Bennion on Statute Law

Part 1 - Statutory Texts

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The Drafting of Legislation

As I have said, this book is not primarily concerned with drafting technique. Yet it is difficult to understand an Act without some knowledge of how it comes to be the way it is. The work of the drafter is crucial to statute processing, but is little understood outside the drafting office. It seems necesary to spend a little time on this therefore. I propose here to single out four aspects relevant to our theme: the drafter's function, the drafting office, the controversy over whether civil-law drafting on the continental model is superior to common-law drafting on the English model and the question of standardisation. Later I shall also discuss what I call the drafting *parameters*, the factors behind the special techniques of British drafters.

The drafter's function

By saying in chapter 1 that the drafter is merely a technician, denigration of his function was not intended. When helping to frame the report of the Heap Committee I ventured to write: 'Although, like the plumber or the electrician, the draftsman provides a necessary service for the user, he is not employed, as they are, by the consumer' (Statute Law Society 1970, p 17). I said this to make the point, thereafter spelt out, that the needs of the statute user are in practice subordinated to governmental interests. My reference to the plumber or electrician has at times been misunderstood. For example, the former New Zealand legislative draftsman and anti-positivist, NJ Jamieson wrote that if the drafter of legislation is treated as a plumber or electrician then 'open societies are likely to be doomed' (Jamieson 1976, p 550). He argued that if the drafter is to be considered as a craftsman at all he should be seen as an industrious clockmaker who never makes the same clock twice. In his view the drafter is 'engaged in an infinitely more venturesome and skilful enterprise than the judge who accepts by his own judicial doctrine of Parliamentary sovereignty that he is being at the most taught, and at the least merely told, how to tell the time by it' *(ibid* p 546). He later wrote *(ibid* p 558) that to compare drafting with plumbing 'naturally results in inadvertent clowning more tragic than funny'.

Describing the drafter as a technician, I adverted to the skill he must undoubtedly possess. Only because the capacity to acquire the skill is rarer than that needed by an apprentice plumber or electrician can it be inapt to make the comparison. But Jamieson is right to feel uneasy: the legislative drafter's function is basic to democracy. Though merely a technician he should not be an unaware technician. He operates only as a technician, but the democratic process requires that he does so as an ardent democrat. He needs to be fired by a sense of the public importance of his function. The drafter who is a wage-slave, seeing the job as just another well- paid occupation, is a disaster. (See further Bennion 1962, pp 339- 346.)

The drafting office

Drafting can be organised in various ways. In early times the judges did it, hence the famous rebuke to counsel by Hengham CJ in 1305: *'Ne glosez point le Statut; nous le savoms meuz de vous, qar nous les feimes'* ('Do not gloss the statute; we understand it better than you do, for we made it', YB 33-35 Edw I (RS) 82, 83). Six hundred years later judges were still making comments in court about their drafting of statutes (now very rare), but the sublime confidence had evaporated. In 1902 Lord Halsbury LC abstained from delivering judgment because the case concerned an Act he had drafted himself. He said: 'I believe the worst person to construe it is the person who is responsible for its drafting' *(Hilder v Dexter* [1902] AC 474, 477). For a rejoinder by the present author see Bennion 1962, p 346. Sir Courtenay Ilbert, a former head of the Parliamentary Counsel Office, also sided with Hengham CJ:'. . . the Parliamentary Counsel can often, from his knowledge of the history and intention of an enactment, give a clue to its true construction' (Ilbert 1901, p 93). Between 1487 and 1869, when the Parliamentary Counsel Office was established in Whitehall, drafting of Westminster Acts was done either by Chancery barristers or by counsel attached to the government department in question. Lord Thring, who in 1869 became the first to be appointed as Parliamentary Counsel (with one assistant), had drafted Acts of Parliament during his private practice at the Bar till 1861, when he was appointed draftsman to the Home Office (Thring 1902, p 5). The Parliamentary Counsel Office, where all government Bills (except purely Scottish ones) are now drafted, grew in size but very slowly. A third draftsman was added in 1917. It was only in 1930 that the number of counsel was increased to four, when a more formal system became necessary. Up till about 1935 it was the practice to allow unestablished draftsmen in the Office to undertake outside drafting work for a fee. At the same time outside practitioners were also employed to carry out drafting assignments. Currently the Office employs around 20 drafters.

The Parliamentary Counsel Office has raised the technical efficiency of legislative drafting to a standard far superior to that prevailing when it was set up in 1869. A corresponding drawback is thus expressed by Lord Renton: 'But the trouble is that the need to achieve certainty of legal effect causes the brilliant men who have to draft the Bills to resort to skilfully compressed phrases which are nothing like ordinary language' (Renton 1980, p 6). I discuss this question of compression in detail below (chapters 3 and 14) and conclude that it is inescapable and can be dealt with only through subsequent processing by text-manipulation methods such as Composite Restatement (chapter 23).
The Office was set up as the Office of Parliamentary Counsel to the Treasury though the last three words have now been dropped. Although answerable to the Law Officers on technical matters of drafting, it is in practice an adjunct of the Cabinet Office. This is because its primary function is to serve the government of the day, the head of which is still First Lord of the Treasury. The government must get its Bills on time and they must be in a form which will first stand up in Parliament and then stand up in court. This is difficult enough to achieve without worrying too much about users' chronic complaints of obscurity (or such is the Office's traditional attitude). My own view on this is discussed elsewhere (see Bennion 1980(1) and (5)) where I criticise in detail the characteristics identified by Twining and Miers at the end of the following passage

… the Parliamentary Counsel Office appears, at least to outsiders, to have developed a rigorous, arcane and somewhat inflexible craft-tradition. They have an enviable reputation for technical proficiency and, in some of their relatively rare public pronouncements, a less enviable reputation for *hubris* (Twining and Miers 1981, p 203; for a choice example of this *hubris* see (1982) *Times Lit Supp* 1009).

