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WRITTEN EVIDENCE TO THE RENTON COMMITTEE

BY FRANCIS BENNION

1. *Introductory Note*

1. This paper was prepared, and is submitted, entirely as my personal evidence to the Committee. It does not represent in any way the views of the Parliamentary Counsel Office, or any other official body. I am grateful to Mr. A. N. Stainton, C.B., First Parliamentary Counsel, for permission to prepare and submit the paper, given without his having seen it.

2. So that the paper can be properly evaluated, I ought to explain how the views expressed in it came to be formed, and my claim to speak on the subject. I became interested in statute law before call to the Bar in 1951, having spent a year as editorial assistant on ***Halsbury's Statutes*** after coming down from Oxford. In 1953 I joined the Parliamentary Counsel Office (left 1965, rejoined 1973).

1956	Constitutional drafting in Pakistan.
1959-1961	Drafting on secondment in Ghana, Produced new system of publishing statutes and statutory instruments (loose-leaf). Wrote Constitutional Law of Ghana
1963-1965	Part-time lecturer in legislation at Treasury Centre for Administrative Studies, and also at Marlborough House courses for Commonwealth draftsmen.
1965-1968	Secretary of Royal Institution of Chartered Surveyors.
1968	Founded Statute Law Society.

1968-1971 Draftsman of financial legislation for Jamaica Government. Member of general committee, Bar Association for Commerce, Finance and Industry. Member, official working party on Classification of U.K. statutes. Member of Heap Committee, Vice-Chairman of Stow Hill Committee (both set up by the Statute Law Society - reports published in 1970 and 1972 respectively by Sweet and Maxwell).

1970 *Tangling with the Law* published.

3. In 1965, after twelve years in the Parliamentary Counsel Office, I left to become Secretary of the Royal Institution of Chartered Surveyors, the leading professional body in the field of valuation, estate management and surveying. This position brought me into contact with other professional bodies, such as the RIBA, the Law Society and the Institute of Chartered Accountants, whose members, like those of the RICS, were heavily involved in the operation of Acts of Parliament. I speedily realised that there was great dissatisfaction among the professions with the state of our statute law, and the difficulties it caused for professional people. Indeed, I was informed by Sir Henry Wells, the RICS President, that one reason why

they had appointed a draftsman as Secretary was the hope that he might be able to do something about it.

4. About this time I read the important paper submitted by Hedley Marshall, C.M.G., and Norman Marsh (later a Law Commissioner) to the Third Commonwealth and Empire Law Conference at Sydney in 1965. I was particularly struck by their criticisms of the methods of drafting in use at Westminster, *e.g.* the following:-

> 'One major defect of the United Kingdom method of drafting statutes must here be mentioned. As stated above, legislation in this country is largely ad hoc and framed to deal with particular situations as they arise. Leaving aside the subject of amendment and consolidation for the moment, there appears to be little attempt to integrate new principal Acts of Parliament dealing with substantive aspects of a particular subject with existing Acts of Parliament dealing with other substantive aspects of that same subject. Such Acts exist side by side, often without reference to one another, and the courts have the duty to try to interpret their often obscure and complicated provisions in relation to one another and to the common law.
>
> 'The Limitation Act, 1963, is stated in its long title to be an Act to extend in certain cases the time-limit for bringing legal proceedings where damages are claimed which consist of or include damages or solatium in respect of personal injuries (including any disease or impairment of a person's physical or mental condition) or in respect of a person's death; to limit the time within which proceedings for contribution may be brought under s.6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, or s.3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940: to make further provision as to the application of the Limitation (Enemies and War Prisoners) Act, 1945, to Northern Ireland, and for purposes connected with the matters aforesaid. The Act then proceeds to vary the operation of the provisions of the Limitation Act, 1939, and the Acts above referred to without specifically amending them. The Limitation Act, 1939, was an Act which consolidated with amendments certain enactments relating to the limitation of actions and arbitrations and, while not a code, at least reduced to some coherence some of the statute law relating to the limitation of actions as it existed at that time. The Law Reform (Limitation of Actions, etc.) Act, 1954, preserved this situation by effecting certain alterations to the Limitation Act, 1939, by ad hoc, textual amendments to specified sections of that Act. The Act of 1963 has, however, undone much of the good effected by the consolidation of 1939 since it has piled new provisions on to those of the Act of 1939

by referential and not textual legislation, and has failed to integrate the two sets of provisions.

'Similarly, the Homicide Act, 1957, which made radical changes in the law relating to murder, stands by itself on the statute-book as a principal Act, and although ss.2 and 3 of the Offences Against the Person Act, 1861, were repealed by it, numerous other sections relating to murder were left standing and *no attempt was made to integrate the*

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provisions of the Act of 1957 with those of the Act of 1861-another example of piling statute upon statute.

'Two different methods of drafting amendments appear to be in vogue in the United Kingdom-the referential and the textual.

'The referential amendments are drafted in a narrative or discursive style producing an interwoven web of allusion, cross-reference and interpretation which effectively prevents the production of a collection of single Acts each relating to a particular subject otherwise than by the legislative processes of consolidation and repeal. As Sir William Graham Harrison has pointed out, often Act is heaped upon Act until the result is chaotic, and almost completely unintelligible. Indeed much of the confusion existing in the statute-book today is directly attributable to referential legislation.

'The second method, the textual, is used chiefly, but not exclusively, for consequential amendments to statutes other than that which is the main subject of amendment, such consequential amendments being set out in a schedule to the amending Act. By textual is meant the specific and seriatim insertion, substitution or deletion of words, paragraphs, sections, or subsections in or from the principal Act, in the same way as a new spare part is inserted into an engine in the place of an old one.

'So far as statutes [of Commonwealth countries other than U.K.] which enact provisions relating to entirely new subjects or concepts are concerned, i.e. those that may be said to break new ground, the drafting technique in many Commonwealth countries is on the whole simpler than that which obtains in Westminster. Where substantive enactments are drafted relating to specific matters upon which legislation already exists, it is the practice not to pile a new and independent Act indiscriminately upon the existing legislation, but to endeavour to integrate the new provisions with the old, either by amendment of the old Act Or by the enactment of a completely new, comprehensive statute, embodying the new law and the old, and by the repeal of the existing Act. Therefore, under this system it would be unlikely that Acts like the Homicide Act, 1957, and the Limitation Act, 1963, of the United Kingdom, would exist Their provisions would be incorporated in or integrated with the Offences Against the Person Act, 1861, and the Limitation Act, 1939, respectively. Under this method all amendment is, of course, textual and an examination of the statute-books of any of the territories that have adopted this method will give examples of the scheme of such drafting.

'It will be apparent to those who have studied the details of the discussion in this paper on the respective merits of referential and textual drafting, that much of the undoubted advantage brought about by the preparation of a comprehensive code or codes would be lost if the codes were not preserved in their original state of clarity. It is suggested that any continuance of the present system of referential drafting is likely to reduce the condition of any future codes to a state of obscurity, and indeed confusion, after a few years of Parliamentary legislative activity, whether of a principal or amending kind. It therefore necessarily follows that for a code to be a success and to achieve the aim of accessibility and coherence,

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the textual method of legislative drafting should be universally adopted for the future,'[1]

5. In 1966 I produced a paper (unpublished, but widely circulated) entitled "Some Suggestions on the Form and Publication of Statute Law". This outlined the reforms I have sought to promote ever since. In the first annual report of the Law Commission it was acknowledged in these words:-

'We are greatly indebted to Mr. F. A. R. Bennion for a detailed and thought-provoking memorandum…..'[2]

The thoughts it provoked were not, however, disclosed either then or subsequently.

6. In 1968 1 conceived the idea of setting up a body representing users of statute law, including publishers and academics. A steering group of four lawyers (one of the other three being Hedley Marshall, co-author of the paper referred to above) set to work, and the Statute Law Society was formed. It early sought to persuade the Law Commission to draw up a *comprehensive* programme of consolidation, as indeed it had been asked to do by the Lord Chancellor in 1965. In this we were unsuccessful, as shown by the correspondence reproduced in the Stow Hill Report (pp.20-8). The response of the Commission to the closely-reasoned proposals in the Report itself was brief and equally negative (pp. 64-5). This surprised me, since Mr. Norman Marsh, one of the Law Commissioners, was the other co-author of the 1965 Sydney Paper and the Stow Hill report is really a working out of suggestions made in that paper.

7. Naturally, I stand by the findings of the Stow Hill Committee. What follows is an amplification and development of those findings. It is put forward in full consciousness of the enormous difficulty of the Renton Committee's task. The record is littered with high hopes doomed to disappointment, ambitious schemes that proved unworkable, and over-sanguine expectations. Sir Granville Ram, First Parliamentary Counsel, remarked in 1946, in words which remain true to this day:-

"The chaotic condition of the Statute-Book has been the subject of complaint for at least four hundred years, and it must be acknowledged that the long attempts to improve its form and arrangement is in the main, a story of failure. experience has abundantly proved that no progress in the task of producing a reasonably well ordered Statute-Book is to be expected until *a definite place is made for such work among the duties of Parliament and of the Executive Government."*(Emphasis supplied.)

8. A brief outline history of attempts to reform the statute-book is given in Appendix A. The field for reform is so wide, and the topics for discussion so numerous, that, in the time available to me, I had to confine myself in this paper to two main topics. These are the imperative need to change to a textual amendment system, and the way in which the object of making a "definite place"for statute law reform might be achieved.

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2. Textual Amendment - the Essential Reform

9. Parliamentary draftsmen suffer more than most from the imperfections of the statute-book. After twenty years as a draftsman I can say without hesitation that my main difficulty in understanding the statute law of the United Kingdom, and therefore in drafting amendments to it, has arisen from the widespread use of the referential amendment system. It must be difficult for those whose work has not consisted, day in and day out for many years, of drafting amendments to the statute-book to grasp the essential importance of this point. I take

[1] *Case Law, Codification and Statute Law Revision by* H. H. Marshall C.M.G., Q.C., LL.B,, F.R.G.S. and Norman S. Marsh M.A., B.C.L., 1965, pp.19, 20, 21, 32-3, 40-1.

[2] The Law Commission, First Annual Report 1965-1966, p.21.

it therefore that my main task in this paper is not so much to explain the difference between the two systems or illustrate their practical working, but to convince the Committee that I am right in identifying this as the main cause of obscurity. To this end, a detailed exposition, with numerous examples, is set out in Appendix B. This is a highly technical matter, not offering immediate rewards to the reader. I can only say that its importance justifies the intellectual exertions needed to follow it. Here, I will merely try to outline the points which need to be kept in mind if the thesis in favour of widespread use of the textual amendment system is to be accepted.

10. I begin with the concept of the principal Act. This is a familiar term, used in this paper in a slightly special sense. I mean by it the Act in which the statute law on a particular topic is embodied. In my view the major part of our statute-book would ideally be arranged, as the first Statute Law Commission said in 1854, in"300 to 400 statutes",each with a convenient scope and title. If this were done, each Act would be a "principal Act".

11. In the United Kingdom principal Acts are identified broadly as of two kinds. One is the consolidation Act and the other is the Act which either embodies initial legislation on a novel topic or is a substantially-altered version of a previous principal Act. An example of the latter is the huge Local Government Act 1972 (c. 70). I believe consolidation Acts should be planned so as to constitute for some years into the future the sole Act on a topic. This does not always happen even in relation to the enactments consolidated-for example the Hire-Purchase Act 1965 (c. 66) did not include hire purchase law relating to advertising, which was separately consolidated as the Hire-Purchase (Advertisements) Act 1967 (c. 42).. A similar split, inexplicable on any grounds of rational classification, occurred with the Housing Act 1957 (c. 56) and the Housing (Financial Provisions) Act 1958 (c. 42), and the Income and Corporation Taxes Act 1970 (c. 10) and the Capital Allowances Act 1968 (c. 3).

12. Imperfect as it is, our present system still produces a considerable number of principal Acts each year. In 1972, for example, out of eighty public general Acts passed, nine were consolidation Acts and seven others were Acts which replaced a block of existing statute law and so may be counted as principal Acts also. Sixteen out of eighty does not sound a high proportion, but it is put into perspective by comparing the number of pages. The 1972 Acts total 2,527 pages, of which 1,371 pages, or more than half, were taken up by the sixteen new principal Acts. Another six Acts, totalling only thirteen pages, were amending Acts relying entirely on the textual amendment system. Nine other Acts, totalling 74 pages, were of a kind which would probably have had to be drafted in the same way under any

system. This leaves forty-nine Acts, of 1,048 pages, which were amending Acts using the referential method. On a changeover to a purely textual system, these forty-nine Acts are the only ones which would have had to be drafted differently, and the differences, though vital, would not have involved significant additional effort by the draftsman. In most cases, indeed, no extra effort at all would have been required.

13. What is the gravamen of the charge against the referential amendment system? I would express it as follows:-

> *Referential amendments destroy the integrity of the principal Act, requiring the reader to conflate two or more enactments dealing with the same point. It is this task of conflation, imposed separately on every person who needs to consult the enactments in question, that is the bugbear.*

Detailed examples are given in Appendix B. Here it may suffice to illustrate the point with a relatively simple example.

14. Section 17 of the Agriculture (Miscellaneous Provisions) Act 1963 (c. 11) runs as follows-

> "The powers of the Minister . . . under section 2 (2) of the Improvement of Livestock (Licensing of Bulls) Act 1931, or under that section as applied to pigs by section 6 of the Agriculture (Miscellaneous Provisions) Act 1944, to refuse to grant a licence to keep a bull or boar for breeding purposes shall include power to refuse to grant such a licence if he is not satisfied that the bull or boar conforms to such standard of suitability for breeding purposes as may be prescribed for bulls or boars respectively under the said Act of 1931; and different standards may be so prescribed for different classes of bulls or boars."

15. When the 1963 Act was going through Parliament as a Bill, the wording given above provided in itself a reasonably clear indication of what the Bill sought to do. Once, however, the 1963 Act was on the statute-book, section 17 simply added another obstacle in the process of conflation. Section 2 (2) of the 1931 Act had then been amended by two different provisions, and all three provisions needed to be read together and conflated by anyone seeking the authoritative expression of Parliament's will on the matter. This is the concept, so often bewailed by hapless statute users, of "one Act being piled upon another". The result is difficult enough when a narrow point has to be investigated, but for anyone seeking, for example, to master the whole statute law relating to pig breeding the multiplicity of such instances defeats even the stoutest-hearted. Under the textual amendment system of course, the amendments would have been written into the 1931 Act so that, as noted up or reprinted, section 2 (2) would indicate the up-to-date position without any need for conflation.

16. Conflation of different enactments by the statute user is usually difficult, sometimes extremely difficult, and occasionally impossible. *The right course is for the draftsman to do the job of conflation initially, and reproduce the result by the form of his textual amendment.* The resulting saving in the time taken by practitioners and, correspondingly, in the costs charged to their clients, would be enormous. As the famous American draftsman Reed Dickerson remarked nearly twenty years ago:-

> "Suitable standards and conventions not only save the draftsman's time, but the time of private citizens, administrative officials, and the courts. (It is safe to say that the lack of these things cost the government and the public many millions of dollars annually.) "[3]

17. Another substantial advantage of keeping a principal Act "clean" by using only textual amendment is that the need for consolidation becomes less frequent. On a topic such as housing or road traffic, where Parliamentary amendment occurs in every session, it is not always possible to keep the principal Act in coherent shape by textual amendment. There comes a time when the whole corpus needs to be reorganised and re-enacted. Subject to this, Acts can continue for many years without the need for consolidation. Furthermore, when consolidation does become necessary it is a far easier task if the amendments to the principal Act have all been textual.

18. A further argument in favour of the textual system is its naturalness. If one has a document the wording of which does not achieve its intended purpose, the natural thing to do is to alter the wording textually, so that the document when copied out as amended is self-contained. At the instance of the Colonial Office, this system was exclusively used for British colonies in one of two forms. Either an ordinance would be amended textually, or, if the Legislature enacting it was small, or indifferent, a new ordinance embodying the required

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[3] *Legislative Drafting* by Reed Dickerson.

amendment would replace the existing one. Either way, the person who had, at intervals of ten or fifteen years, to prepare a revised edition of the statutes had a relatively easy task.

19. Naturally, the methods they were taught from London when they were colonies have continued to be used by self-governing nations like Canada and Australia. It is an historical anomaly that we should have taught our colonies a superior method which, owing to contemporary political conditions at Westminster, could not be used here and yet have retained our own inconvenient system long after it seems to be necessary.

20. The views of those familiar with the colonial system are illustrated in a memorandum submitted by the British Institute of International and Comparative Law in June 1967 in reply to a questionnaire on the form and arrangement of the statute-book issued by the Statute Law Committee. In paragraph 3 of this memorandum the following appears-

> "The one subject-one Act 'system which makes possible a clean and tidy statute-book is itself made possible only by the system of textual drafting adopted in Canada, in parts of Australia and in New Zealand, which was universally used in the colonies by the Colonial Legal Service and still is in general use in the newly independent territories of the Commonwealth. In our opinion, this is immensely superior to the referential system of drafting both for substantive and amending Acts. . . . In our opinion, the textual method of drafting is the key to all reforms and improvements that it is suggested should be made to the statute-book of the United Kingdom. It conduces' to clarity, eliminates obscurity in the statutes, and so lightens the burden of those whose duty it is to interpret the statutes. It must be

> emphasised, however, that once this system is introduced, either universally or in a particular sector of legislation, referential drafting as we know it should be excluded universally or in that sector. Perhaps the most important result flowing from the introduction of the textual method of drafting is that under it the greater part of statute law revision can be carried out by a comparatively junior lawyer in an office and can be given effect to by the publication of a reprint of the Act in question. The referential system precludes this course being taken and necessitates the repeal, consolidation and re-drafting of Acts by Parliamentary draftsmen and the consumption of Parliamentary time for their debate and their passage through the Houses. Again in the textual system of drafting, it is the draftsman who interprets the law by integrating it with the existing statutes as he goes along whereas under the referential system the draftsman and Parliament merely ***declare*** a part of the law ***ad hoc***, usually without reference to the existing law, and leave it to the courts to carry out the interpretation of the several parts and the whole as best they may."[4]

21. I agree with this passage wholeheartedly, except that I would not base any argument on the amount of Parliamentary time taken by consolidation Bills. Usually this is minute, though a flood of consolidation Bills may give rise to difficulty in finding Members to man the Joint Select Committee.

