The Controversy over Drafting Style

Introductory

I gather that there is growing dissatisfaction, particularly among judicial and other members of the House of Lords, with the highly-detailed style of our parliamentary drafting. The new intake of Tory lawyers in the Commons are also showing early signs of interest in the subject. The backbench Conservative Lawyers Committee has been revived, and statute law is to be an early item on its agenda.

As a former Parliamentary Counsel I try to defend our system. Its basic virtues are that it provides legal certainty and democratic control. Essentially it is now very accurate and precise, though there are occasional lapses. Those who hanker for simpler drafting as the answer to the problems are, in my view, on the wrong tack. That there are answers is undoubted, but they do not lie in that direction. [1]

Our present drafting is certainly capable of improvement, like the product of any skilled technique. For example a friend who is the editor of a legal journal (not this one) wrote recently to ask what I thought of the drafting of s 5(3) of the Mobile Homes Act 1983. I felt bound to reply that it struck me as inadequate.

I always regret being obliged to make adverse, even though I hope constructive, comments on the output of the Parliamentary Counsel Office (PCO). With the sense of solidarity proper to the members of any order, I choose however to regard this as no more than a form of self-scourging. I console myself also with the thought that the ***amour propre*** of a small body of draftsmen must always take second place to the wellbeing of the statute book.

There is other consolation too. No one should allow occasional inadequacies to prevent him from realising that in Britain we now enjoy a very high standard of legislative drafting. Perfectionists (of whom I am one) tend to see only the flaws, hoping to correct them. That is all very well, but it should not obscure the reality. I will return in a moment to s 5(3) of the Mobile Homes Act 1983, because there are some lessons there. But first, because it is much more important, I would like to look briefly at the positive side of our drafting techniques.

Precise and imprecise drafting

In ascertaining the legal meaning of an enactment it is important first to determine whether the drafting is precise or imprecise. Modern British Acts are produced by precision drafting, where the draftsman aims to use language accurately and consistently, and moreover is allowed himself to draft any amendments made to the Act during its parliamentary progress. Older Acts however frequently suffer from the vice of disorganized composition. Here the text may be the product of many hands; and the language is often confused and inconsistent. The technique of interpretation applied can then only be as rigorously literal as the accuracy of the drafting permits. If an Act is sloppily drafted, so that the text is confused, contradictory or incomplete in its expression, the interpreter cannot sensibly insist on applying strict and exact standards of construction. It is therefore necessary at the outset to bear in mind the date and style of drafting. [2]

In an article published in 1981[3] Philip Circus alleged there to be a widely-held belief both inside and

[1] As to these answers see Bennion *Statute Law* (Oyez Longman) 2nd edn 1983.
[2] If, in say a consolidation Act, a form of words reproduced from an earlier Act is under examination, the date of the earlier Act may be the crucial one.
[3] 131 NLJ 893. This allegation is discussed below.

outside the legal profession that the standard of legislative drafting has fallen over recent years. Despite the rumblings reported above, I do not believe this to be generally true. The judiciary recognise that modern drafting is precise. Thus Lord Reid said: 'our standard of drafting is such that [the need to do violence to the words] rarely emerges'[4]. Lord Bridge referred to 'a modern statute, using language with the precision one expects'[5]. Lord Roskill remarked that until comparatively recently 'statutes were not drafted with the same skill as today'[6].

The unified control essential to consistency and precision had been lost at an early stage in the emergence of the Houses of Parliament. It was not to be fully regained until the present century. Within this gap of some five hundred years the distinguishing feature of the statute book was its disorganized composition. As Lord Loreburn LC said of this: '... from early times courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure they often are'.[7]

The modern transformation started with the establishment of the PCO under Thring in 1869. By this a single government department came to be responsible for the drafting of all government Bills not solely relating to Scotland or Ireland. A uniform technique was adopted, which to the present day has steadily improved in exactness and precision. It is important to grasp the essence of this transformation. The difference is between organized and disorganized composition. With disorganized composition there is in reality no coherent meaning. One statement contradicts another. Within a single statement there are glaring defects. As Grove J politely put it, the language 'is not strictly accurate and grammatical'[8].

