

Prosecution policy; Statute Law Society; Statute Law reform; law-churning.

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Déjà Vu, or the Judge Addresses the Society

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Postscript on Prosecutions

It is unusual to begin with a postscript, but my excuse is that developments have occurred in the Cash (or loans) for Honours affair that, if they had occurred in time, would have been mentioned in my recent article on prosecutions.¹ The Attorney General, Lord Goldsmith QC, has published a letter of his that throws important light on his constitutional role in the prosecution process.² Relevant extracts are as follows:

“There have been suggestions³ that I should stand aside from any involvement in this case. However, it would not be right for me to do that.

First, there are a small number of offences for which any decision to bring a prosecution would require my personal consent under statute. In such cases the need for my consent (or that of the Solicitor General) is an essential legal condition. It is not one which can be avoided. Nor can the consent power be delegated by the Law Officers to any third person . . .

Secondly, even in relation to those prosecutions for which my personal consent is not required, the Attorney General has statutory responsibility for the superintendence of the CPS and is answerable to Parliament and to the public for its actions. It is therefore normal for the CPS to consult the Attorney General on any sensitive cases . . .

. . . it can often be helpful for the Law Officers to instruct independent counsel to advise, and it is in fact quite normal for this to happen in sensitive or difficult cases. Accordingly if the CPS consult me on a prosecution in this case, I propose that my office should appoint independent senior counsel to review all the relevant material and advise on any prosecutions.

. . . I could not simply ‘rubber-stamp’ the views of counsel, since this would not be consistent with my ultimate legal and constitutional responsibilities. However, if a decision were taken not to prosecute, I would consider at that stage how best to ensure that the basis for that decision was explained, including (so far as compatible with the interests of justice) making known what course counsel had advised. This would give greater confidence in the objectivity and impartiality of any decision.”

I now return to the present article.

Introductory

What goes around comes around. I recently came across the Statute Law Society's 2005 Annual Lecture. It was delivered to members of the Society by Mr Justice Beatson on 21

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¹ P. 847 above.

² Letter to Dominic Grieve MP dated 7 November 2006.

³ Because Lord Goldsmith was appointed on the advice of a possible suspect, the Prime Minister Mr Blair, and is a friend of the Prime Minister and of other possible suspects. [FB's note.]

November 2005 and has now been published.⁴ He said that a movement for reform of our system of statute law needed to be started and asked: “How do we get it going?”. I thought: “This is where I came in”. I founded the Statute Law Society nearly 40 years ago with that very object.⁵ That can be readily ascertained from the website of the Charity Commission for England and Wales.⁶ There are in fact two objects:

1. To procure and further the making of technical improvements in the form and manner in which statutes and delegated legislation are expressed and published with a view to making the same more readily intelligible.
2. To further the education of the public in the processes and scope of legislation of all kinds and at all stages, and for this purpose to gather and disseminate information on legislative processes of all kinds.

I regret that since I ceased to be its chairman in 1979 the Society has pursued only the second of these objects. This might explain the apparent ignorance of its first object shown by **Sir Jack Beatson**. Before ascending to the Bench Sir Jack was a distinguished academic lawyer and Law Commissioner.⁷ He is a welcome addition to the ranks of statute law reformers.

State’s Duty to Make the Law Accessible

The points made by Sir Jack Beatson when addressing the Statute Law Society are not new, but that does not mean they are without importance. It is significant that one of our most distinguished jurists should independently have arrived at the very need for reform that motivated those who long ago helped to set up the Statute Law Society as a campaigning body (which in practice it has unfortunately ceased to be).

The key statement made by Sir Jack is that “It is the duty of the state to make the law accessible to its citizens”.⁸ In relation to legislation I have expressed this duty as follows:

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“Royal assent to an Act having been communicated, it becomes the constitutional duty of the Crown, acting through its officer the Clerk of the Parliaments, to settle the final text of the Act, and procure entry of the text on the Parliament Roll and the Chancery Roll, and procure publication of the text by the Queen’s Printer of Acts of Parliament.”⁹

In support of his key statement Sir Jack cites¹⁰ the dictum of Lord Justice Scott that the right of the public to know what the law is forms part of the rule of law.¹¹ I myself have commented that the practical need for state promulgation of the law arises from the fact that, if the authors of legislation are to secure their object, people must know what they have done.¹² In further support Sir Jack says the issue might be discussed as an aspect of the requirement of legal certainty. I have devoted much space to this topic also.¹³ Then there is the well-worn maxim that ignorance of the law is no excuse, which in the days when Latin was respected one would have rendered as *ignorantia juris neminem excusat*.