Other defects which the heads of the Office have collectively displayed since the death of Sir Granville Ram in 1952 are timidity, reluctance to innovate and lack of leadership. It was regrettable that when the Law Commission was set up in 1965 it was found necessary to include statute law among its functions in addition to the reform of lawyer's law. This betrayed my ideal of the drafter as the keeper of the statute book — an ideal which Ram certainly subscribed to. He established a separate consolidation branch in the Parliamentary Counsel Office and instigated the passing in 1949 of an Act that considerably aided the process of consolidation (see chapter 6). He was a man full of resource who never lost his nerve and was a doughty champion of the Office (Kent 1979, p 73).
Two examples may be given of the reluctance to innovate. In 1974-75, in conjunction with the Central Computer Agency I conducted in the Office an experiment in the use of a computer for legislative drafting (see Bennion 1975(4)). This was done in

relation to what subsequently became the Children Act 1975 and the Sex Discrimination Act 1975. It was the first time a computer had been used in the drafting of British legislation, but, except for the late Sir Anthony Stainton, my colleagues in the Office displayed little interest.

The other example concerns the Interpretation Act 1978. A disgracefully long period had elapsed since the passing of the previous Act (the Interpretation Act 1889). Much complaint had been expressed over this quite unnecessary delay, which meant that many obsolete provisions continued to encumber the statute book. Other countries had developed this useful tool to a considerable degree. Even Northern Ireland, with exiguous resources, had been able to produce a very sophisticated model (the Interpretation Act (Northern Ireland) 1954 — see Leitch and Donaldson 1955 and Leitch 1965). The adoption of these improvements by the United Kingdom Parliament was confidently looked forward to. The Renton Committee for example, after pointing out that without the 1954 Act subsequent Northern Ireland statutes would, upon a conservative estimate, be one-third larger than they are, called for a comprehensive revised Interpretation Act (Renton 1975, paras 19.4-19.11, 19.31, 19.32). What happened? The 1978 Act, produced under the inspiration (if that is the word) of the Parliamentary Counsel Office, amounted to little more than straight consolidation of existing British enactments.

My own belief is that, while legislative drafting is a difficult art requiring a lengthy apprenticeship, it is not the best arrangement to make it what Sir Noel Hutton has called 'a life engagement' (Hutton 1979, p 253). Most drafters join the Office in their 20s and remain involved in its work until well past the official retirement age. They do little else but drafting. Alec Samuels has commented that under our present system the drafter 'gets further removed from the day-to-day application and use of statutes in legal practice' (Samuels 1974, p 532). For a Canadian view see Bennion 1980(7).

Common-law drafting *v* civil-law drafting

In Canada, where they have a bilingual legal system in English and French, the British style of complex drafting has been dubbed 'common-law drafting'. Professor Clarence Smith of Ottawa University had this to say about its relation to civil-law drafting:

> . . . if we take any random example of this drafting of either side we do not seem to be even in the same world. A civil-law draft is likely to be simple and short — a common lawyer is inclined to say disdainfully, conversational — so that at least you think you understand it easily. A common-law draft is likely to be a writhing torrent of convoluted indigestion (Clarence Smith 1972, pp 158-9).

Clarence Smith is not impressed by the argument (to which I

subscribe) that the complications of common-law drafting are justified by its much greater degree of certainty and democratic control. He does however admit the danger that drafting in wide terms may encourage the litigation which detailed precision makes absolutely hopeless *(ibid* p 162; for examples see Bennion (1971(2), pp 140-1).

The theme is taken up by Sir William Dale in a book published in 1977, *Legislative Drafting: A New Approach.* He supports the view that the British should go over to the continental system of drafting. The book, commissioned by the Commonwealth Secretary General to help developing countries draft their laws, compares recent United Kingdom statutes on copyright, divorce, adoption, labour law and other topics with corresponding statutes in France, Sweden and West Germany. Dale holds that a statute should be drafted so that it can be understood by all affected by it. An author should be able to understand a statute on copyright, a family man a statute on family law, a landowner a statute on land law, and so on (Dale 1977, p 331).

This sounds fine until we look more closely. Copyright law applies to every sort of creator or performer, down to the writer of an article in a parish magazine and the man who does lightning sketches on the pier. We are all family men or women and most of us at some time own or rent a dwelling. Thus Dale's thesis really means that statutes should be drafted so that they can be understood by all. Though many people hold this view, and it has the ring of fairness, it could be achieved only by giving to judges and officials a degree of discretion unlikely to be aceptable in a democracy. Even then, the law would not really be 'understood by all'. Only the very broad principles would be understood. Their application to particular cases would depend on how the discretion happened to be exercised. The Code Napoleon enacted the whole law of tort in two sentences:

> Any act whatsoever by a man that causes damage to another obliges the person at fault to make good the damage. Everyone is responsible for the damage he causes not only by his act but also by his negligence or imprudence.

It left the aggrieved citizen uninformed as to whether in a particular case he might receive compensation from a tortfeasor, and to what amount (Renton 1980, p 6). Dale quotes approvingly a sample of civil-law drafting from Sweden: 'The performance of a work at a place of business for a comparatively large closed group of people shall be considered a public performance' (Dale 1977, p 2). It would be interesting to hear non-lawyers discussing whether a hotel room hired by a firm for its staff party is a 'place of business' or whether 43 party-goers consisting of the firm's staff with a few relatives and friends is 'a comparatively large closed group'. Only a judge's discretion could give the answer, and in court there could be fevered argument on practically every word of the provision.

