The Legislative Implementation of Law Reform Proposals

by Francis Bennion

Introductory Note by Francis Bennion This relates to a Law Commission Colloquium held on 14 May 1986. After the initial headings it gives the text of comments I made as part of the Colloquium under the following heads:

Composition of the Law Commission
Lawyers' law
Codification
Statute law reform
Criminal attempts
Twenty-one years of the Law Commission

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LAW COMMISSION - QMC COLLOQUIUM

Law Reform: Can We Do Better?

Draper's Hall - May 14, 1986

Title: The Legislative Implementation of Law Reform Proposals

Additional Comments: Francis Bennion

Chairman: Professor Graham Zellick

I mainly want to talk about the form in which law reform proposals are couched. Before I start on that, I would just say a word about a different but related matter - the composition of the Law Commission.

Composition of the Law Commission

This has been a matter of interest to me since I was concerned in the drafting of the Law Commission Act of 1965. The late Sir Noel Hutton was the draftsman of that Bill, and I was his Assistant. I pulled some strings to get that position because I was very interested in the project. I recall, and I hope I may be allowed to say this after 21 years, that there was some departmental in-fighting about the proposal to set up the Law Commission. I must not go into any detail about that, but my recollection is that the Lord Chancellor's Department were unconvinced of the need for a separate law reform body and were very anxious to retain control. If you read the terms of the Act you can see that they did retain control in the appointment of the Chairman and other Commissioners, and in the right to approve or disapprove the programme of work undertaken by the Commission.

Another device for securing control was the temporary nature of the appointments. The Chairman is on secondment from the High Court. It is a great honour to have a judge of the High Court as the Chairman, and a very important aid to the success of the Commission, but it

means that the Chairman is merely on secondment for a period of five to six years before returning, as has been the pattern, to the promoted rank of Lord Justice of Appeal. The four other Commissioners are also, in practice, on secondment - usually from a university. The post of Commissioner is confined by the 1965 Act to persons who have had experience as teachers in a university - no polytechnics allowed - or as barristers or solicitors, or in judicial office. So that is a rather narrow range to draw from. It excludes, as I say, polytechnics. It also for example excludes magistrates, civil servants, local government officials and company lawyers.

The draftsmen used by the Law Commission are also mostly on secondment. Usually they are drawn from the Parliamentary Counsel Office. I believe there have been some retired Parliamentary Counsel working for the Commission on a part-time basis. But the basic drafting strength consists of Parliamentary Counsel staff, usually on a two-year secondment. The Commission has a Secretary, who is also on secondment. It does not possess a powerful Chief Executive as most effective bodies nowadays need to have.

I thought you might be interested in some figures about the composition of the Law Commission during its first twenty years, taken from the Annual Reports. There have been five Chairman, whose terms of office averaged about five years. There have been fifteen Commissioners, averaging between six and seven years, and six Secretaries, averaging three years. Usually there have been four Parliamentary Counsel on full-time secondment, with perhaps some other drafting help. Currently there are about twenty other lawyers on the staff in addition.

That is the picture, distorted slightly by the fact that the first Chairman, Lord Scarman, served for eight years and the second Secretary, Mr. Cartwright-Sharp, served for ten years. Mr. Marsh, who is with us today, served for thirteen years as a Commissioner, and thereby upsets the average somewhat!

There we see the pattern of going in and coming out on a short term basis. All people of very high ability and experience, but not able really to identify with the Commission for more than a short period in their careers.

So one has to look to the permanent legal staff as the core of the operation. Here there was a big change in 1984, when out of the five senior posts of Assistant Solicitor four were abolished by the Lord Chancellor as an economy measure. On that Walter Merricks, a member of the Royal Commission on Legal Services, wrote in the *New Law Journal* (May 18, 1984):-

> "The aim is now to have only a small permanent core of civil servants and to recruit a number of outsiders. This means that the work of law reform for the Law Commission will no longer be regarded as offering a possible life-time career. In Civil Service terms, the deletion of senior posts will be seen as a down-grading of the whole operation. It will also signal a move by the Lord Chancellor's Department to use the Commission more for its own short term purpose rather than allowing the Commissioners the independence to select items within a broad and longer term law reform programme."

