

Introductory note by Francis Bennion

This article is followed by a letter from Alec Samuels in response, and a letter from me in rejoinder. (Doc. No.1981.004)

Legislative Technique

Bringing Acts into Force: The Computer Dimension

Francis Bennion

Two recent reports highlight the dissatisfaction felt by the profession over the present official arrangements governing the commencement of Acts of Parliament. The first, by a working party of the Statute Law Society, was published in the inaugural issue of the *Statute Law Review* ([1980] Stat LR 40). The second, which begins by expressly commending the Statute Law Society report, was produced by the Law Society's Law Reform Committee last December.

The main cause of dissatisfaction is the user's difficulty in finding out which provisions of an Act are in force. A second complaint concerns the period between the time when a statutory provision becomes operative and the time when its text becomes available to the profession. The reports contain useful discussions of the complex detail involved, and put forward modest proposals for improvement. One of these has already been acted on officially. The Civil Service Department have recently issued new guidance to Departments which adopts the principle of a Statute Law Society recommendation. This was that second and subsequent commencement orders relating to an Act should include a note listing the provisions of the Act brought into force by previous orders.

The purpose of this article is to examine, in more depth than was attempted by these two reports, the conceptual factors underlying the problem. It is submitted that the key to a solution lies in the continuously updated text, considered in the light of growing availability of computer-assisted facilities. To this must be applied a criterion mentioned by David Andrews, Chairman of the National Law Library Limited, in the current issue of *Computers and Law*:

'I believe that the new technology, if it is to be exploited to the full, will involve some fundamental reappraisal of and changes to *traditional published formats...*' (emphasis added).

In the area we are discussing, traditional published formats are totally unsystematic. The Law Society report describes in detail a recent example, the Local Government, Planning and Land Act 1980. This contains 197 sections and 34 Schedules, and is divided into 19 Parts. Many of its provisions came into force with the signifying of Royal Assent on November 13, 1980, but copies of the Act were not obtainable until four weeks later. The report says of it:

'The statute user is given little assistance in the search he must make through the Act for commencement provisions. First he will want to know whether there are any general commencement provisions gathered at the end of the Act, as recommended in the [Statute Law Society Report]. On looking through Part XIX (Miscellaneous and Supplementary), he will find that there are none. The statute user must therefore search through the Act for specific commencement provisions.'

The report goes on to say that this search is rendered difficult by the fact that sidenotes and headings rarely give any indication of the location of commencement provisions. When these

are run to earth (and in this Act they are numerous), they usually provide for the making of commencement orders by a Minister. The search then begins for these orders. Here we have a familiar example of two endemic vices of our statute law, namely Anonymity and Scatter.

Textual Analysis

To understand what can be done we must embark on a textual analysis. The basic components in their most simplified form are the following:

1. The substantive provisions of an Act ('Act A').
2. The commencement provisions of Act A (giving power to make commencement orders).
3. The transitional provisions of Act A (dealing with transitional matters concerned with commencement).

To this basic model must be added a complication. Many Acts are later amended by other Acts. It is to be hoped this will be done textually, so that one substantive text as amended can be printed as a whole. Subject to this possibility, the amending Acts ('Act B', 'Act C', etc) will each consist of the three elements mentioned above (namely substantive provisions, commencement provisions and transitional provisions). The substantive provisions of Act B may supplement, substitute or repeal substantive provisions of Act A, and similarly with Act C. The user therefore has serious problems of text-collation and conflation.

Here we must stress the significant factor. Under our present system, *the various provisions stand alone*. In Act A the substantive provisions are separate from the commencement provisions, and both are separate from the transitional provisions. The same applies to Act B and Act C. It is true that if textual amendment is used (and it is not always used) the substantive provisions of Acts A, B and C can be printed in combined form, but this does not apply to their commencement and transitional provisions. If there are numerous amending Acts (as there often are), and some or all of the Acts in question have numerous commencement and transitional provisions (as they often do) the number of separate texts becomes formidable.