What are the essential features of civil-law drafting? Dale's book does not give a clear answer, perhaps because the concept is not as definite as is sometimes thought. One element is the background presence of a general code: 'Codification, willy nilly, involves — nay, is — the continental style' *(ibid* p 334). Such a code is not of course present in British law. Another element, leading from the first, is the tendency to state a principle:

> The continental lawmakers, influenced by their heritage of codes, think out their laws in terms of principle, or at least of broad intention, and express the principle or intention in the legislation. This is the primary duty of the legislator — to make his general will clear *(ibid* p 332).

The contrasting English practice was described by Professor Gower in relation to the Companies Act 1948:

> One of the reasons for the complication and difficulty of the . . . Act is its lack of completeness. No one by reading it could glean any real understanding of Company Law. Nowhere are the fundamental principles enunciated. Exceptions are laid down to rules which are never stated . . . (Gower 1960).

The truth is that the pragmatic British are chary of statements of principle. They distrust them because they almost invariably have to be qualified by exceptions and conditions to fit them for real life. What is the use of a principle that cannot stand on its own?

In any case, continental drafting is far from consisting entirely of statements of principle. Many of its manifestations are as lengthy and complex as anything issuing from the Parliamentary Counsel Office. Nor are they likely to be as thoroughly thought out and self-consistent. British lawyers are becoming more familiar with the continental style through reading directives and other products of the European Commission (described in chapter 5). This tends to lead to greater respect for our own drafters. The Law Commission found, for example, that a proposed directive on the law relating to commercial agents suffered from the following defects:

(1) It laid down rules without specifying what consequences flowed from their breach.
(2) It used a number of different words to express the same idea.
(3) It used the same word to express a number of different ideas.
(4) It tended to make the same point twice, once positively and once negatively.
(5) Statements of principle were followed by non-exhaustive, ill- chosen and misleading lists of illustrations.
(6) Particular instances were given of a general principle which was nowhere stated.
(7) It used a technique of descriptive drafting which did not exhaust all the possibilities.

The Law Commission felt that these defects and others meant

that the text was badly drafted, unclear, ambiguous and internally inconsistent. Their conclusion was that 'the directive in its present form is quite unworkable' (Law Com No 84, pp 11-12).

Perhaps the most telling argument in favour of common-law drafting is its greater degree of democratic control. In his 1973 study of American malpractices, *How the Government Breaks the Law*, JK Lieberman argued that public bureaucracies were given too much legislative power. This was done by over-use of what in this book we call the broad term (see chapter 16). Lieberman cited phrases like 'immoral behaviour', 'public nuisance' and 'disloyalty to the state' as being particularly corrupting of the public service.

The Australian criminologist John Braithwaite argued that much 'white-collar crime' is caused by people abusing a position of power, and that to reduce opportunities for bribery or other corruption discretion should be confined within narrow limits (Braithwaite 1979, chap 10). Even without contemplating the commission of criminal offences such as bribery (which do nevertheless occur), one can see that to vest decision making in a non-elected judge or official by bestowing wide discretionary powers on him is undemocratic. This is a vice of much human rights legislation.

I suggest that the key to the controversy between upholders of common-law and civil-law drafting is to be found in the following passage from Sir William Dale's book: '. . . one may say on behalf of the draftsmen that, when once one understands a United Kingdom Act, one can usually ascertain the answer to one's question. But what time, toil and trouble may be needed to get to the bottom of the Act!' (Dale 1977, p 82). It is to save such time, toil and trouble that one looks to adequate processing of the legislative text.

Standardisation

Drafting technique, like any other, is always capable of minor improvements here and there. The only improvement of major significance I envisage however is in the use of standardisation. Far too much unnecessary confusion is caused by the tendency of drafters to say the same thing (or virtually the same thing) in different ways. This is no fault of theirs. The drafter of a particular Bill (usually wanted in a hurry) drafts the common type of provision in his own words for the simple reason that standardisation clauses simply do not exist. They ought to be brought into existence and updated as necessary by some body charged with that function. In England it would no doubt be the Law Commission, in default of there being a body whose only task is to look after the statute law. Statute law cannot serve the community effectively if it is no one's job to look after it. For over a century that function has nominally been performed in Britain by the Statute Law Committee, which I once described in a newspaper article (accurately if disrespectfully) as an august body that meets once a year and consists of people

whose job it is to do something else. This criticism has recently been supported by Lord Justice Ralph Gibson (see Zellick 1988(2), p 53). In what follows I refer to the body whose function it is to look after statute law (whatever it may be called in a particular country) as the keeper of the statute book.

I suggest then that the keeper of the statute book should produce standardised clauses wherever it is possible to do so. These could either be embodied in the Interpretation Act, to be attracted automatically by use of the term defined, or in the form of model clauses, to be inserted bodily in each Bill making use of them. They would be most effective if they were not simply definitions but were thoroughly worked out and comprehensive statements of the relevant portion of law. On this limited scale codification is practicable. Take as an example the question, so often needing to be determined, of whether a new statutory offence creates absolute liability or requires *mens rea*. There should be model clauses available which set out in a codified form the full consequences of each alternative so that all the drafters of the new offence need do is 'plug in' to one or other model clause. Indeed it might be advantageous to have several alternative clauses available, giving progressively stricter offences.