22. Further telling passages in the same sense are to be found in a recent book on legislative drafting by G. C. Thornton, who has drafted in New Zealand, Hong Kong and East Africa. He comments:-

> "A broad distinction exists between two widely differing techniques
> of drafting amending legislation. One method may be described as direct and textual, the other as indirect, referential and cumulative.

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[4] British Institute of International and Comparative Law, Memorandum June. 1967 (unpublished), para. 3.

"The indirect method, which is less familiar outside the United Kingdom, consists of a narrative statement in the amending law stating the effect of the amendment. The amending law does not in so many words purport to amend the principal Law, nor does it merge with it and lose its separate existence on enactment as an amending law generally does when the direct method is followed. Inherent in the method is the use of much referential legislation. The effect is a cumulative one as statute is piled on statute making comprehension progressively more difficult….

"The cumulative effect of the use of this technique may be observed in straightforward form by reference to the legislation in the United Kingdom for the protection of birds. A principal Act of comparatively small dimensions (16 sections) was enacted in 1954. When amendments were required in 1967 this purpose was achieved by the enactment of a further separate Act of just 12 sections. The content of the amending provision could undoubtedly have been integrated directly with the 1954 Act if the direct method of amendment had been followed. It may be noted that the indirect technique produces unnecessary complexities such as the following

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penal provision which creates in Section 4 of the 1967 Act an offence under the 1954 Act:

> '4. (1) Subject to this section, if any person wilfully disturbs any wild bird included in Schedule 1 to the principal Act (wild birds protected by special penalties) while it is on or near a nest containing eggs or unflown young of any such bird he shall be guilty of an offence against that Act and liable to a special penalty under that Act.'

"The interweaving process is seen further in two later subsections of the same section:

> '(5) In section 4 of the principal Act (general exceptions to liability under section 1 or an order under section 3 of that Act) references to the said section 1 shall include references to subsection (1) above and references to such an order shall include references to such an order made by virtue of subsection (2) above.
> '(6) A licence under section 10 of the principal Act to take or kill any wild birds or to take the nests or eggs of any wild birds shall be taken as authorising any act reasonably incidental to that taking or killing which would otherwise constitute an offence against that Act by virtue of this section.'

"The practice which prevails in the United Kingdom is singular and unlikely to be used as a model elsewhere, but as English statutes are widely used as precedents, it may be as well to pursue the matter a little further.
In the United Kingdom, most statutory amendments of substance are effected indirectly or referentially while consequential amendments are effected directly, frequently in schedule form. Often the same amending provision that is made indirectly is immediately repeated in the form of a direct amendment. This practice is seen in s.2 of the Protection of Birds Act 1967 [U.K.] which states:-The powers of the Secretary of State under section 2 of the principal Act to prescribe common wild birds whose eggs may be taken or destroyed without contravening section 1 of that Act shall cease; and, accordingly, in subsection (4) (a) of the said section 2 the words from' or of any other common wild bird 'to the end are hereby repealed.

"The United Kingdom style, therefore, produces a pottage comprising direct amendments, indirect amendments and provisions incorporating both techniques. The effect, at least to one not nurtured from his early years on English statutes, is confusing, particularly so as it rests on a stream of consistently invidious but inevitably inconsistent decisions as to which

amendments should properly be effected by one method, which by the other and which by both."[5]

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23. In the present state of our statute-book there are certain limitations on the use of the textual amendment system. A provision of an Act which has been heavily amended referentially will probably have to go on being amended in that way until it is consolidated. In the example given above (paragraph 14) it is difficult to see how any further amendment of section 2 (2) of the 1931 Act could be drafted other than referentially. Another limitation arises in the case of old Acts whose language is different from present-day usage. If it is not possible to re-enact the original Act with amendments, the objective may well have to be achieved by referential amendment. Another exceptional case arises where a term used in a great many Acts is being altered or abolished. For example, the Criminal Law Act 1967 (c. 58) abolished the concept of felony and misdemeanour. These terms were to be found in hundreds of enactments and, in the absence of a computerised statute-book, it was not possible to discover them all.

24. If it is decided to go over to the system where textual amendments are to be used except in cases, such as those just mentioned, where this is impracticable, the question arises how it is to be achieved. For reasons given in the next section of this paper, it seems desirable that Parliament itself should make the necessary decision rather than Ministers or civil servants. Accordingly I would propose that each House of Parliament be invited to adopt a new standing order running as follows: *A bill amending any enactment shall do so by directly altering its text unless this is impracticable.*

25. If this were done, a Bill containing unnecessary referential amendments would be out of order, as, strictly speaking, would be an attempt to move an amendment to a Bill so as to include in it a referential amendment. The question whether textual amendment was impracticable " would, like other questions of order, ultimately be one for the Speaker. In practice, no doubt, the guidance of officials from the Public Bill Office, advised by the draftsman, would be accepted by the chair. In debates leading up to the adoption of the new standing order it would be made clear what "impracticable" was considered to mean and future decisions would be taken accordingly. This should not produce any inconvenience in practice.

3. The Four Corners Doctrine

26. Why has the system of referential amendment obtained such a hold at Westminster? It seems there is just one reason-the traditional desire to make a Bill comprehensible to Members of Parliament without their having to consider other documents. This principle was stated by Lord Thring, the first Parliamentary Counsel appointed when the Office was set up in 1869, as follows:

"It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the Bill in order to comprehend its meaning."[6]

27. A fuller statement of this traditional doctrine (which for convenience

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[5] *Legislative Drafting* by G. C. Thornton, M.A., LL.B, Butterworths 1970, pp.295-9.
[6] *Practical Legislation* by Lord Thring. G.C.B,. London 1902, p. 8.

I will call the four corners doctrine) was made by another distinguished draftsman, Sir Courtenay Ilbert:

> "…the draftsman of a public Act of Parliament has to be guided by rules, not only of logic, but of rhetoric. A Bill for such an Act may be regarded from two points of view. From one point of view it is a future law. From another point of view it is a proposal submitted for the favourable consideration of a popular assembly. And the two points of view are not always consistent. The mode of expression and arrangement which is most suitable to officials who have to administer the law, or to lawyers who have to explain the law, is not always that which is most suitable to the Minister or other Member of Parliament who has to pass the law. Lord Thring's aphorism, 'that Bills are made to pass, as razors are made to sell', expresses an important half-truth. The Minister in charge of a Bill will often insist, and wisely insist, on departure from logical arrangement with reference to exigencies of discussion. He will have considered how he intends to present his proposals to Parliament, and to defend them before the public, and will wish to have his Bill so arranged and expressed as to make it a suitable text for his speech. If the measure is at all complicated, he will desire to have its leading principles embodied in the opening clause or clauses, so that when the first fence is cleared the remainder of the course may be comparatively easy. In settling the order of the following clauses, he will consider what kind of opposition, and in what quarter, they are likely to evoke. He will deprecate unnecessary length, and will often wish to have his measure so drawn that it can be contained in a single clause or appear on a single page. He will prefer a few long clauses to many short ones, bearing in mind that each clause has, as a rule, to be separately put in Committee. His theoretical objections to legislation by reference will often yield to considerations of brevity. He will eschew technical terms, except where they are clearly necessary, remembering that his proposals will have to be expounded to, and understood by, an assembly of laymen. . . , The draftsman has, of course, to bear in mind all these considerations. Indeed it may be said, without disrespect, that he has to study the idiosyncrasies of Parliament much as a nisi prius barrister has to study the idiosyncrasies of a common jury."[7]

28. That the four corners continues in full force at the present day is illustrated in an article by Sir Noel Hutton in the *Modern Law Review,* where he says:-

> "The same document has to be designed to satisfy two distinct
> legislative audiences: rust (in point of time) the Parliamentary audience, mainly composed of laymen, whose primary need is to ascertain, with the minimum of labour and preferably no reference to any document other than the Bill itself, what is the general purpose and effect of each clause or section which they are asked to pass; and secondly, the expert lawyers and other professionals who will seek to

> find in the Act as passed a specific answer to each specific question upon which they have to advise or decide. One customer wants a picture and the other wants a Bradshaw."[8]

29. When I first read this statement, in 1961, I accepted it uncritically as an expression of ineluctable necessity. Looking back, it seems to have taken me a remarkably long time to appreciate the full force and effect of the four corners doctrine and the way it destroys any hope of securing a statute-book free of major obscurities. I am bound to assume, out of respect for great Victorian draftsmen who made radical improvements in the style of drafting, that in their day the four corners doctrine was a political necessity, and that governments would not have secured their legislation without it. This is illustrated by Sir Courtenay Ilbert, writing towards the end of the 19th century:

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[7] *Legislative Methods and Forms* by Sir Courtenay Ilbert, Oxford 1901, pp.241-2.
[8] *Modern Law Review,* Jan. 1961, p.21.

"If the increased vigilance of Parliament and the public has checked legislation by private Members, it has also augmented the difficulties of government legislation, and materially affected the form which that legislation has assumed. A generation or two ago a Minister would satisfy himself, or accept the assurance of his Department, that his Bill contained the necessary provisions, would explain his theme in Parliament, and would leave form and details very much to the draftsman. The number of Members who took an active part in the discussions in committee was not large: the amendments moved were not numerous. Under these circumstances the length of a Bill was not of great importance. It might contain details which, although not necessary, were usual, and might be useful. In the present day a Minister demands before all things that his Bill should be short. Clear it ought to be, short it must be. The more words it contains the more pegs it offers for amendments."[9]

30. In my view, the most important question to be faced by the Renton Committee, and those who will consider its report, is whether conditions have changed sufficiently for Members of Parliament to accept being deprived, in the interests of a clear statute-book, of the convenience of having Bills drafted in accordance with the four corners doctrine. This is essentially a question for experienced politicians, and all I can do is venture to put forward some relevant considerations. Before doing so, I would confidently assert that no draftsman who takes an objective view would question the desirability of scrapping the four comers doctrine and resorting entirely to textual amendment if that accords with the wishes of Parliament. The decisive question is therefore whether Members of Parliament, weighing the advantages and disadvantages, would still wish to assert their need of the four corners doctrine. If they would, that settles the matter and the doctrine must remain. If they are prepared to give up the doctrine then I can see no justification whatever for preserving it.

31. Speaking as an observer, rather than a practitioner, of current Parliamentary style, I would assert that the modern Member of Parliament

(in both Houses) has a much higher level of social awareness, knowledge of affairs and political sophistication than his mid-Victorian counterpart. It has not been my experience that Ministers are unwilling to accept a Bill of sufficient length to carry out its intention, or that they fuss about the arrangement of clauses. This reflects the fact that the Opposition, and private Members, will find ways of debating points they wish to debate, within the limitations laid down by the power of selection of amendments, the closure rule and (in rare cases) the guillotine. These techniques of controlling the length and the subject-matter of debates are of recent growth, and in this respect the position has changed radically within the past hundred years.

32. A further change is the much greater length and complexity of modern statute law, occasioned not by any drafting techniques but the spread of state activity and regulation into almost every part of the nation's life. Members of Parliament suffer more than most people from the problems which, under any system of drafting, necessarily confront those who are concerned with legislation. Therefore they stand to gain more than most from improvements in the clarity of statute law, and are well aware of it. A notable incident of a Member who was not content to put up with obscurity, but did something about it, was Mr. Keeling, whose name has been given to the type of Schedule (setting out the text of enactments amended by the Bill containing it) which resulted from pressure by him and other Members supporting him over a number of years. For a long time, complaints have been frequently voiced in both Houses of Parliament about the complexity of Bills and the statute-book generally. If Members were asked whether as a contribution to clarity they would be prepared to give up

[9] Ilbert, *op. cit,* p. 217.

the four corners doctrine, provided adequate alternative means of providing information were designed, my own feeling is that they would readily accept.

33. The final reason I would put forward for suggesting that the abolition of the four comers doctrine might be acceptable today lies in the technical improvements in book production and other methods of communication we now enjoy. In the last century textual amendments required to be noted up by hand, a laborious process productive of error and much untidiness. Today we can; if we want to, devise highly effective loose-leaf systems under which replacement pages, reprinted to incorporate amendments, can be speedily issued without excessive cost. I saw this operation from the inside when in 1960 I devised and carried into effect a new system of looseleaf publication of statutes and legislative instruments in Ghana. I do not want to add to the length of this paper by embarking on the topic of computers, but as Chairman of the Computer Committee of the Statute Law Society, I came to realise the immense convenience which will result when we get round to putting our statute law on computer tape and devising a search and retrieval system

34. Because of the crucial importance of the decision about retaining or discarding the four corners doctrine[1] I think it as well to put before the Committee an extended quotation from Sir Courtenay Ilbert which deals fully with the reasons for the doctrine. This describes the three ways in which an enactment can be amended. These are by repealing it and

substituting a new provision, by textual amendment limited to altering the words in question, and by referential amendment.

35. In the following extract I have, for ease of reference, inserted numbers to the paragraphs:-

> 1. " The English legislator rarely, if ever, finds himself in a position to inscribe a brand-new law on a blank sheet of paper. The utmost that he can usually aim at is to remove some blemish from, or to alter or add to some provisions of, an existing law or institution; in other words, to pass an amending Act. And the best mode of framing an amending Act, so as to be intelligible both to those who have to pass it and to those who have to observe and administer it, is often a problem of considerable difficulty.
>
> 2. "From the point of view of administration the most convenient plan is to repeal the old law, and re-enact it with the necessary modifications. But the law to be amended is often contained in more than one Act, and experience has shown that attempts to combine consolidation with substantial amendment are rarely successful. Even where there is only one Act that need be amended, a proposal to repeal the whole Act for the purpose of making a single amendment, or two or three amendments of minor importance, is open to many objections. It gives the proposed legislation an appearance of being more important and more extensive in its scope than it really is, and the prudent legislator will usually prefer to minimize rather than magnify his proposals. It obscures, and distracts the attention of the legislature from, the immediate point or points in issue. It throws the whole law into the crucible, exposes to amendment, not merely the particular provisions which the introducer of the Bill desires to alter; but all other provisions of the law which appear to be in any way open to criticism, and consequently multiplies the points of attack and the obstacles to progress in Committee. The proposal to repeal and re-enact, not the whole of an Act, but merely a particular section of an Act, is often open to similar objections from a parliamentary point of view. For the section may embody a principle, or may contain provisions, which the introducer of the Bill does not desire to question, but which cannot escape criticism if the whole section is proposed for repeal.

3. " In some cases also the law embodied in the new enactment is intended to apply only to events and transactions happening after a particular date, leaving events and transactions happening before that date to be governed by the old law, and in such cases, if the old law is repealed, it is often not easy to express the precise operation of the law with respect to occurrences at different dates.

4. "For all or some of these reasons the promoter of an amending measure usually has to content himself with altering the form or substance of existing sections, or adding sections to an existing Act.

5. " If, for any of these reasons, the method of repeal or re-enactment is not adopted, the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to Bills in Parliament, or like errata or addenda in books, that is to say, in the form of directions

to strike out particular words or sentences from an enactment, and to add others, This is the form frequently adopted by the Indian legislature. It has considerable advantages. It enables a clerk to note up, almost mechanically, the alterations in the statute law, by simply striking out or writing in the necessary words. Thanks to this method of amendment, the Legislative Department of the Government of India is able to issue periodically revised editions of the most important Indian Acts, which embody the amendments up to date, and thus, for many purposes take the place of repealing and consolidating Acts.

6. " The substitution is not completely satisfactory, partly because it is always necessary to bear in mind the date from which the new enactments incorporated in the old law began to operate, and partly because, for this and other reasons, if a case on the amended Act comes into court, the judge or magistrate often finds it necessary to inspect the original Act instead of relying on the reprint. But for purposes of practical administration such reprints are of great convenience.

7. " On the other hand, from the parliamentary point of view, an amending Bill drawn in the technical form adopted by the Indian legislature is open to serious objections. In the first place it is absolutely unintelligible without the text of the enactments which it is proposed to amend, and even if these objections can be removed by means of an explanatory memorandum, a Bill thus drawn is, as any one who has watched attempts to amend parliamentary amendments will readily understand, extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in Committee. For these reasons the technical method of amendment is hardly ever adopted in England except in the case of non-contentious measures.

8. " Under these circumstances, the ordinary mode of amending an Act is to state in the amending Bill the effect of the amendment proposed to be made. This is the commonest mode, and for parliamentary purposes is the most convenient, because under it every member of Parliament who knows anything of the subject, learns at once the nature of the amendment proposed. And in some cases, where the amendment virtually overrides a large portion of the existing enactment, it is practically the only possible method.

9. "There are cases in which it may be possible to combine what may be called the popular and the technical mode of amendment, by stating at the beginning of a clause the substance of the amendment proposed to be made, and adding, in a separate subsection or

otherwise, technical amendments, which make the requisite alterations in the language of the enactment amended."[10]

36. I fully agree with the objections expressed in paragraph 2 of the above to wholesale repeal and replacement of enactments to be altered. On paragraph 3, I do not myself share the difficulty expressed. Paragraphs 5 to 7 discuss critically the textual system. Paragraph 6 expresses a criticism which, with respect, does not seem well founded. Anyone applying the amended law will find it easier to grasp in the form of the original Act with

the amendments written in, and this more than compensates for the need, in the cases cited, to refer also to the unamended version. Paragraph 7 contains the two most serious objections to the textual system. The first I fully accept, and the next section of this paper suggests the type of explanatory memorandum to meet the need mentioned by Sir Courtenay. The second objection is less easily dealt with, but I shall try.

37. Sir Courtenay's second objection is that it is extremely difficult to devise Parliamentary amendments to a Bill drafted on the textual system, and that therefore this system can only be used for non-contentious measures. If this were true in modern conditions it would of course require the four corners doctrine to be retained for contentious Bills. In order to explain why, in my view, it has ceased to be true I need first to go into more detail about the mode of drafting a Bill on the textual system. I distinguish two types of Bill.