We complete the textual analysis with the statement that, whereas under traditional published formats there may be a large number of separate texts relative to Act A as amended, *conceptually there need only be two*. One is the substantive text of Act A (as for the time being textually amended). The other is a text combining the commencement and transitional provisions of Acts A, B and C. In other words a substantive text has two aspects. One is its own wording, viewed as a component of the statute book. The other is its chronology, or the dates on which in successive versions it becomes or ceases to be operative. At both ends, the chronology embraces transitional provisions needed to enable each version to come into effect, or cease to be operative, smoothly.

Jamaica Schedule

This two-text concept gives us the clue. Instead of traditional published formats, each item of legislation should be designed, as it very easily could be, so as to consist of two texts only, updated as required. These would respectively comprise the substantive provisions and the historical provisions, the latter being set out in a Schedule of the type known (for reasons we have not space to go into now) as a Jamaica Schedule. The device works in this way.

Act A, when originally passed contains a Schedule which will operate as a historical file (the Jamaica Schedule). Paragraph 1 states a date as being the commencement date for every provision of the Act *not* specified in any subsequent paragraph of the Schedule ('the master commencement date'). Subsequent paragraphs deal seriatim with substantive provisions of the Act for which the master commencement date is not to apply, or for which transitional provisions are required (setting them out). Here is a brief example of such a paragraph, taken from Schedule 3 to the Consumer Credit Act 1974. It concerns provisions of the Act enabling

a consumer to request that information be given him concerning any file on him kept by a credit reference agency.

‘48. Sections 157 and 158 do not apply to a request received before the day appointed for the purposes of this paragraph.’

So much for the Jamaica Schedule as included in Act A when originally passed. The essential feature of the device is that the Schedule *must* be textually amended whenever a relevant change takes place. Section 192(2) of the Consumer Credit Act 1974 requires any commencement order under the Act to include a provision amending Schedule 3 so as to insert an express reference to the day appointed. As a result of this, para 48 now reads as follows:—

‘48 Sections 157 and 158 do not apply to a request received before May 16, 1977.’

The user with an updated text has no need to hunt out commencement orders. The whole story is in the Act itself. Moreover the Act does not lay down crude ‘commencement dates’. Schedule 3 spells out exactly what is the effect when each provision becomes operative. This feature is a notable advance, greatly easing the task of the user.

The same updating technique must be used by amending Acts. Thus Act B would amend the substantive provisions of Act A textually, and then go on to make corresponding textual amendments to the Jamaica Schedule contained in Act A. These would specify the commencement dates of the substantive amendments (or provide for commencement orders) and lay down any transitional provisions. Act C would do the same, and so it would go on. With a fully updated text of Act A the user concerned with commencement or transition would never need to refer to Acts B or C, or to any commencement order. The whole history would be set out in the updated Jamaica Schedule.

It will be seen that, *provided the text of the updated Jamaica Schedule is quickly available*, this method is far superior to that advocated in the two recent reports, namely an explanatory note attached to the latest commencement order. The Jamaica Schedule is part of the Act itself. It does not need to be hunted out, it is fully comprehensive, and it has the force of law. Moreover its arrangement exactly follows the arrangement of the Act. So a person who wishes to know whether, say, s 157 is in force, and if so whether there are any transitional provisions, simply follows the numerical order and looks up the passage in the Jamaica Schedule dealing with that section.

In 1972 the concept of the Jamaica Schedule was proposed to the Law Commission by the late Lord Stow Hill on behalf of the Statute Law Society. While acknowledging that the idea had its uses, the Law Commission did not then pursue it. With conventional publishing methods the value of the Jamaica Schedule is limited by the time-lag between any amendment of the Schedule and the availability of a reprinted version. *There is no such time-lag for subscribers to a computer service such as Lexis*. It is to be hoped therefore that the authorities responsible for our statute law will now think again.

It will not be very long before the time arrives when instantly updated statutory material is available as a matter of course to all members of the profession. For years after that time the profession will be forced to grapple with a statute book framed according to traditional published formats. When the way forward is so clearly indicated can we not prepare for it now?

The following letter commenting on the above article appeared in the New Law Journal published on 14 May 1981.

