

FIFTH COMMONWEALTH LAW CONFERENCE 1977

Law Reform

Legislation: Principles and Methods

Paper delivered by Francis Bennion¹

Improvements in Legislative Techniques

Commonwealth governments could do more to make statute law accessible to the user. Some governments are better than others in this respect, and I am conscious that the government of my own country is somewhere near the bottom of the league table. Nevertheless I venture to put forward suggestions which may be found to have some application in the Commonwealth generally. These have nothing to do with the *content* of legislation. As a technician I am content to assume (in this forum at least) that measures passed by our legislators are wise, humane and enlightened. The more true that is, the greater the unwisdom of not doing all that is possible to make them effective. This was the problem that occupied Jeremy Bentham most of his life. As John Stuart Mill put it, Bentham's concept of legislative improvement relates to form and not substance:

'It does not concern itself with what the laws should be, but declares that whatever they are, they ought to be systematically arranged . . .'²

Mill considered that Bentham had proved the necessity and practicability of codification, which Mill defined as

'The conversion of all law into a written and systematically arranged code; not like the Code Napoleon, a code without a single definition, requiring a constant reference to anterior precedent for the meaning of its technical terms; but one containing within itself all that is necessary for its own interpretation, together with a perpetual provision for its own emendation and improvement'.

Codification in this sense has ceased perhaps to be a practicable aim. Bentham was working before the industrial revolution. The social reforms and constant change generated by it have put paid to codification as a general legislative technique. Yet the problem of obscure law remains.

Edmund Burke once said that where mystery begins justice ends. If this were literally true justice would have ended long ago for those on whom statute law impinges (which means every citizen). Fortunately for democracy and the rule of law, Burke was indulging in hyperbole for the purpose of pointing to an important truth. Its importance has grown since Burke's day, vast areas of social policy have been brought under control by legislation. Not only justice is at risk, but the proper implementation of social policy also.

To a large extent, social policy is nowadays implemented by the device of *legislation*. Yet little has been done to ensure that this device operates as smoothly and effectively as it possibly can. The science of legislation, upon the formulation of which Bentham laboured so

¹ Proceedings & Papers of the Fifth Commonwealth Law Conference (1977) p.53 and blue page 7.

² *Dissertations and Discussions*, Vol. 1.

industriously most of his life, has scarcely moved forward from where he left it. What can be done to improve the situation?

The natural response is to look for improvements in drafting technique. In 1973 that response led to the setting up in Britain of the Renton Committee on the preparation of legislation. The report of the Committee was published in 1975³, and contains some valuable proposals. In my view, the most important thing about the Renton Report is the stress it lays upon textual amendment of statutes in preference to the pernicious system, formerly almost universally used in Britain (though nowhere else), of indirect or referential amendment. Without textual amendment it is impossible to preserve the textual integrity of an Act of Parliament, and obscurity is inevitable.

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 draftsmen to say the same thing (or virtually the same thing) in different ways. This is no fault of theirs. The draftsman of a particular Bill (usually wanted in a hurry) drafts the common type of provision in his own words for the simple reason that standardised clauses simply do not exist. They ought to be brought into existence by some body charged with that function. In England it would no doubt be the Law Commission, in default of there being (as in my view there ought to be) 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. In what follows I refer to the body whose function 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 draftsman 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.

³ Cmnd 6053.

Standardisation is an area where cooperation between Commonwealth 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.

Statute law processing

When Bentham put forward his ideas on codification he thought of law as consisting mainly of case law and to a limited extent of Acts of Parliament. That was the position in his day. Now the situation is transformed. Not only have Acts of Parliament become much more numerous and far-reaching, but also they are supplemented by a huge mass of orders, regulations and other subordinate legislation. This is where developments in official technique have fallen short of what is required and what is possible, to the confusion of statute law users.

With the general rise in living standards and increased sophistication of techniques (requiring highly trained personnel), the real cost of labour has soared. Legal expertise is as costly as any. It should not be wasted. Yet it is wasted prodigally by the failure of governments to *process* statute law. It is put before users as raw material, and not as a finished product. Each user is expected to apply his own finishing process.

We can think of statute law as a collection of statements. Like most statements it is in the form of sentences, often very long and complex. The legislator's object is to get these sentences *understood* by the persons to whom they apply - otherwise he fails in his purpose. But he does not put the sentences before these persons in the best way for understanding. The sentences dealing with one point are often in different places. They are scattered about in different Acts, regulations and orders. They are in compressed language very difficult to understand. They lack adequate headings and signposts. All these drawbacks can be overcome by further processing.