38. The first type is one which makes a number of relatively small amendments to the principal Act. A good example is the Furnished Lettings (Rent Allowances) Bill 1973. The other type is one for which no English example can be given, namely the major Bill which replaces whole sections of the principal Act or adds sections to it. Up to now these have always been drafted as self-contained measures by the referential method.

39. Suppose it is desired to amend the law or town and country planning, embodied in a recent consolidation Act. The new provisions, under the present system, might occupy about twenty sections in the new Act, which is drafted as an independent measure. Under the textual system, the twenty sections would be inserted in their appropriate places in the principal Act. It is important to note that using the textual system would make virtually no difference to Parliamentary proceedings on the Bill. Under the present system each clause would be debated separately in Committee, and the question would be proposed that the clause stand part of the Bill. Under the proposed new system the appearance of the Bill would be almost unchanged. There would still be twenty clauses, and they would be drafted in virtually the same way. Instead however of beginning straight away with each substantive clause the Bill would have clauses each beginning something like this: ' After section 21 of the principal Act there shall be inserted the following new section: '. It is clear that the same debate on the clause could take place under both systems, and that it would be just as easy to frame amendments to the clause under the new system as the old.

40. There are two further arguments I would advance against Sir Courtenay Ilbert's second objection in his paragraph 7. One is that with the kind of textual memorandum suggested in the next section of this paper it is far easier to see what the effect of a Bill is (so as to be able to frame amendments) than under the present system. The other, relating to the framing of Opposition and back bench amendments, is that the House of Commons has greatly relaxed its rules against amendments to Bills which are not properly drawn. This goes along with the prevailing practice under which virtually all amendments are drafted by Parliamentary Counsel if they are to be effectively made in the Bill. The sensible practice has grown up of

[10] Ilbert, *op. cit.,* pp.256-9.

allowing amendments to be drafted in a way which proclaims the real point sought to be made rather than being technically correct. An additional

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factor, if my suggestion for the setting up of a Statute Law Commission providing drafting services for Members of Parliament were adopted, would of course be the help that such a service could give. Even under the present system Members of course gain much assistance from the advice of officials of the House.

41. Finally I would comment on the last sentence in paragraph 8 of Sir Courtenay's exposition. I do not accept that referential amendment is the only method possible where the amendment has to override a large portion of the existing enactment. It would always be possible to add a new section to an Act commencing with the words" Notwithstanding anything in this Act. . .". For good measure, one could also insert in the overridden enactment words such as "Subject to the provisions of [the new enactment]".

4. The Textual Memorandum

42. The proposal for use of a textual memorandum to inform members of Parliament, and others interested in a Bill, about the effect of the Bill's provisions is explained in paragraphs 30 to 35 of the Stow Hill Report. Since that was written I have been able to put the idea into practice. The only departure from the Stow Hill proposals was that the memorandum was made a command paper. Two revisions of it were also issued as command papers, and therefore the suggestion in paragraph 34 that it should be revised by the Public Bill Office was not followed.

43. The Bill in connection with which the textual memorandum was issued was the Furnished Lettings (Rent Allowances) Bill 1973. This was an ideal vehicle for the use of the textual amendment system. The purpose of the Bill was to amend Part II of the Housing Finance Act 1972 (c. 47) so as to provide, in addition to the rent allowances given by the Act to tenants of unfurnished dwellings, rent allowances on the same basis to tenants of furnished dwellings. As my instructions said, the provisions necessary for this would have been "knitted in "when the 1972 Act was being drafted if the Government had then decided to grant rent allowances to tenants of furnished dwellings. There was only the 1972 Act to amend, and by far the simplest method was to do the "knitting in" by way of textual amendment so that at the end of the day the 1972 Act would be in the form it would have taken if originally drafted to include furnished tenancies. There was a particular need for adopting this method because the Housing Acts were in course of being consolidated and this might have been complicated if the usual referential method had been employed. Three editions of the memorandum were published, the Bill being amended at two stages in the Commons but not at all in the Lords.

44. As will be seen from an inspection of this memorandum, it makes the Bill simple to follow, and equally simple to amend. Certainly, as the draftsman, I found it a great help to use the memorandum myself when considering the effects of the Bill and any proposed alterations to it.

45.There were no complaints during the Parliamentary proceedings about the Bill being drafted in the textual form, and one or two Members expressed approval of the textual memorandum. I was interested to see that Members accepted and referred to the memorandum quite readily, and did not find it in any way strange to use. It is of course a natural and obvious

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way of giving an explanation. It required little time to prepare, since its wording follows automatically from the wording of the Bill.

46. One criticism that might be made is that the printing of the memorandum involved extra expense. This is true, and with a major Bill that might require a lengthy memorandum, perhaps reprinted four or five times to match revisions of the Bill during its progress through Parliament, the printing costs and calls on the printing resources of the Stationery Office could be heavy. Against this must be weighed the enormous gains that would result in a wide variety of spheres from having a clear statute-book, and also the advantage to all those concerned with the Bill in being able to see the exact effect of provisions which necessarily have to be thoroughly worked out. All draftsmen are familiar with the fact that when a Keeling schedule is prepared it invariably brings to light necessary amendments to the Bill, which have lain undiscovered because no one has carried out the operation which necessarily has to be done to prepare either a Keeling schedule or a textual memorandum.

47. In the case of a more complex Bill it would be desirable to indicate in the memorandum which provisions of the Bill effected the various alterations shown in the memorandum. The memorandum need not necessarily deal with all the provisions of a Bill. For example, in the case of the Town and Country Planning Bill referred to in paragraph 39 above, the twenty new sections would not of course need to be set out in the textual memorandum, since their purport would be obvious from a reading of the Bill. Indeed it can be said that the repeal or addition of an entire section need not be shown in the memorandum because there is no difficulty in understanding its effect. This fact would ensure that even with lengthy and complex Bills drafted on the textual amendment system the textual memorandum need not be of unwieldy size.

48. Finally I should mention that the textual memorandum to the 1973 Bill was not the first of its kind. I have found at least two previous examples, a memorandum to the Companies Bill 1928 (Cmd. 3032) and one to the Transport Bill 1968 (unnumbered).

5. Consolidation

49. The 1875 Select Committee reported that four objections were held against the statute-book, the third being" From the want of consolidation where groups of statutes on similar subjects are left in a state of great perplexity ".[11]They went on to remark that" current legislation would be much more clear if a draftsman had always Acts to work upon, which in themselves were made clear and intelligible " [12]

50. A witness before the 1875 Committee, Sir James Fitzjames Stephen, who had consolidated virtually the whole of the Indian statute-book, said of consolidation" both legislation and the administration of justice would be simplified to an extent of which you can hardly have 'an idea until you have seenitdone " [13]

[11]Report of Select Committee of the House of Commons on Legislation 1875, p. iv.
[12]*Ibid.,* p.v.
[13]*Ibid*.,Q.266.

51. In the light of these remarks, it is interesting to observe that the pace of consolidation seems to have altered very little since 1875. Part I of Appendix C to this paper sets out the number of consolidation Acts, and the total of their pages, compared to figures for Acts of all kinds. Taking the 32 volumes of the Third Edition of Statutes Revised first, it will be seen that the Edition as published in 1948 included only 166 consolidation Acts out of a total number of 4065 Acts. By pages, the record looks better, there being 6549 pages of consolidation against 26089 total pages. Taking consolidation Acts in the Third Edition which were still in force at the end of 1971, we find that the number of pages has dropped to 2890. Nevertheless, out of a total of 70 consolidation Acts in the Third Edition which remained in force (though in most cases heavily amended) at the end of 1971, as many as 29 were enacted in the nineteenth century, and a further 34 enacted before the Second World War.

52. Looking at consolidation Acts dating from 1949 onwards, it is convenient to split the period into two: 1949-65, as being pre-Law Commissions and 1966 onwards, as indicating the impact of the Law Commissions. Part lB of Appendix C gives the figures, and it will be seen that during the first post-1948 period the average number of consolidation pages in the annual volume was 361 (out of 1204), while in the second or Law Commission period, it was 512 (out of 1927). Thus, although the total consolidation pages increased, as a proportion of the total output they dropped from 30 per cent to 27 per cent.

53. Part II of Appendix C gives a list of present candidates for consolidation by subject. In the time available to me I could do no more than read through the Index to the Statutes and note the subjects which seemed likely to need consolidation. The number of these totals *155*, but is likely to be an under-estimate. There are some striking instances of urgently-needed consolidation. For example, the Customs and Excise Act 1952 is affected by no less than 101 other Acts. The subject of Death Duties has never been consolidated and 92 different Acts are relevant. Cases where 50 or more different Acts relate to the subject in question are given below, with the number of relevant Acts in brackets-

Administration of Estates (75)
Animals (50)
Bankruptcy (63)
Children and Young Persons (56)
Commons (68)
Companies (70)
County Courts (53)
Criminal Procedure (91)
Damages (50)
Education (66)
Evidence (148)
Fisheries (62)
Forgery (53)
Fraud (104)
House of Commons (132)
Housing (61)
Justices of the Peace (50)
Land Drainage (56)
Landlord and Tenant (50)
London Government (70)
Merchant Shipping (122)
Metropolitan Police District (74)
Mines and Quarries (76)
Parliament (60)
Public Health (64)
Stamp Duties (139)
Supreme Court (133)
Telegraphs (65)
Trustee (61)

54. When one bears in mind that almost all the 193 consolidation Acts now in force have been amended, many substantially, by the referential method, it is clear that our present statute-book could not by any stretch of the imagination be described as a consolidated statute-book. Indeed, it has never merited that description. It is also clear that the remarks quoted at the beginning of this section from the proceedings of the 1875 Select Committee are as appropriate today as they were a century ago.

6. A Keeper of the Statute-Book?

55. In my submission the history and present state of the statute-book irresistibly point to one conclusion. It is that the problem of obscure statute law will not be solved until a body is established whose primary function is to keep under continuous review the state of our statute law, and to promote and execute the activities needed to put the statute-book into a satisfactory condition, and keep it there. This b6dy would be, as it were, the keeper of the statute-book, and might well take the form of a statutory commission, analogous to the flaw Commission. Legislation would in any case be needed to amend the Law Commissions Act 1965 to take away from the Law Commission the functions assigned to the new body.

56. It would probably suffice to have a three-man Commission, with of course the necessary supporting staff. One Commissioner might concentrate on public general acts, including consolidation and Statute Law Revision Acts; the second might tackle local and private Acts and statutory instruments, while the third could deal with organising and operating a scheme for recruitment and training of draftsmen, the provision of a drafting service for Members of Parliament, and the formation of links with universities, law publishers, professional bodies and other interested parties.

57. *Public General Acts.* The most important aspect of the Commissioners' task would undoubtedly be the production of a satisfactory set of public general Acts. A thorough and comprehensive consolidation programme should be worked out, with the object of reducing the whole statute-book (excepting only Acts for which this treatment is unsuitable, such as ancient Acts and Acts dealing with individual eases) to a fully consolidated state of between 300 and 400 principal Acts. It would obviously be highly desirable for the textual system to have been brought into operation, so that the new principal Acts would remain " clean ". If this had been done, I would advocate making a start with the easier consolidation, so that the number of" clean "principal Acts would rapidly grow; In many cases this operation would be relatively simple, and would place little extra burden on government departments. If, on the other hand, it were decided that the four corners doctrine should remain in operation, there would be a, pressing need to devise and execute methods of minimising its deleterious effect on the statute-book. I am not hopeful that much could be done in this way, but the continuance of the doctrine would increase, rather than reduce, the need for a Statute Law Commission as the only way of securing such mitigation of the evils of the four corners doctrine as is

practicable. Probably this would rely on frequent consolidation of amended Acts-a very heavy burden.

58. It follows that the Commission should be a permanent body, though its size could no doubt be reduced once the initial task of putting the statute-book into consolidated form had been achieved. The Commissioner responsible for public general Acts would clearly need to have had a wide experience of statute law, including service as a draftsman. He should be allowed a long enough period in his post to enable him to frame plans in the knowledge that he will have to carry them out himself. One of the drawbacks to the system established by Sir Granville Ram of having a separate consolidation branch within the Parliamentary Counsel Office is that almost without exception the draftsmen assigned to that branch know that they are going to be there only for one or two years, and will then return to the main stream. This system was continued with the Law Commissions in 1965 and must inevitably induce a short-term view of the work by draftsmen temporarily assigned to the Law Commission. This does not matter as far as concerns drafting of consolidation Bills, but it is important to secure that forward planning is on a long-term basis.

59. Apart from consolidation, the Commissi6ner dealing with public general Acts would supervise the preparation of Statute Law Revision Acts, the preparation of the annual Index to the Statutes and Chronological Table, and anything else that needed to be done in relation to the body of the public general Acts. For example, a new Interpretation Act is long overdue and would pose great difficulties in its preparation. The whole subject of interpretation of statutes would be a function of the new Commission, who would therefore inherit the

problems associated with the Law Commissions' 1967 working paper. It might be helpful to prepare, for use by Parliamentary Counsel, model clauses dealing with the situations which frequently have to be provided for in Acts, e.g. criminal liability of corporations and their directors, the setting up of statutory corporations, service of notices, rights of entry, civil actions for breach of statutory duty and *mens rea.*

60. The new Commission might well be a suitable vehicle for operating an advisory service to Members of Parliament, and a service of drafting private Members' Bills and amendments. I do not suggest that such a service should in any way interfere with the practice under which almost invariably private Members' Bills or amendments which are likely to become law are drafted in the Parliamentary Counsel Office. Indeed, one important purpose of setting up the Commission would be to leave the Parliamentary Counsel Office free to carry on without distractions its vital task of processing all new legislation which finds its way to the statute-book. While, however, the Parliamentary Counsel Office would be spared the task of devising consolidation programmes, and dealing with the other matters suggested as falling to the lot of the Commission, it would be desirable for there to be very close liaison between the Parliamentary Counsel Office and Statute Law Commission, and for assistant Parliamentary Counsel to do a spell of consolidation, at least until the necessary corps of draftsmen is built up by the new Commission.

61. *Local and Private Acts.* Preoccupation with the tangled state of the

public general Acts tends to mean that little attention is paid to local and private Acts. In this field, however, the confusion is much worse. Whereas for many years an annual Index of public general Acts has been published, this has not been so with local and private Acts and the latest Index is over a quarter of a century old. The preparation of a new Index is long overdue, and it might be desirable for the Index to be produced annually in future.

62. The new Commission might give some attention to the drafting of local and private Acts, which has not been reviewed for many years and is different in a number of respects to the method used for public general Acts. For this reason, if for no other, it would be desirable for the Commission to form links with the Parliamentary Bar and Parliamentary Agents. Overhaul of the Parliamentary procedure concerned with local and private Bills is probably needed also, and the Commission could play its part in this. Indeed, whenever Parliament concerned itself with matters related to its functions, the Commission would have a duty to assist.

63. *Statutory Instruments.* Also within the scope of the Commission would be the form and publication of statutory instruments, including consolidation of the frequently-amended instruments. The Commission would no doubt be able to assist the Select Committee on Statutory Instruments, and the Counsel to the Speaker. Supervising preparation of the Annual Guide to Government Orders would be within the province of the Commission.

64. *Other functions of the Commission.* It would no doubt be convenient for the Commission to supervise the Statutory Publications Office and concern itself with all publications relating to Statute Law generally. In this connection it would be important to establish communications with the law publishers so that all parties concerned could coordinate their services to users of statute law. There is scope for much progress in the use of computer typesetting, and other computer applications. For example, with computer typesetting the Stationery Office could supply tapes to commercial and other users on a profitable basis, so that the latter could reproduce the authentic texts. More important are the possibilities for computer search and retrieval techniques, and the Commission would have an important part to play in developing these and other methods (such as algorithms) aimed at helping practitioners and the public generally to grasp statutory requirements.

65. Another important function of the Commission would be the working out and operation of a training-scheme for draftsmen. It would be vital to produce as quickly as possible a number of new draftsmen, and for some service with the Commission could be a prelude to joining the Parliamentary Counsel Office. I do not suggest that the Commission

should try to instil techniques which can only really be learnt in the practical drafting of programme legislation, but it would be within the Commission's resources to give general instruction on the science of legislation and specific instruction on the technique of consolidation. There is room for investigation of the best method of carrying out and presenting a consolidation, and it must be advantageous for the Commission to produce a code of practice in this respect as a guide for consolidating draftsmen.

66. The functions of the Commission, especially in relation to the

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training of draftsmen should bring it into contact with university law departments. Study of the science of legislation needs to be extended, and it is a subject which certainly should rate a professorial appointment in at least one United Kingdom university. Whether London University shared this view or not, it would obviously be useful for there to be close liaison between the Commission and at least one of the colleges of London University. Law students could provide a useful addition to the Commission's strength in carrying out routine tasks connected with its functions where these called for some, but not much, legal knowledge.

67. Since all our law reform has to use the medium of legislation, it is important that lawyers should have, as part of their general training, instruction in the preparation, enactment and interpretation of Acts of Parliament, and this could well be promoted by the Statute Law Commission.

68. It would not be appropriate for me to embark on speculation as to the Ministerial arrangements that would be made in relation to the *Commission.* That is a *question of the machinery of government.* It would be important, however, if the Commission is to remove statute law from the Cinderella role ft has hitherto occupied, for it to be in the charge of a Minister, preferably of Cabinet rank. It is particularly vital that the Commission should be given sufficient funds to carry out its task properly, and its case for getting these would be strengthened by Cabinet representation. It would not be worth setting up the Commission if it were to be starved of funds, and such funds would be well invested-for reasons which have already been mentioned. One aspect of the manpower problem, key to the success of the Commission, concerns extra burdens which would be put on government departments by dramatically increasing the momentum of consolidation. It would relieve this problem if the Commission were permitted to have members of their legal staff seconded to government departments to help in work generated by the Commission, and make sure it was kept moving. The problems of departmental lawyers in connection with consolidation are similar to those experienced by the Parliamentary Counsel Office. The departments are primarily concerned with their current legislation programme, and must give first priority to that. Consolidation brings few rewards in the shape of votes, and is invariably last in any queue. The position might be improved if at least one lawyer in each department were concerned only with the Commission's operations.