The other side of the picture

We may rejoice in modern precision drafting, but I have to confess that there is another side to the picture, namely the unhelpful attitude displayed by the PCO. It adopts a defensive posture, and the lowest of profiles. It tries to pretend it isn't there. Its output is anonymous. No one outside it can put a name to a particular Act of Parliament, whether to praise an elegant composition or castigate some infelicity. This refusal to name the authors breeds its usual consequence. To be anonymous is often to be indifferent. The PCO has indeed shown itself indifferent to the plight of statute users who find themselves unable to comprehend what binds them. It thus partakes of what Shaw castigated in The Devil's Desciple: 'The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them: that's the essence of inhumanity.'

The insularity of the PCO is shown by its refusal to discuss its work with outsiders. This applies even to the Statute Law Society. I have previously recorded the reply I received a few years ago when, as the then chairman of the society, I politely sought to open the channels of communication. The then head of the PCO told me with equal politeness that there was no way the society could be associated with the work of the PCO, whether before, whilst or after it was done[9]. This, the official stance of the PCO, distressed me when I was a member of it and distresses me still. I believe it to be wrong.

The present head of the PCO, Sir George Engle, is on record as saying 'We know as much as our critics'. This statement lacks the accuracy usually displayed by precision draftsmen. It is at once an understatement and an overstatement. It understates (unless read, as perhaps it was meant to be, as 'We know at least as much as our critics') the immense knowledge and expertise possessed by draftsmen, who in this sense know a very great deal more than their critics. It overstates draftsmen's awareness of the problems of the ordinary statute user. The latter ignorance would be eased by opening up channels of communication.

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[4] *Luke v Inland Revenue Commissioners* [1963] AC 557, 577.
[5] *Wills v Bowley* [1982] 2 All ER 654, 682.
[6] *Jennings v United States Government* [1982] 3 All ER 104, 116.
[7] *Nairn v University of St Andrews* [1909] AC 147, 161.
[8] *Ruther v Harris* (1876) 1 Ex D 97, 100.
[9] See 130 NLJ (1980) 56.

Falling standards of drafting?

As mentioned above, in a recent article[10] Philip Circus said that there is a widely-held belief both inside and outside the legal profession that the standard of legislative drafting has fallen over recent years. I have not myself encountered this belief. Stated in the way expressed by Mr Circus, it at once gives rise to doubt about the qualifications of persons said to entertain it. This is because any statement about the standard of legislative drafting needs to distinguish the productions of professional draftsmen (such as the Parliamentary Counsel) from those of officials who draft legislation as an incidental duty in the course of wider-ranging duties.

Since Mr Circus's attack is developed exclusively against the Price Marking (Bargain Offers) Order 1979, it seems that his real target is draftsmen of the latter description. In the main, Parliamentary Counsel confine their drafting to public Acts of Parliament. Departmental orders are drafted within the departments. There is little connection between the two systems, and it would be coincidental if standards in both declined (or indeed rose) in step with each other.

I do not myself believe that the standards of either type of draftsman have recently declined. What is happening is that drafting tasks of greater and greater complexity are being imposed upon departmental lawyers whose training and experience do not fit them for this role. The remedy is clear. Drafting of all government legislation should be carried out within a suitably-enlarged Parliamentary Counsel Office. An Act and its attendant orders and regulations form a single corpus of statute law. If not all drafted by the same hand, they should all be drafted on a common philosophy and with the employment of the same technique.

