Guardian Miscellany

FRANCIS BENNION discusses last week's proposals to make our laws understandable to those who are supposed to obey them

Laws are not for laymen

I'm the parliamentary draftsman.
I compose the country's laws
and half of the litigation.
I'm undoubtedly the cause.

SOME would add to this old jingle that the draftsman is the cause of half the *frustration* as well. Mrs Maureen Colquhoun, MP, a newcomer to the House of Commons, certainly would. In a debate on the Sex Discrimination Bill she said: "We come back time and again in the Committee to the language of the Bill and whether it is understandable." Plainly she and some of her colleagues have been jolted to find that the simple subject of equal rights for women apparently needs to be wrapped up in language that even lawyers find difficult to understand.

Later she cried despairingly: "One sometimes feels that we should send the Bill back and begin again, because it really is quite impossible". The Minister, John Fraser, administered sympathy but pointed out that, as he had been told for many years, the impossibility lay rather in doing anything about it. There was nothing he would like better than for the Bill to contain explanations alongside the clauses, but it just wasn't on.

Further trouble on the Sex Discrimination Bill has arisen over pronouns. Some people feel that a much-trumpeted measure liberating women from millennia of male domination should confine itself to feminine pronouns. One reason it can't goes back to Lord Broughham, a Victorian male chauvinist. As Lord Chancellor 150 years ago, he procured the passing of an Act with the praiseworthy object of shortening the language used in Acts of Parliament. His target was provisions which went something like this:

> "If any individual or body corporate, or any two or more individuals or bodies corporate, shall contravene this Act, he or she or it shall be liable, or, as the case may be, they shall each be liable, to the following penalty…"

The solution that struck Lord Brougham was to enact that "person" should be deemed to include both an individual and a body corporate and that words in the singular should include the plural. This meant that one could say, with the same effect.

> "If any person shall contravene this act…"

But what pronoun was to follow? Here Lord Brougham showed his male chauvinism. He provided that masculine words should include the feminine, but not the other way round. So the pronoun was "he".

There are ways round Lord Brougham. The Sex Discrimination Bill is drafted in terms of discrimination against women, with a provision early on to say that it is to apply equally to discriminations against men "with such modifications as are requisite". So the famous "lavatory clause", which protects the British public against such nasty foreign customs as having what Mrs Millie Miller, MP called a "dragon" officiating over urinating males was drafted accordingly. (When asked whether dragons were always women, Mrs Miller replied: "That seems to be the case in French toilets.") the lavatory clause says:

> Being a man is a genuine occupational qualification for a job where… the job needs to be held by a man to preserve decency or privacy because… the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities…

There is one case, therefore, where it is to be permissible to discriminate against a woman applicant for a job. Conversely, if the vacancy were for an attendant in a Ladies, the clause would operate the other way round and rule out male applicants. Simple.

But the trouble is that people do not find it simple. For centuries there have been complaints about what King James I called "cross and cuffing statutes. Manu committees have sat. Many remedies have been tried, to little avail. The latest committee, chaired by Sir David Renton, a former Home Office minister, reported last week.

The Renton Committee points out that the problem of obscure statute law is important to every citizen.

> "There is hardly any part of our national life or of our personal lives that is not affected by one statute or another. The affairs of local authorities, nationalised industries, public corporations and private commerce are regulated by legislation. The life of the ordinary citizen is affected by various provisions of the statute book from cradle to grave."

The rule of incomprehensible law

The committee might have added that the rule of law and parliamentary democracy itself are imperilled if laws are incomprehensible. They did say that it is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear, and that otherwise it is oppressive and deprives the citizens of one of his basic rights. It is also needlessly expensive and wasteful. Reed Dickerson, the famous American draftsman, said it cost the government and the public "many millions of dollars annually."