69. Setting up a Statute Law Commission would leave the Law Commission free to concentrate on reforms of substance in " lawyers' law " and the preparation of codification Bills. There would thus be three different bodies each concerned with a separate and vital aspect of legislation: the processing of current Bills, the promotion and execution of schemes for law reform in non-departmental fields (where political repercussions are insignificant), and the condition of the statute-book from a general and technical point of view. I do not presume to speak for Scotland, but I would expect similar arrangements would be found convenient there.

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7. Summary of Proposals

70. By far the most important reform, and one that stands by itself and could be implemented immediately, is to insist on use of the *textual amendment system* in amending

Acts. This could be done by adopting in both Houses of Parliament a new standing order as follows:-

A bill amending an enactment shall do so by directly altering its text, unless this is impracticable.

During a transitional period, while Bills in the pipe-line were continuing their progress, textual amendments would often be " impracticable ". After this, the change would mean that principal Acts would remain "clean ".

71. Coupled with the textual amendment system would be the production of *Textual Memoranda*. For Government Bills these would be white papers, issued by the Minister in charge of the Bill, as in the case of the Bill for the Furnished Lettings (Rent Allowances) Act 1973 (c. 6) (Cmnd. 5183, *5235*, 5242). So far as necessary they would set out the text of enactments amended by the Bill, indicating changes by typographical means. A similar system would need to be devised for private members' Bills.

72. A separate reform, vital if centuries-long dissatisfaction with the statute-book is to be finally ended, would be to set up a separate *Statute Law Commission* under the authority of a Minister, charged with the permanent duty of keeper of the statute-book. The Commission would take over from the Law Commission the tasks of consolidation and statute law reform, but not codification. Other functions of the Statute Law Commission would be keeping under review the state of the body of statutory instruments and local and private Acts, compilation of indexes and chronological tables, preparation of a new Interpretation Act, supervision of all official publications of statutory material, devising and executing a training scheme for draftsmen, and providing a drafting service for Members of both Houses of Parliament.
Setting up a Statute Law Commission would leave the Parliamentary Counsel Office free to carry on unimpeded its vital task of processing Government programme legislation, and enable the Law Commission to concentrate on reforms of substance in " lawyers' law " and the preparation of codification Bills. The three bodies would work in close cooperation. Similar arrangements would be made for Scotland.

73. Adoption of the above would indicate acceptance by both Houses of Parliament of a shift of emphasis from the amending Bill to the principal Act. Amending Bills would no longer be drafted so as to be self-explanatory, but would concentrate on preserving the integrity of the principal Act as a complete expression, logically arranged, of the statute law on the topic in question. This would be facilitated by the inclusion in each principal Act of a *permanent Schedule of commencement dates, transitional provisions and repeals.* This Schedule (called the " Jamaica Schedule "by the Stow Hill Committee) would be amended each time the principal Act was amended, so that the text of the Act, with amendments carried into it, would at all times be up to date in all respects. The amending Act would be a mere shell and, once the amendments had been physically

carried into the principal Act (by noting up or reprinting) no further reference would need to be made to the amending Act. Though desirable, this proposal is not essential to the adoption of proposal 1.

APPENDIX A

A BRIEF HISTORY OF COMPLAINTS

I

Year

1550 I would wish that . . . the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall most help

to advance the health of the Commonwealth "-Edward VI.

C. 1565" . . . where many laws be made for one thing, the same are to be reduced and established into one law, and the former to be abrogated "-Lord Keeper Bacon.

1609 A complaint by James I about " divers cross and cuffing statutes both these statutes and reports, as well in the Parliament as common law [should] be once maturely reviewed and reconciled; and that . . all contrarieties should be scraped out of our books. .

1616 Sir Francis Bacon, Attorney General, puts forward proposals " touching the compiling and amendment of the laws of England ",one of which was the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law ".

c. 1650 2 committees appointed" to revise all former statutes and ordinances now in force, and consider . . . how the same may be reduced into a compendious way and exact method for the more base and clear understanding of the people."

1796 House of Commons committee reports on consolidation Acts and the problem of obsolete and expired statutes, discrepant statutes, and the habit of legislating in one Act on a variety of subjects.

1816 Both Houses of Parliament resolve that a digest of the statutes should be made and that an eminent lawyer with twenty clerks under him should be commissioned to do the work, which was" very expedient to be done."

1833 Royal Commission appointed to digest criminal law and report on practicability of other consolidations.

1845 Further Commission appointed on criminal law.

1853 Lord Cranworth, L.C. embarks on" Code Victoria"

1854 Statute Law Commission set up. It reported that the exlsting statute law might be consolidated into 300 to 400 statutes over a period of about two years.

1856 First Statute Law Revision Act passed.

1868 Statute Law Committee set up by Lord Cairns L.C.

1869 Parliamentary Counsel Office set up.

1870 Vol.1 of Statutes Revised (1st edn.) published. (Completed 1885)

1875 Select Committee report "that the work of consolidation should be carried out upon a regular system, and by skilled hands, acting under the authority of some permanent government force, with a Minister, or separate department constituted for the purpose, in connection with the Office of the Parliamentary Counsel."

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c 1885 Statute Law Committee work out" a systematic long-term programme of consolidation."

1888 Vol.1 of *Statutes Revised* (2nd edn.) published. The preface said: "It is expected that the Edition will be completed within 3 or 4 years ". In fact it took 41 years, the final volume being published in 1929.

1947 Long-term programme of statute law reform inaugurated.

1950 *Statutes Revised* (3rd edn.) published as a whole, in 32 volumes. In the preface Lord Jowitt L.C. said:

1965 Law Commission and Scottish Law Commission set up. Law Commission requested by Lord Gardiner L.C. " to prepare a comprehensive programme of consolidation and statute law revision ". (Their programme was not in fact comprehensive and when a second programme was requested in 1971 the word was dropped.)

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APPENDIX B

THE FOUR CORNERS DOCTRINE IN OPERATION

1. To show by examples the full cumulative effect of piling one Act upon another when the Acts are drafted in accordance with the four corners doctrine is, for obvious reasons, difficult to do without inflicting impossible burdens on the reader. Nor would it be right to single out the worst cases and put them forward as typical. What I have decided to do therefore is to take, as offering a sufficient variety of examples, housing Acts amending consolidation Acts passed in 1957 and 1958, and in particular the Housing Act 1961. I became familiar with these Acts when doing a recent consolidation, and the difficulties imposed by drafting under the four corners doctrine in this field are fresh in my mind. I want to make it quite clear however that I am far from wishing to criticise the skill and technique of whichever draftsmen happened to handle the Acts in question. This Appendix is intended to illustrate the way in which the four corners doctrine *necessarily* produces added length and complexity, regardless of the abilities of individual draftsmen. Since the Parliamentary Counsel Office was set up in 1869, individual draftsmen have had little choice but to draft in accordance with the four corners doctrine. Naturally, the skill and experience of different draftsmen varies, but no one can produce a draft which is more artistic than the method he is compelled to use allows.
2. The last housing consolidation was carried out in two instalments- in itself a cause of some additional complexity. The Acts in question are the Housing Act 1957 (c. *56)* and the Rousing (Financial Provisions) Act 1958 (c. 42). The first amendments to these Acts were made by two Acts which received Royal Assent on the same date in 1959.
3. One of these 1959 Acts was very brief and it is convenient to deal with this first. It was the Housing (Underground Rooms) Act 1959 (c. 34), and it only had one effective section. Nevertheless this is of interest for our purpose. We notice first that section 1(1) is more than doubled in length by the inclusion of two parentheses explaining the meaning of provisions being amended by the Act. It is a point constantly to be borne in mind when studying the effect of the four corners doctrine that it adds greatly to the length of statutes-in itself a cause of added complexity.

> "under modern conditions the public interest is becoming increasingly affected by the unsatisfactory condition of the Statute Book. It is no longer lawyers alone who are mainly concerned in ascertaining the law, but a much wider section of the public, comprising Central and Local Government administrators, representatives of employers and workers, and those of public bodies and private associations.
>
> . . The reconstituted, Statute Law Committee decided that arrangements ought to be made whereby the Statute Law of the United Kingdom may be constantly revised so that new and completely revised editions . . . can be brought out as occasion requires. This is the salutary practice in many territories within the Commonwealth. . . it is one that ought to be established in the Mother Country as soon as possible . . . I hope that this edition . will suffice until further progress with the work of consolidation and statute law revision makes possible the production of a more concise edition of what will then, I trust, be a greatly simplified Statute Book."

4. Section 1 of this 1959 Act illustrates a mixture of referential and textual amendment. Section 1(1) amends the 1957 Act referentially, though it would have been possible to cast both amendments, instead of one only, in textual form. Thus, section 1 of the 1959 Act could have been worded as follows-

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> 1. The Housing Act 1957 is amended as follows-
> (a) in section 4(1), after' Act, 'insert' (except section 18 (1) *(b)* and (2)) ';

(b) in section 18 (2), the words from' Subject 'to' deemed unfit for human habitation 'are repealed."

5. In the textual memorandum the provisions of section 4 (1) and 18 (2) of the 1957 Act, printed so as to indicate the words being inserted and those being repealed$_9$ would have made the position entirely clear. It is worth noting that, as so often happens with the referential method of amendment, section 1 of the 1959 Act as actually drafted poses a small but quite difficult question, namely, whether subsection (1) has any independent effect or is there merely to pave the way for subsection (2) and could therefore be repealed by a Statute Law Revision Act. With slight hesitation, I conclude that it could not be so repealed. For the statute user who wishes to note up amendments as soon as they are made, the drafting of section 1 is a minor irritation, the prelude of many more to come in the housing field.

6. The other 1959 Act ran to 32 sections and two Schedules. Many of its provisions applied to Scotland, which has its own housing legislation. Accordingly, since I am unwilling to inflict on the reader more than is absolutely necessary, I will instead make the next major Act applying to England and Wales only the main source of examples. This is the Housing Act 1961 (c. 65).

7. Part I of the 1961 Act contains provisions applying in substitution for sections 1 to 6 of the Housing (Financial Provisions) Act 1958 (c. 42). Sections 1~to 4 of the 1961 Act are direct replacements of sections 1 to 4 of the 1958 Act. Under the system now proposed these sections would have been put into the 1958 Act in place of the sections repealed, as from the operative date specified in 1961 5. 1(3). 1961 5. 1(4) contains a referential amendment which begins another tangle of complexity, this time in relation to the New Towns Act 1959 (c. 62). 1961.5. 5(2) applies provisions in the 1958 Act which would have applied automatically if the new sections had been added to that Act. Similarly 1961 S. 6 would have been unnecessary if slight textual amendments had been made to the 1958 Act. 1961 ss.5 to 8 could also have been added (by way of substitution) in the 1958 Act.

8. 1961 s.9 is a mixture of textual and referential amendment which, every time it has to be referred to by the reader, poses difficult problems of conflation. Subsection (4) is striking, since it applies one existing provision of the 1958 Act (the definition of " hostel " in s.15) to two other *unchanged* provisions of that Act. Nor is it any easier to construe in relation to 1961 s.9 itself so far as it relates to part of a hostel. This is because section 9 (1) refers to ' part ' of a hostel, and therefore does not seem to need the treatment given by the final words of s.9 (4).

9. Since 1961 s.9 is a typical example of the obscurity produced by even one layer of referential amendments, it is perhaps worth illustrating how the operation could have been carried out relying entirely on textual amendment. In this case s.9 would have been drafted somewhat as follows-

"*Revised version of Housing Act 1961, s. 9*

"Grants for hostels. 9.-(l) Section 15 of the Housing (Financial Provisions) Act 1958 is amended as follows-

(a) in subsection (1), for " or development corporation substitute " development corporation or housing association ", after " provisions of " insert " sub-section (2A) below and ", and for " or corporation insert" corporation or housing association ";

(b) after subsection (2) insert the following subsections-(2A) In relation to a housing association, subsection (1) above shall apply only where the building

was provided or converted by the association under arrangements made by them with the Minister; and if the Minister is satisfied that the housing association has made default in giving effect to the terms of the arrangements, he may reduce the amount of the contributions

payable to the housing association under the said subsection (1), or suspend or discontinue payment thereof, as he thinks just.'

(2B) Where a building which has been provided or converted by a housing association for use as a hostel becomes vested in a local authority, and at the time of the vesting the building is one in respect of which a contribution is payable under the said subsection (1)-

(a) no further contribution shall, after the time of the vesting become payable under that subsection, but

(b) the Minister may, if he thinks fit, pay out of money provided by Parliament to the local authority sums not exceeding any sums which would after that time have become payable by him under that subsection in respect of the building if all conditions precedent to the payment of the sums had been fulfilled;

(c) in subsection (4) for " board " substitute either board or facilities for the preparation of food adequate to the needs of those persons, or both; and, in relation to a building provided or converted after the commencement of the Housing Act 1961 for use as part of a hostel includes part of a hostel ".'

(2) In section 22 of the said Act of 1958, at the end insert the following subsection-" (4) In this section " hostel " has the same meaning as in section 15 of this Act."

(3) In section *50* (3) of the said Act of 1958, at the end insert the following paragraph-"In this subsection " hostel " has the same meaning as in section 15 of this Act.""

10. If 1961, s.9 had been drafted in this way, the section amended (1958, s.15) could have been reprinted as shown below, so that the relevant statutory provisions would all have been located in one place-

"Housing (Financial Provisions) Act 1958, s. 15 as amended by Housing Act 1961, s.9

"Grants for hostels.

15.-(1) In respect of a new building provided, or a building converted, by a local authority, development corporation or housing association for use as a hostel, being a building approved for the purposes of this subsection by the Minister, the Minister shall (subject to the provisions of subsection (2A) below and section 22 of this Act) make to the authority, corporation or association, a contribution-

(a) payable annually for such number of financial years, not

exceeding sixty, as he may determine, being years beginning with the year in which the building is, or, as the case may be, the works of conversion are, completed;

(b) of such amount, not exceeding the sum produced by multiplying £5 by the number of bedrooms contained in the building, as he may determine having regard to the standard of construction and amenity of the building.

(2) Subject to the provisions of section 22 of this Act, the like contribution, if any shall be payable in respect of a building which, under authorised arrangements made by a local authority with a development corporation or housing association, has been provided or converted by that

corporation or association for use as a hostel as would be payable if the building had been provided or converted by the local authority for such use, and shall be paid by the Minister to the authority, who shall pay to the corporation or association by way of annual grant an amount not less than the contribution.

(2A) In relation to a housing association, subsection (1) above shall apply only where the building was provided or converted by the association under arrangements made by them with the Minister; and if the Minister is satisfied that the housing association has made default in giving effect to the terms of the arrangements, he may reduce the amount of the contributions payable to the housing association under the said subsection (1), or suspend or discontinue payment thereof, as he thinks just.

(2B) Where a building which has been provided or converted by a housing association for use as a hostel becomes vested in a local authority, and at the time of the vesting the building is one in respect of which a contribution is payable under the said subsection (1)-

(a) no further contribution shall, after the time of the vesting, become payable under that subsection, but

(b) the Minister may, if he thinks fit, pay out of money provided by Parliament to the local authority sums not exceeding any sums which would after that time have become payable by him under that subsection in respect of the building if all conditions precedent to the payment of the sums had been fulfilled.

(4) In this section " hostel means a building wherein is provided, for persons generally or for any class or classes of persons, residential accommodation (otherwise than in separate and self-contained sets of premises) and either board or facilities for the preparation of food adequate to the needs of those persons, or both, and in relation to a building provided or converted after the commencement of the Housing Act 1961 for use as part of a hostel, includes part of a hostel."

11. 1961 s.10 in substance makes a number of simple textual amendments, but since it is drafted so as to indicate on the face of it the effect of the changes it makes, it is much longer than it would otherwise have been. It illustrates that the four corners doctrine applies even where textual amendments are made, though often they are not fully textual as here. Subsections (1) to (3) of ~.10 each incorporate commencement provisions not designed to be inserted textually in the enactments amended.

12. 1961 5. 11 (U applies provisions of the *1958* Act which would apply automatically if the 1961 Act had been textual in form. 1961 s.11(2) brings into operation. the Second Schedule to the Act, which contains consequential amendments. It is noteworthy, however, that nearly all these amendments (including one to another corpus of statute law, relating to town and country planning) are referential rather than textual in form.

13. Part II of the 1961 Act, although entitled " Amendments of Housing Act 1957 " does not amend the 1957 Act textually and is largely self-contained. It introduces a new corpus of law relating to the management of houses in multiple occupation and, under the system advocated in this paper, would have been added in an appropriate place to the principal Act. 1961 s.20 is of interest. It amends the 1957 provisions relating to certain offences in a way which, although the amendments might have been made textually, means that for ever afterwards both s.20 and the amended section must be referred to.

14. 1961 s.21 performs the curious operation of applying provisions of the 1961 Act itself to a wider context. It is probable that this was the result of a late amendment to the Bill for the 1961 Act, and in the consolidation the effect of s.21 has been written into the clauses reproducing ss. 12 to 15.

