

# The work of parliamentary draftsmen.

Shaun Ley examines the work of the people who actually write our country's legislation - the parliamentary draftsmen - and whether laws should be gender-neutral, simpler and fewer.

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Shaun Ley:

It's not that long ago that the Office of the Parliamentary Counsel, the official name for the draftsmen, would have been filled with manuscript paper, propelling pencils and plastic rubbers. If MP's had spent the day debating and amending legislation, the draftsmen would then have to correct the Bill by hand. They had to work quickly because at 18:45 in the evening a clerk would collect the new pages and take them to the printers. Today the process is much quicker, which is just as well since the amount of legislation they are asked to produce has grown dramatically. Bills have to be ready much sooner than in the past, so they can be put out for public consultation in draft form before they are introduced in Parliament. That adds one more stage to the work, according to chief draftsman, the First Parliamentary Counsel, Stephen Laws.

Stephen Laws:

The work has grown partly because there is more pre-legislative scrutiny. So bills are prepared for pre-legislative scrutiny. They are then revised, then they are introduced, and then we are back at the beginning where the process

used to start. There is also more volume in legislation. I think there are a number of reasons for that, but part of it is changes in the law: there has been a great growth in the body of administrative law – and in the way that the courts look at legislation. All that means that more has to be said.

Shaun Ley:

In this programme I am looking at some of the challenges facing the draftsmen. Quantity is one; another can be the desire of politicians to respond with new laws when a big public controversy is dominating the news headlines. Jonathan Bracken, a lawyer who's done drafting for commercial organisations promoting private bills, recalls what happened at the beginning of the 1990's when ministers tried to respond rapidly to a series of attacks by dogs on children, through legislation. They demanded that the draftsmen come up with a Dangerous Dogs Bill.

Jonathan Bracken:

As somebody described it, it's moral panic legislation. There was an issue, Government decided it was going to act, and off it went, and the story doing the rounds in Westminster at the time was that parliamentary counsel had said they couldn't define a Pit-Bull Terrier and the Home Secretary replied "well you could if you had one hanging on your elbow" and the legislation therefore contains a definition on the lines of "a Pit-Bull Terrier is a dog of the kind commonly known as a Pit-Bull Terrier".

Shaun Ley:

Trying to draft new laws quickly is one reason they might not work, but there's another more fundamental problem according to the Liberal Democrat peer Lord Phillips of Sudbury. He became so unhappy with the amount of new laws Parliament was being asked to consider, and the lack of time to scrutinise them properly, that he tried to give up his seat in the Lords.

Lord Phillips of Sudbury:

I did get extremely frustrated at passing, as the House of Lords and Commons together do, thirteen thousand pages of new law a year or more: a tsunami of complex, impenetrable, intrusive legislation which you know is going to confuse the man and woman in the street, which you know is going to play into the hands of the lawyers and specialists who, of course, thrive on all this plethora of complexity.

Shaun Ley:

Lord Phillips, himself a lawyer, blames both the politicians who come up with the ideas for new laws and the officials employed to turn those ideas into reality.

Lord Phillips of Sudbury:

You've got politicians who have no strong grasp of the underlying realities of that which they are legislating about, and the civil servants have the same problem, and then we've got the parliamentary draftsmen who, of course they are in a bit of an ivory tower, because it's a highly particular art. So you've got three elements which produce the legislation, none of whom have any knowledge or experience or feel for what they are legislating about, and you can see emerging at the end of the day major pieces of legislation which have really serious shortcomings both in terms of conception and in terms of drafting and it ends up making lots and lots of lawyers very happy. They are the only people at the end of the day who may understand it.

Shaun Ley:

The Plain English Campaign says the desire for precision can lead the draftsmen to make laws overly complicated. Peter Rodney is the campaign's legal consultant.

Peter Rodney:

This is from the Road Traffic Act 2002<sup>1</sup> and its subsection (4) of section 175: "subsection (3) applies at any time to any vehicle to which subsection (1) applies if at that time Article 3 of Council Regulation (EEC) No. 3821/85 requires recording equipment to be installed... "

Shaun Ley:

I hope you are following this because, remember, ignorance of the law is no defence.

