

Our Legislators are 'CADS'

The above title is intended not as a sensational attack on members of Parliament, but rather as a mnemonic. After 20 years spent in drafting legislation I have reached the conclusion that there are four vices of statute law which largely contribute to the obscurity so many people complain about but are not really the fault either of legislators or draftsmen. They spring from the system itself. I call these four vices Compression, Anonymity, Distortion and Scatter. There is a cure for them, and I will come to that later. In what follows I use examples drawn from the Consumer Credit Act 1974. (Since I drafted this myself I cannot be accused of attacking fellow draftsmen.)

Compression

As a method of keeping his bill within bounds, the modern draftsman relies heavily on compression of language. This produces a concentrated effect unlike that of other prose. It makes heavy demands on the reader, for every word counts and many of the words are of crucial importance. One form of compression, very commonly employed, is the device of 'application'. Part III of the Consumer Credit Act creates a licensing system for credit and hire businesses. It contains 22 sections, and is very detailed. When (in pt X) the Act gets round to dealing with another type of business, labelled an 'ancillary credit business', it wants to impose a licensing system on this also. To avoid setting out a further 22 sections the Act simply says (in s 147) that the provisions of pt III apply to an ancillary credit business as they apply to a credit business. But it is not quite as simple as that, because the whole of pt III is not suitable as it stands. So some of its provisions are disapplied and others are modified. It is not therefore a straightforward matter for the reader to see just what the licensing system for ancillary credit businesses amounts to. He has to do a certain amount of mental *conflation* (the term used to describe the reconciling of two or more texts into one).

Anonymity

An Act of Parliament gives some clues to its contents, but not as many as the user needs. The 193 sections of the Consumer Credit Act 1974 are arranged in 12 parts, each with an explanatory heading. Within the lengthier parts there are occasional cross-headings, and every section has its sidenote. That is all. 157 of the sections are broken into subsections, but there are no clues to the contents of individual subsections. Nor is there any sign to say when a term is a defined term or to point the way to where the definition is to be found. Perhaps more serious is the lack of anything to direct the reader's attention, when he looks at one provision, to other provisions which have an important bearing on it. For example, it is very important to know that a breach of advertising regulations made under s 44 of the Consumer Credit Act has penal consequences. That is laid down by s 167, but there is no signpost to s 167 in s 44. The conditions under which a bill is enacted preclude adequate signposting. For one thing its provisions, and their numbers, are constantly changing.

Distortion

There are several ways in which an Act of Parliament, compared to the ideal expression of the propositions contained in it, may be distorted. To start with, it is a dual-purpose vehicle. It starts life as a bill, a vehicle for legislative proposals sub-mined for debate and amendment. It must be in the form of clauses and schedules, and drafted in a way to disarm political criticism and enable Parliament to debate its crucial features one by one. It often introduces novel concepts, which have to be led up to and adequately explained. Then, on royal assent, it becomes an Act - a more or less permanent feature of the legal system which has still to function effectively long after the novelty has worn off and the conditions in which it was drafted and debated have passed into history. It is plain

that what may be desirable for a bill may be less desirable for an Act, and vice versa. So that is one cause of distortion.

Another lies in the fact that when the draftsman is designing his bill he does not know what, when Parliament has finished with it, it will contain. Many bills are heavily amended, sometimes by the insertion of wholly new material, An architect would not produce a very tidy house if at each stage of its construction he were told that the client's requirements had radically altered. Even after royal assent this process of unforeseeable alteration continues, as one amending Act follows another.

Scatter

Under our legislative procedure the scattering of provisions dealing with one point is inevitable. When, as frequently happens today, a new system of control is introduced the first step is to pass an Act of Parliament giving the necessary powers of compulsion. Some of these powers will be continued in the Act itself but others must be left to *regulations*, to be made later under provisions contained in the Act. This is for two reasons. First, the parliamentary time available to a modern government is insufficient for the passage of a bill itself containing all the necessary detail. Secondly, time is needed *after* Parliament has laid down the main outlines during which the details can be worked out by government departments in accordance with those outlines and in the light of experience of the working of the Act.

