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Mr Gladstone's Hearthrug

Lord Thring, the first Parliamentary Counsel, described how, when drafting Bills, he used to go alone to 10 Downing Street to discuss the details with the Prime Minister, Mr Gladstone, in an atmosphere of somewhat alarming informality: 'I never hesitated to tell him my mind, "This will not do"; he would then stand up with his back to the fire and make me a little speech urging his view of the case; I then replied shortly till the point was settled...He understood and revised every word of a Bill and even settled the marginal notes'.

The Parliamentary Counsel Office was established by Robert Lowe, Chancellor of the Exchequer. in 1869. Hitherto Government parliamentary Bills had been drafted in Lincoln's Inn as part of the ordinary work of Chancery barristers. Lowe's object was 'to have a considerable drafting department and thus to train up young men in this very peculiar branch of business'. The need for training and long experience has been generally recognised since, and Sir William Graham-Harrison, himself an expert draftsman, held that a man 'may be so skilful an advocate as to draw tears from a North Country jury, or so attractive an exponent of a point of law as to keep all members of the court awake all the time, and may even be an acute critic of the drafting work of others, and nevertheless may know no more about the constructive side of drafting than David Balfour knew about womenkind or Lady Allardyce about sow-gelding".

Although the Parliamentary Counsel Office has grown considerably in size, it has grown reluctantly. Until 1917 there were only two counsel. By 1932 there were only four, and outside members of the Chancery Bar were still occasionally employed on the old basis. Today the number of counsel is about eighteen, but this is still small considering that the Office is responsible for the drafting of virtually Government Bills and has many other duties, including the preparation of the more important statutory instruments. The desire to keep the Office small has probably come more from within than outside. The intimacy of a small office, resembling a set of chambers at the Bar, has been cherished from Lord Thring's day as facilitating consistency in drafting technique and an awareness by the head of the Office of all that is going on.

The task of the Parliamentary counsel is a thankless one, and along with their more obvious techniques draftsmen have to cultivate a thick skin. The New Statesman has called the Office the best-organised closed shop in the country. Mr R.E.Megarry, as he then was, described in a famous dedication to his book on the Rent Acts his 'awe and affection' for the draftsmen and a sympathy for the Court 'as profound as it is respectful'. Judges have often given vent to their impatience with the draftsmen's work, as in the following recent example: 'To reach a conclusion on this matter involved the Court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the depths. I regarded it at one time as a slough of despond through which the Court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side'.[1]

1 *Davy v Leeds Corporation* [1964] 1 WLR 1218 at 1224.

It has become commonplace to hurl imprecations at the draftsman's head, but is he the right target? Parliamentary counsel are recruited only from lawyers of the highest ability. As Louis Blom-Cooper has said in a broadcast: 'The qualifications are demanding; nothing much less than a double first from Oxbridge is required, together with an aptitude for phrase-making in a way that will stand the test of scrutiny, first by tedious and pernickerty politicians, and secondly by lawyers looking for loopholes and Judges searching for the simple answer to the problems posed by litigants'. Is it perhaps the system that is wrong? It is significant that the draftsmen's correct title is Parliamentary Counsel to Her Majesty's Treasury. Their task is conceived in terms of getting the Government's programme through. We have a political system which seems to involve the imposition of more and more regulation on the citizen, producing what Lord Justice Danckwerts recently described as 'the over-governed state in which the citizens of this country live'. Not only are these provisions highly detailed and particular, but they are subject to constant tinkering. The real political differences between party platforms are nowadays so small (probably because the scope for manoeuvre, and therefore the true alternatives, are so restricted) that the politicians fall back on changes which, in the context of history, can only be regarded as trifling. Nevertheless they call for a great many words to give them effect. This is partly because, under our system, the changes can be effected only by changing the law (and the existing law is voluminous and verbose) but also because we have come to regard it as a bastion of freedom to have our rights and duties spelt out to the utmost degree. The alternative, which would involve giving a far greater discretion to officials and others, is regarded as unacceptable.

The tradition approach to the production of legislation is, therefore, first that Government business must be got through. This involves the production of Bills with a totally inadequate time for their preparation, and the main stress is on producing a Bill which will effectively achieve the desired result, i.e., will be water-tight and proof against evasion. The evils of haste in producing a draft are obvious and well known. The Canadian draftsman, Elmer Driedger, once remarked that there was for each Bill an irreducible period of preparation - 'as the time is cut down, the quality deteriorates, so that ultimately the point is reached where no Bill fit for introduction can be produced'. The second major factor governing the present-day output of legislation is that Bills are designed for Parliament. Lord Thring once remarked that a Bill is made to pass as a razor is made to sell. We have never got away from the idea that the language which is destined to form part of the law of the land must also be framed so as to be palatable to Members of Parliament. Admittedly much progress has been made in educating M.P.s to the understanding that, while they are properly concerned with the substance of a proposed enactment, they should leave its language to the expert. It is nowadays rare for any amendment to be made to a Bill, and to remain there, unless it has been drafted by or at least approved by Parliamentary Counsel. Nevertheless the impact of M.P.s' ideas as to the form of legislation remains considerable. Dislike of conferring discretion leads to insistence on detailed provisions being made in the Bill. Unwillingness to trust the draftsman leads to distortions, not to mention waste of parliamentary time. A recent instance arose on the Race Relations Bill, when much time was wasted and an unnecessary amendment forced because Members of Parliament thought they were being clever in pointing out that a definition of discrimination which included the word it defined was defective, when in fact it was not.