Let me give an example. To avoid any suggestions that I am criticising the work of another draftsman (dog, after all, doesn't eat dog), I select it from an Act I drafted myself. That does not in fact mean I am criticising my own drafting, because this provision is drafted in the usual manner, and is in no way out of the ordinary. The Consumer Credit Act 1974 places on the Director General of Fair Trading the function of licensing credit grantors. Section 42 adds the following new subsection to section 13 of the Tribunals and Inquiries Act 1971:-

‘(5A) Subsection (1) of this section shall apply to a decision of the Secretary of State on an appeal under section 41 of the Consumer Credit Act 1974 from a determination of the Director General of Fair Trading as it applies to a decision of any of the tribunals mentioned in that subsection, but with the substitution for the reference to any party to proceedings of a reference to any person who had a right to appeal to the Secretary of State (whether or not he has exercised that right); and accordingly references in subsections (1) and (3) of this section to a tribunal shall be construed, in relation to such an appeal, as references to the Secretary of State.’

All that the Consumer Credit Act does for the reader is to inform him that section 13(1) ‘provides that on a point of law an appeal shall lie to the High Court from a decision of any tribunal mentioned in that subsection or the tribunal may be required to state a case for the opinion of the High Court’. Everything else he must work out for himself. Even if (which is not the case) the government published updated texts of the 1971 Act, so that a reprint of section 13 as amended was available, the reader would not be much better off. Consider what he is asked to do:-

- (a) Look up the text of the 1971 Act.
- (b) Read section 13(1), which runs as follows:-

‘(1) If any party to proceedings before any such tribunal as is specified in paragraph 2(b), 4, 6, 10, 16, 17(b), 18(a), 21, 26, 28(a) or (b) or 32 of Schedule 1 to this Act is dissatisfied in point of law with a decision of the

tribunal he may, according as rules of court may provide, either appeal therefrom to the High Court or require the tribunal to state and sign a case for the opinion of the High Court.’

(c) Perform the not inconsiderable intellectual feat of reading subsection (1) again as if it were written in the way the new subsection (5A) directs. This involves:-

(i) reading the words ‘any such tribunal as is specified in paragraph 2(b), 4, 6, 10, 16, 17(b), 18(a), 21, 26, 28(a) or (b) or 32 of Schedule 1 to this Act’ as if they were the words ‘the Secretary of State on an appeal under section 41 of the Consumer Credit Act 1974 from a determination of the Director General of Fair Trading’;

(ii) reading the words ‘any party to proceedings’ as if they were the words ‘any person who had a right to appeal to the Secretary of State’ (whether or not he has exercised that right);

(iii) reading the words ‘a decision of the tribunal’ as if they were the words ‘a decision of the Secretary of State’; and

(iv) reading the words ‘require the tribunal’ as if they were the words ‘require the Secretary of State’.

(d) While keeping in his head the four adaptations listed in paragraph 3 above, apply subsection (1) as so modified. This involves in deciding whether or not he or his client is a person who had a right of appeal to the Secretary of State (whether or not he has exercised that right). It also involves finding out which are the rules of court referred to and looking them up. They raise further similar problems, and the chase continues.

It has been officially estimated that 100,000 licences will be issued under the Consumer Credit Act 1974. It may be taken therefore that there will be a very large number of determinations in respect of which applicants may wish to consider appealing. In every case they or their advisers will need to go through the intellectual processes just described. In a period of twelve months there are likely to be hundreds of instances. Let us take a very conservative estimate and say five hundred. What does this mean?

Suppose it takes a lawyer one hour to work through these intellectual processes and find out whether there is a right of appeal, how it is to be exercised and so forth. Five hundred legal man hours a year will be required. If a lawyer charges £10 an hour for his work this produces a cost of £5,000. Now the fact is that this job could be done once, by an official employed by the keeper of the statute book, and the results published by authority for practitioners to use. Saving: 499 man-hours or £4,990. But this is just one instance in one Act. How many man-hours and how much money would be saved if a service of this kind was provided for the statute-book generally? How much more effective would legislation become? I suggest that the benefits would be very great indeed.

Restatement

In an article last year in the *Solicitors’ Journal* entitled ‘Our Legislators are CADS’⁴ I put forward a scheme for the restatement of statute law to remedy the four vices indicated by the mnemonic in the title of the article:

Compression of language,
Anonymity or lack of sign-posting,
Distortion caused by Parliamentary considerations, and
Scatter.

⁴ 120 Sol. J. 390, <http://www.francisbennion.com/1976/001.htm>.