Other factors also introduce scatter. Even *within* an Act scatter frequently occurs. One cause is the rules of parliamentary procedure. These require that everything in a bill (apart from any preamble and the long title) must be contained either in a clause (which on enactment becomes a section) or a schedule, and that a schedule must have a clause to introduce it. Thus whenever a schedule is used material is bound to be split between the introducing clause and the schedule, There is also Scatter between clauses, eg where one clause is made subject to another.

Peripheral Acts also cause scatter. The Interpretation Act 1889 [now the Interpretation Act 1978], for example, is the background to every later Act. When the later Act speaks of 'writing', say, or 'service by post' it automatically attracts provisions of the Interpretation Act 1889 which expand the meaning of these terms.

Amending Acts introduce scatter. If, as it ought to be wherever possible, the amending Act is so drafted that it directly alters the text of the earlier Act, scatter may be avoided (assuming reprints of the Act as amended are available). In other cases it is not.

The remedy: restatement

The defects of compression, anonymity, distortion and scatter can be remedied by restating the whole of the relevant statutory provisions, including those contained in subordinate legislation, in a single comprehensive text, I am myself doing this in relation to the Consumer Credit Act 1974, [see *Consumer Credit Control*] producing a restatement with the following features:

1 *The structure of the restated text is designed to present the statutory provisions to the reader in the most helpful and logical way*

There are various ways in which the statutory provisions might be structured, In the system I use the basic unit is the *paragraph*, prefixed by the symbol §. Where the basic unit is lengthy it is divided into *subparagraphs* each consisting of a separate sentence distinguished by a capital letter. Thus the subparagraphs of §40 are designated §40A, §40B and so on. A group of paragraphs dealing with a particular topic is called a *division*, and each division is given a number. Thus Division 6 deals with a separate topic and para 40D in Division 6 is designated 6§40D. Paragraphs and subparagraphs (unless very short) are further divided into *clauses* using arabic numerals in brackets (6§40D(3)). Occasionally a clause is further divided (6§40D(3)(e)).

2 Long sentences are broken up

It is a feature of common-law drafting to depart from ordinary sequential prose, where a complex proposition is conveyed in a succession of sentences. Instead, the proposition is framed as a single sentence so as to obviate arguments based on the weakening of the links between different sections of a proposition where it is divided into sentences. Since the Restatement is not itself law it can ignore this difficulty and give the reader the benefit of normal prose patterns. A paragraph of the Restatement may therefore correspond to a part only of a lengthy section or subsection of an Act.

3 The paragraphs retain the statutory language as far as possible

The Restatement is not a paraphrase or summary. It is intended to bring before the reader the actual language of the Act or statutory instrument. The wording of each paragraph therefore follows closely the wording of the original. Usually, it departs from it only so far as is required for reasons of 'carpentry', ie to make it fit the different format. Occasionally it is desirable to take the opportunity to polish, as by ironing out unnecessary differences in wording, always making sure the meaning is not changed. In some instances the preparation of the Restatement brings to light ambiguities, obscurities or omissions. Where it seems possible to correct these to accord with the obvious intention it is done. Otherwise the defect is reproduced. Either way, the treatment used is explained in a *textual note*.

4 A system of informative headings is provided

Each division has a heading, and there are cross-headings within those divisions which are of sufficient length to make this worthwhile. Every paragraph and subparagraph has its own heading. These headings, when printed together without the text, indicate at a glance the whole structure and scope of the legislation and are called the *Analysis*.

5 Compressed language is broken up by typographical devices

The main typographical device is to begin each grammatical clause within a sentence on a *new line*, with a reference number in the margin. In this way density of expression is relieved, and the reader does not have to work out for himself where the breaks in sense occur. Another important typographical aid is the printing of defined terms within single quotation marks. This indicates that a definition of the term will be found in the interpretation division of the Restatement. Thirdly, key phrases are italicised.

