Legislative Technique

From the Dark Tower

Published comments by Whitehall draftsmen on their art are rare. Two recent examples are therefore to be welcomed, particularly as they exhibit very clearly the drawbacks (so harmful to the public) of that curious genus. An article in the October 1979 issue of ***The Parliamentarian*** (published by the Commonwealth Parliamentary Association) displays the attitudes of Sir Noel Hutton who for twelve long years from 1956 to 1968 presided over the Parliamentary Counsel Office. A more extended exhibition of the same attitudes is furnished by a former Parliamentary Counsel, Sir Harold Kent, in his cleverly entitled autobiography ***In on the Act***. The book is ambitiously subtitled, in suitably Olde Englishe lettering, ***Memoirs of a Lawmaker***.

The ivory-tower arrogance of the Westminster drafting office glints through the chinks of Sir Noel's prose. His article is in terms of a review of the second edition of G.C.Thornton's book ***Legislative Drafting***; but he uses the opportunity of ventilating his distaste for all critics of the timeworn methods. First he explains why no modern British draftsman has written a book equivalent to ***Thornton***. "Service with the Parliamentary Counsel is a life engagement", he tells us. (Sir Harold Kent disproves that for a start: he left the Office at the age of 50 to become Treasury Solicitor.) "Accordingly there is little point for anyone....other than the Parliamentary Counsel and their Scottish colleagues, to acquaint himself with the mysteries and techniques of drafting legislation".

Clearly I am wasting my time writing this column. No one outside 36 Whitehall will be interested (and there is not likely to be much interest there either). But that is rubbish as the responses to this column show. Moreover it is pernicious rubbish. For one thing, no one could suggest that draftsmen of statutory instruments have a life engagement doing that work. They tend to be busy departmental solicitors with many other tasks. Yet the bulk of statutory instruments exceeds that of statutes. Both types of legislation should be drafted on similar lines so as to form a coherent whole. Advice from experienced Parliamentary Counsel would greatly assist statutory instrument draftsmen. The fact is, however, that no user of complex modern legislation can grasp its meaning without knowledge of how it comes to be the way it is. Nor can there be much hope of improvement if outsiders take no interest. But Sir Noel does not try to hide his belief that no improvements are needed.

Nor does he try to hide his contempt for statute users who strive for improvement. It is feature of our national life for people to form voluntary associations in order to pursue a common aim. There are thousands of such associations. Why should not statute users do this? In 1968 they did do it, and the Statute Law Society was formed. Immediately it sought with utmost courtesy to establish relations with the Parliamentary Counsel Office. It was rebuffed.

Early on, the Statute Law Society organized a series of lectures with notable speakers, Sir Leslie Scarman (as he then was) being the first. Invitations were sent to the Parliamentary Counsel Office, and frostily declined. Members of the Office were instructed to have no dealings with the Society, and that attitude has been maintained to this day. When in 1977 I became chairman of the Society I wrote to the head of the Office, Sir Henry Rowe. Once again I sought to establish some form of working co-operation, however tenuous. I had no desire that there should be hostility between the producers of legislation and the would-be reformers. Sir Henry was extremely kind (he, like Sir Noel and Sir Harold, is a kind man). He gave me lunch, when we talked of anything but statute law. But his official reply was expressed in terms I can never forget: "I cannot see any way in which your Society could be associated with our work". He added for good measure that "there could be no question of giving you or your Society any facilities for

discussing our work with us, whether before, whilst or after it is done". The drawbridge was up at the Ivory Tower, and it was going to stay up.

In his article Sir Noel does make one grudging reference to the Statute Law Society. Speaking of the method of amending statutes textually rather than indirectly, he says: "Since about 1965 there has been a great deal of clamour, much of it ill- considered, for a move over to this system as a general rule". He adds: "The demand was orchestrated by a self-appointed body known as the Statute Law Society".

This is a great man, twitching away at flies that intrude on his concentration. It is a twitch to write of "clamour, much of it ill-considered" instead of answering the lengthy and detailed arguments that have been advanced for textual amendment. It is a twitch to call a voluntary association "self-appointed". It reveals too the perennial vice of the appointed civil servant, that "the gentleman in Whitehall knows best".

As a member of the Renton Committee, Sir Noel is aware of the elaborate case put to it by the Statute Law Society and independently, by me (then one of the Parliamentary Counsel). Anyone who wishes to consider this case may do so by studying ***Renton and the Need for Reform***, published in 1979 by Sweet and Maxwell on behalf of the Statute Law Society.