The scope for comprehensive model clauses in modern legislation is enormous. An Act imposes obligations, which immediately raises questions about the consequences of a breach of the obligation. Is it a criminal offence, and if so of what type? Does it give rise to civil liability, and if so what remedies are available? Can duties imposed on ministers or officials be enforced, and if so how? If the Act sets up a new tribunal to hear complaints of breach of duty what are its powers and procedure? If the duty of policing the Act is given to an inspectorate what are its powers? Can it use force to enter premises? Must information it acquires be kept confidential? And so on. There is no need to work these things out afresh every time a new Act is drafted. Standardisation would save time in drafting and shorten Bills. It would simplify the law and help the citizen to find out what his rights and duties are.

Standardisation is an area where cooperation between Common- wealth countries would be fruitful. Model clauses on topics like strict liability or powers of entry could be drawn up in uniform terms applicable to any common law country.

A Statute Law Institute?

In default of the production of model clauses by an official keeper of the statute book, the job could be done by an unofficial body. Here the history of the American Law Institute is relevant. In 1923 a meeting attended by judges and representatives of the American Bar Association resolved:

That we approve the formation of the American Law Institute, the object of which shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work (Lewis 1945).

The great success of the restatements, codes and model laws produced by the Institute has fully justified this joint initiative by the American bench and bar. A non-official body of this kind has greater freedom than a state organism like our Law Commission, but can possess no less authority. It may prepare codes for enactment by the state, or merely promulgate restatements and model provisions for the service of the profession (including law publishers). Either way lawyers are contributing in a professional way to the efficiency of their operations, rather than depending altogether on the state.

There is today general dissatisfaction with the administration of justice. The feeling of dissatisfaction is not confined to that radical section of the community which would overthrow existing social, economic and political institutions. If it were, we as lawyers could afford to ignore it. But the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions. It is unnecessary to emphasise here the danger from this general dissatisfaction. It breeds disrespect for the law, and disrespect for law is the cornerstone of revolution . . . (1 *American Law Institute Proceedings* (1923 1).

This might be said in Britain today, as well as having been said in Washington 70 years ago. The professional people whose utterance it was added that they intended to tackle the problem with 'a consciousness of the obligation which *rests upon the profession* to take informed action to better existing conditions' *(ibid;* emphasis added). Why should the legal profession in Britain today feel any less obligated in this respect than did the American legal profession of 70 years ago?

The drafting parameters

The more important statutory texts become law by the method described above as *full parliamentary validation*. The text is prepared by the drafter for consideration by legislators, who may amend it. But it also has to be in a form suitable for subsequent operation as law. The same text must serve two distinct purposes. Each purpose requires the text to possess certain characteristics, sometimes conflicting. These requirements may be called the drafting parameters. They control the form of the text. If they are not known and understood by the reader he can scarcely be expected fully to understand the text. The typical characteristics of the text cannot

be recognised and allowed for. Furthermore, text processing and the need for it cannot be grasped, and the development and improvement of processing methods is likely to suffer neglect.

The drafting parameters give rise to the special skills and techniques of the legislative drafter. The parameters operate, with varying degrees of intensity, on every drafting assignment. Some are more important than others.

The parameters can be divided into two groups, broadly corresponding to the two purposes mentioned above. The first group, which may be called ***preparational,*** is concerned with the procedures which prepare the way for the text to emerge as part of the law. The second group, which may be called ***operational,*** is concerned with the subsequent working of the text as law. The groups are made up as follows:

Preparational drafting parameters	*Operational drafting parameters*
Procedural legitimacy	Legal effectiveness
Timeliness	Certainty
Comprehensibility	Comprehensibility
Debatability	Legal compatibility Acceptability Brevity

It will be noticed that comprehensibility appears in both groups. As will appear, it does not operate in quite the same way for each.

Preparational parameters

These govern the drafter's task in preparing successive drafts of the text to satisfy the ministers and officials who are his clients, and subsequently in steering the resulting Bill and any amendments to it through Parliament. In other words, they relate to what happens between the inception of the project and the signifying of assent to the Bill. (By contrast the operational parameters, which the drafter must also bear in mind from the inception of the project, relate to what happens or may happen once the Bill becomes law.)

Procedural legitimacy As part of his function of drafting the text, the drafter is responsible for ensuring that the text (whether of the Bill itself or amendments to it) complies with the procedural requirements laid down by Parliament. Before the Bill is introduced, the drafter must satisfy the requirements of government procedure for example (in Britain) by submitting the text to the Law Officers (who supervise the drafter) and later to the Legislation Committee of the Cabinet (who under current practice must approve the text before publication). Earlier still, the drafter will have had to obtain approval of his text at each stage from ministers and civil servants in the department promoting the Bill and in other

departments affected by it. From the earliest moment in the drafting process there are various procedures which must be complied with.

These procedures have an effect on the text. In the pre- parliamentary stage the drafter may (sometimes against his better judgment) be required to alter his text to meet or forestall objections by ministers and civil servants. After introduction of the Bill further such objections may be raised (particularly in relation to the drafting of proposed amendments), and in addition objections from opposition members and government backbenchers are likely. It seems best in this analysis to separate the effect such objections have on the text from the effect exerted by procedural requirements affecting legitimacy. The former are considered later in discussing the parameter of *acceptability.*

The legitimacy parameter is mainly related to rules of parliamentary procedure. If the drafter omits a step in the pre- parliamentary procedure laid down by the government this will not invalidate his Bill. It may however cause difficulty or delay, and is to be avoided. In this sense therefore it may be said to affect legitimacy. The drafter fails in his job if he does not take all the steps he is expected to take. They involve time and trouble, and may leave him insufficient opportunity to attend adequately to the other parameters.