One cause of obscurity has been the practice of drafting, or trying to draft, so that a Member of Parliament did not need to go outside the four corners of the bill in order to understand the way it changed the law. A bill drafted in this way does not make a good act. For example, suppose that after the Sex Discrimination Bill became law it were desired to add at the end of the "lavatory clause" set out above the words "or are receiving medical attention." The fours corners doctrine would produce an amending bill reading something like this:

> ….section 7 of the Sex Discrimination Act 1975 (which provides that sex is a genuine occupational qualification for a job where the holder of the job needs to be present when people are in a state of undress or are using sanitary facilities) shall apply as respects persons receiving medical attention as it applies as respects persons in a state of undress.

After the bill had become an act the statute user who wanted to know the law on this point would need to look both at the original section and the amendment, and conflate them. Further amendments would exacerbate the problem.

The other type of amending bill, using what is called the textual amendment method would simply say:

> In section 7 of the Sex Discrimination Act 1975, after "state of undress" there are inserted the words "or are receiving medical attention".

Members of Parliament would need an explanatory memorandum to tell them the effect of the bill but for future users section 7 would be reprinted as amended and there would be no need for conflation.

In address to the Ottawa symposium on comparative law in 1971, I said:

> "We in England have never been able to get away from the idea that the language which is destined to form part of the law of the land must also be framed so as to be comprehensible and palatable to laymen in Parliament. This is an inherent contradiction; indeed an absurdity, from which flows many of our troubles. I would venture to suggest that it should be a prime axiom of legislation that, unless there are over-riding reasons to the contrary, language which is destined to form part of the law should be framed solely with that end in view."

I repeated this in my evidence to the Renton Committee and also stressed that going over to the textual amendment system was "the essential reform". In their recommendations the committee fully accept this, on the understanding of course that Members of Parliament are given all the explanatory material they need outside the bill.

My other major recommendation the committee do not accept. It was that a Statute Law Commission should be set up to be the "keeper of the statute book". It would consolidate sets of statutes dealing with one subject into single Acts, compile indexes, supervise subordinate legislation and Local Acts, provide a drafting service for Members of Parliament and set up a training scheme for draftsmen. The committee find this too radical. They prefer to load further duties on the Statute Law Committee, an august body that meets once a year and consists of people whose job it is to do something else. The Statute Law Committee have been responsible for our statute law for over 100 years. They are therefore responsible for the deplorable state it is in. To load further duties on a body that has so emphatically demonstrated its incompetence is no sort of solution.

Neither is it a solution, as the Renton committee suggest, to subject defective Bills to a process of rearrangement and drafting improvement *after* Royal Assent and then re-enact them. If a commercial publisher had sat on the committee (and it is commercial publishers alone who have enabled statute law to continue operating in this country) he would have pointed out an obvious truth. If say a Finance Act has just been passed (Finance Acts are among the worst offenders for obscurity) every commercial publisher rushes out his annotated edition of it because that is what bemused practitioners are gasping for! What sense does it make to tell him that although the finance Act has come into force, he had better wait six weeks (the Committee's estimate six months would be more likely) until the new, improved and differently-arranged model comes out.

So Mrs Colquhoun will not get much comfort from the Renton Report, even though it does contain dozens of useful suggestions. Nor will the statute users who have clamoured so long for reform. At bottom, as with most problems in public life, lies the question of money. Statute Law has been starved of resources and the State has abdicated its function of ensuring that its laws are comprehensible.

Commercial publishers to the rescue

The hope now lies with the commercial publishers, who can, however, only provide what practitioners will pay for. A consortium of commercial publishers could provide a *restatement* of the statutes and regulations, which would bring together all the law on each subject. Individual publishers could then publish their own commentaries on the restatement. After ten years of campaigning to get effective official action, this is now my solution.

One small ray of hope the Renton Committee offer Mrs Colquhoun: there should be a trial run of printing Bills with explanations alongside the clauses. So what John Fraser thought impossible might perhaps come true.

Francis Bennion has been a parliamentary draftsman, in this country and elsewhere in the Commonwealth since 1953 (with intervals of doing other things). Last month he left the Parliamentary Counsel Office (where all United Kingdom statutes are drafted) for the second time.