15. 1961 s.22 (4) modifies indirectly a provision of the 1957 Act which, if it had been changed textually, would have continued to stand by itself without the need for other reference. A similar observation can be made about 1961 s.23(2) and (6). 1961 *s.25* is an interesting example of textual amendment which nevertheless informs the reader of the effect of the amendments. Even so, it would be easier to understand them if the whole of s.24 (1) of the principal Act were set out in a textual memorandum, with the words to be inserted printed in bold type.
16. 1961 s.27 illustrates the common technique of repealing enactments twice over. The statute-book is cluttered with a whole section which is unnecessary except for the purpose of conveying to the Members of Parliament the effect of repeals set out in the Fourth Schedule.
17. 1961 s.29 is an interesting example of what might be unkindly called bogus textual amendment. Subsection (1) appears to be a simple alteration of a figure in the Rent Act 1967. On reading subsection (2) however we find that the alteration applies only to cases arising after the commencement of the 1961 Act. This is not so surprising, but we find in subsections (3) and (4) much more complicated limitations on the effect of the textual amendment. It is worth noting too, that s.29 is operating on the Rent Act 1957, once again a different corpus of law to the housing Acts. 1961 s.30 contains a mixture of referential and textual amendments. It is particularly striking that s.4 (1) (d) of the 1959 Act is first amended referentially (in 1961, s.30 (3)), and immediately afterwards textually (in 1961, 5. 30 (4)). This means that s.4 (1) can be noted up partly, but not completely.
18. 1961 ss. 32 and 33 again operate on a different corpus of law, this time the law of landlord and tenant. In a fully consolidated statute-book the right course would have been to write in these provisions as textual amendments to the landlord and tenant code.
19. A great deal more could be said in illustrating how the 1961 Act complicates the law, but to do so would be wearisome. When it is considered that the 1961 Act was to be followed by numerous other Acts operating in the same way it can easily be seen how obscure the housing enactments, newly consolidated in 1957-8, rapidly became. I would stress that this was by no means a special case, but the ordinary working out of the four corners doctrine.
20. Tempting though it is to leave the matter there, I feel obliged to give a very sketchy indication of the way in which, throughout the following decade, the complexities of housing legislation multiplied. I take one instance only, that stands

for many. All the Acts referred to in the remainder of this Appendix are Housing Acts.
21. 1961 ss.14 to 16 gave local authorities power to require the landlord of a defective house to carry out repair work within a specified period, and gave the landlord a right of appeal. If the notice was not complied with, 1961 S. 18 gave the local authority power to do the work and recover the cost from the landlord. Nothing was said about the consequences to the landlord of disregarding the notice, apart from his liability to pay for the work done by the local authority. It could be argued that disregard of the notice would be a breach of statutory duty, and therefore a common law misdemeanour. The next major Housing Act was the Housing Act 1964, running to 108 sections and five Schedules. It was decided to take the opportunity in this Act of clarifying the position over the default of a landlord under ss. 14 to 16 of the 1961 Act, and this was done in 1964s. 65, which is a mixture of referential and textual amendments. 1964 s.64 also amends 1961 s.l8 in the same mixed way. I will forbear going through these sections in detail, but anyone who does so will quickly see in what a complicated state they left the law.
22. That is not the end of the story about a landlord's default. It was discovered that 1964 s.65 left a doubt about whether, after conviction, the landlord was still liable to do the work required by the original notice and, if he failed to do so, was liable to further penalties. This was rectified in the next major housing Act, which was the Housing Act 1969 (c. 33). The provision in question is 1969 s.61, again a mixture of textual and referential amendment.
23. The provisions we have just been discussing are criminal in character, and it is accepted that there is a special obligation to make the law clear where penalties are involved. The

secretary of a property company, asked to advise the directors on their personal liability and that of the company where the company has defaulted in complying with a notice to carry out work under 1961 s.16 would face a difficult task. He might go through the following processes-

1. He would observe that 1961 s.16 had received textual amendment in three places. Finding it quite easy, he enters these amendments in his copy of the 1961 Act.
2. He observes from 1961 5. 16 (3) that 1961 5. 15 (3) and (4) apply to a notice under s.16, and then discovers that s.l5 (4) has been textually amended, so he writes that into his copy too.
3. He sees from 1961 s.17 that the company has a right of appeal, but finds that s. 17 has been amended referentially by 1964 5. 64 (7), so he tries to conflate the two provisions.
4. He then notices that under 1961 s.18 the local authority have power to carry out the work themselves. He finds it difficult to weigh up the full effect of this, since 1961 s.18 has been heavily amended both textually and referentially.
5. He wonders whether the company are liable to a penalty if they fail to comply with the notice. He sees nothing about this in the 1961 Act, but then discovers that 1964 s.65 (1) does provide for a penalty, but leaves it doubtful whether after conviction the company is still liable to do the work.
6. He also finds from 1964 s.65 that a local authority has powers of entry, since 1957 s. 159 is applied by s.65 (4).
7. He also sees that by applying s.23 of the 1961 Act, s.65 *(b)* has rendered him and the directors liable to personal penalties.
8. Having worked his way through to 1969 s.61 he finds that this contains a fresh set of penal provisions, and tries to master the way in which they operate on the earlier Acts.

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24. The above gives an inadequate picture of the problems of the statute user faced with doing his own conflation. With the passage of further amending Acts a clear exposition (which depends on the result of conflation) becomes more and more difficult, and often impossible.

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APPENDIX C
CONSOLIDATION
PART I
Consolidation Component in Annual Statutes
A. *Statutes Revised (3rd edn.)*

Vol.	Date -	Total Pages	Pages of † Consolidation	Total No of Acts	Number of Consolidation Acts
1	1235-1770	689	0	359	0
2	1770-1821	804	61	236	4
3	1822-35	750	184	191	12
4	1836-44	765	17	175	1
5	1845-9	815	0*	102	0
6	1850-9	862	15	230	3
7	1860-6	904	300*	225	10
8	1867-71	812	118	185	3
9	1872-7	837	263	186	10
10	1878-83	938	462	148	12

11	1884-90	835	220	201	16
12	1891-4	987	552	132	12
13	1895-1905	844	187*	215	5
14	1906-1911	1,017	413	154	14
15	1912-18	777	256	145	11
16	1918-21	789	176	147	2
17	1922-4	515	112	79	3
18	1924-5	846	472	58	10
19	1926-9	706	75	119	3
20	1929-32	920	112	93	3
21	1932-4	915	366	71	5
22	1934-6	925	452	64	7
23	1936-8	821	257	76	4
24	1938-9	791	448	69	7
25	1939-41	703 0	113	0	
26	1941-1	761 116	67	1	
27	1944-6	825 3	68	1	
28	1946	802 108	32	1	
29	1946-7	741 294	42	2	
30	1947	656 0	7	0	
31	1947-8	896 375	43	1	
32	1948	841 135	33	3	
		26,089 6,549	4,065	166	

*Clauses Acts omitted, as facilitating local and private Acts only.
† includes Scottish

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B. *Annual Volumes 1949-72*

Year	All Acts		All Consolidation Acts		Consolidation - Acts (S.)		Consolidation Acts (S.)	
	No.	Pages	No.	Pages	No	Pages	No.	Pages
1949	93	2288	10	679	2	94	8	585
1950	50	1000	11	413	1	142	10	271
1951	63	675	4	75	2	45	2	30
1952	63	1437	6	895	1	27	5	868
1953	55	815	- 5	257	- 0	0	5	257
1954	65	1198	4	153	1	60	3	93
1955	48	747	3	397	0	0	3	397
1956	58	1016	5	168	2	77	3	91
1957	61	1103	9	539	0	0	9	539
1958	76	1188	11	288	0	0	11	288
1959	72	1451	8	592	1	123	7	469
1960	65	1157	4	313	0	0	4	313
1961	65	1048	2	179	0	0	2	179
1962	59	1335	5	516	1	123	4	393
1963	59	1416	4	211	1	48	3	163
1964	98	1421	2	192	0	0	2	192
1965	52	1166	4	275	0	0	4	275
1966	52	1060	3	196	1	171	2	25
1967	91	2155	13	510	2	65	11	445

1968	77	2426	10	564	2	151	8	413		
1969	65	1709	3	89	0	0	3	89		
1970	58	1509	3	805	0	0		3	805	
1971	81	2107	10	721	1	139	9	582		
1972	80	2527	8	701	1	359	7	342		
1949-65.	1102	20471	97	6142	12	739	85	5403		
1966-72	504	13493	50	3586	7	885	43	2701		
AV.49-65	65	1204	6	361	1	43	5	315		
AV.66-72	72	1927	7	512	1	126	6	387		

PART 11
Candidates for Consolidation

Note: This list has been compiled very roughly by simply looking through the Index to the Statutes. Figures in brackets give the number of Acts entered in the Index under the title given (or a related title). Year is date of last consolidation or principal Act. Purely Scots entries disregarded.

Administration of Estates (75)
Adoption of Children (19)
Agricultural Credits (16)
Agricultural Holdings * (23)
Agriculture * (40)
Agriculture, Fisheries & Food, Ministry of (l8)
Air Corporations (6)
Air Force (48)
Alien (14)
Alkali, etc. works (10)
Allotments * (20)
Ancient Monuments (12)
Animals (50)
Arbitration (13)
Army (77)
Arrest (14)
Atomic Energy (23)
Auxiliary Forces (17)
Bail (14)
Bank of England (40)
Banknote* (14)
Bankruptcy * (63)
Betting, Gaming & Lotteries (32)
Bills of Exchange 1882(13)
Bills of Sale 1878(11)
British Nationality 1948 (17)
Building Society 1962(17)
Burials * (28)
Business Names (4)
Canals (22)
Capital Allowances 1968 (11)
Capital Gains Tax (8)
Civil Aviation (30)
Civil Defence (24)
Civil List (1)
Clean Air(9)
Colonial Stock (15)
Commons (68)
Commonwealth Development (13)
Companies 1948 (70)
Compensation (Defence) (20)
Comptroller and Auditor General 1866(11)
Conveyancing and Law of Property 1925* (48)
Copyright 1956(14)
Coroners* (35)
Costs (40)
County Courts 1959(53)
Criminal Procedure * (91)
Crown Proceedings 1947 (20)
Customs and Excise 1952(101)
Damages * (50)
Death Duties (92)
Defence (41)
Dentists 1957 (9)
Diplomatic Privileges (12)
Distress (30)
Dogs 1906(21)
Education 1964* (66)
Electricity (40)
Employment (42)
Evidence* (148)
Exchange Control 1947 (9)
Execution* (18)
Explosives (25)
Factories 1961(15)

Caravan Sites (7)
Carriers (6)
Census (5)
Charities 1960 (22)
Children and Young Persons 1933 (56)
Cinematograph (26)
Fire Services (15)
Firearms 1968 (4)
Fisheries* (62)
Food and Drugs 1955* (20)

*Separate Acts needed for EW and Scot. (figure in brackets EW only)

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Forestry (6)
Forgery 1913 (53))
Fraud (104)
Friendly Societies (33))
Fugitive Criminals (20))
Game* (39)
Gas (22)
Habeas Corpus (17)
Harbours and Docks (17)
Highways 1959(41)
Historic Buildings (7)
Horticulture (8)
House of Commons (132)
Housing 1957* (61)
Hovercraft (7)
Indecency (23)
Industrial and Provident Society 1965(11)
Industrial Injuries Insurance 1965(11)
Insurance (28)
Intoxicating Liquor (22)
Iron and Steel (11)
Isle of Man (19)
Judicial Committee of Privy Council (36)
Juries* (41)
Justices of the Peace * (50)
Land Drainage * (56)
Landlord and Tenant * (50)
Legal Aid and Advice * (7)
Libel and Slander* (16)
Limitation* (33)
Livestock Industry (11)
Livestock Rearing and Hill Farming (16)
London Government (70)
Magistrates' Courts 1952* (43)
Marriage * (40)
Married Woman * (22))
Master and Servant (32)
Matrimonial Causes * (22)
Medical Profession 1956(17)
Mental Health 1959* (25)
Merchant Shipping 1894(122)
Metropolitan Police District (74)
Mines and Quarries 1954(76
National Health Service* (38)
National Insurance (26)
National Parks (13)
New Towns 1965* (7)
Notary Public (12)
Nurses 1957* (9)
Oaths 1888 * (29)
Parliament (60)
Patents 1949(23)
Perjury 1911 * (21)
Pests (16)
Petroleum (17)
Physical Training and Recreation 1937(12)
Plate (27)
Police* (35)
Prisons* (21)
Prize (20)
Prosecution of Offences 1879* (15)
Public Health 1936 * (64)
Public Utilities Street Works 1950(11)
Public Works Loans (15)
Race Relations 1965 (2)
Rating (30)
Registration of Births etc.* (34)
Representation of the People (33)
Riot etc. (20)
Sexual Offences (23)
Shops 1950 (7)
Slaughter (10)
Social Security (9)
Stamp Duties (139)
Supreme Court (133
Telegraphs (65)
Treason (35)
Trustee 1925 * (61)
Water* (29)
Wills (28)

Total: 155 subjects

*Separate Acts needed for EW and Scot. (figure in brackets EW only)

PART III

Consolidation Acts now in Force

Acquisition of Land (Authorisation Procedure) Act (S.) 1947
Administration of Estates Act 1925
Adoption Act 1955
Advertisements (Hire-Purchase) Act 1967
Affiliation Proceedings Act 1957
Agricultural Holdings Act 1948
Agricultural Holdings Act (S.) 1949
Agricultural Marketing Act 1958
Agricultural Wages Act 1948
Agricultural Wages Act (S.) 1949
Air Corporations Act 1967
Air Force Act
Air Force Reserve Act 1950
Alkali etc. Works Regulation Act 1906
Ancient Monuments Consolidation and Amendment Act 1913
Arbitration Act 1950
Army Act
Army Reserve Act 1950
Attachment of Earnings Act 1971
Auxiliary Forces Act 1953

Bankruptcy Act 1914
Bankruptcy Act (S.) 1913
Betting Duties Act 1963
Betting and Gaming Duties Act 1972
Betting, Gaming and Lotteries Act 1963
Bills of Exchange Act 1882*c*
Bills of Sale Act 1878
Births and Deaths Registration Act 1953
Building Societies Act 1962

Capital Allowances Act 1968
Chelsea and Kilmainham Hospitals Act 1826
Children and Young Persons Act 1933
Children and Young Persons Act (S.) 1937
Circuit Courts and Criminal Procedure Act (S.) 1915
Civil Aviation Act 1949
Coinage Act 1971
Coinage Offences Act 1936
Colonial Development and Welfare Act 1959
Commissioners for Oaths Act 1889
Contracts of Employment Act 1972
Coroners Act 1887
Costs in Criminal Cases Act 1952

*c*Codification Act

Courts Martial (Appeals) Act 1968
Criminal Appeal Act 1968
Criminal Appeal (N.I.) Act 1968
Customs and Excise Act 1952

Dangerous Drugs Act 1965
Deeds of Arrangement Act 1914
Defence Act 1842
Dentists Act 1957
Development of Inventions Act 1967
Diseases of Animals Act 1950
Dog Licences Act 1959
Dogs Act 1906
Dramatic and Musical Performers' Protection Act 1958

Education Act (5.) 1962
Exchequer and Audit Departments Act 1866
Export Guarantees Act 1968

Factories Act 1961
Factors Act 1889
False Oaths Act (S.) 1933
Films Act 1960
Firearms Act 1968
Food and Drugs Act 1955
Food and Drugs Act (S.) 1956
Food and Drugs (Milk, Dairies and Artificial Cream) Act 1950
Foreign Jurisdiction Act 1890
Foreign Marriages Act 1892
Forestry Act 1967
Forgery Act 1913
Friendly Societies Act 1896

General Rate Act 1967
Government Annuities Act 1929
Governors' Pensions Act 1957
Guardianship of Minors Act 1971

Highways Act 1959
Horse Breeding Act 1958
Housing Act 1957
Housing Act (S.) 1966
Housing (Financial Provisions) Act 1958
Housing (Financial Provisions) Act (S.) 1968
Hydrocarbon Oil (Customs and Excise) Act 1971

Income and Corporation Taxes Act 1970
Industrial Assurance Act 1923
Industrial and Provident Societies Act 1965
Industrial Injuries and Diseases (Old Cases) Act 1967

Insurance Companies Act 1958
Interpretation Act 1889

Land Charges Act 1972
Land Compensation Act 1961
Land Compensation Act (5.) 1963
Land Drainage Act 1930
Land Registration Act 1925
Late Night Refreshment Houses Act 1969
Law of Property Act 1925
Legal Aid Act (5.) 1967
Licensing Act 1964
Licensing Act (5.) 1959
Limitation Act 1939
Local Employment Act 1972
Local Government Act (5.) 1947

Magistrates' Courts Act 1952
Manoeuvres Act 1958
Marine Insurance Act 1906*c*
Marriage Act 1949
Matrimonial Proceedings (Magistrates' Courts) Act 1960
Medical Act 1956
Merchant Shipping Act 1894
Midwives Act 1951
Midwives Act (S.) 1951
Military Lands Act 1892
Mines (Working Facilities and Support) Act 1966

National Debt Act 1972
National Insurance Act 1965
National Insurance (Industrial Injuries) Act 1965
National Savings Bank Act 1971
National Service Act 1948
Naval Discipline Act 1957
New Towns Act (S.) 1968
Nurses Act (S.) 1951
Nurses Act 1957
Nurses Agencies Act 1957

Offences Against the Person Act 1861
Overseas Resources Development Act 1959

Partnership Act I 8_{90}C
Patents Act 1949
Pawnbrokers Act 1872
Perjury Act 1911
Petroleum (Consolidation) Act 1928
Pharmacy Act 1954

*c*Codification Act

Pilotage Act 1913

Plant Health Act 1967
Poisons Act 1972
Post Office Act 1953
Police Act (5.) 1967
Prevention of Fraud (Investments) Act 1958
Prevention of Oil Pollution Act 1971
Prisons Act 1952
Prisons Act (5.) 1952
Private Legislation Procedure Act (S.) 1936
Protection of Animals Act 1911
Provisional Collection of Taxes Act 1968
Public Health Act 1875
Public Health Act (5.) 1897
Public Health Act 1936
Public Health Act (5.) 1945
Public Stores Act 1875
Public Works Loans Act 1875

Regimental Debts Act 1893
Registered Designs Act 1949
Registration Service Act 1953
Representation of the People Act 1949
Rent Act 1968
Rent Act (5.) 1971
Road Traffic Act 1972
Road Traffic Regulation Act 1967
Road Transport Lighting Act 1957

Sale or Goods Act 1893
Salmon and Freshwater Fisheries Act 1923
Sea Fish (Conservation) Act 1967
Sea Fish Industry Act 1970
Sea Fisheries Regulation Act 1966
Sea Fisheries (Shellfish) Act 1967
Settled Land Act 1925
Sexual Offences Act 1956
Sheriffs Act 1887
Shops Act 1950
Slaughter of Animals Act 1958
Slave Trade Act 1824
Slave Trade Act 1873
Small Holdings and Allotments Act 1908
Solicitors Act 1957
Solicitors Act (5.) 1933
Stamp Duties Act 1891
Stamp Duties Management Act 1891
Summary Jurisdiction Act (S.) 1954
Supreme Court of Judicature (Consolidation) Act 1925

Taxes Management Act 1970
Teachers Superannuation Act 1967

Television Act 1964

Therapeutic Substances Act 1956
Titles to Land Consolidation Act (5.) 1868
Town and Country Planning Act 1971
Town and Country Planning Act (5.) 1972
Trade Marks Act 193$
Tribunals and Inquiries Act 1971
Trustee Act 1925
Trustee Savings Banks Act 1969
Trusts Act (5.) 1921

Universities and College Estates Act 1925

Vehicles (Excise) Act 1971

Wages Councils Act 1959
War Damage Act 1943
Weeds Act 1959

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4.