Draftsmen as agents of the Legislature

Another question about draftsmen is raised by Lord Wilberforce's recent reference to 'the legislature and its drafting agents'[11]. In fact the legislature in Britain possesses no drafting agents. The draftsmen are all agents of the government or executive. This is a feature of our constitutional arrangements which not uncommonly gives rise to complaint (particularly among back-bench MPs, who because of it have no access to skilled draftsmen). It is not irrelevant to a general understanding of Acts of Parliament to know, and keep in mind, that they are drafted by officials who are under the control not of Parliament but the government of the day.

For the fact is of course that our legislature possesses no drafting agents. Government Bills are drafted by civil servants employed to serve the executive. The same applies to statutory instruments. Even private Members' Bills (where they reach the statute book) are drafted or redrafted in Whitehall. The curious result is that while Parliament passes the Acts it does not decide on their wording. Even in the rare case where an amendment is agreed to against the Government's wishes and not subsequently reversed, it will be reworded by the Whitehall draftsman. This practice is accepted by Parliament in the interests of technical efficiency and consistency.

Judges and other interpreters in search of the will of the legislature need to bear in mind that, while Parliament may have agreed to the wording, it has not chosen it. That could make more than a technical difference in the long run. A body whose words are chosen for it is likely to find, to some extent at least, that its meaning is chosen for it too. The fact that our legislature does not possess drafting agents might ultimately have serious consequences for its independence from the executive.

Section 5(3) of the Mobile Homes Act

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[10] 131 NLJ 893.

[11] *Edwards (Inspector of Taxes) v Clinch*, The Times, 23 October 1981.

I end with a matter raised above. Why should my friend the editor not have been able to enter into a direct dialogue with the draftsman of s 5(3) of the Mobile Homes Act 1983? The PCO would say the draftsman is too busy; but draftsmen are not busy all the time. In any case there ought to be enough draftsmen to allow of such interchanges. The manufacturers of any product ought to be willing to discuss their output with users. The obligation is increased when the users have no choice but to be so.

Faute de mieux, I now propose, for I hope the public good, myself to deal with some criticisms of s 5(3). In the role of a self-scourger, I am forced to admit that this one small subsection suffers from at least four defects, all but one of them commonplace in modern British drafting. The draftsman was faced with the task of providing a definition of the word 'family', as used in the Act. This is how he did it-

> (3) A person is a member of another's family within the meaning of this Act if he is his spouse, parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece; treating-
>
> (a) any relationship by marriage as a relationship by blood, any relationship of the half blood as a relationship of the whole blood and the stepchild of any person as his child; and
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> (b) an illegitimate person as the legitimate child of his mother and reputed father;
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> or if they live together as husband and wife.

The first point to make is that this is one more example of the statutory vice of compression, where the draftsman attempts to cram multifarious factual situations within one brief verbal formula.[12] Here it produces a construction where the last nine words dangle in space. What these danglers ask us to do is mentally join them up with the opening words of the definition to form this proposition-

> (3) A person is a member of another's family within the meaning of this Act if he is his spouse, or if they live together as husband and wife.

The reader can do this joining-up only if he is able to retain the opening passage in mind while negotiating the intervening block of 57 words. Attempting it, he is distracted by the fact that the danglers seem to be part of paragraph (b), though victims perhaps of a typographical mishap of the kind now only too common. He then faces the puzzling idea of a mother and reputed father being other than persons living together as husband and wife.

The next defect is the vice (thankfully rare) of inelegance. With all due deference to the Gay Liberation Front, it really is absurd for a draftsman to use the construction 'if he is his spouse'. This is slipshod drafting, notwithstanding that s 6 of the Interpretation Act 1978 rescues the legal meaning with its provision that words importing the masculine gender include the feminine, and vice versa.

The third fault is very common. I call it asifism. We are instructed to treat various things as if they were the reverse of what they really are. Asifism is perhaps productive of more confusion and head-scratching than any other drafting defect. Here we have no less than four examples of it. We are told to treat affinity as if it were kinship, half blood as if it were whole blood, stepchildren as if they were natural children, and bastards as if they were legitimate. All to save a few words.