Parliamentary procedure affects the text in a number of ways. In Britain it entirely governs the form of the Bill and of the accompanying explanatory and financial memorandum. It decrees that the Bill must begin with a long title and be composed of one or more clauses. It allows a preamble and Schedules, but no other type of formulation. It requires amendments to be in a certain form, and lays down the various stages through which the Bill must pass. On financial aspects it requires certain resolutions to be drafted and passed. It governs timetable or guillotine motions and the closure of debate. The drafter must ensure that all these complex rules of order are complied with or he risks involving the government in embarrassment and delay. In extreme cases a defective Bill, amendment or motion may have to be withdrawn.

Timeliness This parameter is mainly constituted by the government's timetable for legislation. At the beginning of each session in Britain (usually in November), the Queen's Speech sets out the principal Bills which the government intend to introduce during the session. It does not specify the order in which they will be introduced, or the projected dates. Behind the scenes however, the Future Legislation Committee of the Cabinet will have laid its plans long before the Queen's Speech is delivered. Modern governments almost invariably find themselves with inadequate parliamentary time for all the measures they wish to see passed into law. This means that departments with Bills in the programme are expected to conform meticulously to the timetable, and the drafter

must follow suit. The timetable will allow for the fact that lengthy or contentious Bills must be ready for introduction early in the session, since otherwise they may fail to pass through the necessary stages before the session ends. This raises particular difficulty at the beginning of a new Parliament, especially where there is a change of government. There are few acceptable Bills in the pipeline, yet the new government is anxious to put before Parliament the measures for which the voters are taken to have given it a mandate.

Another case where the drafter finds himself the victim of a tight timetable is the emergency Bill, suddenly required to meet some unforeseen national or international development. On the other hand, an unexpected general election may give the drafter a breathing space since all current Bills fall on a dissolution of Parliament.

The Renton Committee reported that drafters were the first to recognise that time pressures may affect the quality of their output. They quoted Sir Anthony Stainton: 'By the time instructions are received, there may not be much room for the draftsman to take decisions which will make for simplicity or clarity . . . The pressure to get things done is usually great' (Renton 1975, para 8.3). This is strikingly illustrated in a story told by Sir John Fiennes:

> There was one occasion, on a Financial Bill, when I sat down on a Sunday at home and rewrote a whole Part of a Finance Bill. It went to the printer on Monday night, and the text was handed in at teatime on Tuesday. The Revenue never saw the final version of that until the Bill was published (Renton 1975, para 7.12).

The drafter is expected to be timely at all stages of the preparation and enactment of a Bill, but the shoe tends to pinch most as the date fixed for publication draws near. As Sir Noel Hutton has said:

> Under any system of programming, the date of introduction will eventually become more important than the precise content of the Bill when introduced and the process of drafting will have to be continued after introduction by means of government amendments moved in Parliament. This is not the best method of constructing a Bill, and it adds fuel to the complaint that Parliament is given no sufficient chance to consider the legislation placed before it. . . (Hutton 1967, p 294).

Another aspect of the importance of the date of publication is that once the wording of the Bill is public property it is much more difficult to alter it. Not only does valuable parliamentary time have to be taken in debating amendments, but the constraints of the rules of procedure inhibit the drafter. The Bill is in the possession of Parliament and even though a major change may be required, the drafter will not be able to recast his draft as he could freely do before it had seen the light of day. He must content himself with the minimum of alteration, to the prejudice very often of the finished product. There is moreover the risk that defects in the Bill as published will be damaging to the government.

These factors explain why time pressure is most powerful immediately before introduction of the Bill. In most cases the time allowed is inadequate, and drafting of the Bill perforce continues in Parliament. The majority of amendments made to Bills would have been incorporated in the Bill as first published if sufficient time had been allowed. The remainder are in response to public pressure, and here again sufficient time for their preparation is rarely available.

The drafter will protest at the insufficiency of time allowed him. He will point out that compliance with the drafting parameters requires the necessary time, or the product will suffer. He will be heard, but it will make little difference. In the end he will comply with the government's timetable, doing the best he can. It is what he is paid for. His only consolation may be to reflect on Sir Noel Hutton's remark that time can be the friend of drafters 'for they are always striving after the perfection which . . . is usually in fact unattainable; and the last bell, even if it comes too soon, does at least release them from that vain endeavour' (Hutton 1961, p 19).

Comprehensibility The government will incur criticism in Parliament if the Bill is not comprehensible to members, and so the drafter strives to make it so. Until recently. Bill drafting in Britain was governed by the 'four corners' doctrine, expressed by Lord Thring as follows: 'It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the Bill in order to comprehend its meaning' (Thring 1902, p 8). The Renton Report contains the following passage:

> How far Members of Parliament are able to understand the general purpose of many Bills without reference to other documents we could not discover, but one of our witnesses, Mr Francis Bennion, has expressed the view that: 'if Members were asked whether as a contribution to clarity they would be prepared to give up the four corners doctrine, provided adequate alternative means of providing information were designed, my own feeling is that they would readily accept'.
> If this is so, it would make it easier to amend existing enactments by the textual amendment method (Renton 1975, para 7.15).

The four corners doctrine required the drafter to make the text of his Bill self-explanatory. An unfortunate consequence was that Bills amending existing legislation were almost invariably expressed in indirect or non-textual form, because textual amendments require accompanying explanatory material in order to be comprehensible. Since the report of the Renton Committee condemning non-textual amendment, and the commencement of publication of the offical revised edition *Statutes in Force* (the method of publication of which necessitates use of the textual amendment system), the four corners doctrine has happily lost much of its effectiveness. We discuss this aspect more fully in chapter 14.