Peter Rodney:

"...if and only if the circumstances of its use are such that each requirement of those Articles is complied with. "

Shaun Ley:

That bit of traffic law is actually quite important if you are in the freight business. It deals with equipment that lorry drivers are required to have. But what does it actually mean? Fortunately Peter Rodney can translate it.

Peter Rodney:

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<sup>1</sup> Despite extensive searches, the Office of the Parliamentary Counsel has not identified the provision referred to..

I can eventually work out that: if I don't have a tachograph in my cab as a lorry driver, and if I don't use it correctly, I am guilty of an offence. But I'm a lawyer. It takes me quite a long time to work all this out. I would have thought rather difficult for the average lorry driver to understand. It's the lorry driver who is the one who's actually going to get prosecuted for not obeying the law, why do we have to have a lawyer to explain it to him? He shouldn't have to have a lawyer in his cab as well as the spy in the cab in the shape of the tachograph to say "oh be careful: you must have a rest break now".

Shaun Ley:

But Jonathan Bracken says, in the six years since that law reached the statute book, the parliamentary draftsmen have sharpened up their act.

Jonathan Bracken:

There has been an awful lot of modernisation and I think one of the very encouraging signs is how much they have embraced plain English drafting and done a very, very good job at it, and it's actually quite a brave step. Commercial lawyers tend still to put six words in where one word would do. Parliamentary drafting by comparison is relatively brief to begin with and what's now being produced is even briefer, much clearer, but obviously it's not without some concerns because there is always that fear, well, if I put these extra words in does it avoid litigation or doubt?

Shaun Ley:

And that's one reason why Stephen Laws, who's in charge of the draftsmen, says so-called plain English has its limitations.

Stephen Laws:

Sometimes you have to draw very fine distinctions, and in the end we think it is much easier for the reader to have something that he can find a certain answer to than to have something that may be easy to read but in fact gives a degree of uncertainty of what the intended result is. We do try to avoid complication; sometimes the complication is inherent in the process.

Shaun Ley:

The Plain English Campaign is still campaigning on this and they have come up with some wonderful examples. One on their website says this about trying to define when food or drink is hot or not. It says

"Food or drink supplied on or from any premises is 'hot' for the purposes of this Schedule if the food or drink, or any part of it,—

(a) before it is supplied, is heated on the premises or elsewhere for the purpose of enabling it to be consumed at a temperature above the

ambient air temperature and, at the time of supply, is above that temperature, or

(b) after it is supplied, may be heated on the premises for the purpose of enabling it to be consumed at a temperature above the ambient air temperature. “

Do we actually need to say what is hot and what is not? Isn't that common sense?

Stephen Laws:

I fear it may not be as simple as all that. That is of course a provision that I think originated in the Finance Act 1972 because it's to do with value added tax and even with that degree of precision it's not escaped discussion by the courts. There's a case about whether or not a takeaway meal is hot, and there were takeaway meals that were delivered that were hot and there were takeaway meals that were delivered so far from the place where they were heated that they were cold at the time they were delivered and had to be re-heated in a microwave. There are very difficult distinctions I'm afraid.

Shaun Ley:

And this is the kind of thing you and your colleagues have to scratch your heads worrying about sometimes?

Stephen Laws:

Indeed.

Shaun Ley:

The former Conservative cabinet minister Sir Malcolm Rifkind says the desire to make the language of drafting plainer is based on a false premise.

Sir Malcolm Rifkind:

Ordinary people, normal human beings do not read Acts of Parliament. The crucially important thing of an Act of Parliament is that it should avoid ambiguity; and for it to be clear, it has to be precise. If that means using a kind of language which we may not use in conversation, but which the courts understand and can therefore interpret, then all to the better.

Shaun Ley:

But then he was a lawyer before he became a politician. So was Harriet Harman, who is now the Leader of the Commons, in charge of the government's legislative programme. She, though, takes a different view from

Sir Malcolm: arguing that in a democracy people should be able to understand the laws they are expected to obey.