I will not repeat what is said in the article here, but it can be referred to as an amplification of the above argument. So too can my book *Consumer Credit Control*⁵ which uses the method of restatement outlined in the article.⁶ In the book, section 13(1) and (5A) of the Tribunals and Inquiries Act 1971 is restated, together with the relevant rules of court, as a single passage. Each reader does not have to perform the intellectual gymnastics described above. They have been done for him, once and for all. The official language is of course retained. Annotations are provided.

If the device of Restatement were to be used for statute law generally, there are three ways this might be done:-

By Parliament itself (the restatement might be enacted in the form of an Act of Parliament).

By one or more private bodies, such as commercial publishers or university law departments.

By a body, such as a Statute Law Commission, which has an official status (perhaps conferred by Act of Parliament) but has no power to override legislation.

In some ways an enacted restatement would be better than any other. It would itself constitute the law, and would repeal the Acts and subordinate legislation restated by it. The possibility of conflict between the enacted law and the restatement would be avoided, as would the need for anyone to consult both texts. Yet there are serious problems about an enacted restatement. First, the restatement must include not only Acts of Parliament but also statutory instruments the making of which Parliament has delegated to Ministers. It has done this because statutory instruments concern matters of detail which Parliament has not time to consider itself or because they relate to topics on which speedy action might be needed, or for similar reasons. Having delegated this responsibility Parliament ought not be asked to take it back by passing statutory instruments in the form of an Act of Parliament.

Second, Parliament is unlikely to agree to enact the restatement without either being satisfied that it exactly reproduces the existing law (apart from formal or trifling departures) or allowing itself an opportunity to debate and amend it. Either of these would be destructive of the object of the restatement. The history of the process of consolidation of Acts of Parliament (always well behind requirements) shows the danger of insisting on slavish reproduction of the existing law, with all its obscurities and ambiguities. Even the freedom given first by the Consolidation of Enactments (Procedure) Act 1949 and later (to a wider extent) by the system of 'consolidation with Law Commission amendments' has not enabled the output of consolidation in Britain to keep pace with requirements, partly because even the abbreviated Parliamentary procedures are time- and effort-consuming for the draftsman. To allow Parliamentary debate and amendment on the other hand would be unworkable. Parliament has insufficient time for substantive legislation, and we should in any case be back with the problem of distortion of the legislative structure by amendments made in Parliament.

The third objection to an enacted restatement is that it would have to take the form of a Parliamentary Bill, so that the improvements in structure and signposting effected by the Restatement would be lost. This might be obviated by making the restatement a Schedule to an Act, rather as some constitutions were treated in the days when Westminster provided constitutions for other countries. This is a clumsy device however. Of course if Parliamentary procedure were changed so that the form of Acts could be improved that might get round the difficulty.

⁵ Oyez Publishing 1976.

⁶ I later renamed the method 'composite restatement' because it combined primary and secondary legislation in one formulation. For further details of this method see F A R Bennion, *Statute Law* (3rd edn, 1990) Longman, Ch 23, www.francisbennion.com/1990/002/ch23.htm and F A R Bennion, *Statute Law* (2nd edn, 1983) Oyez Longman pp 307-322, www.francisbennion.com/1983/006/apb.htm.

Fourthly, it would interfere with the exercise by Ministers of their delegated power of sub-legislation if their regulations and orders were crystallised into legislation. Statutory instruments should remain under control of those with power to make them (subject of course to overriding powers of annulment or affirmation retained by Parliament). Government departments would not relish seeing their regulations picked up and remodelled without their control, and such control, if given, would be another delaying factor. Furthermore the amendment of statutory instruments would be difficult if they had become embedded in an enacted restatement. The text of the restatement would not distinguish between the origins of its provisions and problems of *vires* might become acute.

It is true that the objections listed above did not prevent the enactment by Congress of the United States Code in 1926, described as 'the official restatement in convenient form of the general and permanent laws of the United States'. Clearly the possibility of an enacted restatement is worthy of investigation.

There is of course nothing to prevent a university law department, commercial publisher or other private body from producing and publishing a restatement in some field of enacted law. It will have the value indicated by the skill and effort which has gone into it, but that will be difficult for outsiders to assess. It is true that many private compilations have won high renown - Halsbury's *Laws of England* being a notable example. Ideally the restatement should be fully comprehensive, and the effort required might be beyond the reach of any one British publisher - though a consortium of commercial publishers and others might accomplish the task.

My own view is that it would be best for the restatement to be produced and promulgated by an official body such as the Law Commission, or a body set up for that purpose. The law restated would remain fully in force in its original form, and would be amended by Act of Parliament or statutory instrument in the ordinary way. It would be for the body responsible for the restatement to follow suit and issue its own amending material in accordance with such changes in the statute law. Similarly, the courts would retain their full authority to pronounce upon the meaning and effect of any enactment in the form in which it was passed by Parliament or made by a Minister. The courts would no doubt treat the restatement as being of persuasive authority, but in any conflict the actual law would prevail - the restatement would not in itself be law.

