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PUBLIC AND PRIVATE DRAFTING

Objectives, problems, styles and approaches

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Introduction

Legal drafting is about communication. And communication is difficult. Consider this baffling label on a box of fairy lights -

> For indoor or outdoor use only.

With legal drafting you have the added problem that someone will try to catch you out. In *The Hind and the Panther* John Dryden said –

> No written laws can be so plain, so pure,
> But wit may gloss, and malice may obscure.

We are asked to discuss the drafting of legislation and the drafting of private documents. I shall try to identify some similarities and differences. And I shall concentrate on legislation, as I spent many years drafting it. But all I can hope to do in a limited time is to stimulate some thought.

The audience

Let us start with the audience. The private drafter's audience tends to be confined. For instance, for a contract there will be the parties, their professional advisers and ultimately the courts. But legislation is a public document. So the audience is wider: civil servants, ministers, members and officials of both Houses of Parliament, the media, academics, the courts and potentially the world at large.

Criticism

One consequence is that the legislative drafter's work is subject to more scrutiny and criticism than the private drafter's. After all, vilifying the legislative drafter is a national pastime. The frustrating thing is that Bills are sometimes said to be badly drafted when the critic's true point is that he or she does not like the policy – which is not generally the drafter's province.

Parliament

Another feature of Bills is that they have to be enacted. So the drafter has to be an expert on Parliamentary procedure. And Bills can be amended in Parliament, and therefore in public. This might be because the policy changes in response to debate as the Bill proceeds. But once a Bill is introduced and the curtain goes up, it can be difficult to accommodate new thoughts within a structure that was not meant to take them. The private drafter will not be faced with having to amend his or her material in the public gaze.

Changing the law

Let us now consider the object of legislation – to change the law. Take section 1(1) of the Scotland Act 1998 –

> There shall be a Scottish Parliament.

That is pretty powerful stuff. Once the provision came into force, there was in law a new Parliament – and that was that.

The power of legislation adds stimulation to the drafter's task, but the responsibility can also be fairly daunting. The private drafter's product may have serious consequences, but it has no power to change the law.

General application

Another feature of legislation is that it is of general application. It looks impersonal, almost abstract.

Take section 13(1) of the Equality Act 2010, which is about discrimination. The subsection refers to a protected characteristic (which

includes age, disability, race and religion) and it envisages two people called A and B. It reads –

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Here the parties (A and B) are nameless abstractions, and the discrimination is couched in general terms. In a private document the parties are usually real people with real names, and their actions are real events usually spelt out in some detail.

This tendency to abstraction often makes legislation difficult to read and difficult to draft. For example, it is easier to think about a contract between named parties to supply specified goods on a specified date than to think in general terms applicable to all contracts for the sale of goods.

Precedents

Now let us consider precedents. All Bills are different. Precedents are rarely useful. I am fond of illustrating this with an Act from Azerbaijan. It copied our Interpretation Act, right down to the provision headed "Application to Northern Ireland". Precedents will be helpful to the private drafter drawing up a simple will or conveyance. But some private documents will have to be drafted without a precedent for assistance (or perhaps hindrance).

The process of drafting

Now let us consider the process of the actual drafting. I think there are three parts, though they overlap – find out what the client wants, analyse it, and express it.

Finding out what is wanted

In legislative drafting, discovering the client's intention can be hard work. One factor may be the difficulty of the subject. Tax springs to mind. Another factor may be that the policy is not settled in enough detail to enable real progress to be made. Yet there may be political pressure to

get moving. I imagine the private drafter has similar problems. There will be no political pressure; but there may still be a difficult time-table.

Analysis

Once the legislative drafter knows what is wanted, he or she has to subject it to a rigorous analysis. For you cannot enact something that does not stand up.

Take this case. You charge an asset to tax by two provisions applying in two overlapping situations. To avoid a double charge the department suggests a rule that if either provision applies the other should not. But if provision 1 ousts provision 2, and provision 2 ousts provision 1, you go round in circles and may get no charge at all. You can break the circularity by saying that if provision 1 applies provision 2 does not, or by saying that if provision 2 applies provision 1 does not. But you cannot say both.

The drafter's analytical function is crucial. It is no good reading the instructions and immediately starting to write. You need to think things through, taking nothing for granted. In *The Advancement of Learning* Francis Bacon put it like this –

> If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.

A lot of this thinking through has to be done in tranquil solitude. When I think of my time as a drafter (and especially as a tax drafter) I tend to think of Wordsworth's description in *The Prelude* of Isaac Newton's statue –

> The marble index of a mind for ever
> Voyaging through strange seas of Thought, alone.

But the analysing and arriving at a workable draft also entail a process sometimes called iterative. It involves throwing ideas back and forth between the drafter and the instructing department in order to arrive at something that stands up to examination in Parliament and the courts.

There is a certain pleasure in all this. In Christopher Marlowe's celebrated play, Dr Faustus says –

> Sweet Analytics, 'tis thou hast ravish'd me!

And in discussing tavern discourse Dr Johnson put it like this –

> I dogmatise and am contradicted, and in this conflict of opinions and sentiments I find delight.

I imagine that the private drafter will often have to go through a similar process of analysis and iteration.

Expressing the policy

Once the legislative drafter knows what is to be achieved and has analysed it, the hardest part of the job is often done. But you still have to express the agreed policy in unambiguous terms. And that is easier said than done. Take this sign in a zoo –

> Crocodile feeding at noon. Bring the children.