Bringing Acts into Force

Dear Madam,

With reference to Francis Bennion's article (1981) 131 NLJ 356, as I understand it, the Government has agreed that commencement order no 2 will refer to commencement order no's so that the statute user can trace the complete history of commencement, but has not agreed to provide in commencement order no 2 a cumulative statement of commencement. Certainly the user needs an up-to-date cumulative statement, either in the latest commencement order or in a schedule in the principal Act itself. Textual amendment of the principal Act itself so as to include the commencement date when in force has advantages, but as time passes, and everybody knows that the whole of the Act is force, and has been for a long time, the flutter of commencement dates written into every section would become rather unpleasing and unnecessary. The computer ought to be able to solve the problem without difficulty. A different type face could be used for statutes in force as opposed to those not in force. The press of a button could tell me instantly when a section was brought into force. A press of a button could give me the complete commencement statement for the statute at a glance.

Yours faithfully,

ALEC SAMUELS

Southampton University

FB responded to this letter (Document 1981.004) in the New Law Journal published on 28 May 1981.

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Website: www.francisbennion.com
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Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website.

The Jamaica Schedule

Dear Madam,

I am most grateful to Alec Samuels for his comments (May 14) on my article of April 2. The passages in which I advocated use of the Jamaica Schedule were closely-reasoned, and perhaps not easy to follow. Since I am anxious there should be no misunderstanding of a proposal that would be of great utility to statute users, I will try to answer Mr Samuels's points as briefly as is possible in a letter.

Mr Samuels says that while textual amendment of the principal Act so as to insert commencement dates has advantages, 'The clutter of commencement dates written into every section would become rather unpleasing and unnecessary'. So it would, but that was no part of my proposal. The Jamaica Schedule forms an entirely separate historical file, updated as necessary by textual amendment. It leaves the sections of the Act uncluttered, and need be referred to only where necessary.

The advantages of the Jamaica Schedule are as follows.

1. All the commencement dates of an Act (including commencement dates of any amendments to the Act) are in one place separate from the substantive provisions.
2. All the transitional provisions (of the Act and amendments) are in one place, namely the same place as the commencement provisions.
3. Where any sections of the Act are repealed, the repeal dates can also be inserted by textual amendment into the Jamaica Schedule.
4. The commencement, transitional and repeal provisions are always up-to-date. They are part of the Act, so they are authoritative and one does not have to search elsewhere for them.

5. The Jamaica Schedule goes into detail, and can be more illuminating than a simple commencement date.

The last point is important to those who desire clarity. Merely to say that a provision comes into force on a certain date does not always make clear exactly what activities are governed by it. Litigation may then be necessary. There are many examples of this in the reports. Here is just one. Section 1 of the Defective Premises Act 1972 came into force on 1 January 1974. It imposes certain obligations on 'a person taking on work for or in connection with the provision of a dwelling'. In *Alexander v Mercouris* [1979] 3 All ER 305 the Court of Appeal was called on to decide whether these obligations applied where a building contract was made before the commencement date but the work was not completed until after it. With a Jamaica Schedule, the litigation would have been unnecessary. The Schedule would have said: 'Section 1 applies to work taken on after December 31, 1973'.

Mr Samuels discusses the computer aspect. He seems to think that here the Jamaica Schedule has no advantage over a cumulative statement in the latest commencement order. This overlooks the following factors:

1. Such a statement is not authoritative. It is expressed not to form part of the order.
2. It is not complete, because it does not include parts of the Act not brought into force by order. Nor does it include transitional or repeal provisions.
3. It needs to be asked for. Mr Samuels talks of 'the touch of a button', but as computer users will confirm the operation is not that easy. The updated Jamaica Schedule is part of the Act and can be accessed by bringing up the Act.
4. Searching for and inspecting cumulative statements takes more on-line computer time and is therefore more expensive. Operational cost is a vital factor delaying the availability of computer search and retrieval facilities to the ordinary practitioner.

I hope I have said enough to show that the Jamaica Schedule offers concrete advantages to the profession. If it were not so I would not waste people's time proposing it.

Yours faithfully,

FRANCIS BENNION

Hove