If, under the present system, Bills are designed to serve the ends of Government and Parliament exclusively, what changes in approach are needed? It seems to some that the third person who ought to be considered is the user. By the user I mean the person, usually a professional man or woman or an official, who has to work to the actual text of an Act of Parliament. I do not myself subscribe to Sir Alison Russell's view that an Act is supposed to be read and understood by the

plain man; it cannot be assumed that a person without the skill that comes from training and experience can safely be left to find his way round an Act of Parliament.

What does the user, in this sense, want from the statute book? Ideally he would like a simple system to tell him where to find the law on any particular point, and would like to find it comprehensively set out in one place. While the common law system continues and until all our laws are reduced to written form, it is plainly not possible to realise this ideal for any point which is not exclusively dealt with by statute. Many points are, however, so dealt with, and yet we are manifestly far from this ideal. In order to begin to tackle the problem, it seems necessary to find out precisely what the user needs and in exactly what ways the present system fails him. The best way to find this, perhaps the only way, is to ask him. Little has so far been done in this direction, although last year the Statute Law Committee did set up a sub-committee to consider what improvements should be made in the form and arrangement of the statute book. Although praiseworthy, this was an enquiry of limited scope, directed only to the system of publication of Acts. It has, however, resulted in the recently-announced decision to publish the next edition of *Statutes Revised* in loose-leaf form. Many doubt whether this will do anything to help, since it is apparently not to be accompanied by any more far reaching changes in the system of producing Acts in the first place. It is highly important that before publication of the new *Statutes Revised* begins there should be further enquiry and research. Otherwise we may have to wait another generation for real reform.

With this in mind, a number of users of statute law have recently formed the Statute Law Society. With three experienced parliamentarians among its vice-presidents (Lords Shawcross, Stow Hill and Grimston) and a widely representative Council, including Sir John Mellor (Chairman of the Prudential Assurance Company Ltd.), Sir Harry Wells (Chairman of the Land Commission), well- known lawyers such as Desmond Heap, Frank Layfield, Q.C., and Hedley Marshall, as well as a number of accountants, professors of law, and legislative draftsmen, the Council of the Society can fairly claim to be sufficiently high-powered to tackle the problem seriously. The first of the two main objects of the Society is 'to procure and further the making of technical improvements in the form and manner in which statutes and delegated legislation are expressed and published with a view to making the same more readily intelligible'. Therefore the Council of the Society has set up a committee to 'examine ways in which the present system of framing, enacting and publishing statutes fails to meet contemporary requirements'. It is hoped that users of statute law will make representations to the committee on any points within their experience which fall within its terms of reference. When the committee has reported, a further committee will be set up to suggest remedies and to investigate the possibilities of the computer (including the desirability of using electronic digital computers to store, search, retrieve and index the text of statutes and statutory instruments) and the use of algorithms, flow charts and other aids to comprehension.

The other main object reflects the need felt by the founders to promote education and research within this field. It is a quarter of a century since Professor G.W.Paton argued that more emphasis should be placed in the universities on the technique of drafting statutes. He felt that only the fullest knowledge of this technique, and of the rules of interpretation, would 'succeed in retaining some consistency in English law as a whole'. Little has been done, however, and there are, as far as I am aware, no courses in any English university which meet Professor Paton's challenge. Accordingly the Society will 'further the education of the public in the processes and scope of legislation of all kinds and at all stages and for this purpose gather and disseminate information on legislative processes'.

The formation of the Society has been welcomed by the Law Commission, whose Chairman, Mr Justice Scarman, feels that the influence of those who have to use the statutes may well be very beneficial in finding solutions to problems of drafting, arrangement and presentation. He has agreed to give a talk at the first meeting of the Society, which will be held at 6 o'clock on 10 October, in the Middle Temple Hall.

In order that it may justify the hopes placed in it, the Society will have to attract a large membership and sufficient finance. The cost of holding enquiries of the kind envisaged, and conducting the necessary research, is very considerable. It is hoped therefore that all practitioners who have this cause at heart will become members of the Society. The individual subscription is three guineas per annum. The Society also hopes that there will be support from commerce and industry. The overhead cost of many a company's legal department could be greatly reduced if the present system of framing and publishing Acts of Parliament and statutory instruments could be improved. It is therefore hoped that many companies will support the Society by becoming corporate members at an annual subscription of 50 guineas. Applications for membership should be made to the Honorary Secretary, Mr C.Whybrow, at 1 Essex Court, Temple, London EC4.

One after another, our venerable institutions are coming under close scrutiny, and such scrutiny nearly always leads to comprehensive proposals for reform. It is perhaps appropriate that on the eve of the centenary of the Parliamentary Counsel Office a thoroughgoing enquiry into our system of producing and promulgating, what is after all the law of the land, should be embarked upon. The direct line of development from the days when Mr Gladstone faced Lord Thring across the hearthrug at 10 Downing Street may well have exhausted its fruitfulness. Perhaps there is need for a new start and a new approach envisaging that the product of the legislative machine should, like the products of most other machines, be designed for the consumer.

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