ORAL EVIDENCE TO THE RENTON COMMITTEE

BY FRANCIS BENNION

Present: The Rt. Hon. Sir David Renton M.P. (Chairman); The Duke of Atholl; The Rt. Hon. Baroness Bacon; The Hon. Mr. Justice Cooke; Sir Basil Engholm; Mr. J. A. R. Finlay; Sir John Gibson; Mr. P. G. Henderson[11]; Sir Noel Hutton; Mr. K. R. Mackenzie; Sir Patrick Macrory; Mr. S. J. Mosley; Mr. Ivor Richard M.P.; Mr. Ewan Stewart.

Secretaries: Mr. A. M. Macpherson and Mr. R. S. Cumming.

CHAIRMAN: First of all I would like to thank you, Mr. Francis Bennion, for the trouble you have taken to submit this paper which you sent to us last July, and which I know has aroused a great deal of interest among us all. I understand you would like to start your oral evidence by some opening remarks of your own, and as we all have quite a number of questions to put to you, perhaps you could let us hear your remarks as briefly as possible.

A: In view of your hint I will try to make them brief; but I find very great difficulty in dealing in a brief way with something which is a very complex matter, anything said about which, to be meaningful, inevitably is complicated. I would like to explain how I come to be here, although there is something said in my written evidence about it. It may seem rather strange that a civil servant should appear before the committee in the way I am here. I seem to have contracted at an early stage a kind of bug which does not allow me to rest—I complain bitterly about it because it is a great nuisance to me—but something has got into me which does not allow me to behave perhaps as a normal parliamentary counsel would and accept the limitations of the position. I went into the office in 1953, over 20 years ago, and I remember at the very beginning of the first day entering that office with a feeling of great apprehension, because I regarded the law and the place where the law was manufactured as almost a holy place. I took up law as a career because I have a very high opinion of its value to the community—in fact it is essential to any civilised community. In the parliamentary counsel office I found that the facilities did not nearly come up to what seemed necessary for the

[11] Now Sir Peter Henderson, Clerk of the Parliaments.

nation's law-factory. For example, instead of finding what should have been the best library in the country for those engaged in changing the law, it was nothing of the kind. That was rather symptomatic of the whole set-up, and I still feel the way in which we tackle the problems of preparing legislation in this country is not commensurate with the great importance of the task to the country as a whole.

It follows that I think this committee is an extremely important

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committee. I consider it the most important thing that has happened in relation to statute law since 1875 (when the Select Committee was set up). I have said something in my written evidence of the centuries-long complaint about the intractability of statute law, and I do not need to repeat that. Because the problem is so vast and so important, and because of the warning you have given me about time, I would like to confine my opening remarks to what m my opinion is the nub of the whole thing. First of all, that we should go over to a system of textual amendment; and secondly, that there should be some serious attempt to produce a scientific statute book for the first time in this country.

Textual amendment is dealt with in Part 2, beginning at page 6, of my written evidence, and I probably do not need to repeat anything there, except perhaps what I say in paragraph 10, which I stand by, that: “In my view the major part of our statute book would ideally be arranged, as the first Statute Law Commission said in 1854, in ' 300 to 400 statutes, ' each with a convenient scope and title.”

This brings me to what I call the principal Act, and the operation of textual amendment. There is a great deal of controversy about how you would arrange a statute book under titles if you were going to have one. I would like to stress right at the outset that what I am advocating about textual amendment *can operate perfectly well on the system we now have.* That is, every time there is a new principal Act, a clean Act, (that is, every time there is a new consolidation Act of any sort or a new Act which operates—as the Local Government Act 1972 did in a whole sector of public life—by modifying statute law and replacing it) it should not be amended in any way but textually. As I say in paragraph 12 of my written evidence, we have half our output, or even more, in the form of principal Acts which are clean, which are unamended, and I cannot express too strongly my feeling of the absurdity of having people spend a great deal of time in producing clean Acts, with an expertise which is very rare, and then having a system under which, immediately, Parliament begins to pass Bills which dirty the clean Act, which amend it otherwise than textually. I do not think I need explain what textual amendment is, or what the other form of amendment is, which I refer to as referential amendment or indirect amendment. I take it what I have said in my written evidence about the precise meaning of those terms and the way in which they work out in practice need not be repeated now.

This committee is fortunate in having a sort of panacea available. There are very few official committees set up to deal with any problem who have got in their grasp something which will at least go halfway to solving that problem. It can be done without any expenditure, without the setting up of new bodies or anything at all, except a resolve in the future to amend clean principal Acts textually so that the amendments can be written into the Act to preserve the integrity of structure. I feel it would be—and I can think of no smaller word—a catastrophe if the committee came to any other conclusion than that we should go over to textual amendment wherever possible. I am certain if we go on with the present system there is no hope of tidying up the mess the statute book is in, or if it were tidied up, keeping it tidy. I am certain of that. If anybody does not accept it I would be glad to

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hear the reasons why and try to deal with them. I think this is the nub of the whole thing.

Q. Before you go on to the other main theme you wish to develop, I was wondering whether you would like us to deal with the question of textual amendment. I wonder if I might put the first question by referring you to paragraph 24 of your paper. You say: "Accordingly I would propose that each House of Parliament be invited to adopt a new standing order running as follows: A Bill amending any enactment shall do so by directly altering its text, unless this is impracticable." That I think is the climax of your argument, the crux of the whole matter; would you agree?

A. Yes, indeed.

Q. I think I could tell you that other witnesses have pointed out the advantages of textual amendment; many of us are, I think, convinced of the advantages. But other witnesses have also pointed out that the opportunities for textual amendment are limited; that many other factors have to be borne in mind, that although a counsel of perfection would undoubtedly be to have textual amendment all the time, it is just not practicable—to use the same expression as you have used here. In view of what I have said, would you care to say when you think it would be impracticable to have textual amendment?

A. I have dealt with this in paragraph 23 of the memorandum, where I say: "In the present state of our statute book there are certain limitations on the use of the textual amendment system. A provision of an Act which has been heavily amended referentially will probably have to go on being amended in that way until it is consolidated." Then a little lower down:

"Another limitation arises in the case of old Acts whose language is different from present-day usage." There are undoubtedly a number of cases where it is not practicable, and that is why my argument is limited to the clean principal Act, although in the proposed standing order I have not used precisely that language, but that is basically what I am proposing.

Q. You say you should have textual amendment whenever there is a suitable principal Act which deals with the matter in that way. But when there is not one you cannot. That is what you are saying?

A. To give it more precision, whenever there is a suitable Act which either has not been amended at all, or if it has been amended is amended only textually. I might stress that under the long-standing practice of the Parliamentary Counsel Office (based on the four corners doctrine) there are a great many instances where textual amendment is perfectly practicable, but is nevertheless not used.

Q. My only other question on this matter relates to consolidation, and it goes without saying—without elaborating what you have already told us— that the whole key to this problem of extending textual amendment is the rate of consolidation; and in another part of your paper you have indeed referred to that in some detail. First of all, would you agree that just as the principal aim in your opinion should be textual amendment, so the principal method of achieving textual amendment must be greatly extended consolidation?

A. Yes. Only by that can we reap the full advantage of textual amendment in keeping the statute book tidy.

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Q. Could you tell us what in your opinion are the principal limitations on consolidation today?

A. First of all there is the shortage of draftsmen. Under the system of referential amendment consolidation of the amended and amending Acts together is often extremely difficult. It requires what in my paper I call conflation, which is a useful word to describe the perplexing mental process of working out the effects of cumulative statutes piled one upon the other. This is what the consolidating draftsman has to do whenever he is faced with a referential amendment of an Act to be consolidated. If he were only concerned with textual amendments,

the consolidation could be done by an assistant. I mention that because it does add to the length of time taken for consolidation; although nothing can be done about that in the case of existing Acts. The shortage of draftsmen is quite remarkable. It is highlighted by the fact that the Law Commission in their first annual report, when they were reporting the staff they had in 1965, said that there were four draftsmen on their staff of 35, and they also made the remark that "In due course it will clearly be necessary to increase their number."[12] Yet in their latest annual report you find the number of draftsmen is still four, though the total staff has increased to 47.[13] That is why we have no dramatic increase in consolidation. That is the main obstacle. Secondly, and also very important, is the shortage of staff in the Departments who operate the Acts to be consolidated. I had experience of that myself, because I did a housing consolidation which ought to have been before Parliament now, and when the first draft of the Bill, which was about 330 clauses, had been completed, the onus was then on the Department of the Environment to comment on it and say where it did not agree with what they thought the Bill should say. But owing to under-staffing in the legal department of the DOE we had no way at all of making progress, because the staff were tied up with the current Housing Bill, and it meant the consolidation was put aside. I have made a suggestion in my written evidence to deal with that, which is that there could be attached to every major department a legal officer whose sole function it is to deal with statute law consolidation and other matters of that kind.

Q. For the record, could you point out the paragraph?

A. It is the second half of paragraph 68, beginning: "One aspect of the manpower problem, key to the success of the Commission. ..." I think this is an aspect of the Cinderella treatment that statute law has always had in this country, that nobody ever thought it worthwhile making sure the major departments had an officer who kept his eye on the state of the statute law affecting that department and was available for consolidation and other similar work, and was not taken away from it to deal with current departmental business. It is often, almost invariably, the case that consolidation has to wait. It is last in the queue. I think those are the two principal factors. A third factor, which I do not regard as serious, is the possibility that the manning of a joint select committee processing consolidation Bills might be a real obstacle, because there must be ways,

even if the committee has to sit in several divisions, of overcoming that problem.

CHAIRMAN: I think members of the committee will have questions on this matter of textual amendment and consolidation combined.

LADY BACON: Can I ask a question about textual amendment arising from paragraph 26 of Mr. Bennion's paper? I must say his paper is absolutely wonderful, but I did not quite follow the argument on the four corners doctrine. Mr. Bennion says the reason why the referential amendment system persisted so long was the traditional desire to make a Bill comprehensible to Members of Parliament without their having to consider other documents. I do not quite follow this, because I would have thought that with textual amendments the Member of Parliament would have been able to understand a Bill very much better without having to look up so many previous Acts of Parliament. I do not follow this at all, because we have been assuming in this committee that if we had textual amendment it would in effect mean fewer documents to look at rather than more.

A. It is quite true that if we had textual amendment there would be fewer documents to look at in order to *see precisely* what a Bill does. If a Bill were further amending a principal Act which had already been heavily amended textually we could discover the Bill's precise effect by just looking at one other document—a version of the principal Act printed as previously

[12] The Law Commission, First Annual Report, 1965-66, para. 10.
13 The Law Commission, Eighth Annual Report, 1972-73, para. 74.

amended. Though if there were a lot of textual amendments made by the Bill it might still be difficult to get their effect without physically writing them in (that's what a textual memorandum or Keeling Schedule is for).

Under the present system we have to look at the principal Act and each amending Act as well in order to discover *the precise* effect of the Bill. But the four corners doctrine caters for M.P.s who only want a *rough* idea of what the Bill does, and gives them this within the four corners of the Bill so that they need look at no other document. But if the Bill is making textual amendments then it will be difficult to follow the meaning of the Bill without some other document which shows how these textual amendments alter the Acts in question. Could I refer to the example of the Furnished Lettings (Rent Allowances) Bill, I think the members of the committee have had this.

CHAIRMAN: We have got it, and the explanatory memorandum as well.

A. Please look at Schedule 1 to the Furnished Lettings (Rent Allowances) Act 1973—just glance at the first two or three paragraphs. I think you can see they are meaningless in themselves. In the Bill they were accompanied by a textual memorandum which showed by heavy type and other devices what the effect of those amendments was. It could not have been done by a Keeling Schedule, because the amendments scatter too widely around the Act being amended—in this case the Housing Finance Act 1972. Here you have to have *two* documents so that Members of Parliament can understand what the Bill is getting at. Therefore that is a breach of the four corners doctrine, which requires amendments to be put in such a way that Members of Parliament are roughly able to understand the Bill without looking at anything else. Perhaps I could summarise it this way. If you only want a *rough* idea of what a Bill does, the four corners doctrine gives it you in the Bill itself, whereas with textual amendment you also need (if there is no

Keeling Schedule) a textual memorandum. **But** to find *out precisely* what a Bill does under the four corners doctrine you have to conflate the Bill, the principal Act and the amending Acts. Under the textual amendment system you can usually obtain precision just from the textual memorandum (or Keeling Schedule), but if you want to consult the principal Act as well you can do so easily, since it will not have been amended otherwise than textually, and its integrity will therefore have been preserved. The textual memorandum in the example I have shown you sets out the provisions of the Housing Finance Act 1972 which were amended by the Bill, and includes parts of Schedules 3, 4 and 10. The explanation is in the preface on the inside of the front cover.

Q. In effect the textual memorandum serves the same purpose as a Keeling Schedule?

A. Yes, it does. There are two differences. One is you could not have a Keeling Schedule in this Bill without it being extremely lengthy, because of the wide scatter of amendments; the other thing, which is the more important, is that a Keeling Schedule remains in the Bill after it has become an Act, and clutters up the statute book; it is sometimes useful to have this in the statute book, but quite often it is not. In those cases it is better to have a separate document.

MR. MOSLEY: If a referential amendment is used, it means you must look at the principal Act as well?

LADY BACON: That is the point I had.

A. Could I distinguish between getting a rough idea of what the Bill is about and going deeply into the effect? If you want to do the latter you would have to look at the Act being amended. But if a Member of Parliament merely wants to see the basic effect of the Bill he gets it (under the four corners doctrine) from the text of the Bill itself. Take any Act of Parliament. I refer to the Housing Act 1961—I do not know whether the members have it, but perhaps I could at random find something. If you take section 6 of the Housing Act 1961, that is referentially amending section 8 of the Housing (Financial Provisions) Act 1958. It goes on in

brackets for about three-and-a-half lines to explain the effect of section 8, and after the brackets close you get the enacting provision that subsections (1) and (2) of section 8 should apply as they apply under the said Act of 1958, but as if . . .—and then with various modifications. If you read the words in brackets and the following words you get a rough idea of what the amendment does; whereas if it had been done textually you would not get any idea of what the effect of the amendment was without a textual memorandum or Keeling Schedule. I hope that makes it clear.

THE DUKE OF ATHOLL: With the Bill you also have a textual memorandum?

A. That is so; and in fact on this Bill you have three versions of it, the versions after the first labelled first revision and second revision.

Q. Is it not possible, instead of having a memorandum, which I suppose may not be very clear, to label them incorporating the amendments at committee stage?

A. That is done in the words in the middle of the front cover.

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CHAIRMAN: The second revision, which as I understand it was added for use by members of the House of Lords?

A. Yes.

Q. Because it refers to amendments proposed to be made by the Bill as amended by the House of Commons. Therefore it has already been through the Commons, and this would be making it clear what the effect of the amendments proposed in the Lords would be, is that right?

A. No, the Bill was not amended in the Lords, so that the second revision of this memorandum was the final version. It enables Members of the House of Lords to see, when they get the Bill as printed in that House and look at the second revision of the memorandum, what the effect of the Bill would be on the Housing Finance Act 1972.

SIR JOHN GIBSON: Could you tell us whether in this instance you found that the team, by which I mean counsel, departmental solicitors and others concerned in the preparation of the Bill, were able to accommodate reasonably easily the extra work imposed by having to prepare the textual memorandum in those three versions?

A. Yes, I in fact did it myself.

Q. There would be some extra work, and I think the committee would like to know whether this extra work can reasonably easily be accommodated?

A. Yes, there is a certain amount of extra work, which in this case I did myself for all the three versions. It did not take me very long, and it has got the extremely valuable effect that the draftsman is forced to see exactly what he is doing. He ought to prepare the text of the main Act, as it will be after his amendments, and in doing so one always finds, and I think Sir John will probably agree, the points one has overlooked, and one improves them. On top of that, everybody on the team found it an immense help to have a document which shows what is being done; so although it is a small Bill, I admit that, on balance I think the memorandum did not add to anybody's work and produced a better Bill. There was extra printing of course.

SIR BASIL ENGHOLM: I do not want to underrate the importance of the question of textual amendment, but I got the impression you were claiming rather much for it; in fact you said it would be a sort of panacea. Various things may be claimed for textual amendment, but it does nothing to clarify a principal Act. If the principal Act is full of detail, any amount of textual amendment will not help to make the Act less detailed. Then again you have to consider the style of drafting, and improving drafting techniques. Is it not asking rather a lot of us to believe that if you go over to textual amendment, then by 1984 everything will be perfect?

A. I am currently engaged in drafting, and I do not intend to play down the importance of what Sir Basil has in mind, namely to improve techniques of drafting so as to simplify the

expression of the law. I am really looking, as I think the committee is looking, for some fairly dramatic improvement, and I know textual amendment would provide that, and that within 10 years the statute book would be very much better than it would be in 10 years if you did not have textual amendment. I am not saying drafting style cannot be improved; but I honestly believe the draftsmen in this country, both

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English and Scottish, try their very best to turn out a high quality product.

For better or worse they are the draftsmen we have got—and you cannot in a short space of time get a troop of archangels who can draft very much better. I do not believe the technique of draftsmen is very defective; they have so many handicaps, and one of the biggest is the state of the statute book. When I draft, and probably everybody else, I cannot do what I ought to be able to do—that is, scientifically examine the statute book to see precisely where changes are required, what the effect of what I am doing is going to be over here and over there. I am sure Sir John knows what I am talking about. We have not got the tools and equipment which enable us to do the sort of job an architect does in extending a house, because we are in the dark owing to the inadequacy of the statute book. If we could remedy this I think the drafting standard itself would go up.