Harriet Harman:

The balance to be struck is making the bill sufficiently detailed for it to be clear to the courts what we meant, but not so complex that it might be clear to the courts but it's unclear to everybody else. And that's why we're publishing bills in plain English alongside the kind of legalese.

Shaun Ley:

Do you want to go any further with that?

Harriet Harman:

Yes I do because I do think that if a law of the land is being passed by the House of Commons it should be understandable by the people upon whom it imposes obligations or on whom it confers rights, and I don't think that you should have institutionalised the sense that you've got to get somebody to interpret it for you. And I think that they've risen terrifically to the challenge, the parliamentary draftspeople have, in actually drafting in plain English.

Shaun Ley:

Stephen Laws said to us that the most important thing about laws is that they are precise and perhaps that matters more than that they are easy to understand. Is he right in that?

Harriet Harman:

Well I think you've got to try and do both. Not everybody's got a brain as sophisticated as the parliamentary draftsmen or the judiciary. Sometimes when we introduce a new law affecting business, for example, one of the biggest complaints is not the obligation that it confers but actually the difficulty of them understanding the obligation and how it knits in with all the previous legislation that they have still already got. So certainty and precision is one very important element but it's not the only thing. It's a democracy and people should understand their own laws in a democracy.

Shaun Ley:

The sophisticated team of draftsmen and draftswomen have had to grapple with another change: what's called gender-neutral drafting. Whitehall rumour has it that once upon a time a law was drafted which said any reference to the male should be held to embrace the female. A rather graceless way of ensuring legislation applied equally to women as well as men. Stephen Laws admits it's an issue there was some reluctance to tackle.

Stephen Laws:

For years we worried that if we went over to gender-neutral drafting we would find that what we drafted would become more complicated or more intricate or less readable. But we were often asked to do it and ministers are keen on it.

Harriet Harman:

Nowadays people don't expect women to be invisible and all subsumed under the word "he". These are laws for women as well as men, laws made by a parliament of women as well as men. I know it is a bit of a challenge in terms of drafting but it just brings the language up to date with how people speak about the world. People nowadays don't say 'he' when they mean 'he and she'. We do have to modernise our drafting in that respect.

Stephen Laws:

When we started with gender-neutral drafting we found that it was not nearly as difficult as we had thought it was, and everything now is drafted in gender-neutral terms. There is an exception: in so far as it doesn't have an unreasonable cost so far as simplicity is concerned.

Shaun Ley:

Some people might wonder why it's worth worrying about, why it matters.

Stephen Laws:

A lot of ministers' time in Parliament is spent defending legislation and part of our job is to make it as defensible as possible, and ministers when they are defending their bills in Parliament want to talk about the policy. The minister doesn't want to defend gender-specific drafting: he wants to defend - he or she, to be gender-neutral - wants to defend the policy.

Shaun Ley:

And implementing government policy is ultimately what drafting is designed to do. You might say it's in the draftsmen's or perhaps draftspeople's contracts. But what other skills are required?

Stephen Laws:

You need to be good at two ends of the spectrum: you need to have a good conceptual grasp of whatever you are presented with: so that you can structure it so that you can present the whole picture in a way that is going to be easy to understand, and you have to be prepared to go down into the very finest detail: you have to be able to do a repeal schedule that makes sure that every word that is inconsistent with what you have done that already appears

on the statute book has been removed and corrected. The very fine work at one end, and the big conceptual idea that enables you to show Parliament what the policy is and to present it in a way that's going to make sense, at the other end.

Shaun Ley:

Lawyers usually end up specialising, but the range of subjects drafters deal with is as limitless as the scope of government. So a magpie mind helps. Stephen Laws says it's not the most lucrative of legal careers, but it is one of the most challenging.

Stephen Laws:

You are sitting on the front row of events and you are doing something creative, and the sense that there is something that is your creation on the statute book is one of the things that attracts people to the job.

Shaun Ley:

Stephen Laws' department has been in existence for more than one hundred years. In that time the tools of the trade may have changed but not the skills required. Lawyer, technician, artist: quite a job description for the draftsman's contract.