goes straight to the point and it has been said that his "baffling economy of words" have the "compactness of a mathematical formula".¹⁶ However, the analogy with a mathematical formula remains only an analogy. Words are inexact symbols and take colour and meaning from their context. Precision itself is a matter of degree as what is precise enough for one purpose may not be so for another purpose. There can also be over-precision which is not necessarily a virtue as it results in lack of flexibility when flexibility may be necessary. In determining the degree of precision which is desirable in any particular provision the draftsman has to exercise his judgment and skill. Quite often he has to use abstract words (e.g. reasonable, fair, equitable, just, proper, sufficient, satisfied) which obviously need to be interpreted in the light of circumstances.

The difficulty of comprehending a statutory provision by laymen is not necessarily the fault of the draftsman. One cannot expect complex ideas to be expressed, whether in a statutory form or otherwise, with such simplicity that it can be understood by a person who does not have the relevant background. The real reason for the complexity of modern statute law is the complexity of human affairs in modern society. A draftsman certainly has no perverse desire to create conundrums to baffle those who have to read statutes or to set them mountain-climbing after his meaning. Good draftsmen are in fact fully conscious of the need to achieve as much intelligibility and simplicity as possible. The understanding and use of plain and ordinary words is of utmost importance to a draftsman. The general belief that a draftsman uses a special kind of language which is different from ordinary English is certainly untrue. One has only to look at any modern statute to see that most of the words which are used are from the current stream of ordinary English words whose meanings are to be ascertained from any good dictionary. Where the draftsman wishes to modify the ordinary meaning of a word or expression for the purposes of the statute he specifically does so by means of a definition or interpretation provision. In the absence of any defined meaning in the statute, a word or expression must be given its ordinary meaning unless it is a technical word or expression which has acquired a technical meaning.

The meaning and definition of words inevitably reminds one of the famous dialogue between Alice and Humpty Dumpty which is reproduced here for the benefit of those who have yet to appreciate the consummate art of Lewis Carroll in concealing profound thought with the simplicity of a child's language.

"I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't — till I tell you. I meant 'there's a nice knock-down argument for you!'" "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less." "The question is," said Alice, "whether you can make words mean different things." "The question is," said Humpty Dumpty, "which is

the Common Law still remains strong. One distinguished judge has advocated that "we must get into the habit of looking first for our law in the statute book and turning to case law only if the law cannot be found in the statute. There is nothing revolutionary in such a change. Indeed, it is belated; for already the bulk of the English law that matters has found its way into the statute book." See Mr. Justice Scarman, *Law Reform*, p. 47.

16. *Fowler's Modern English Usage* (2nd ed.), p. 411.

to be master — that's all." Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. "They've a temper, some of them — particularly verbs, they're the proudest — adjectives you can do anything with, but not verbs — however, I can manage the whole lot! Impenetrability! That's what I say!" "Would you tell me, please," said Alice, "what that means?" "Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't intend to stop here all the rest of your life." "That's a great deal to make one word mean," Alice said in a thoughtful tone. "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra." "Oh!" said Alice. She was too much puzzled to make any other remark.¹⁷

Draftsmen have been cautioned against the temptation to resort to Humpty Dumpty definitions too freely as they are a barrier to communication. Robinson comments that "Humpty Dumptyisms are a trap for the unwary; if, having defined a word one way, he forgets about his definition and uses it in its normal sense, there will always be ambiguity lurking in the air. The ambiguity is not resolved by qualifying the interpretation clause with the expression 'unless the contrary is intended'."¹⁸ An amusing example of a Humpty Dumpty definition is given by Reed Dickerson in which "September 16, 1940" was defined to mean "June 27, 1950"! "This feat of legal draftsmanship," comments Dickerson, "is not likely to be equalled, let alone excelled, in this century."¹⁹

In this short paper I have attempted to focus on the essence of the process of drafting statutes and to present it as intelligibly as possible for the general reader, whether he is a lawyer or not. I hope the paper will help to dispel some of the misunderstanding that exists at present as to the nature of the drafting process and the function of a draftsman. I have not touched upon the techniques and other technical aspects of legislative drafting as they would only be of interest to a specialised audience. Moreover, it would be extremely difficult to try to explain them in simple and intelligible terms.

The quality of our statute law is a matter of immense importance to the welfare of the community. We need good draftsmen just as we need good policy-makers if that quality is to be maintained at a high standard. Unfortunately it takes many years of toil and practice to produce a good draftsman and very few lawyers have the ability or temperament for this exacting task. A draftsman must be a competent all-round lawyer; he must have an ability to analyse problems coupled with an imaginative foresight; he must have a capacity to see through misconceptions and to foresee problems and difficulties; he must have considerable patience and an ability to accept criticism whether justified or not; he must have an understanding of the ways of Government and administrators; he must have a maturity of mind when dealing with matters of social and economic policy; he must be able to grapple with all kinds of problems and grasp new ideas quickly; he must be able to work under pressure; he must be in touch with contemporary ideas and trends. Most of all he must be a skilled craftsman who is

17. *Through the Looking-glass*, Chapter VI.

18. S. Robinson, *Drafting* (1973), p. 56.

19. *The Fundamentals of Legal Drafting*, p. 102.

fastidious in his choice and use of words and who takes pride in his craftsmanship. As a craftsman he must never be satisfied with his work unless he has within the available time produced a draft which is the best that he can do. He must also never cease to find ways to improve his skill and techniques. He may be a jack-of-all-trades but he must be a master of the art of drafting.

I may perhaps conclude with another observation of Johnson which it would do well for every draftsman and lawyer to keep in mind. "Sir Joshua Reynolds once asked him by what means he had attained his extraordinary accuracy and flow of language. He told him, that he had early laid it down as a fixed rule to do his best on every occasion... and that by constant practice, and never suffering careless expressions to escape him, or attempting to deliver his thoughts without arranging them in the clearest manner, it became habitual to him".²⁰

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20. *Boswell's Life of Johnson*.

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