

The Role of Legislative Counsel: Wordsmith or Counsel? [2]¹

*Stephen Laws*²



No wordsmith worth his salt would address this question without seeking to analyse and define each of the terms in the question — and for me the most important, or at least the most contentious, is the “or”. For, at the risk of spoiling the suspense, I have to say at the very start that so far as legislative drafters for the UK Parliament are concerned, my answer to this is an emphatic “Both”.

Before I explain why I think this is the case, however, I do need to say something about what I think is meant by the contrast the question poses. What does a counsel do that a mere wordsmith does not?

Well I take a wordsmith to be someone who works just with words and holds back from considering the substance of what they express. So a drafter who is just a wordsmith would take the words of his instructions and translate them into legal propositions that were concisely and accurately expressed. But he would accept no responsibility for the content. A counsel however would be someone who tenders advice, who provides his clients with assistance, and even direction and leadership. He or she would provide more than a mere technical service of producing a legislative text.

But I do not want to analyse the idea of a wordsmith in such a narrow way as to make the question too easy to answer. I do not want or need to confine the idea of a wordsmith to a pedant, someone like Mr. Noah Webster the American lexicographer, who, as legend has it, was found by his wife embracing the chambermaid. “Mr. Webster”, she said “I am surprised”. “No, my dear”, he replied, “You are amazed. We are surprised.”

So when I talk of the translation of instructions, I am conscious that “translation” is itself a slippery concept. In the UK there has been some discussion recently of the need for the “translation” of

¹ Stephen Laws was unable to attend the CALC Conference held in Nairobi in 2009, so this paper was presented by Edward Stell on his behalf. Edward is a Parliamentary Counsel in the Office of Parliamentary Counsel in London.

² First Parliamentary Counsel, United Kingdom

legislative text into “plain language”, in circumstances where what I think is clearly meant is the translation of the legislative text into a different context in which the text can be supplemented by explanatory material that has the effect of rendering the text more easily understood.

I do not know how many of you are familiar with the book of lectures by Umberto Eco “Mouse or Rat – translation as negotiation”.

In those essays Eco distinguishes true translation from transliteration. In transliteration the words in the source language are simply reproduced in the target language and rearranged into the appropriate syntax. By contrast, true translation, he says, involves a degree of “negotiation”, in which the translator has to choose the elements of the original text that are capable of being reproduced in the target language in a way that retains the same literary flavour as the original. But the translator has to negotiate the different structures and components of the two languages – just, I say, as the drafter has to negotiate the differences between the language of policy formulation and the language of the statute book.

To illustrate the point Eco contrasts the translation into Italian of “rat” in the First Chapter of Camus’ “the Plague” (La Peste”) with Hamlet’s words on being surprised by a movement behind the arras, which are followed by his lethal attack on the hidden Polonius: “How now, a rat”.

The problem is that, although Italian has both the words “topo” for mouse and “ratto” for rat, the word “topo” is used in everyday usage for both a mouse and a rat, while “ratto” is used only in technical texts. Moreover “ratto” has none of the English connotations of betrayal. Instead it suggests something speedy – “ratto” is slang for speedy. The translator has to decide whether it is possible or appropriate to keep the connotation of betrayal in Hamlet’s exclamation or to confine himself to the correct word “topo” for a rodent that has caused a surprise. If he decides to use extra words to express the concept of betrayal, the translator necessarily produces an allusion that has an extra emphasis that is lacking in the English. In “the Plague”, however, the connotation that comes with the reference to a rat is one of a rodent that creates apprehension, as a potential carrier of disease. This can be achieved by saying “grosso topo”; “topo” alone would fail to do that. The addition of “grosso” ensures that the reader understands the reference as a reference to a rodent that is big enough to suggest a threat.

All this reminds me of Richard Hyland’s³ assertion that “Legal writing is one of those rare creatures, like the rat and the cockroach, that would attract little sympathy, even as an endangered species”. I shall just pause for a moment as we all think about the translation into Italian of the word “rat” in that quotation. I am certainly not, of course, when I talk about translation, talking about translation into any special legal language.

³ Prof Law Rutgers Law School - *A defense of legal writing* in 1986 U PA L Rev

So, accepting for the purposes of today's question this analysis of a broader meaning for translation, I can see that there can be an element of "negotiation" and also of "interpretation" in even a mere wordsmith's translation of instructions into law. Even a mere wordsmith has to be an expert in making sense of his instructions, of perceiving the legal content of what he is asked to do and of analysing it and negotiating the elements of the instructions that need to appear in the text. The wordsmith also has to arrange the material and structure it so that it retains, so far as possible, the same policy message as the instructions. And for this purpose I do not make any distinction between those who receive their instructions, as we do in the UK, in the form of a narrative description of what is wanted and those who receive instructions in the form of a draft.