While Sir Noel does not attempt to answer the case for textual amendment, he does repeat the antiquated view of his Office on this topic. Repetition is all he could manage. The view is too hardened; the idea that one might conceivably be wrong too unthinkable. The timeworn method of indirect amendment he describes as "saying what you meant". Textual amendment is "playing with words on paper" (another twitch). The former he says, "was both scientific and most convenient to the Members of Parliament who had to pass the Bills and to the experts (legal or lay) in the relevant field of law, each of whom were more concerned with the substantive change...." Grudgingly, he admits a third category:

"There is, of course, always a third class of consumer of legislation, namely the student or new practitioner who meets it for the first time. For him, no doubt, the method of textual amendment is preferable, so long as he is provided with a clean amended text".

Here is the height of intellectual arrogance. (Or perhaps to be fair to Sir Noel who is a very clever man indeed, it is simply unawareness of the fact that not all statute users are Oxford double-First and Fellows of All Souls). Does Sir Noel really suppose that once a practitioner knows of a change he retains it indelibly and never needs to look up the current law again? Does even Childe Roland (and here I switch from the metaphor of the Ivory Tower to another which is apposite, the Dark Tower) suppose that only "new practitioners" need to consult an updated, comprehensible text? Is he unaware that for many years our legal system has functioned only because commercial publishers have provided users with updated texts, either in textbooks devoted to a particular subject or in collections such as ***Halsbury's Statutes***? Can there possibly be any excuse for his not realising that all practitioners depend utterly on these products of private enterprise, and would be lost without them? Does he really not see that these products are far more efficient if publishers can offer unified texts (as they can only do if the textual amendment system is used by legislative draftsmen)?

Sir Noel has not finished yet. He goes on to explain why the Parliamentary Counsel Office has at long last moved over to textual amendment as the preferred method. It is not because of pressure by the Statute Law Society. To admit that would be undignified. Nor is it because of the recommendations of the Renton Committee. It is for a reason which displays the official mind in all its crass insularity.

The new official publication ***Statutes in Force*** uses a "loose booklet" method under which booklets containing heavily amended Acts can be replaced by reprinted versions. Formerly, all official collections of Acts were bound in volume form. Now, says Sir Noel, "the public can expect to find the amended text (if it happens to belong to one of the subjects which has been published in this edition) within a matter of months". The idea that "the public" looks up law in ***Statutes in Force*** is ludicrous. I would wager that not one in a hundred members even of the legal profession make a practice of consulting that work. It does not

give them what they need, which is annotations and explanations in addition to the text. It is an official work of record. Moreover it is seriously incomplete.

But Sir Noel places much weight on this new official edition. He tells us that in the Parliamentary Counsel Office it has operated as "a powerful inducement to adopt textual amendment". It has "fostered a switch in technique so that more and more amendments are effected by that method".

Now Parliamentary draftsmen do not rely on ***Halsbury's Statutes*** for texts of the law they are instructed to modify. They are required to use an ***official*** text. This is where ***Statutes in Force*** comes in. What Sir Noel is telling us is that throughout this century (and longer) the Parliamentary Counsel Office has ignored the needs of practitioners for textual amendment because it was of no use to the draftsmen. Now that draftsmen need it too they are prepared to supply it.

That is the real answer to Sir Noel's talk of "ill-considered clamour". It is only ill-considered in disturbing the Olympian peace of a Whitehall retreat. What it clamours for is good for most people. When it becomes good for draftsmen too they acknowledge that fact in the most practical and convincing way. They adopt it.

It was, by the way, the Statute Law Society which, by its "clamour" for a looseleaf system, led to the adoption of the format of *Statutes in Force*.

Childe Harold is no better than Childe Roland: indeed he is rather worse. Sir Noel Hutton does at least acknowledge the existence of the "clamour" for reform. He mentions the Renton Committee, and even the Statute Law Society. Sir Harold Kent does not. But I shall leave him for another time.

Trivial Drafting Change

Blackstone called the jury the Palladium of liberty, and in our own day Lord Devlin regards it no less highly. As a good democrat, he values the achievement of the English in securing popular consent at the root both of the making and the application of law. Less plausibly, he tells us (in a new collection of his lectures entitled ***The Judge***) that a worthwhile by-product of the jury system is that "the criminal law has to be such as can be understood by the average citizen; if it were such as to confuse the modern jury, there would be something wrong with the law". Here, Lord Devlin, with respect, is too optimistic. Many areas of criminal law are incapable of understanding by the average lawyer, never mind the average citizen.