In my submission the effectiveness of the Law Commission would be strengthened if it could be seen to a greater degree to offer within itself a permanent career ladder for able lawyers.

Lawyers' law

The main topic I want to raise concerns the form in which law reform measures are expressed. We have had quite a lot of discussion today about what *is* a law reform measure. The Irish people are about to be asked in a referendum whether they want to amend the Constitution to allow legislation permitting divorce. Now is that law reform? In one sense it is law reform, but it is of fundamental policy importance.

From one point of view, any Act of Parliament is a law reform measure. The theory of interpretation is that an Act of Parliament or provision in an Act is there to cure a mischief. A social mischief, the mischief on the ground, as I call it - or, which usually but not always corresponds, a legal mischief in the sense of the law not being as it should - not providing for the social mischief in question.

On that definition, every Act of Parliament is a law reform measure. When we talk about "lawyers' law" - the Solicitor General, I thought, put it very helpfully this morning when speaking of "lawyers' amendments" - we are talking about something which shades off and has no clear-cut identity but nevertheless represents a genuine concept.

"Lawyers' amendments" are amendments to the law which a lawyer might suggest in order to make the law work more efficiently. They do not affect the policy of the law; it is a matter of efficiency not policy. Now the ultimate in that direction is the Bill or measure which makes no difference whatsoever to the policy content of the law, such as a straight consolidation. A straight consolidation is a collecting together of Acts of Parliament into one Act without any amendment. It is the ultimate in "lawyers' law" reform - unspectacular but very useful.

Codification

Another example in that category is codification. We have heard a lot today about codification. I consider codification, like consolidation, to be in essence a reproduction of the existing law and nothing more. Of course, in many cases the law will be found to be doubtful and then the codification must resolve the doubt. It should do so, I submit, in a way which is a genuine attempt to state what is most probably the existing law. It is a *lawyer's* answer to the doubt: he is not injecting his own view of policy but trying to assess and reproduce what a court would decide.

The great advantage of producing measures of this kind by way of law reform is that there is no policy content. Members of Parliament who consider the Bill will have no justification for altering the policy of the law and making substantial amendments. If they can be told by the draftsman - as, for example, the Consolidation Committee, a Joint Committee of both Houses of Parliament which examines Consolidation Bills, is usually told - that there is no change in the law, then there can be a special procedure for taking the Bill out of Government time - always very scarce - and allowing it to go through in an expedited manner.

So I would like to suggest to the Law Commission, and to others such as Professor Smith's very useful working party on criminal law codification, that in this field of codification they should eschew alterations of policy and substance. Instead they should produce codes which are a straight enactment of the existing law: the common law coupled with relevant enactments.

If the Law Commission could do that they might be able to remedy their disastrous record on codification. It is the statutory duty of the Law Commission to codify the law. In their first programme, they announced their intention to codify the law of contract, the law of landlord and tenant, family law and the law of evidence. What happened?

Nothing more has been heard about codification of the law of evidence. Codification of family law was quietly abandoned around 1970. Though much work was done on the Contract Code, as we heard this morning, the demise of that project was reported to Parliament by the Lord Chancellor in 1973 (HL Deb Vol 344, cols 624-5). Great efforts were made with landlord and tenant law, but in 1978 this project, too, was adandoned. The Commission remarked on that: "It is now clear to us that the task of preparing a complete code of the basic law of landlord and tenant is immense and cannot be completed..." (LAW COM No. 92, para 2.34). That leaves extant only the project to codify the criminal law.

What has caused this failure? It is, I suggest partly a problem of resources and partly a problem of technique in the way the codification is attempted.

It is very significant and unfortunate that the Law Commission has never embarked upon a serious examination of the techniques of codification that should be employed. Yet there are doubtful areas. There is the area which concerns the question of including *reforms*, which I have dealt with. There is the question whether a code should be *comprehensive*, or confined to specific areas of the chosen field of law. There are the questions of how much *detail* the code should contain, what techniques should be used to *enact* it, and what techniques should be used to *amend* it - as will be required from time to time.

It is understandable that the Law Commission, when it was first set up and enthusiastically announcing that ambitious first programme, should not have wanted to spend time and resources on a preliminary investigation of this kind. They wanted to get on quickly and reform the law. But look at the result. The law did not get reformed by the method Parliament had laid down, namely codification.