This brings us to the fourth vice, for which the draftsman of this particular provision cannot be held responsible. It is lack of standardization. There are many concepts which recur frequently in legislation. The idea of a 'family' is one of them. The obvious solution is to define such concepts once and for all (without 'asifism') in the Interpretation Act. Why does not our Interpretation Act, updated in 1978 after an unconscionable lapse of 89 years, do this? We do not know, and no one will tell us. The PCO is *incommunicado*.

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[12] For a ripe example concerning the myriad varieties of dishonesty encompassed by one brief enactment see J R Spencer 'The Metamorphosis of Section 6 of the Theft Act' [1977] Crim LR 653.

Conclusion

Thus can one small subsection be used to illustrate some of the things that are wrong with our system of legislative drafting, excellent though that system is overall. The danger may be that in the view of statute users the defects will come to outweigh the virtues. If the PCO does not come off its high horse and open a dialogue, there may be unfortunate consequences. Already there is talk in Whitehall of splitting the PCO up and allotting the draftsmen to the various government departments. There are arguments favouring this. It would end the undesirable division between the drafting of Acts and the drafting of the statutory instruments made under them. It would allow departmental Bills to be drafted by lawyers familiar with the work of the department.

I believe that such a development would on balance be deleterious because it would tend to diminish uniformity in drafting style. But if the PCO continues to let its case go by default, that is what may happen. There can be no guarantee that an arrangement thought suitable when Queen Victoria had been on the throne a mere dozen years will be found to remain serviceable as we pass into the twenty-first century. (1983) Law Society's Gaz 2355

NOTE

The Chairman of the Statute Law Society Sir George Baker, a retired Lord Justice, wrote a letter in response to the above. It was published (1983) LS Gaz 2644 in October 1983 (along with a letter from Sir George Engle, head of the PCO). The text of these two letters is in Boxfile 53, along with the text of the above article. I drafted the following replies to Sir George dated 31 October 1983, the first of which was not sent.

First letter (not sent)

The Editor,
Guardian Gazette.

Madam,

'The Controversy over Drafting Style'

It is unfortunate that in his letter Sir George Baker addresses none of the real issues raised by my article. Instead he accuses me of including a misstatement. That I did not do so is confirmed by the accompanying letter from Sir George Engle.

The Statute Law Society was founded in 1968 as a users' pressure group, not as a supporters' club of the Parliamentary Counsel Office.[13] All the Society's published reports have been critical of the output of the Office. This one would expect, but it does not mean there need be any personal hostility or unfriendliness. Such as there was in the past came from the side of the Office. I spent 15 years inside it during two spells between 1953 and 1975, and I know what I am talking about.

Criticism of the attitude of the Office has come from a number of sources. The present Lord Chancellor said in his recent book *The Door Wherein I Went* (p 251)-

> 'Lord Gardiner has more than once expressed the view that the Lord Chancellor should assume responsibility for the training and administration of parliamentary draftsmen, who at present live in a sort of Arcadia of their own under the nominal tutelage of the Prime Minister. If ever a Chancellor attempted to add this province to his empire, I fancy he would have a fight on his hands. Those wily

[13] For the story of its founding see 1983(02).

men vastly prefer King Log to King Stork.'

This fully justifies my use of the word 'insularity', to which Sir George Baker objects. Nor has anything changed since Sir George Engle took over, as his carefully-drafted letter reveals to those who have eyes to see. In the article, I quoted the statement by Sir Henry Rowe, Sir George's predecessor, that there was no way the Statute Law Society could be associated with the work of the Office, whether before, whilst or after it was done. Does Sir George withdraw these words, and tell us there is a new policy of consultation and co-operation? Not at all. He says 'it is not possible now, any more than it was in the past, for us to accord [the Society] any special facilities for discussing our work with us'. We did not want special facilities - just any facilities at all.