Comprehensibility in its preparational aspect fights with several of the other drafting parameters. This is partly because the composition of the parliamentary audience differs markedly from the general run of statute users. Most statute users are lawyers. Where they are not lawyers they are public officials or members of professions (such as accountants or architects) whose work brings them into frequent contact with enacted law. Most MPs on the other hand are neither lawyers nor familiar with law; they are politicians. The task of making legislative proposals understood by non-lawyer politicians while securing their legal effectiveness is one of the most formidable faced by the parliamentary drafter. When the other parameters are brought into consideration also (as they must be) the drafting problems can become considerable.

Debatability If a Bill is to serve its parliamentary function, it must be so framed as to allow the main points of policy to be debated. If they are buried in confused verbiage, it becomes more difficult for members to perceive what they are and deploy argument. The main policy debate takes place on second reading, where it is conducted on broad principles. This is followed by the committee stage, where a different position arises. Here it is possible to propose textual amendments to the Bill, and debate whether they should be made. The rules of order require these amendments to make grammatical sense, and fit into the structure of the Bill. If the structure is excessively complex, backbench members will have difficulty in achieving this. In evidence to the Select Committee on Procedure, I suggested that a better method would be to allow members to put down simple amendments merely raising the issue of policy. If accepted, these would be followed at the next stage by (undebatable) technical amendments giving effect to them (see Bennion 1978(2)).

It should be added that the debatability parameter sometimes operates the opposite way. A government may wish its Bill to be drawn so as to stifle debate or render amendment difficult. This occurs with highly controversial measures. Even a non-controversial Bill may contain passages which the government prefer to gloss over, for fear of trouble in the House. Parliamentary storms can suddenly spring up over relatively trivial points and the drafter needs to be constantly on guard. One device for restricting amendment is to draw the long title tightly (see p 42).

Debatability also concerns the order of clauses. Normally each clause is debated in the order in which it occurs in the Bill (though a procedural motion may provide otherwise). It is common for more time to be spent on the first few clauses of a controversial Bill than on all the rest put together, particularly where a guillotine motion is put in operation. With a controversial or 'prestige' Bill it may be important to the smooth passage of the Bill, or the kudos accruing to the government from it, to begin with the right topic. In reporting

parliamentary proceedings, the media give most prominence to the opening exchanges on a Bill. The parameter of *debatability* is summarised in the following statement by Sir John Fiennes to the Renton Committee (Renton 1975, para 7.9):

> One of the jobs of the draftsman is to present changes in the law to Parliament in a debatable form . . . You have to arrange a Bill, be it a new Bill or an amending Bill, in a form in which it is capable of rational debate in the House all through its stages; if possible so that the main debates occur at the right places, mopping up the subsidiary debates which will therefore not occur. If you have the subsidiary debates first they will probably blow up into the main debates, and you will then have the main debates again in their proper places afterwards.

Sir Courtenay Ilbert has written to similar effect (see Ilbert 1901, pp 241-3).

Acceptability In framing his text, the drafter must do his best to ensure that the wording chosen is acceptable to those involved in the legislative process. Even though the policy of the Bill may be unacceptable to political opponents, the wording must be such as to minimise objection from them. This factor applies from the start of drafting, when the audience to be satisfied consists of administrators and legal advisers within the sponsoring department. Later, government ministers may be shown the text. Before publication in Britain it has to be approved by the Law Officers and the Legislation Committee of the Cabinet. Then it runs the gauntlet of scrutiny by MPs, political and professional commentators, and by representatives of vested interests. The drafter has to keep a low profile and offer the smallest possible target.

This means that provocative language must as far as possible be avoided. The red-blooded terms of political controversy are toned down. The prose style is flat. This sometimes disappoints MPs who have campaigned for a controversial measure, and would like to see it finally enacted in ringing tones. (Such disappointment was expressed, for example, over the Sex Discrimination Act in 1975.) But it is safer so. Supporters of the Bill will not carry their disappointment into action against it; opponents must not be armed gratuitously.

Also to be reckoned with is the intense conservatism of legislators. Occasionally the drafter has an opportunity to add new meanings, or even new words, to the language. For example I did this with 'custodian' and 'custodianship' in the Children Act 1975. Once I attempted to introduce a shortened spelling of'programme' elsewhere than in the computer field. However my use of 'program' to describe a plan of official action was rejected by the Lord Chancellor in Legislation Committee. Typically, there was no attempt at reasoned argument or discussion. On another occasion I ran into trouble by

laying down a test of whether the landlord had 'tried his best' to let office property. This seemed better modern style than the well- worn phrase 'used his best endeavours'. The meaning is exactly the same, and greater precision is not attainable. In the House of Commons Gordon Oakes described the phrase as 'amateurish', while Denis Howell thought it a 'headmaster's phrase' and demanded that 'better phraseology' be provided in the House of Lords ((1974) 867 HC Deb cols 1545, 1551, 1573; for a comment see Renton 1975, para 11.3). I stood firm against this, and the phrase remained (see General Rate Act 1967, s 17A).

A good draft requires consistency of style, which can only be achieved if it is composed throughout by the same hand. This fact has led to the development of the current practice under which not only the Bill itself but virtually all amendments made to it are drafted by Parliamentary counsel. Modern Parliamentary counsel fight to uphold this position. Lord Thring, the first head of the Parliamentary Counsel Office, described how Mr Gladstone understood and revised every word of a Bill, and even settled the marginal notes (Thring 1902, p 6). That does not happen today, though Lord Duncan-Sandys came near it during his tenure of ministerial office in the 1950s. If any part of the draft is not acceptable, the drafter himself alters it. It follows that in self-protection he will leave himself open to as few demands for change as his experience and foresight permit.