I am not saying this in any censorious way. The Law Commission have done a magnificient job, and those who have worked with it and for it are to be congratulated. But, probably because of the exiguousness of their resources, the Commission have neglected a vital area of law reform - improving the way in which the law is presented to the user.

Statute law reform

Statute law remains a Cinderella subject. I have failed in my attempts as a member of the Law Faculty at Oxford University to persuade my colleagues to introduce any sort of course in statute law. I have had other similar failures elsewhere.

Yet when you look at the indications of the importance of this subject, they cannot really be denied. The present Lord Chancellor has pointed out that nine out of ten cases on appeal concern statutory interpretation. Butterworths, the publishers of the Annual Review of the *All England Law Reports*, have just completed the 1985 volume. It contains articles by academic lawyers on twenty-five topics dealt with in the *All England Law Reports* for 1985. I have got from Butterworths the total number of 1985 cases discussed in the articles on each of these twenty- five subjects. I will not weary you with many of the figures, but I think that some of them are interesting. Statute law had the most cases: 72 cases in the *All England Law Reports* for 1985 concern statute law. The next number is Tort with 35, Criminal Law and Procedure - 34, Practice and Procedure - 26, Commercial Law - 24, Contract - 23, and so it goes down. That is an indication of the importance of statute law in litigation.

Criminal attempts

Another failure by the Law Commission concerns the Criminal Attempts Act 1981. The lengthy commentary by the Law Commission on their draft Bill was described by the Commission as "a powerful analysis of the problems that have been caused by the common law of attempt". But what happened in the Bill itself? The whole matter was put into one clause. All the difficulties that were so ably and extensively discussed in the commentary were left undealt with in what was destined to be the new Act.

As soon as that Report was published, I wrote an article that appeared in the *New Law Journal*, regretting this treatment of the subject (130 NLJ (1980) 725). I said: "There will be just as much doubt and ambiguity and problems over the law of attempt in the future as there have been in the past". Professor Glanville Williams, who wrote an article in reply to mine, agreed with this, although he disagreed with some of my other conclusions in the article.

And then we got the case of *Anderton v Ryan* [1985] AC 560. You may remember that was the case where a woman bought a video recorder at a very low price mistakenly thinking it had been stolen. She was charged with attempted handling, but because the recorder had not really been stolen, it was held by the House of Lords to be impossible to attempt to handle it. Now Professor Glanville Williams has just produced an article in the *Cambridge Law Journal* ([1986] CLJ 33) where he really does use some extreme language about the House of Lords decision in *Anderton v Ryan*:

> "... the tale I have to tell is unflattering of the higher judiciary. It is an account of how the judges invented a rule based upon conceptual misunderstanding; of their determination to use the English language so strangely that they spoke what by normal criteria would be termed untruths; of their invincible ignorance of the mess they had made of the law ..."

And yet the true cause, in my view, was that the Criminal Attempts Act did not spell out in sufficient detail what was to be the new law, and left open the possibility of that kind of confusion.*

So oppressed have I been over the years by this lack of any organ of our judicial or legal system which would tackle these problems adequately that I advocated to the Renton Committee twelve years ago that there should be a parallel commission set up, the Statute Law Commission, which would do these things and of whose work the Law Commission could make use.

I gave oral evidence to the Renton Committee and was cross- examined by the then Chairman of the Law Commission, Sam Cook, in a very hostile way - he had at one time been a formidable cross- examiner. The Renton Committee rejected my suggestion that there should be a Statute Law Commission. It was unnecessary they thought. (The evidence is reproduced in *Renton and the Need for Reform* (Sweet & Maxwell, 1979).)

I am afraid that I have to say that events in the ensuing twelve years have cast doubt on that conclusion. I hope, and on this point I will end my remarks, that the Law Commission, in its next twenty-one years, will find itself able to take on some examination of the techniques of legislation. Perhaps too they will be able to build up their own core of draftsmen. They may be able to increase their permanent high-level lawyers, replacing those abolished posts and strengthening their role in the second twenty-one years of their existence.

Twenty-one Years of the Law Commission

Composition of the Commission

The Law Commission consists of a Chairman and four other Commissioners, appointed by the Lord Chancellor (Law Commissions Act 1965, s 1(1)). They must be experienced-

> (a) by the holding of judicial office, or
>
> (b) as barristers or solicitors, or
>
> (c) as teachers of law in a university (Ib s 1(2)).