6 Detail is removed from the main Restatement by use of defined terms

A modern Act removes detailed provisions from the body of the Act, and avoids repetition, by allotting a label to such provisions and using that instead. Thus where in the Consumer Credit Act 1974 it is desired to refer to revolving credit (as opposed to credit in the form of a fixed amount) the term 'running-account credit' is used and this is given a fairly complex definition. The Restatement can go further than the original Act or statutory instrument in using this method, and the interpretation division of the Restatement may be lengthy and involved. The reader who needs only the main outline of the law need not trouble himself with it.

7 Non-essential detail is omitted from the Restatement

Some provisions of an Act are of no interest to the ordinary reader. A provision merely conferring power on a minister to make regulations, for instance, need not be read by the person who just wants to find out what the law affecting him is. It can therefore be omitted from the Restatement, as can other material of concern only to officials administering the Act. Also omitted are spent provisions, or provisions which have not yet been brought into operation. A reader who had a need to consult such

provisions would do so by consulting the Act or statutory instrument itself, but such a need would be exceptional.

8 Applied provisions are restated in full

The Restatement deals with the problem of 'applied' provisions by one of two methods. Either the applied provisions are set out again in full, with any modifications incorporated, or the statement of the circumstances to which they apply *directly* is widened. Whichever method is used, the reader is spared the necessity of making his own conflation of the provisions.

9 Annotations are provided

To achieve maximum utility the Restatement needs copious annotation. The first note after each paragraph or subparagraph must always be one giving its statutory origin. Then there must be a textual note wherever the statutory language has been departed from in a significant way. These notes are an essential adjunct to the Restatement itself, and need to be provided by its compilers. Other notes are a matter of choice, and it would be perfectly possible for them to be produced by a different set of people. For example if the Restatement were produced and published by an official body, it could be left to commercial law publishers to bring out annotated versions of the whole or a portion of the official Restatement.

Example

The following is an example showing the restatement of part of s 48 of the Consumer Credit Act 1974 in the form of a new defined term:

1 §360 "canvass a regulated agreement off trade premises"

- (1) To "canvass a regulated agreement off trade premises" is for an 'individual' (called the canvasser)
- (2) to solicit the entry (as 'debtor' or 'hirer') of another individual (called the consumer) into a 'regulated agreement'
- (3) by making oral 'representations', at a place *other than* a place where a 'business' is carried on (whether on a permanent or temporary basis) by any of the following -
 - (a) the 'creditor' or 'owner'
 - (b) a 'supplier';
 - (c) the canvasser, or the 'person' whose employee or agent the canvasser is, or
 - (d) the consumer,
- (4) to the consumer or *any other individual* while the consumer or other individual is present at that place
- (5) during a visit by the canvasser to that place *which is*
- (6) a visit carried out for the purpose of making such oral representations to individuals who are at that place
but is not
- (7) a visit carried out in response to a request made on a previous occasion.

Source

The term is not used in the legislation, but this definition is based on the Consumer Credit Act 1974, section 48.

Interpretation

'individuals' see 1§1700
'debtor' see 1§1020

'business' see 1§320
'creditor' see 1§920

'hirer' 1§1620

'regulated agreement' see 1§2560

'representation' see 1§2620

'owner' see 1§2160

'supplier' see 1§2920

'person' see 1§2320

Status and use of the Restatement

I believe that all users of statute law would gain enormous benefit if the main body of statute law were restated in this way. The best system would probably be for an official organisation such as the Law Commission to produce the Restatement itself, leaving annotations-to commercial publishers. It would have to be done by instalments, and would take many years. The programme of consolidation of enactments could be scrapped to make room for it, since Restatement would make consolidation largely unnecessary.

The Restatement would have strong persuasive authority, but the enacted law would of course remain paramount. In practice it should be possible to proceed by consulting the Restatement *instead of* the enacted law, especially if published commentaries cited the Restatement rather than the enacted law. Only if difficulty arose over some obscurity or ambiguity would it be necessary to compare the texts. In such cases the existence of the Restatement would be a valuable adjunct.

Commercial loose-leaf versions of the Restatement with annotations might well become the most commonly used source books for statute law. I believe they would serve a useful public purpose in bringing statute law fully before those to whom it is directed in a form they can consult easily and understand.

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