Drafting legislation is pretty much like any other attempt at communicating. You should express yourself accurately but as clearly and simply as the circumstances allow. Beyond that, there are no particular rules. Some people are better at it than others. But whatever the natural abilities of an individual, it can take a good deal of effort.

Techniques - examples

Various techniques are available. Here are a few simple and familiar ones.

First, it is often best to aim for short sentences rather than great slabs of prose.

Second, it is often best to prefer positive statements to negative ones. They are usually easier to understand. For instance, avoid this –

> A tenant, other than one who does not have a lease for more than three years, must register his rights.

Instead, say this -

> A tenant who has a lease for more than three years must register his rights.

Third, it is often best to avoid cluttering up a sentence with cross-references. For instance, if subsection (2) provides that subsection (1) does not apply in certain circumstances there is often no need for subsection (1) to start with "Subject to subsection (2).....".

Over the years both legislative and private drafters have developed useful techniques. And techniques can help.

Techniques – other points

But I want to make some general points about technique. And I suspect that they apply to private drafting as well as to legislative drafting.

First, some techniques of composition are not available to the legislative drafter. This is largely because Acts are designed to achieve only one stark object - to change the law. There is little place for techniques like metaphor, simile, irony and humour (unless unintended). So Acts lack exuberance. They are restrained and deadpan. They put me in mind of General Ulysses S Grant, who was said to betray "no more emotion than last year's bird nest".

No drafter would now adopt this exuberant style from an Act of Richard III –

> It is ordered that the statute be annulled and utterly destroyed, taken out of the Roll of Parliament, and be cancelled and burnt, and be put in perpetual oblivion.

Contrast the pedestrian section 13(5) of the Endangered Species (Import and Export) Act 1976, which reads –

> The Importation of Plumage (Prohibition) Act 1921 and the Animals (Restriction of Importation) Act 1964 are hereby repealed.

A consequence of the limited object of an Act is that every word is taken to have a purpose. So emphasis by repetition is not a technique you can use. If an Act said the same thing twice, would something stated only once have equal weight? If an Act said something twice but in different words, would it be trying to communicate one message or two different ones?

In Lewis Carroll's *The Hunting of the Snark* the Bellman says, "What I tell you three times is true". You should not follow that example. Instead, follow the advice in *Saint Matthew, chapter 6*: "Use not vain repetitions".

The second point about techniques is that there can never be an end to the search for better ones. Each Bill is different, and each will need a different approach. So do not be afraid to push back the boundaries. At the same time, do not be afraid to abandon or restrain a technique.

Take a simple example. You do not need to say "The qualifying conditions are as follows". Feel free to say "These are the qualifying conditions". But I once tried "Here are the qualifying conditions". I did not try it again, because I thought it amounted to gimmickry.

Take another example. Some insurance contracts call the insured "you". But the person reading the contract may be someone other than the insured, such as a legal adviser or the courts. Such a person will have to make a mental adjustment when reading the contract. The wider legislative audience may make that problem worse for Acts than for contracts. Anyway, the device was once tried in a draft Bill but abandoned. I do not know whether it has been tried again. Personally I find the device irritating anyway. This is especially so if the word "you" is in bold type. It interrupts the flow.

While some techniques may be abandoned, others may need to be used with restraint. For instance, the technique of using short sentences can almost parody itself if pushed too far. And starting sentences with "But" or "And" can look like gimmickry if overdone.

My third (and most important) point about techniques is that clarity of thought and depth of analysis are what really matter. If the analysis is sound, and the thinking is clear, clarity of expression often follows. If the thinking or the analysis is unsound, the draft will be unsound and no amount of technique will help. As Cato the Elder said –

Rem tene; verba sequentur. (Grasp the subject; the words will follow.)

In *Alice's Adventures in Wonderland* the Duchess put it like this -

Take care of the sense, and the sounds will look after themselves.

Dr Johnson was more pessimistic, but also more realistic, when he put it like this –

> Most men think indistinctly, and therefore cannot speak with exactness.

Introspection

What sort of people are drafters? Thinking, analysing and seeking precision tend to suit people of a sceptical, reflective and introspective nature. And this must be true of private drafters as well as of legislative drafters. I am reminded of the seventeenth century scholars devoted to the medieval period. A younger man was inflamed enough by some of them to regret that their learning should lead to "a sort of morose reservedness".

Satisfaction

Finally, despite its frustrations, drafting is satisfying. It is stimulating to express complex ideas as precisely, clearly, economically and elegantly as the subject allows. If the subject is important it adds to the satisfaction. Private drafters must get similar satisfaction, though they will have fewer readers. And that brings me back to where I started – the wide audience that legislation has.

Take the European Communities Act 1972. Here is section 2(1) –

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.....

That is pretty powerful stuff, and it packs a great deal into relatively few words. It brings to my mind a phrase from Sir Sacheverell Sitwell's analysis of Mozart's wind concertos, when he likens the bassoon to "a sea-god speaking".

And that puts me in mind of another Sitwell, Sir George. The qualities he sought in garden design are the qualities the drafter should embrace. They are: simplicity, restraint, harmony.

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Note

See also these articles by Geoffrey Bowman –

Why is there a Parliamentary Counsel Office?
in Statute Law Review 2005 Vol 26 No 2 pages 69 to 81

The Art of Legislative Drafting
in European Journal of Law Reform 2005 vol 7 issue 1/2 pages 3 to 17