This excludes experience as polytechnic teachers, civil servants, magistrates, and company lawyers, among others.

The following information is taken from the first 20 Annual Reports, concluding with the report for 1984-1985. It shows that there have been 5 Chairmen (average 5 years), 15 Commissioners (average between 6 and 7 years), and 6 Secretaries (average 3 years). Throughout the period there have usually been four Parliamentary Counsel seconded for two years. Currently there are about 20 other lawyers on the staff. Increasing use is being made of staff seconded from universities.

In 1984 the Lord Chancellor abolished four of the five senior legal posts. In the New Law Journal (May 18 1984) Walter Merricks, who was a member of the Royal Commission on Legal Services, commented-

> "The aim is now to have only a small permanent core of civil servants and to recruit a number of outsiders ... This means that the work of law reform for the Law

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* After this talk was delivered the House of Lords reversed *Anderton v Ryan* in *R v Shivpuri*, *The Times* May 16, 1986.

> Commission will no longer be regarded as offering a possible lifetime career ... in civil service terms the deletion of senior posts will be seen as a downgrading of the whole operation. It may also signal a move by the LCD to use the Commission more for its own short term purposes rather than allowing the Commissioners the independence to select items within a broad and longer term law reform programme."

Chairmen of the Commission

> Scarman J 1965-1973 (8 years)
> Cooke J 1973-1978 (died) (5 years)
> Kerr J 1978-1981 (3 years)
> Ralph Gibson J 1981-1985 (4 years)
> Beldam J 1985-

Other members of the Commission

> Trevor Alldridge 1984-
> Claud Bicknell 1970-1976 (6 years)
> Stephen M Cretney 1978-1983 (5 years)
> Brian Davenport 1981-
> Aubrey L Diamond 1971-1977 (6 years)
> Stephen Edell 1976-1983 (7 years)
> Julian Farrand 1984-
> WAB Forbes 1977-1981 (died) (4 years)
> LCB Gower 1965-1971 (6 years)
> Derek Hodgson 1971-1977 (6 years)
> Brenda Hoggett 1984-
> Neil Lawson 1965-1971 (6 years)
> NS Marsh 1965-1978 (13 years)
> Andrew Martin 1965-1970 (5 years)
> Peter M North 1976-1984 (8 years)

Secretaries of the Commission

> Hume Boggis-Rolfe 1965-1968 (3 years)
> J M Cartwright-Sharp 1968-1978 (10 years)
> JCR Fieldsend 1978-1980 (2 years)
> BMF O'Brien 1980-1981 (1 year)
> RH Streeten 1981-1982 (1 years)
> JGH Gasson 1982-

Functions of the Commission

The commission is required to submit to the Lord Chancellor programmes for law reform. If he approves a proposal, the Commission must proceed with it, but not otherwise (Ib s 3(1)).

Statute Law

The Law Commission's functions in relation to statute law are-

> "... *in particular* the codification of [the] law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and generally the simplification and modernisation of the law..." (Ib s 3(1)).

Codification

The Law Commission has been under a statutory duty to codify the law since it was set up 21 years ago-

> "It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic

> development and reform, including in particular the codification of such law ...": Law Commissions Act 1965, s. 3(1).

Lord Gardiner, who as Lord Chancellor was responsible for setting up the Law Commission, expressed his conviction of the need for a programme of virtually total codification: *Law Reform NOW* (Gollancz, 1963) p. 11.

The Law Commission has embarked upon a number of codification projects, but apart from that concerning criminal law all have been abandoned without any product.

In its first programme the Commission announced its intention to begin by codifying the law of contract, the law of *landlord and tenant*, *family law* and the law of *evidence* (First Programme of the Law Commission (LAW COM No. 1, 1965), p 3). Later the Commission added the production of a *criminal code* to the list (The Law Commission: Second Programme of Law Reform (LAW COM No. 14, 1968), p 6).

Nothing more has been heard about codification of the law of *evidence*.

Codification of *family law* was quietly abandoned around 1970.

Though much work was done on the *contract* code, the demise of that project was reported to Parliament by the Lord Chancellor on 9 July 1973 (H.L. Deb. Vol. 344, cols. 624-625).