Q. Whatever you may say about the standard of drafting, you still have the difficulties of detail and all the things that can complicate legislation— the approach to legislation, the way in which one is looking at the framework, how much detail is being put in, how much provision you are making to cover contingencies. All this sort of thing is far from drafting; it is the approach to legislation as such, and this makes it, whatever you do about textual amendment, still a complicated business.

A. Indeed, I would not dissent from that at all. Nobody is going to draft a simple income tax law in this country, or a simple Companies Act, because the subject is not simple.

MR. JUSTICE COOKE: You are giving us your observations to the effect that there is considerable scope for the use of the textual amendment system now. That is correct, is it?

A. Yes.

Q. The other thing I wanted to ask about was consolidation, Mr. Bennion, you of course were vice-chairman of a committee of the Statute Law Society which produced a report which we have all read called *Statute Law, the key to clarity.* You have a copy of that, I see, and are no doubt very familiar with its contents. Would you please look at paragraph 16 on page 5 where at the beginning you say: “This being the existing situation, we consider it of great importance that, in so far as this is feasible, a programme should as soon as possible be formulated of large-scale consolidation over a measurable period of years”. Then rather more than halfway down the page you refer to one of the difficulties being the shortage of draftsmen, and you say: “Our correspondence with the Law Commission on this head is with their permission reproduced in Appendix B to this Report.” When one looks at Appendix B on page 21, one sees a letter from the Statute Law Society to Sir Leslie Scarman dated 15 October 1969; and in that letter about halfway down you say this: " While the carrying out of a consolidation programme may be difficult, there seems no great difficulty about drawing up a programme and seeing what it involves. We suggest that this could be done within a period of 12 months or so, and we would like to suggest the aim should be to complete it by the end of 1970. The actual programme of consolidation might, of course, take a period of something like 20 years, but the important thing is to make a start.” What I

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wanted to ask you was this: is 20 years still your estimate of the period which would be required to put into effect a programme of that kind?

A. I think if the programme is to include the measures listed in paragraphs (a) to (d) of that letter,[14] and is vigorously pursued with adequate finance, that it could be done in 20 years.

CHAIRMAN: Without increasing the number of draftsmen?

A. Certainly not. If you look at the letter, it says the scheme implies the following, and then you have a list beginning with (a) a list of titles of future consolidating Acts; and under (c) an indication of the manpower requirements and other resources required, together with suggestions as to how those might be met; for example, recruitment and training of draftsmen. It would not be difficult to estimate on the assumption that you are drawing up a full scale programme with all that involves.

CHAIRMAN: What it primarily involves is more skilled draftsmen?

A. Yes.

MR. JUSTICE COOKE: In your evidence today you have mentioned obstacles to consolidation, and referred to the need for more skilled draftsmen, and also the need for more departmental resources. I wanted to ask you if those were the only obstacles to consolidation? May I make it easier by putting this? Very frequently you find that before a branch of law can be taken, separated out and consolidated, it needs amendment. Would you agree with that?

A. Yes.

Q. That of course would be a delaying factor in the programme of consolidation?

A. Yes.

Q. Another delaying factor which I will put to you arises out of an experience which you have described to us in your evidence this afternoon. You said about the consolidation of the Housing Acts—on which I understand on good authority you have made splendid progress—that the whole thing had to be postponed because of a departmental programme; that is right, is it not?

A. The reason I was given for the postponement was not the mere existence of another Bill making alterations in the law of housing, but the fact that the preparation of that Bill took away people whose time would otherwise have been available for the consolidation.

Q. Does it not frequently happen that a departmental programme for one reason or another holds up a consolidation?

A. For one reason or another, yes.

Q. And that is a fairly common thing, is it not?

A. I think it is a fairly common experience.

CHAIRMAN: Are there any more questions on textual amendment?

MR. FINLAY: Paragraph 24 of your written evidence suggests that there should be a new standing order as follows: "A Bill amending any enactment shall do so by directly altering its text, unless this is impracticable." Would it be feasible to contemplate such an order without any reference to impracticability, so that it read: "A Bill amending any

enactment to which this order applies shall do so by directly altering the text"; and then to provide that the order applied to any enactment not amended otherwise than in the manner permitted by the order—which would limit its scope of course to clean Acts? This would not give the order such wide application as it might have if you attempted to bring in the concept of impracticability? Would an order limited in that way produce anything like the kind of effect in a decade that you spoke of?

[14] *Statute Law: the key to clarity*, p. 21.

A. Obviously it would depend on how the word “impracticable” was interpreted and applied in practice. Yes, I think it would produce much the same effect as the other. But it has greater precision. I do contemplate there would be occasions when the standing order suggested by Mr. Finlay would have to be suspended, because there might well be cases where an Act is being amended that has not been previously amended, but it is still very difficult to do it textually.

Q. So even in the case of a clean Act, one that had never been amended at all, it might be necessary to amend it otherwise than by textual amendment?

A. I cannot envisage an example, but I would not rule out the possibility, because there may be separate individual Acts each independently standing, and what you want to achieve not being possible by textual amendment in each of them; and also the possibility of an emergency, because sometimes you have to pass Bills quickly, they have to be passed in one day.

MR. FINLAY: Might I ask one other question, not related to the last. The form of the textual memorandum on the Furnished Lettings (Rent Allowances) Bill 1972 is that it sets out the two Acts which were being amended, and then in the preface explains that the text of these two Acts is set out in the document. It is set out so that additions and substitutions are indicated in heavy type, and repeals with or without substitutions are indicated by the repealed words being printed with a line drawn through them. Would it be right to say that any textual memorandum explaining the amendments proposed by a Bill which used the textual memorandum method would be a textual memorandum in this form, and no other kind of explanation would be required?

CHAIRMAN: As to the text anyway; there might be as to the substance.

MR. FINLAY: But so far as the text is concerned the memorandum would always be in this form? Is that going too far?

A. No; I could suggest two variations in the **form, if I may.**

CHAIRMAN: Are they set out in your paper?

A. No, not really. First, if it is a big Bill, I think the textual memorandum would have to indicate which provisions of the Bill make which changes, so that one could find an amendment one was interested in. That is not done here because it is a short Bill. The other point is that where the textual amendment takes the form of adding a whole new section, I do not think that needs to be set out again in a textual memorandum. An example occurred in the Centre Point amendment to the Local Government Bill, which I think perhaps has been circulated to the committee.[15] What I wanted to show the committee is this. There is a single clause moved into the

Local Government Bill, it was actually added to the Bill last night toy the House of Commons, and it added two sections to the principal Act, which is the Rating Act of 1967. This is interesting because you see you can add two sections by one clause; whereas the other way, the referential way, you have two clauses; so there is immediately a saving on parliamentary debating time—instead of having two clauses you have one. The other point is that no kind of textual memorandum is given for this, it is self-explanatory. So where you are adding a whole new section you do not need the textual memorandum, or very often you do not, because it can be made self-explanatory. The other point I wanted to make is that, if you look at the new section 17B, right at the end, subsection (9), that is a commencement provision which on the system of referential amendment would be in the amending Bill; and therefore you could not, as you can with this, be content with just looking at the principal Act as amended by this one as the whole story. It would greatly simplify the law if that procedure

15 See Appendix A (not reproduced).

were followed all through. I do not know whether there is time, but I would like to make a point on the question of drafting. This was to deal with office blocks remaining empty. The instructions were that there was to be a penal surcharge on the rates unless the owner had tried his best to let the building. It seemed to me that was a perfectly good simple phrase, so I put it in. That is subsection (2) *(a) of* the new section 17A. It says "where *(a)* the owner has tried his best to let the building. . . ." The meaning of that is given in subsection (5), which gives the factors to be taken into account in deciding whether the owner has tried his best to let the building. I did that in an attempt to use an everyday phrase; it seemed to me to do what was required. But it did not meet with much success in the House of Commons, and I thought the committee might be interested to see what the House of Commons said about it. The report is in today's Hansard.[16] That is the reward of the draftsman who tries to use simple language.

SIR JOHN GIBSON: There are occasions when the draftsman cannot win.

CHAIRMAN: I could have hazarded a guess that "did his best" would have been regarded as probably much too colloquial.

A. I wanted to get in the idea of trying.

SIR PATRICK MACRORY: You did say early on that there would be occasions when textual amendment would not be possible. If one had to choose between a fixed rule for referential amendment or textual amendment what would you say?

A. I must say if it had to be one or the other I would choose the former, because it would be far too constricting to say you must always have textual amendments. It would not work.

CHAIRMAN: It would not work, you must have a principal Act and an amendment.

SIR PATRICK MACRORY: What is the reason for the shortage of draftsmen?

A. This work is just not appealing to many people. One has to have the sort of bug which unfortunately I seem to have contracted, because I find it fascinating.

CHAIRMAN: It does seem to be a bug which infects those who embark on

this particular kind of activity. It is very rare for people, even if they leave the parliamentary draftsmen's office, not to become deeply interested in the work, captivated by it; and therefore it would seem to be a question of spreading it around that this really is not only well paid and secure as a form of employment in our profession, but terribly important and very interesting. It surprises me that, although it is one of the most important jobs in the profession, there have been so few people who have even attempted it. Why do you think there have been so few?

A. I think the reason basically is that in the universities statute law has always been regarded as a vulgar subject, not worthy of academic treatment. It was not regarded as having the interest attaching to common law doctrines. That has led to its not being taken seriously in the universities, which after all provide the formative basis for young men who might later enter the parliamentary counsel office. It is astonishing there is no university in the United Kingdom with a chair in legislation. Legislation is a vitally important subject. Every bit of our law is formed that way, it is done in the form of Acts of Parliament. The way they are drafted, interpreted, their interaction with each other, the principles behind it, the comparative studies of this subject by reference to other countries, and in particular of course the EEC countries which raise very pressing problems, have been entirely neglected. Legislation has been the Cinderella of the universities as well as of the Government and government departments. This is why I have argued the case for setting up a special body.

[16] See Appendix B.

SIR NOEL HUTTON: I wanted to remind you of what you said in the Heap Report in 1970,[17] and I suppose you, unlike other witnesses from the Statute Law Society, actually read this publication before putting your name to it.

A. It expresses the views of a large committee, much larger than this.

Q. May I come to the interesting question of the Furnished Lettings (Rent Allowances) Bill, which you attached to your memorandum, and ask you a couple of questions about it. If you look at the text of the Bill you could not get any idea at all what the Bill is doing?

A. No.

Q. You are not supposed to be able to get anything from this. You have to go to the title, and that tells you what this Bill is really trying to do. It is perfectly intelligible and there is no need to look any further. Do you have any difficulty, has the Chief Clerk of Public Bills any great difficulty in seeing if the provisions of the Bill are always within the title of the Bill? Do you have to speak to the Chief Clerk of Public Bills in such a case; do you give him a memorandum, or do you leave him to work out for himself the amendments covered by the title?

A. I did discuss the matter with the Chief Clerk of Public Bills. It was an unusual departure, and the Clerk advised me on the best way of publishing the memorandum. I do not think he expressed any difficulty about the question whether the Bill was within the title. The memorandum should be some help in that.

SIR NOEL HUTTON: The very first amendment, to section 18 (3) *(b)* of the Housing Finance Act of 1972, is obviously not covered by the title. I have

no doubt the answer is that when you have got your motions you can find out.

CHAIRMAN: If I may interrupt: I want to understand what Sir Noel is getting at. As I understand it, the first amendment in the first Schedule is a mere paving amendment, it is mere drafting, and it is not the sort of thing one would expect to find referred to, although it may be indirectly covered by it, either in the long title or the explanatory memorandum.

A. Could I explain, Mr. Chairman. This amendment has no operative effect at all. It is mere statute law revision. The Act deals with rebates, from rent of dwellings, and section 18 (3) *(b)* mentions the case where there is no rent. How you can have a rebate from a non-existent rent one does not know. We took the opportunity to remove those words because they had no effect, and that was clear to the Clerk. It was allowed despite the long title because it had no operational effect and it made no difference; it was a bit of tidying up.

SIR NOEL HUTTON: I have stumbled on an interesting point. I was really asking that to pave the way for my next question. On a Bill of this kind, is it really possible for a private member to get his amendments in order?

A. I have dealt with that in my memorandum.[18] Perhaps I can say briefly that no difficulty was experienced in this. As a general answer, if there is a reasonable indulgence by the Chair, as I think there is increasingly, to enable a member to raise the point of substance he wishes to make, I do not think there is a serious problem. But members would welcome advice on drafting amendments of that kind, perhaps given by the Statute Law Commission I propose.

CHAIRMAN: I think we must now go over to that theme. Perhaps you could outline your views on that, and we will then question you.

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[17] *Statute Law Deficiencies.*

[18] Paras. 37-40.

A. In my submission, this committee cannot review the form in which public Bills are drafted without also reviewing the form of the statute book. Bills are intended to amend the statute book and, except on the question of textual versus referential amendment, the form in which Bills are drafted is largely dictated by the form of the statute book. To improve the form of Bills with a view to—in your actual terms of reference— "achieving greater simplicity and clarity in statute law" it is essential to improve the form of the statute book, including the form in which it is published, and the means available of using it. This committee, therefore, in my submission, has power to consider and make recommendations on ways of improving the statute book, including the setting up, as suggested in Part 6 of my written evidence, of a special body for that purpose which, for convenience, I call a Statute Law Commission.

Perhaps I could refer the committee to paragraph 55 of my written evidence. Before going on to that I would like to make it clear why this is the Second part of my solution to the problems we face. The first is to have clean Acts amended in a way which keeps them clean. The second part is, put shortly, to hurry up the process of getting clean Acts, and into the situation where you have what could be called a consolidated, classified, systematic statute book, as various committees going back to 1835 have

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asked for. I say in paragraph 55 that the history and present state of the statute book irresistibly points to one conclusion: "It is that the problem of obscure statute law will not be solved until a body is established whose primary function is to keep under continuous review the state of our statute book." And I suggest that body should be, as it were, the keeper of the statute book. I am absolutely convinced after 20 years' personal experience in this matter, that the key to a permanent solution of the problem of complex statute law is to set up a body whose function it is to look after the statute book, to keep it under continuous review; and I have given to you, Mr. Chairman, a suggested list of functions for such a body.[19] It is really a further working out of the proposals in Part 6 of my paper. What I have done is set out various functions, most of which I think it is essential that somebody should be carrying out if we are to solve the problem of the statute book. May I outline that to you, Mr. Chairman?

. Q. That might take some time, but I would have thought you could single out one or two, or at the most three of these functions as being the really essential ones.

A. Unfortunately I regard almost all as essential.

Q. Here is one: "Keep the statute book under continuous review from the technical aspect." That covers some of the others. Then you have:

"Devise and carry out a scheme for reducing the statute book to an orderly collection of enactments in up-to-date form arranged by subjects." That also covers some of the others. Then thirdly: "Secure the drafting and enactment of Consolidation and Statute Law Revision Bills". Do those three points not sum up all?

A. I think if I could have a little indulgence, this is so important that I would welcome a few minutes to put it to the committee. The first of the functions is to enable Bills to be shortened, simplified and made more consistent by various ways, such as devising ways of eliminating overlapping, conflicting or divergent provisions, and harmonising drafting practices; scrutinising Bills in draft and after introduction to Parliament preparing model clauses and standard definitions. Then I suggest rationalisation of the rules relating to interpretation and the drafting of a new Interpretation Act. Another suggestion is to promote the application of computers to statute law. Here I would like to say that Mr. Leitch, who has recently retired as Chief Parliamentary Draftsman, Northern Ireland, wrote a very valuable article on computers and statute law.

CHAIRMAN: Which we have got.

[19] See Appendix C.

A. But I might make a short quotation from that, because he says, on the question of computers, "There is as yet no clear allocation of responsibility within the Government machine and, if any real progress is to be made, it is essential that some person in authority should have a continuous and controlling grasp of the whole subject-matter of the application of computers."[20] That, I think, is an important function of any body such as a Statute Law Commission.

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Another one is the carrying out of comparative studies of drafting techniques and so on.

Then, in square brackets, there are suggestions upon the scope of the Commission in relation to local and private Acts and statutory instruments. I think it is important to realise there is other work, besides public Bills. Then the Parliamentary function: provide a legislative drafting service to Members of both Houses of Parliament; carry out liaison with officials of both Houses of Parliament; operate a training course for draftsmen of statutes and statutory instruments.

There are some possibly questionable proposals at the end: helping the statute user; carrying out continuing research into the needs of statute law users, by methods including consultation with professional bodies, universities and law publishers; providing an information service on general aspects of statute law to Members of both Houses of Parliament, civil servants, local authorities, professional practitioners; and acting as an Ombudsman regarding complaints about the form of statute law.