Brevity For 100 years or more—in fact since British MPs adopted the practice of close scrutiny and lengthy debate of Bills—drafters have been encouraged to make their Bills as brief as possible. In particular, the number of clauses is kept down. This is because MPs have the right to debate each clause if they wish, preparatory to the putting of the motion that the clause stand as part of the Bill. In general, it must be true that the lengthier a text is, the lengthier will be the time taken in its detailed examination. Modern governments always have insufficient parliamentary time at their disposal (or think they have), so the pressure on the drafter to shorten his Bill is strong. Nor is this the only factor conducing to brevity. Given equal quality, it takes more effort to produce a long Bill than a short one. Drafters are usually hard-pressed, and are not looking for work. The same applies to those instructing them. Again, MPs would rather study a brief text than a lengthy one. They are apt to complain if confronted with too many bulky Bills. Printing resources are always at full stretch. Each Bill has to be reprinted several times as it goes through Parliament, so as to incorporate amendments made. Proof reading (which is done by the drafter as well as the printer) becomes increasingly onerous with bulk.

All these factors conduce to brevity and that requires (or is thought

to require) compression of language. This is one of the principal sources of obscurity. It particularly applies where the statutory language has to be understood by lay people, such as juries. The difficulties over certain provisions of the Theft Act 1968, are a case in point. If drafters of criminal statutes did not feel compelled to cram a wide variety of factual situations within one formula, but were free to create separate offences for each type of situation, there would be less confusion. We return to this point in chapter 14.

Besides leading to compression of language, the ***brevity*** parameter induces the drafter to use the technique of ***ellipsis*** (discussed at length in chapter 15). It also requires employment of the ***broad term*** (see chapter 16).

Operational parameters

Having completed our consideration of the ***preparational*** parameters which govern the drafting of the Bill in relation to what happens between the inception of the project and the signifying of assent to the Bill, we turn to the other group of parameters. As stated above, these ***operational*** parameters govern the drafting of the Bill in relation to things which happen or may happen once the Bill becomes law.

The first group of parameters is thus concerned with the government's desire to change the law, and Parliament's consideration of its proposals for doing so. The second is concerned with the functioning of the new Act as part of the statute book. The only connection between the two is that everyone involved in the preparational stage must have regard to how the proposed measure will work as enacted law. Yet the same text has to serve both purposes. As the Renton Committee said: 'The draftsman must therefore carry out his work with one eye to the drafting of proposals that will commend themselves to the favour of a critical legislature, and the other to the eventual product as it will appear in the hands of the user' (Renton 1975, para 7.9). Unfortunately British drafters, and those influenced by them, have tended to acquire Cyclopean tendencies. (Cyclops, it will be remembered, belonged to a race of one-eyed giants who forged thunderbolts for Zeus.)

Legal effectiveness Whether or not he is otherwise Cyclopean, the drafter must always put in the forefront of his mind the need for legal effectiveness. He must ensure, so far as he is able that the text of his Bill is apt to carry out the intentions of the government in promoting the legislation. If the resulting Act comes before a court, the aim is that the court shall interpret it in the desired way. If possible the court must be left no opportunity or pretext for deciding it in any other way. Similarly with other functionaries, such as tribunals or officials, whose duty it may be to apply the new law. This parameter extends as far as firm government intention

itself extends. That intention cannot extend to unforeseeable contingencies, and even on questions which can be foreseen the government may leave the decision to others, or to itself on a future occasion. The first occurs for example where the Act authorises the making of a judicial order 'if the court thinks just'. The second occurs where a government official is given a discretion. The exercise of either type of delegated power is an example of dynamic processing, examined at length in Part IV.

Crucial to legal effectiveness is the drafter's knowledge and correct use of that part of the *corpus juris* which governs the construction of statutes, namely the Interpretation Act and the technique of interpretation. But he must also know and understand the area of law within which he is operating. (For examples of error in this respect see pp 262-263).

Certainty It is usually (but not invariably) desired that the text should be open to one construction only, that is, that its meaning should be certain. It is arguable that this should be treated as an aspect of the *legal effectiveness* parameter discussed above, but conceptually it is slightly different and so is accorded separate treatment. The justification for this separation is illustrated by the occasional case where the Government *intend* the text to be ambiguous. For example, clauses of international treaties are sometimes deliberately drawn so as to be capable of interpretation in each of the varying ways favoured by the respective high contracting parties. If such a treaty is to be given the effect of law by an Act of Parliament, the drafter of the Act will perceive that legal effectiveness is at odds with certainty and be forced to sacrifice the latter. Intentional uncertainty is discussed in chapter 17.

Comprehensibility Except in the rare case of intentional uncertainty, both legal effectiveness and certainty are aided by *comprehensibility*. We discussed above the problem of making a Bill comprehensible to MPs. They need to see as easily as possible what the proposals will amount to. Most lack legal training so cannot be expected to understand proposals purely framed as legal instruments. Nor can such instruments be understood even by lawyers without reference to other materials. Yet legislators, being hard pressed for time, are reluctant to look at other materials in addition to the Bill they are considering.