Great efforts were made with *landlord and tenant* law, but in 1978 this project too was abandoned, the Commission remarking: "It is now clear to us that the task of preparing a complete code of the basic law of landlord and tenant is immense and cannot be completed for a long time unless resources are devoted to it on a scale which is at present impossible" (The Law Commission: Thirteenth Annual Report 1977-1978 (LAW COM No. 92), para. 2.34).

The project to codify *criminal law* was announced in 1968 (The Law Commission: Second Programme of Law Reform (LAW COM No. 14), p 6). Commenting that important parts of it "are complex and obscure, its terminology confusing and its provisions often out of accord with modern conditions", the Law Commission embarked on a comprehensive examination of this area of law with a view to its codification (Ibid). The practical work of this programme was to be shared between the Law Commission and the Home Secretary's Criminal Law Revision Committee.

In 1980 the Law Commission reported that-

> "We have for some time been conscious that our limited resources have prevented us from making progress on the general principles of liability in criminal law commensurate with the work which we and the Criminal Law Revision Committee have been doing in relation to the reform and restatement in statutory form of the most important statutory offences. Yet systematic and sustained work in this field is clearly necessary if the eventual goal of codification is to be attained."

(The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.4.)

Being evidently unable to discharge its statutory duty itself, the Law Commission asked in 1980 for the aid of the Society of Public Teachers of Law, which agreed to its request (The Law Commission: Eighteenth Annual Report 1982-1983 (LAW COM No. 131), para 2.26. The Commission earlier indicated that the initiative had come from the S.P.T.L. (The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.4), and that version of events is maintained in the 1985 Report (The Law Commission: Codification of the Criminal Law (LAW COM. No. 143; H.C. 270) page 5). A group of four leading academic lawyers headed by Professor J. C. Smith took on the task (The Law Commission: Sixteenth Annual Report 1980-1981 (LAW COM No 113), para 1.6. The other three were Edward Griew, Ian Dennis and Peter Glazebrook, the last of whom withdrew in 1984 (The Law Commission: Codification of the Criminal Law (LAW COM. No. 143; H.C. 270) page 5).

This calls to mind Lord Reid's criticism of ad hoc law reform committees, which he vainly hoped would be rectified by the setting up of the Law Commission-

> " ... you cannot expect good results from an *ad hoc* committee which has no adequate staff, which meets only occasionally in the evenings, and members of which cannot attend every meeting. It really will not do at this time of day to remit complicated issues to bodies of that kind."
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> (H.L. Deb. Vol. 271 (9 December 1965) col. 437.)

Why techniques of Statute Law matter

1. It gives rise to most litigation. In the All ER Annual Review for 1985 it had 72 entries. The next highest out of the 25 subjects were-

   Tort 35
   Criminal law and procedure 34
   Practice and Procedure 26
   Commercial law 24
   Contract 23

2. If the common law is inefficiently codified there can be a disastrous effect on the legal system.

   Example This is exemplified by the comments of Professor Glanville Williams on *Anderton v Ryan* [1985] AC 560. In this case D bought a videorecorder at a low price, mistakenly believing it to be stolen. Her conviction of attempted handling was quashed by the Lords on the ground that one cannot attempt a dishonest handling of an article that is not in fact stolen. They thus refused to apply s 1 of the Criminal Attempts Act 1981, which had been designed to secure a conviction in such cases. (See [1986] Cambridge LJ 33, at pp 33 and 43-44.)

3. The Law Commission have shown no interest in my proposals for statute law reform. (See Statute Law p 336, which lists 19 proposals.)

4. One proposal is for the setting up of a Statute Law Commission, which was suggested in my evidence to the Renton Committee in 1974 (see *Renton and the Need for Reform*[#], especially the questioning of Bennion by Cooke J starting with his last question at the foot of page 90).

5. Another proposal is for Composite Restatement (see chapter 27 of Statute Law). This "does half the work for you". I put it into effect in my 4-volume book *Consumer Credit Control*, published in 1976 (23 updating releases). I even paid to have a video made. It received ecstatic reviews, but the Law Commission have shown no interest.

References:

[#] See http://www.francisbennion.com/book/renton.htm.

http://www.francisbennion.com/1988/002.htm

None