It may be asked what is the use of the restatement if it is subordinate to statute law. Will it not be necessary for the practitioner to look at the statute law as well, so that his burden, far from being lightened, is actually doubled? I regard this question as the crux of the whole problem of whether a restatement is worth while.

The restatement is intended as a tool for practitioners who need to find out what the statute law on a particular subject is. I believe it is also capable of being used by laymen - at least in the form of the Analysis (a table merely setting out the headings and subheadings in order) and as an outline exposition (i.e. without investigating defined terms). Tools of this kind are in common use by practitioners and laymen. For practitioners they take the form of annotated texts (such as Halsbury's *Statutes* or the *Annual Practice*) or textbooks (such as Stone's *Justices Manual* or Archbold's *Criminal Pleading, Practice and Procedure*). Very often the busy practitioner relies on statements of law which are not in the official form, and courts nowadays are ready to follow suit. The restatement, if issued by an official body, would merely give a better and more authoritative substitute source. In practice, reference to the official text would rarely be necessary.

To yield its full value, the text of the restatement would need to be annotated. Statutory texts, however well drafted, require copious explanations and illustrations to become fully accessible to the reader. Should the official body responsible for the restatement also be responsible for the annotations? My answer is no. To produce the full range of annotations would greatly enlarge the task of the official body - already heavy if it is to be discharged adequately. It would be best if the official body gathered the best talent available to produce

the actual restatement but left it to commercial publishers and others to produce annotated editions. Indeed for the restatement to succeed it would be necessary for the efforts now devoted by commercial publishers to producing annotated texts of statutes to be switched to the restatement. The compilers of the restatement would need to carry out a limited amount of annotation. The statutory source of each text would have to be given, and textual notes would need to be provided wherever any significant departure had been made from the statutory text. It might be helpful if, where an ambiguity or obscurity had been intentionally reproduced, this was pointed out.

We can now attempt to answer the questions posed above. If the restatement were reproduced by an official body, as I have suggested, it would have strong persuasive authority but the enacted law would 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 versions of the restatement with annotations might well become the most commonly used source books for statute law. I believe they would serve a very useful public purpose in bringing statute law fully before those to whom it is directed in a form they could consult and easily understand.

It would of course be an immense task for a single organisation, even when financed by the state, to produce a restatement of the entire body of statute law. I would propose that a programme of restatement should take the place of the programme of consolidation of enactments, so that the former could use the services of the draftsmen who would be otherwise engaged on consolidation. Nevertheless it is obvious that the restatement would have to be carried out by instalments. Fortunately its value does not depend on its completeness. As I hope to have shown with my own restatement of consumer credit law, the method is useful even when confined to a single topic.

A Commonwealth law institute?

Suggestions for reform such as those outlined above are usually met with the objection that they are impracticable because of shortage of skilled manpower. Yet there is a great duplication of effort if one looks at the Commonwealth as a whole. Common-law countries face similar legal problems. If they faced them together and produced common solutions there would be gain all round, and we could learn from each other. I suggest this could be done by Commonwealth governments joining to set up a law institute, on the lines of the Commonwealth Foundation, to pool resources and to produce material of general utility to the sponsoring governments.

Common-law drafting, and indeed the common law generally, faces a challenge it will shortly have to meet head on. When, as it must do, the directly-elected European Parliament begins to legislate will it do so on common-law or continental lines? If it does so on continental lines, as seems likely, what will be the effect on Britain's legislative system of having the rival techniques operating side by side? What will be the repercussions in the Commonwealth generally? These are questions a Commonwealth law institute could profitably investigate.

Extract from Report of Working Session

The Chairman, Mr. Justice Doyle (Zambia), in opening the proceedings, said that if legislation were to contain less detail, more work would be put on judges. Many Commonwealth countries tried to ensure that the law corresponded more nearly to the feelings of the people.

Mr. F. A. R. Bennion (England) felt that an Act of Parliament should give answers to the questions of those consulting it. One should not have to rely on judicial interpretation to fill

gaps in a statute. Providing answers in a statute to a variety of questions, however, inevitably involved the inclusion of complicated provisions. For that reason he supported the institution of a 'restatement' which would be the responsibility of some supervising body on the lines of a Law Commission. In a restatement, various typographical devices and annotations would be used to signpost definitions and to bring together into one place cognate material.

The Chairman thanked all the contributors to the discussion for a most useful exchange of views and brought the session to a close.