⁴ *Statute Law Review*, Vol. 27 No. 1 (2006), p.1.

⁵ For the founding of the Statute Law Society see *Statute Law Review* Spring 1983, pp. 63-64, <http://www.francisbennion.com/1983/002.htm>.

⁶ See <http://www.charity-commission.gov.uk/registeredcharities/showcharity.asp?remchar=&chyno=261226>.

⁷ He was Rouse Ball Professor of English Law in the University of Cambridge 1997-2001, having been a Commissioner of the Law Commission of England and Wales 1989-94.

⁸ *Loc. cit.*, p.4. It can only usefully be made available to those with functional legal literacy (see footnote 35 below); the rest must rely on advice from these.

⁹ F. A. R. Bennion, *Statutory Interpretation* (4th edn, 2002), p.182 (paragraphing omitted).

¹⁰ *Ibid.*

¹¹ *Blackpool Corporation v Locker* [1948] 1 All ER 85 at 87.

¹² *Ibid.*

¹³ See, eg, F. A. R. Bennion, *Statutory Interpretation* (4th edn, 2002), pp.682-689.

It is widely accepted that it is the duty of the state to make the law accessible to its citizens. One might say the principle is elementary in a democracy, and almost goes without saying. But do the authorities of the British state accept this duty? Only to a limited and insufficient extent it seems.

The Confused Statute Book

Sir Jack further complains that “to find out what statute enacts in relation to a topic, if one has recourse only to the material provided by the state, one has to look in several, sometimes many, places”.¹⁴ That is a vice that thirty years ago I called “scatter”. In an article published at that time I made detailed suggestions for remedying it.¹⁵ I repeated these suggestions in a book¹⁶. A Law Lord of the period, **Lord Cross of Chelsea**, wrote of this book:

“It ought to be read and, I do not doubt, will be read, by Parliamentary Counsel. It ought also to be read, though I am less confident that it will be read, by judges in appellate courts who are constantly called upon to wrestle with problems of statutory interpretation. Finally, I hope that it may be read by many academic lawyers and encourage those who do not already do so to include the study of statute law in their courses.”¹⁷

Further editions of the book were published in 1983 and 1990, but my reform suggestions were mostly ignored by the authorities. As Sir Jack points out, the vice of scatter is with us still.

Another complaint by Sir Jack is: “The state does not provide us with an up-to-date version of the statute book.” He adds: “For that we have to turn to commercial publications.”¹⁸ When I entered the Parliamentary Counsel Office in 1953 it was drummed into me (what is in any case a matter of common sense) that in his or her work a legislative drafter should never rely on a commercial publication when ascertaining the text of the law he or she is to alter, since there is neither guarantee of its accuracy nor remedy for its inaccuracy. Only official versions of the law could, I was told, be relied on. These would always be available. “It is the duty of the state to make the law accessible to its citizens”.

But official versions are not always available, so the profession is forced to use commercial publications. How can the state justify expecting its citizens to rely on commercial publications when it forbids its officials to do so? Sir Jack says that this situation “is increasingly unsatisfactory given the pace of legislative change and the fact that the change is very often effected by textual amendment of earlier statutes”.¹⁹ The subject of textual amendment, which I favour, is complex. I have written extensively about various aspects of it.²⁰ All I need say now is that it produces a maximum of scatter, and this needs to be addressed.

When considering any legislative text the user needs to be aware of such questions as: where will I find the text? has it come into force, and if so when?; do any transitional provisions apply?; has it been amended, and if so when did the amendments come into force?; has it been repealed to any extent, and if so when did the repeals become effective?

¹⁴ *Loc. cit.*, p.2.