Wordsmithing in this sense is highly skilled and technical work. Drafters for the UK Parliament have to acquire high levels of expertise in it. For that reason I do not want to say we are not wordsmiths. We are, and we should be proud of the fact that we are. But it is not all we are expected to be. We all know how important words are. It was Wyndham Lewis who said "Liberty is manufactured with words. All our struggles are about words, for no one would fight for reality, since without a name no one would recognise it."

But it seems to me that we in the UK do more than traffic in words.

So what is the work of a member of the Parliamentary Counsel Office in London that makes him or her more than a wordsmith? I shall stop saying "mere" wordsmith now. That is inappropriate.

Well, the first thing to say is that there is no fixed definition of what UK departments expect of Parliamentary Counsel; and attempts to set one out inevitably result in a plethora of exceptions. Requirements have changed considerably over time and indeed change from Bill to Bill today.

I think there can be little doubt what was required in the case of Sir Henry Thring (the first drafter to hold the office of Parliamentary Counsel, the office – in the appointment sense – from which our present Office – in the collective sense – derives). When he sat down to breakfast with Gladstone to discuss the Bill that the PM required, he acted as Counsel and gave advice on policy, and not just words.

On the other hand, when our Office was severely understaffed in the late eighties and early nineties and came under more and more pressure to produce Bills in quantity and at excessive speed, we did develop the habit of demanding that our instructions reached a level of perfection that allowed us to confine ourselves to the wordsmithing—which was all we had time for. That reminds me of the only decent definition of a final draft. "The one produced the night before it is due." Of course a requirement of perfect instructions is a position that it is easy to move to and hard to move away from, because no drafter wishes to acknowledge, or should, that there is any progress in accepting instructions that are less than perfect. Nevertheless, the ambition is quite impracticable. So, in the real world, we have always had to cope (at least from time to time) with instructions that are less than perfect and were prepared before the policy has been fully settled, and, I suspect, that we always shall. And this means we

inevitably become part of the process of finalising the policy – and that our advice is often sought on different options.

In this connection, I want to set the role of the UK drafter in context: because there are a number of factors in that context that seem to me to enhance our role as counsel, as well as wordsmith.

The first is seniority. Even the most junior drafter on a team of two or three drafters in a UK drafting team is likely, just in terms of Civil Service pay grade, to outrank almost everyone else who is working (at least on a day to day basis) on the departmental Bill team, and the senior drafter will never be outranked. We live in more egalitarian and less hierarchical times, and are reminded frequently in our dealings with our customers and the outside world that the age of deference is dead – not something I personally regret. But there is little doubt that departmental Bill teams do look to the drafter for a degree of leadership in carrying forward a Bill project.

So it is not uncommon for the drafter to take it upon himself to alert the department to common traps in the handling of the project and generally to volunteer to provide informal and sometimes formal training on Bill work. It is increasingly common too for drafters to be involved in the project planning for a Bill. And that is desirable. There is nothing more frustrating, in my experience, than to be presented, too late in the day to be able to do anything about it, with a project plan for a Bill that allows six months for policy development, two more months for instructing departmental lawyers to prepare instructions for Parliamentary Counsel and two weeks for the drafter to prepare the Legislation Committee print of the Bill from those instructions.

And the second thing that is relevant to our wider role is that, even more than in the past, civil servants in UK departments move frequently from job to job and are expected to build up experience in all three areas of civil service activity: policy development, operational delivery and corporate services. It is common to be instructed by a team for most of whom, the Bill will be their first experience of Bill work, and may also be their last. This will almost certainly be the case when the instructions come from a department other than one of the big serial legislators. The team of drafters often contains much the largest fund of legislative experience. So it is common for the departmental team to look to the drafter to be their guide through both the Parliamentary process and the processes within Government for legislating (L committee, departmental and external consultation, dealing with the parts of the UK that have devolved administrations, and so on). Parliamentary Counsel becomes the department's pilot through unfamiliar waters.

Another feature of this is that Bills are often seen now in departments as part of wider policy delivery projects; and their Bill teams are now usually led by non-lawyers, who are interested in a whole range of issues including consultation, and eventual implementation. This is generally a good thing; but it leaves the drafter as the specialist in management of the Bill part of the project.