The true position is shown by Sir George's next words: 'We have always welcomed constructive criticism of our products, from whatever source, and have never failed to give it full consideration'. The consideration is behind closed doors. There is no dialogue, no discussion. It is not discussion to deliver an anodyne address such as the one referred to so proudly by the two Sir Georges. This made no reference at all to any of the concrete reform proposals put forward from time to time by the Statute Law Society.

The typical response of the Office to reform proposals (when there is any response at all) is unreasoned rejection. Thus Sir Noel Hutton said of the Jamaica Schedule: 'I should be unalterably opposed to this suggestion' (quoted in Statute Law: the Key to Clarity p 64). That was all. The closed mind is indicated by that word 'unalterably'.

The habit of refutation by mere assertion still persists. All Sir George Engle can offer on the four drafting defects fully discussed in a carefully-argued passage of my article is the assertion that the wording of the enactment in question is 'neither defective nor slipshod'. This is an insult to the readers of a learned journal.

When my book *Statute Law* came out in 1980 I sent a complimentary copy to the Office. It contains many thoroughly-argued proposals for reform, based on a lifetime of practical experience of legislation. I received no response to any of them. Now a second edition has appeared, with added proposals.
I offer this challenge to Sir George Engle. If, as I should dearly like to be the case, I am wrong, and he does indeed intend to make a new start over proposals for reform, let him invite me to come to the Office and have serious discussions about the reform proposals in my book. I would gladly give up the time to do it. I do not want to pursue an arid controversy. All I am interested in is improving the law, in ways I know it could be improved.

Editor,
Guardian Gazette.

Second letter (published LSG (1983) 3211)

The Editor,
Guardian Gazette.

Madam,

'The Controversy over Drafting Style'

With the greatest respect to Sir George Baker, I fear he will find himself disappointed if he believes that the Parliamentary Counsel Office has in any way altered its policy of refusing to discuss with outsiders their reform proposals on matters within its sphere of activity. Study of the carefully-drafted letter from Sir George Engle in your last issue appears to confirm this. However there is a simple way to make sure.

My book *Statute Law* contains many proposals for reform. These have been carefully worked out after a

lifetime of experience of legislation in various Commonwealth countries (including fifteen years in the Parliamentary Counsel Office itself). I am grateful that the book has been well received by reviewers all over the world.

When the book came out I sent a complimentary copy to Sir George Engle's predecessor, who returned a brief acknowledgment. That was nearly three years ago, but there has been no response from the Office to my proposals. Now a second edition has appeared, with added proposals. I should be very pleased to send a complimentary copy of this to Sir George Engle, if he is willing to receive it.

I respectfully make this suggestion to Sir George Engle. If, as I should dearly like to be the case, I am wrong, and the Parliamentary Counsel Office has indeed altered its policy of refusing to discuss reform proposals with outsiders, let him arrange for me to come to the Office and have serious discussions about the proposals in my book. This would require the presentation of supporting argument and evidence, but I would gladly give up the time needed. I have no wish to pursue an arid controversy. All I have ever been interested in is improving the law, in ways I believe it could be improved.

Yours faithfully,

Francis Bennion

[See also 23]

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The following letter was sent to the Editor, ***Statute Law Review*** on 9 December 1986-

Sir,
At [1986] Stat LR 57-58 you published a note on my article "The Controversy over Drafting Style" (1983) LS Gaz 2355-2356. The note mentioned that the article drew replies from Sir George Engle and the late Sir George Baker, published at (1983) LS Gaz 2644. It did not however mention that a reply from me to these letters was published at (1983) LS Gaz 3211.

It is worth drawing attention to this because it gives me an opportunity to report the outcome of the publication of that reply, which may interest your readers. First I should set out its terms, which were as follows:-

"With the greatest respect ... could be improved."[14]

What was the response of the Parliamentary Counsel Office to that offer? Why, there was no response at all! Your readers will draw their own conclusions from this.

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[14] See above.