¹⁵ See F. A. R. Bennion, ‘Our Legislators are CADS’, 120 *Solicitors Journal* (1976), p 390, <http://www.francisbennion.com/1976/001.htm> (CADS was an acronym for four vices of statute law: compression, anonymity, distortion and scatter.)

¹⁶ F. A. R. Bennion, *Statute Law* (Oyez Publishing London, 1st edn 1980).

¹⁷ *Statute Law Review* (1981), p.122, <http://www.francisbennion.com/nfb/1981/004.htm>

¹⁸ *Loc. cit.*, p 2.

¹⁹ *Ibid.*

²⁰ See, e.g., *Bennion on Statute Law* (3rd edn 1990), pp. 325-340, <http://www.francisbennion.com/1990/002/ch23.htm>; F A R Bennion, *Statutory Interpretation* (4th edn 2002), pp.240-243.

To answer these questions, later enactments need to be sought and conflated. Some of these may be in Acts of Parliament; others in statutory instruments. The statute user needs, and should have, reliable official guides to all this, calling for a minimum of work from him or her.²¹ The British statute user does not get these guides, at least to the necessary extent.

In his forthcoming book *The Irish Statute Book* **Brian Hunt** makes similar complaints concerning the Irish statute book, saying: “The disorderly system which the legislature employs as a means of effecting legislative change is matched only by the inadequate arrangements for the publication of legislation”.²² The Irish statute book is of course derived from the British statute book, and shares many of its defects.

A recent complaint of the growing complexity of the

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British statute book is cited by **Lord Walker of Gestingthorpe** in relation to sex discrimination:

“ . . . it has become virtually impossible and almost unacceptable to decide points of this kind in short form. The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial tribunals have long since disappeared. They have been replaced by what truly are ‘extended reasons’ which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice.”²³

Here are some further examples of recent added bulk. Tolley’s *Yellow Tax Handbook*, a guide to current tax legislation in Britain, ran to 4,555 pages in 1997. The current issue has swollen to 9,806 pages.²⁴ On 8 November 2006 Royal Assent was given to the Companies Act 2006. It has 1,300 sections and is the biggest Act of Parliament ever passed at Westminster. **Alastair Darling**, the minister responsible, said of the new Act: “It makes sure the regulatory burden on business is light touch . . .”²⁵ He must be joking – but it is nothing to joke about. Laws of this degree of length and complexity cannot perform their function because it is literally impossible for persons affected to comprehend them.

The Vice of Law-Churning

When an area of the law is in constant flux, with frequent amendment, the position of the user is exacerbated. This has been particularly the case with our criminal law in recent years. Sometimes the difficulties are acute. The events relevant to a particular case may be spread over a period of years. If during that period the law in question has been changed, perhaps more than once, perhaps many times, the position can become tangled and confused.

A country’s laws should not be continually churned into new shapes. For years there has been a constantly-increasing tendency on the part of politicians to think it will benefit them electorally if they promote frequent legislation. An example is given by the veteran journalist **Polly Toynbee**:

²¹ One answer would be my device of composite restatement, of which the selling point is “It does half the work for you”. I used it in *Consumer Credit Control*, my four-volume looseleaf book on the Consumer Credit Act 1974, see <http://www.francisbennion.com/1976/004.htm>.

²² Final page numbering not yet available.

²³ *Secretary of State for Trade and Industry v Rutherford and another* [2006] UKHL 19, [2006] 4 All ER 577, at [37], citing Mummery LJ in the court below. This passage was also cited (at [7]) by Lord Scott of Foscote.

²⁴ *Daily Mail*, 8 November 2006, p. 24.

²⁵ Quoted in *The Guardian*, 9 November 2006, p. 27.