Another thing that contributes to UK drafters' role as counsel is their professional independence. I do not want this to be misunderstood. UK drafters are organisationally firmly within the Civil Service and,

as such they are constitutionally accountable to Ministers alone. Like all civil servants they are subject to the Civil Service code and therefore subject to obligations of “integrity”, “honesty”, “objectivity” and “impartiality”, but they owe no separate obligations to Parliament or to anyone outside Government. Nevertheless, we are professionals with professional standards and we are not officials of the instructing departments – rather we are a central service who can stand outside the policy making process and bring a degree of objectivity to the analysis of what it has produced.

It is this aspect of the role that is perhaps the area of greatest controversy, and the area where it is most difficult to distinguish between the role of counsel and wordsmith (in the extended sense I have already explained). Increasingly drafters are asked to make a positive as well as a critical contribution to the formulation of policy. It is not, if it ever was, acceptable to demonstrate that a set of instructions is analytically incoherent and then to sit back and wait for a better set. Those who detect problems are expected to act like team members and to contribute to finding the solution. This includes the drafter. But where do you draw the line? Lawyers in general, and drafters in particular, do not generally make good policy makers, partly because they concentrate on possibilities rather than on an evidenced-based analysis of what happens in practice.

However there is another element of our independence which undoubtedly gives us the role of counsel, rather than wordsmith. We have a function in the system of being advocates for the protection of the integrity of the statute book, and to ensure that there is no debasement of the currency of the means by which Parliament communicates with the courts.

This involves two things, and matters of substance as well as words. First, it involves fearlessly alerting Ministers to the risks of allowing short term considerations to undermine the respect the courts give to Parliamentary proceedings. The reputation of the Office and the quality of its work is one of the things that ensures that the balance is kept between the principle of Parliamentary sovereignty and the temptation for the courts to make new law to deal with hard cases. It is this that makes UK drafters so reluctant to accept unnecessary material in statutes.

Secondly, our independent role means it is the function of the Parliamentary Counsel to draw to Ministers’ attention, and particularly to the attention of the Law Officers (who have a general oversight of legal policy questions), anything in a Bill that offends constitutional principle. In those jurisdictions where there are written constitutions and it is a function of the drafters to warrant the constitutionality of the legislation they draft, it seems to me unarguable that, in that function at least, the drafters act as counsel not wordsmiths. But, even in the UK, the practical need, if policy is to be effectively implemented, of ensuring that Bills conform to the rule of law, and the relatively recent statutory rule that requires Bills to be construed in accordance with the European Convention on Human Rights, mean that Parliamentary Counsel in the UK have a legal and constitutional input to the drafting of Bills, even in the absence of a written constitution.

I should mention one limitation on our role as counsel. The UK is a large jurisdiction and we are instructed by departmental lawyers who are expected to provide us with the detailed legal background to

the changes we are being asked to make. We expect our instructions to seek to identify consequential amendments, transitional provisions and any other supplementary provisions that need to be made. So to that extent, it seems to me that we do not perform the role that some drafters in smaller jurisdictions have to perform: of instructing themselves on incidental matters.

But there is one further matter that I need to address because it is another area in which the UK drafter undoubtedly acts as counsel rather than wordsmith and that is the role of Parliamentary Counsel in the legislative process. In some jurisdictions the legislature rarely amend Bills introduced by the executive. In others the Government drafter becomes *functus officio* once the Bill has been introduced.

Neither of those is the case in the UK. In recent years the House of Lords has been very active and members there have been successful in moving amendments against the Government. And even in the Commons the impression of a Government steam roller is in many respects an illusion. Unlike in the Lords, the Government does control both the timetable and a majority in the Commons, but that is only half the story. Behind the scenes the process of consultation and the reality of discreet back-bench pressure is constantly making the Government consider the case for concessions. The pressure of a large legislative programme in a world in which Parliamentary time has a finite limit, quite apart from its own commitment to the democratic process, requires the Government to seek to achieve consensus in its Bills so far as it possibly can. And we almost invariably draft the amendments that give effect to any eventual compromise.

What role do Parliamentary Counsel play at this stage? Often it is very different from the role played in preparing the Bill for introduction. There the correct and proper approach for the drafter is the austere one of finding out exactly what the department want and giving effect to it. When it comes to drafting amendments to achieve consensus, however, the task is more subtle, and it requires judgement and professional expertise that go beyond the task of finding words for others. It is often the drafter alone who can identify the change that can satisfy the parties and not compromise the integrity of the Bill, or of the statute book generally. Perhaps a case can be made for saying that this is a form of wordsmithery as I have defined it; but for my money it involves much more participation in the substance, and so is properly described as “counsel’s” work.

I hope that gives an insight into the role of the UK drafter that justifies the conclusion I began with. We are both wordsmiths and counsel.