It is a paradox, if a necessary one, that the people concerned with approving legislation are mostly ill-equipped by training and experience to understand it. The paradox places the drafter in an impossible position. It is impossible because he just cannot satisfy both audiences. On this dilemma I put forward the following view at the Ottawa Symposium in 1971:

We in England have never been able to get 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 comprehensible and palatable to laymen in Parliament. This is an inherent contradication; indeed an absurdity, from which flow many of our troubles. I would venture to suggest that it should be a prime axiom of legislation that, unless there are overriding reasons to the contrary, language which is destined to form part of the law should be framed solely with that end in view. In other words, it should be worded in the most effective way possible to secure that it fits properly into the structure of the statute book (Bennion 1971(2), p 143).

I am glad to say that the Renton Committee accepted this 'prime axiom' (see Renton 1975, para 10.3).

Although the comprehensibility parameter in its operational aspect requires the Bill to be drafted so that it can be understood when it becomes law, this is often hard to achieve. While legal effectiveness and certainty are aided by comprehensibility the reverse rarely applies. To be sure that an enactment will have the desired effect it is usually necessary to enter into specific detail which is often difficult for the reader to follow. This problem is at the root of the controversy between common-law and civil-law drafting discussed above (pp 23-26). It leads to the need for processing by text manipulation (chapter 23).

Comprehensibility, in both its preparational and operational aspects, involves the drafter in problems for which his training as a lawyer may not have fitted him (and in Britain he receives no other training). The skills of a creative writer are needed, with the ability to overcome so far as practicable the limitations of language as a means of communicating ideas. Communication theory and linguistics are two related studies, while devices such as algorithms and flow-charts can sometimes be usefully employed. Occasionally arithmetic, geometry or algebra may find a place (but is it fair to expect users of Acts of Parliament to understand algebra?—the drafter of para 24 of Sched 6 to the Finance Act 1965 evidently thought so). Since the object of statute law is to communicate Parliament's wishes to those bound by them, the question of comprehensibility is crucial; though it has received little study.

Legal compatibility The final drafting parameter concerns the way the Bill, after assent, will fit into the *corpus juris*. Here the British drafter possesses a heady power. The sovereignty of Parliament ensures that its latest word overrides all previous enactments and rules of law, apart from the new restrictions under the Treaty of Rome (see chapter 5). There is thus no technical necessity for dovetailing into existing law; overriding is just as effective. In former times this led to each Act being treated as a separate entity. An occasional 'notwithstanding anything in any other Act' or 'all enactments to the contrary shall cease to have effect' was a sufficient

(though not strictly necessary) gesture towards the existence of earlier contrary legislation.

Things have improved. Even in Britain, the most backward of major Commonwealth countries in this respect, the drafter acknowledges it as his duty to seek out, and repeal or modify expressly, inconsistent provisions. His task is greatly hampered by the chaotic state of the statute book, the lack of arrangement under titles, and delays in printing updated official texts. Until very recently, British drafters were also hindered by lack of access to computerised research and retrieval systems.

Compatibility includes the element of comity. Subject to changes in linguistic usage, the same thing ought to be said in the same way throughout the statute book. Contrary to most people's belief however, there are no books of precedents in the Parliamentary Counsel Office in Whitehall. Drafters vary in their willingness to spend time hunting for models in earlier legislation. They are discouraged by the knowledge that if they carry out this search it will throw up a variety of examples, not one of which may appear any better than the others. The result is predictable. Inconsistent terminology has produced flaws comparable to those of European directives. The position is particularly bad in the tax field.

While statute law is in such a chaotic state, the parameter of compatibility, though it normally places certain demands on the drafter, can if necessary be largely ignored. It would be otherwise if we had a more orderly system, but there is a strange reluctance even among reformers to press for this. The Renton Committee thought consolidation of the statute book on a one Act-one subject basis not possible (despite the fact that it has been done in all other major Commonwealth countries). 'It is not reasonable' they said, 'to expect the law on a given subject to be set forth completely in a self-contained Act of Parliament. . .' (Renton 1975, para 14.7). In fact it is both reasonable and feasible, provided there is adequate cross-referencing.

Conflicting parameters

It is obvious that situations will frequently arise where not all these nine parameters (one, *comprehensibility*, being found in both groups) can be complied with. ***Procedural legitimacy*** may conflict with ***comprehensibility*** or (though rarely) with ***timeliness***. ***Legal effectiveness*** may preclude ***brevity*** and reduce ***acceptability***. Comprehensibility as a preparational parameter may be inconsistent with ***legal compatibility***. And so on.

Legal effectiveness conflicts with ***comprehensibility*** where (as frequently happens) the drafter is uncertain of the precise situations his wording must cover. To be on the safe side he then devises a wide formula, which may lack identifying features. Typically, the drafter has a particular situation in mind but fears to commit himself

by describing it. He knows from experience that if he links his wording to this specific situation it may prove too narrow. Similar cases (that he cannot at present think of) will come along, and not be within the words. His provision will then be *narrower than the object* (see p 264 below).

Since the drafting parameters conflict in these ways, it is obvious that there must be an order of priority. The order is fixed by the government rather than Parliament. In practice it is usually fixed by the drafter, acting as the government's servant. From his experience the drafter is able to judge what answers ministers would give if there were time and opportunity to question them on their wishes as to priority.

The three most important parameters are not usually in conflict with each other. They place demands on the text which cannot be gainsaid. Two are preparational: *procedural legitimacy* and *timeliness*. The third, *legal effectiveness,* is operational. In describing these as the chief parameters I am not making a value judgment, but merely seeking to reflect political realities. Many who are not politicians or civil servants will think that for the health of society, other parameters, such as those of *comprehensibility* or *legal compatibility*, should be accorded greater importance. The relationship of these two parameters to the remainder lies at the heart of the problem of statute law obscurity and its solution.

Statutory instruments

As to the application of the parameters to the drafting of statutory instruments see chapter 4 (p 57)