“The history of Labour’s ‘reforms’ hardly bears repeating; minister after minister reversed direction, created then tore up 10-year plans, dismantled then resurrected a market the party inherited. It invented new primary care groups, remade them into primary care trusts, then merged them again into half the number. It demolished regional health authorities, put in 28 strategic health authorities, then merged them back down to the 10 original regions. And that’s only a thumbnail sketch of the great breathless deckchair shuffle done by Milburn and Reid.”²⁶

It all needed legislative changes, but by this law-churning a Government does serious damage. The nation’s legal system cannot perform its social function properly if it is constantly uprooted and replanted in this way. Lawyers cannot know the law. Law students cannot learn the law. More unproductive lawyers and others are needed to work the system. Judges are thrown into confusion. Lord Radcliffe said:

‘The respect for the law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.’²⁷

The number of pages of legislation promulgated annually has nearly trebled over the past forty years.²⁸ Glenna Robson has exposed the deleterious effects of law-churning in a recent article.²⁹ After pointing out that a recent Government booklet for schools on the British constitution warns that “the law is always developing and changing” she continues:

“It sounds suitably grave as befits the subject of the constitution but it could be taken as a stricture on the legislative and regulatory incontinence which has marked the last two decades of UK governance and particularly the period since 1997. This outpouring has affected every aspect of our lives, but there has been an especial concentration on both the criminal justice process and the court system.”

Ms Robson ends her attack by saying:

“What is depressing is the constant compulsive need to provide a public display of supposedly new initiatives which are, to a large extent, the same old plans smartened up for fresh presentation . . . Too much movement on board may hide the fact that the vessel is holed and sinking.”

As her title indicates, this last reference is to the hackneyed sneer that such over-activity is merely rearranging the deckchairs on the *Titanic*.

The foregoing is confirmed by remarks made by another High Court Judge, Sir Roger Toulson, chairman of the Law Commission. He says of the need for law reform:

“The great tidal wave of legislation has increased the

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need and made it more difficult to obtain parliamentary time for tackling it. The increased scale of the need comes from the fact that much modern legislation is more difficult to comprehend than ever before . . . many pieces of legislation, including major legislation, do not stand alone or endure long enough to be understood before they are added to or amended by other legislation.”³⁰

²⁶ *The Guardian*, 22 September 2006, p.35.

²⁷ Lord Radcliffe, “Some Reflections on Law and Lawyers” 10 C.L.J. 361 at 366.

²⁸ In 1965, 7,567 pages of public general Acts plus statutory instruments were promulgated. For 2005 the figure (including 5,583 pages of European directives and regulations) was approximately 20,800: *Post-Legislative Scrutiny* (Cm 6945, LAW COM No 302, October 2006) Appendix C.

²⁹ Glenna Robson, “Moving the Deckchairs – Again”, 170 JPN (September 9 2006), p.691.

³⁰ 26 *Legal Studies* (2006) pp. 321-8 at 323.

Ireland suffers similar problems. Brian Hunt laments that “Ireland is more heavily legislated than ever before”.³¹ He cites Bruno Leoni’s comment:

“Substituting legislation for the spontaneous application of non-legislated rules of behaviour is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. This preliminary assessment is simply unthought of by contemporary legislators. On the contrary, they seem to think that legislation is always good in itself and that the burden of proof is upon the people who do not agree . . .”³²

The position is similar in Australia. Justice Keith Mason goes so far as to say that the common law is being “engulfed by a tsunami of legislation”.³³

A Problem of Law Texts

The overall problem is one of the efficient promulgation of law texts. The meaning of “law text” is given in a recent article I wrote with Dr Kay Goodall of Glasgow University:

“By a law text we mean a text which either itself constitutes a law or laws, such as a state constitution, Act of Parliament or EU directive, or is an authoritative text from which a law or laws may derive, such as a court judgment or a treaty. It is necessary to distinguish law texts in this sense from other legal texts, such as explanatory notes to a statute, Law Commission reports, or scholarly books and articles. These may be helpful in analysing a law text, but they are not in themselves law.”³⁴

However for the purposes of this article I will deal only with the type of law text known as an Act of Parliament. I will also limit myself to electronic publication, since that is the medium of the future and, to a large extent, of the present also. It is also the medium which best facilitates full presentation of Acts to persons who possess that functional legal literacy without which modern Acts cannot be deciphered.³⁵ If, as I have said above, it is the duty of the state to make the law accessible then it can be said to be the duty of the British state at the beginning of the 21st century to make a full presentation of Acts by electronic means. What does this require? I should say it requires the following:

- Free access to a computer database comprising the texts of all Acts currently in force.
- These texts to show the Acts as originally enacted.
- The database to give the date or dates when each provision of an Act came into force.
- The texts also to show the Acts as subsequently amended, whether by a later Act, a statutory instrument, or otherwise. (This involves writing in textual amendments.)
- The database also to give the date or dates when each amendment to an Act came into force.
- The database also to give the texts of Acts, or parts of Acts, repealed since a cutoff date (say 50 years earlier), with the dates when the repeals became effective.
- The database to be fully searchable and freely downloadable to the user’s computer.