Being such a staunch upholder of the jury, Lord Devlin feels distress at the way a trivial drafting change threatens the downfall of our Palladium. The draftsman of s 4 of the Criminal Appeal Act 1966 (now s 2 of the Criminal Appeal Act 1968), in tinkering with the appeal formula laid down by s 9 of the Criminal Appeal Act 1907, failed to realise (as Lord Devlin puts it) that "he must not alter the structure in such a manner as to destroy the habitat therein of fresh evidence cases". The 1907 Act authorised the jury's verdict to be set aside if it was unreasonable or could not be supported according to the evidence. The 1966 switch to "unsafe or unsatisfactory" appeared trivial to Parliament. But by a unanimous decision in ***Stafford v DPP*** [1974] AC 878 the House of Lords chose to hold that the new wording meant the Court of Appeal could not order a new trial on fresh evidence if, after weighing up the fresh evidence, they regarded it as not rendering the jury's verdict unsafe or unsatisfactory. So, Lord Devlin laments, it is no longer true that all persons serving long sentences of imprisonment know themselves to have been convicted by a jury of their peers who have heard substantially all the evidence. Two men angry at not being included in this Palladian category are Cooper and McMahon. Their convictions for the Luton post office murder have five times been considered, unfruitfully for them, by the Court of Appeal Criminal Division. In the last words of his book Lord Devlin ruefully remarks that an offer by Mephistophles to restore his judicial youth would be refused - "even if he sweetened the offer with a pledge to consign to eternal oblivion all the speeches in ***Stafford v*** .

Mistaking the Case

If the draftsman fails to understand the case to which his provision is directed he is likely to go wrong. In ***Watkins v Kidson*** [1979] 2 All ER 1157 the case was really quite straightforward, but the draftsman appears to have misunderstood it.

The case, (relating to capital gains tax) concerns the value of land with development potential. Two factors influence this value: the nature of the potential and whether permission to exploit it has been or is likely to be given. The second factor may be affected by specific events. The actual grant of planning permission is an obvious one. In ***Watkins v Kidson*** it was indirect: the zoning of agricultural land for housing. This occurred in 1971. The tax payer had inherited the land in 1962, it being valued for probate at #1,581. In 1972 he sold it for #264,000. Planning permission for housing had not then been obtained, but the zoning made it virtually certain that when applied for it would be given.

Capital gains tax was introduced in 1965. Gains on property acquired before then are taxed only on the part of the gain attributable to the period following the introduction of the tax. It is normally assumed that gains accrue at an even rate over the period of ownership (the "straight line" method), but there is an exception for development land. It was in drafting the exception that the draftsman went wrong, apparently because he mistook the case he was dealing with.

The intention was that the straight line method should not apply to development land. Apart from the inflationary element, capital gains on land are due to the two factors mentioned above. If, as in ***Watkins v Kidson***, most of the gain is due to a specific post-1965 planning decision, the tax payer should not be able to escape part of the tax by spreading the gain back to the date of acquisition.

So the case the draftsman had to deal with was where the amount realised on the disposal of the land was greater than it would have been if development was permanently forbidden - in other words greater than the land's existing use value. Where the draftsman went wrong was in thinking the case was limited to land for which planning permission had actually been granted. This caused him to frame the test in terms of the hypothesis that "immediately before the disposal, ***it had become unlawful*** to carry out any development..." (Finance Act 1965, Sch 6, para 23(1)(b)). This clearly supposes that in fact development was then lawful (because planning permission had been obtained).

But in ***Watkins v Kidson***, as we have seen, development was not then lawful. Did that mean the taxpayer could apply the straight line method and escape some tax? He fought his case up to the House of Lords, but lost. Lord Scarman was sympathetic to the draftsman. "In choosing the words italicised, the draftsman, perhaps unwisely, was using some ordinary English words... Perhaps thewords were not happily chosen though I would never criticise a draftsman for using ordinary English words (even in a taxing statute)."

I should hope not indeed. In fact, however, as I have shown, the difficulty was nothing to do with the use of ordinary English words (whatever they may be). If the draftsman had inserted "permanently" before "unlawful" all would have been well.

130 New Law Journal (1980) 56.