I contend that most of these things are essential activities if we are to have a proper statute book, and if we are to have clear law; and somebody ought to be doing them who is single-minded. The Law Commission have been charged with some of these functions by the Law Commissions Act 1965. If I may be allowed to be perfectly frank—I mean no offence, and I hope none will be taken—the Statute Law Committee was set up in 1868 with this sort of function, the broad function of looking after the statute book and modernising it, making sure it was in good shape. But what has happened? After over a century it is still in an appalling state, and the Statute Law Committee has proved a quite ineffective body; not surprisingly, because it is composed of highly eminent end busy people meeting only once a year. How any body like that with such a membership and meeting once a year can possibly superintend the statute book is a mystery. It is impossible, and was shown to be impossible by setting up the Law Commission in 1965 with functions of this kind. I believe the Law Commission has got quite enough for one body. I hope its chairman will forgive me, because it is not a personal thing at all, but the function of tidying up legal doctrine is an enormously important and difficult function in itself, and I think the Law Commission has been constituted more with that in mind. The people appointed as members of the Commission and the staff have been more experienced in that field than in the field of statute law—I except the present chairman obviously. But if one reads its annual reports and the way it deals with statute law—it reaches almost despairing conclusions. The work it has done has been done with the draftsmen who are merely on secondment from the Parliamentary Counsel Office; they are not themselves committed to this work. They are there for two years, and nobody in those conditions can evolve a continuing policy to superintend the statute book. The Parliamentary Counsel Office itself cannot do it, because the Parliamentary Counsel Office always has the prime concern of getting the Government programme through, and no government is going to tolerate for a moment any hold-ups in its programme which can possibly be avoided. That is the preoccupation of the parliamentary counsel. I think we have therefore an overwhelming need for a new body to be set up with the right sort of people,

[20] W. A. Leitch, "A Canadian Contrast on 'Computers and Law'," *N.I. Legal Quarterly,* September 1969,p.286.

who will be hard to find: real experts, particularly in drafting, because drafting is the key to the problem. They should have the permanent function of spreading the word in the universities, having liaison with the universities and with the law publishers, who have a great deal of expertise. We have this new edition called *Statutes in Force*. But I have misgivings about that. One of the great drawbacks about it—and I am not alone in thinking this by any means—is that it does not operate by issuing single pages which can be replaced with revised versions whenever there are amendments; but operates instead by having a booklet for each Act. You cannot replace the booklet without waste until the Act has been heavily amended all through. The result is that we are going to have in my opinion, and those of many other people, a product inferior to the third edition of *Statutes Revised*. That involves writing in amendments by hand, sticking bits of paper all over the place. It is very untidy but has got the advantage, which I make use of every day, that one can have a set of statutes fully annotated, and one can be sure that one has the whole story, subject to the problems of referential amendments—but at any rate one has the whole story. However, with the *Statutes in Force* that is not going to be so, and many people are going to be worried about that. Again, it has been launched without consultation or working in with the law publishers. Cooperation with law publishers is an unheard-of thing here, but in the United States it has been done with great success. All these procedures of publishing Acts of Parliament are extremely expensive; and I put forward a scheme some years ago which I still believe to be the very best one could have, where the publication of the text of the Act on a loose leaf system is done officially, but arrangements are made to interleave that with editorial matter provided by the commercial law publishers. At its most sophisticated, this would enable interleaving by statutory instruments as well. The various kinds of material could be indicated by different coloured paper. Then one could order precisely the material one wants. A user who was interested in a very narrow spectrum, say customs duty on certain goods, could order all the serials related to that and nothing else, and he would automatically get the reprints. He would then have a completely comprehensive and completely up-to-date system for the law he was interested in. I know from my work on the Statute Law Society where the two leading law publishers were represented by their managing directors, they were very willing to co-operate in this way, and not just to make money. This kind of co-operation is something a Statute Law Commission could deal with.

The history of this matter goes back to the fifteenth or sixteenth centuries. Many people say you will never get to the bottom of it. Why on earth should we not have a statute book as good as those of the Canadians or Australians? Their system is marvellously good. The Canadians have a completely reissued set of statutes every 10 years, despite the double handicap that all their statutes have to be in French and English and that they have a federal system, so that there are federal statutes and provincial statutes. I really feel strongly it is time this country brought itself up-to-date in statute law. Far too much is at stake; there are far too many people who need this sort of provision.

It is sometimes asked whether it matters if the statute book is not in an orderly arrangement, because most people just want to look up one particular thing. I do not think this is true; there are many people who need to look at the law comprehensively to start with; and when a Bill comes amending an Act they need to have the Act in up-to-date form, in comprehensive form. The draftsman who has to amend the Act needs to have it in that form.

I have suggested that the major part of our statute book would ideally be arranged in 300 to 400 statutes, each with a convenient scope and title. This is meant to amount to what the 1835 Statute Law Commissioners referred to as Acts “framed as part of a system,” to which the Select Committee of 1875 added the proposition that it should involve a “proper classification of public statutes.” This was the system adopted in this country for colonies. It has been

retained, in much more sophisticated form, by all the independent countries which were formerly British colonies. So far as I know there are no exceptions.

Many people have felt no need to justify what seem to be the obvious merits of an orderly, systematic statute book arranged under titles. I would list the following advantages—

(i) The user knows where to look for the law he wants.[21]

(ii) The specialist practitioner has his law properly organised in one place in a semi-permanent form he can become familiar with.

(iii) The person who needs to obtain a grasp of a subject for some purpose finds his task made easier. This helps, e.g.

Members of Parliament, draftsmen and officials concerned with an amending Bill.

A business man moving into a new field (or his advisers).

A foreigner needing to know some aspect of British law.

A student studying a particular topic (who is often given the relevant Act for use in the examination room.)

(iv) Producers of textbooks and compilations such as *Halsbury's Statutes* are able to present an orderly account of the law.

(v) Order is always better than chaos.

This ridiculous system we have is self-defeating, because the draftsman cannot even begin to produce clean law. He is operating in a frightful muddle.

CHAIRMAN: I think you have made your point very clearly about the need for a new type of body which you call a "keeper of the statute book," or alternatively a "Statute Law Commission"; and I think .members would now like to question you about these things.

MR. STEWART: At the end of paragraph 69 of your memorandum, you say you do not presume to speak for Scotland. Are you envisaging that there would be a separate Statute Law Commission for Scotland?

A. I would certainly think so.

Q. Who would consolidate United Kingdom Acts?

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A. There is a Law Commission for Scotland; I would think you could usefully have a parallel Statute Law Commission; but I am reluctant to make any pronouncement about Scotland. '

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Q. I take it you would envisage United Kingdom statutes would be consolidated by the English Statute Law Commission?

A. I suppose they would be, yes.

Q. And the Scottish Commission would deal with purely Scottish statutes?

A. Ideally I have thought for a long time that Scotland should have its own statute book, in the sense that instead of having Acts with Scottish adaptations, a Scottish practitioner ought to have a Scottish version. I know this is an expensive idea, but I do not see any reason for the fact that Scottish lawyers should have an inadequate set of textbooks simply because it is not worth anybody's while publishing on the scale they do in England, and a much more difficult

[21] As any constant user *of Halsbury's Statutes* knows, when using the title one picks the right volume 9 times out of 10, without any preliminary reference to an index.

statute book. I would very much like to see Scottish lawyers provided with a set of Scottish statutes; and I do not think, again with textual amendment, they would be all that difficult to produce. It might be an expense, but I do not think it would be difficult in any other way.

CHAIRMAN: Scottish law is so much clearer than English law that there is much less need for explanation by textbook.

MR. STEWART: Might I follow this into the field of the current Consumer Credit Bill? You said a moment ago that you would like to see a set of Scottish statutes? Were you aware it was recommended the legislation proposed should be confined to England and Wales, but should have Scottish counterparts?

A. Yes.

MR. STEWART: **To** your knowledge were Parliamentary Counsel consulted about the form of the Bill, as to whether it should be a single United Kingdom Bill or an England and Wales Bill, and what was recommended?

A. My recollection is the instructions simply said it was a United Kingdom Bill.

MR. STEWART: That is to say, no Minister or administrator ever came to the Parliamentary Counsel Office to get advice on this question whether the Bill was to refer to the whole of the United Kingdom or just England and Wales?

A. They were advised by the Scottish draftsmen who had been working on the Bill.

Q. I am talking about what happened before you ever got departmental instructions; there was no approach to your office to say whether or not the Crowther recommendations should or should not be accepted?

; A. I am not aware of it.

Q. You knew you were embarking upon the drafting of a Bill which would apply to the whole of the United Kingdom upon a highly technical subject which the departmental committee concerned specifically recommended should be dealt with in a separate Act for Scotland?

. A. Yes.

• Q. Did you regard it as of any importance that the provisions which you

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were drafting should be able to be fitted into the existing framework of the Scottish law?

A. Yes.

Q. I am interested to find out what steps you took to see that that would happen. Did you consult your Scottish draftsman counterpart in the Lord Advocate's department before deciding on the form of the provisions?

A. The practice is to send the first draft of the provisions, not necessarily the whole Bill, to the Scottish draftsmen and to supply them with all subsequent drafts and correspondence, and they make known their views.

Q. On the form the Bill should take, did you have a consultation before starting to draft?
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A. No, the consultation takes place usually when there is something to show the Scottish draftsman; any views he expresses are taken carefully into account. To give an illustration, we frequently use terms in this Bill relating to consumer credit—in a consumer credit agreement there is the “debtor” and the “creditor,” and in a consumer hire agreement the “owner” and the “hirer.” I thought if I used the term “bailee” for hirer it would be much more satisfactory; but the Scottish draftsman pointed out that “bailee” is not a term used in Scottish law, so I

immediately suggested we did not use the word “bailee” but we should use the word “hirer.” That is the kind of thing which happens.

CHAIRMAN: I think, Mr. Stewart, if you look at clause 1 (6) of the Bill, you will see quite clearly there has been a deliberate attempt to meet points relating to Scottish law.

MR. STEWART: Yes, but if I could follow this point of “bailee” and “hirer”; if you look, Mr. Bennion, at clause 2 (2) *(a) of* the Bill you will see it provides it is the duty of the Commissioner, so far as it appears to be practicable, to keep under review social and commercial practices in the United Kingdom and elsewhere relating to the provision of credit or bailment or (in Scotland) hiring of goods to individuals and related activities. That is the sort of thing where Scotland should be taken into account.

A. Yes.

MR. STEWART: I do not know the technical meaning of bailment, but is it right it involves something more than hiring goods?

CHAIRMAN: With great respect, Mr. Stewart, I wonder whether this is the best use of our time. We are not having a committee stage on this Bill. You have made your point in principle by asking the question about consultation with regard to Scotland. There are other members of the committee who would like to ask questions; and I wonder if we could leave it where it is.

MR. STEWART: If you please. I should say there are a large number of points which could be taken on the Bill.

CHAIRMAN: That reinforces my interruption at that stage. I really do not think you can go on.

MR. MOSLEY: On Mr. Bennion's proposal for a Statute Law Commission, what worries me is that it is so difficult to start something new, and I wonder why you cannot get to it by the Law Commission. You have given reasons for not doing it that way; but have you entirely rejected the possibility of, say, doubling the size of the Law Commission, and

appointing another Chief Law Commissioner of equal standing to Mr. Justice Cooke who would take, over these functions? It does seem to me there would be very much overlap in the work, and that liaison between the two and an expanded office might deal better with the problems.

CHAIRMAN: Before you answer that question, might I add a supplementary one? Would you tell us what kind of people the three Commissioners would be? Would they be civil servants or judges, would they be people taken from the legal profession? Who would they be? And do you contemplate there would be a Minister responsible?

A. I do contemplate there would be a Minister responsible. I have said in my memorandum that I do not think it proper for me to embark on the question of the machinery of government. Certainly there should be a Minister responsible. With regard to the sort of people, that is an extremely difficult problem initially. I think it would be very important to make sure the first Commissioners had got administrative experience as well as experience with regard to statute law. I think there is a problem here. It is no good setting up a body like this and putting people in charge of it who have no experience whatever of the difficulty of launching any new kind of organisation, because there are administrative problems. It might be necessary to go abroad for some of them. I say that because other countries in the Commonwealth have great experience of the sort of system many of us would want to see here. Somebody from the United States might be possible; I do not know. Certainly the chief Commissioner at least should have had lengthy experience of legislative drafting in common law countries. Also, he must have drive and vision, and be totally committed to the aims of the Commission. Returning to Mr. Mosley's question about whether you need a new body; I fully accept it would be useful to have this body in the same building as the Law Commission, sharing a

library and so on. But I think there are valuable gains in having a separate body; because, for one thing, the Law Commission is a reform body. That was in the very first words of the Law Commissions Act in 1965; it was set up for the purpose of the reform of the law. I do not see the Statute Law Commission's function as basically a question of the reform of the law. There is a great deal of reform to do initially, but the keeper of the statute book has a continuing function, not of reforming the law or even in relation to the law as such, but in relation to the technical aspects of the statute book. So because it is a job that has baffled everybody for centuries, and is a very peculiar operation, I think it would be better to start afresh, and recruit people with the necessary ability and experience.

MR. MOSLEY: Could the Law Commission or your proposed Statute Law Commission carry out a measure of consolidation at some very late stage of the legislative process? When a Bill has gone through both Houses, the keeper of the statute book might then step in and in consultation with the parliamentary draftsmen who had drafted the measure might decide to chop out certain provisions from an Act, add a new title and generally do the job of keeper of the statute book. It could then be laid on the table of the House. Do you see this being a function of the keeper of the Statutes, and how would it work in terms of parliamentary procedure?

A. I do not think it would be necessary to deal with it in that way. I think

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the Statute Law Commission would keep an eye on Bills from their earliest inception. Indeed it would be preferable if they could be consulted well before the Bill is introduced. From their vantage point of having the whole statute book under their eyes they could then make suggestions to the draftsmen at an early stage which, given the proper relationship between the two bodies and the co-operation which I am sure you will have, would lead to the Bill, even when introduced, being in a form which satisfies the needs of the statute book.

MR. MOSLEY: Would that always be so? We have had evidence that a Minister often wants the order of clauses in a certain way for convenience in Parliament, and that is not necessarily the same order which would be chosen by the user of the statute book.

CHAIRMAN: Or a logical way.

A. Sometimes you have very long clauses to avoid too many debates on clauses, and they can be split up at such a late stage. I think there might be scope for that kind of thing.

MR. JUSTICE COOKE: You said many people were critical of the principles on which the *Statutes in Force* were being arranged and published. You also said that many people compare the new publication unfavourably with *Statutes Revised,* which is the old publication?

A. Yes.

Q. It is a fact, is it not, that the use of *Statutes Revised,* the older publication, among the practising legal profession is absolutely minimal?

A. I would not dissent from that. I have no knowledge, no idea how much. I know that for some years complete editions of *Statutes Revised* have not been available from the Stationery Office.

Q. Have you any knowledge of the circulation of the new publication?

A. No.

Q. Would it surprise you to know that in many quarters *Statutes in Force* has received a favourable reception among those professionally concerned with the law?

A. I really do not know what reception it might receive. My comments were made on the point of its presenting an up-to-date version of the law for the user; and certainly it is not going to do that.

Q. Your comment is based on the fact that there has been a good deal of criticism of the publication?

A. I have heard people who use it make this particular point; it is a very serious point to anybody who relies on it the way draftsmen do.

Q. Will you accept that it has in many quarters had a favourable reception?

A. Of course, I accept that.

Q. You are of course aware that parliamentary counsel since the inception have been represented on the editorial board of *Statutes in Forced*

A. Yes.

Q. You spoke just now of the statutory duties of the Law Commission, and you said they were primarily law reform. You would agree, I assume, that in the Law Commission Act one of these statutory duties of the Law Commission is that of keeping statute law under review?

A. Section 3(1).

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Q. Do I take it what you are saying is this: that when Parliament in passing that Act attempted to link law reform with the keeping under review of the statute law, Parliament was making an error?

A. That I accept. The Law Commission is concerned with law reform, and in section 3 (1) it is basically the duty of the Commission to take and keep under review all the law with a view to its systematic development and reform; and I made the point that there was a need in the field of statute law for a body not merely concerned with reform but concerned with the day to day running of the statute book. That is more than a reforming function.

Q. You do not regard the achievement of greater clarity and simplicity in our statute law as a measure of law reform?

A. It is a measure of law reform; reform is required, but something more than reform is needed. Might I make an observation on the way in which the Law Commission have carried out their statutory duty? Under section 3 (1) *(d)* they are required to prepare from time to time, at the request of the Minister, comprehensive programmes of consolidation. When the Lord Chancellor asked initially for them to prepare a "comprehensive programme" of consolidation, they did not do it.[22] The Statute Law Society urged the Law Commission to carry out their statutory duty, but got nowhere.[23] When the request for a second consolidation programme was made the word "comprehensive" was dropped.[24]

Q. The Law Commission in England has in fact prepared two programmes of consolidation, has it not?

A. Yes.

Q. Have you read them?

A. Yes.

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[22] The Law Commission, First Programme on Consolidation and Statute Law Revision. Note, para. 1.
[23] Statute Law: the key to clarity, pp. 20-28.
[24] The Law Commission, Second Programme on Consolidation and Statute Law Revision, Note, para. 1.

Q. Have you read in the second programme of consolidation the introduction which indicates the difficulties which are in the way of consolidation?

A. Yes.

Q. Do you agree with what the Law Commission said?

A. It is a factual report, and they say that in their first five years they have succeeded in completing only two out of the seven major topics.

Q. You have seen the reasons given?

A. I think one of the reasons given was the fact that they had only four draftsmen originally who were all on secondment, and they do not have the necessary manpower to get this job done. Perhaps I might make this clear; when they were asked to prepare a comprehensive programme of consolidation they did not do it; and this word "comprehensive" is highly significant. Indeed the correspondence the Law Commission has had with the Statute Law Society shows no determination to tackle the statute book in the way it needs to be tackled. I do not criticise the Law Commission for that; I think they were insufficiently equipped to do it. I think only a body set up for that purpose could do it.

CHAIRMAN: Lack of resources does not indicate a lack of determination.

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A. It indicates a lack of determination if you do nothing about increasing your drafting resources in eight years, and do not put the necessary pressures on. I do not want to be criticising the Law Commission; I am saying the job needs a body with no other function but looking after the statute book, because it is of paramount importance.

MR. MOSLEY: You referred to Mr. Leitch's article on the use of computers? I wonder if you could let us have your views on that?

A. I support entirely what Mr. Leitch says in his article. In conclusion I would like to make it clear my proposal for the statute book is not contrary to the idea of the ***Statutes in Force***. I am not wanting to scrap that edition at all. It should be printed on loose pages, with reprinted pages issued whenever a page was amended. It would be more efficient if each group in the edition, or each subsection were in consolidated form; and that is something the Statute Law Society advocated from the beginning. But I hope no member of the committee will think that there is anything in the idea of a fully systematic statute book which is contrary to ***Statutes in Force***, or requires it to be scrapped.

CHAIRMAN: We have had the benefit of your fresh, challenging and fearlessly explained point of view. Not all of us would agree with everything you have said, but I am sure all members of the committee would agree they are grateful to you for your candour, for the time you have given to the study of the subject. We have been very interested by what you have had to say. Thank you very much for coming.