³¹ *Op. cit.*

³² Bruno Leoni, *Freedom and the Law* (New York, 1991), p.14.

³³ Justice Keith Mason, “The View from the Other Side: Judicial Experiences of Legislation”, Fourth Australasian Drafting Conference, 3 August, 2005, p. 20.

³⁴ “A New Skill? Law-Text Analysis” [2006] 3 Web JCLI, <http://www.francisbennion.com/2006/030.htm>.

³⁵ For functional legal literacy see Peter Blume, “The Communication of Legal Rules” 11 *Statute Law Review* (1990), pp.189-210 at 199.

As Brian Hunt indicates in his book, the way has been shown by Tasmania, with its excellent EnAct system. Key features of this include:

- automatic consolidation of amendment legislation on commencement;
- true “point-in-time” searching of consolidated legislation (searches are carried out on the legislation database for legislation relevant at a specified time point);
- innovative automated tools for drafting amendment legislation;
- advanced searching and browsing capabilities with all cross-references and amendment history information stored as electronic hyperlinks;
- quality control points built into the legislation production process;
- business process tracking for legislation drafting tasks; and
- multiple format delivery for the publication of legislation allowing paper based products, CD ROM products and HTML publishing via the Internet.³⁶

What is the equivalent position in Britain? The matter is dealt with by the Statutory Publications Office, part of the Department for Constitutional Affairs. At the time of writing its website gives the following information about what is known as the statute law database:

“The statute law database of United Kingdom legislation contains the text of all Acts that were in force on 1 February 1991 and all Acts and printed Statutory Instruments passed since then. It also contains local legislation, both primary and printed secondary . . . An on-line enquiry service for the statute law database was launched for government staff on 31 May 2006 . . . We will start developing a similar enquiry service for the

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general public later in 2006.”

This is frankly a disgrace. The questions are endless. It is only a matter of scanning to carry the service back in time as far as needed so why should it stop in 1991? Why does it not show legislation in its currently amended state as well as in its original state? Why is access limited to government staff? Why are the general public mentioned, with no concern shown for the lawyers in private practice who keep the legal system going? And so on.

Those with influence in the legal profession ought to exert pressure for the necessary reforms. I venture to hope these will include Sir Jack Beatson, Sir Robin Auld, and other influential Judges who have shown concern about the shortcomings of the system.

Tax law rewrite project

To end on a cheerful note, and give credit where it is due, let me accord praise to those responsible for the Herculean tax law rewrite project. Bills for tax law rewrite Acts are produced by the project, “which is a long term undertaking to modernise our direct tax legislation so that it is clearer and easier to use”.³⁷ The tax law rewrite Acts so far enacted are the Capital Allowances Act 2001, the Income Tax (Earnings and Pensions) Act 2003 and the Income Tax (Trading and Other Income) Act 2005. The project has also rewritten the pay-as-you-earn regulations.³⁸ As well as consolidating and improving the form of tax legislation the

³⁶ See <http://www.thelaw.tas.gov.au/about/enact.w3p>.

³⁷ Mr John Healey, Financial Secretary to the Treasury, HC Second Reading Committee, 14 December 2004.

³⁸ For further details of the project and its work see *Craies on Legislation* (8th edn 2004, ed. Daniel Greenberg), pp 73-77, 248-249.

project “also takes the occasional opportunity to codify certain aspects of the legislation not previously apparent on its face, notably judicial decisions and extra-statutory concessions.”³⁹

³⁹ *Craies on Legislation* (8th edn 2004, ed. Daniel Greenberg), p 501.