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If It's Not Broke Don't Fix It

A Review of the New Zealand Law Commission's Proposals on the Format of Legislation

by Francis Bennion

In December 1993 the New Zealand Law Commission published proposals for improving the format of legislation in that country.[1] They are of general interest because the reasoning applies to legislation in all common law states. Moreover they raise issues that go much wider and deeper than the mere layout and appearance of statutes. I propose to discuss three of these issues: what the intended audience for legislation is, whether a purpose clause should be substituted for the long title, and whether informative notes should be added to the text. Before doing so I ought to point out that the Report entirely ignores the functional construction rule, under which the various components of an Act, some of which the Report seeks to recast, are accorded by the courts an interpretative significance varying according to their nature and function.{The importance of the rule is indicated by the fact that it takes up the whole of Part XV, running to 45 pages, in Bennion, Statutory Interpretation (2nd edn, 1992), referred to below as 'SI'.}

I. The intended audience

The report cites an opinion, obviously correct, that the person intending to design typography and layout must first know what is to be read, why it is to be read and who will read it.{Report, p. 2.}That the Commission think the audience for raw legislation includes the general public is suggested by the statement, in justification of improvements in its format, that it must be beneficial 'if the public can more easily determine the rules which govern their personal or business transactions'.{Ibid. By 'raw legislation' I mean legislation in the form in which it is enacted and officially published, without assistance of additional notes, typographical aids or summaries.}The Commission cite my own comment that it is strange that free societies should arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend.{Report p. 3.}

It is strange, but that does not mean it is remediable. It could be remedied only if we gave up the social idea of close regulation by statute, of which there is no prospect. I would say that, in New Zealand as elsewhere, current statutes are exclusively addressed to lawyers.{I use this term to include all professional persons, whether technically lawyers or not, who have the expertise needed safely to construe the legislative document within its overall context.} Whether we like it or not, law is an expertise. A lay person would not think they could do as well as a medical professional in assessing symptoms of illness, carrying out a diagnosis, performing a surgical operation, or issuing the prognosis. It is the same with law.

Indeed it can be dangerous for a non-lawyer lacking skilled advice to think he or she understands a text comprised in the law and act upon that supposed understanding.{The only exception is the rare case where

[1] The Format of Legislation, NZLC R27, referred to below as 'Report'.

a part of an Act, such as a statutory notice, is intended to be read and understood by the public unaided.} It is not a question of taking trouble. The Consumer Credit Act 1974 is cited approvingly by the Commission.{Report p. 16. The reference is to Sch 2, which sets out many examples of how the Act is intended to work.}When drafting that Act I went to enormous trouble to make it as clear as possible, but it is still very complicated. This is because it had to deal with complex aspects of the law relating to finance, mercantile practices and real and personal property.

What is clear to a skilled lawyer cannot always to be clear to a lay person. Indeed if the document were intended specifically for lawyers it would be inappropriate, and in many cases impossible, to word it as if a lay audience were also included. Too much would need explaining.{Attempting to do this is one of the defects of Martin Cutts' 'Clearer Timeshare Act', so ably exposed by Euan Sutherland in [1993] 14 Stat. LR 163.} This operates the other way round too. As the Association of First Division Civil Servants told the 1993 Hansard Society Commission on the Legislative Process, and the Commission accepted, 'What appears clear to the layman may not be certain in meaning to the courts; and much of the detail in legislation, which can appear obfuscatory, is there to make the effect of the provisions certain and resistant to legal challenge'.{Cited in paragraph 219 of the report of the Commission.}
There are other causes of legislative complication. An obvious one is that a Bill has to run the gauntlet of parliamentary debate and amendment in both Houses. This imposes specific requirements on the drafter.{For the nature of these see Bennion, Statute Law (3rd edn 1990), referred to below as 'SL', pp. 28-40. For a detailed examination of the vices that block comprehension of legislative texts see SL, chapters 14-19.} The drafter could usually produce a much better text were he or she free to start all over again after the enactment process is finished and rejig the Act. It is for this reason that I have persistently advocated improving the presentation by post-enactment processing, without of course altering the basic wording.{See SL, chapter 23.}

What of the legislator who, like most, is a non-lawyer? Am I really accepting that the wording of Bills and draft statutory instruments has to be beyond the understanding of their nominal creators? I am forced to go that far, even though it appears paradoxical: legislators must rely on explanations from the sponsors of the Bill.{Here we get into Pepper v. Hart territory, about which I wrote in an earlier article (see 'Hansard - Help or Hindrance?' [1993] 14 Stat. LR 149).} There is quite a long history about this aspect, too long to examine here. Until recently Bills were drafted according to the four corners doctrine, under which legislators were supposed to be able to understand the gist of a Bill without going beyond its four corners (that is without looking at any other document). Unfortunately this distorted the finished product, so a system of textual amendment was adopted instead. This requires accompanying explanations.{For the story see SL, pp. 32 and 228-229.}

What are the adverse consequences for the Report of its apparent desire to include non-lawyers? I will pick out just one. The Report devotes considerable attention to devising typographical changes in the format of Acts. These could actually do harm. But there would be no need for such changes if it were accepted that Acts are intended solely for lawyers.

Here are two examples. First, the Report recommends that where definitions are included in an Act the term defined, instead of being shown in inverted commas as at present, should be printed in bold type. The following illustration is given: 'In this Act ... news medium means a medium for the dissemination, to the public or a section of the public, of news, observations on news, or advertisements'. Second, the Report recommends that where in the body of an Act another Act is referred to its short title should be printed in italics. An objection to these changes is that a person lacking the printing resources to show words in bold type or italics will be unable to reproduce the exact wording of the Act. This may happen with a lawyer writing an opinion, or presenting a skeleton argument, or sending a letter to a journal. It may even happen where a member of the public has got hold of a legislative text and wishes to give an extract from it. The law has gone beyond conveying its meaning wholly in words and resorted to conveying part of its meaning by the use of typographical devices needing expensive equipment to reproduce them. This is objectionable

in principle.

A further objection to such typographical changes is that until the enormous body of existing legislation is entirely converted there will be two different format systems existing side by side, an obvious source of confusion. Lawyers do not need such tinkering, and will not benefit from it. It would be worth while only if there were something seriously wrong with the present system. There isn't. As the Americans say, if it ain't broke don't fix it.

I have spent some time on this aspect of the Report because I find it disturbing that the Commission has not faced up to the important question of the audience for raw legislation. The way recommendations on format are drawn up is bound to be affected by whether or not a lay audience is envisaged. The Report hints that it is, but does not make this clear. The hesitation is typical. There is, for understandable reasons, a reluctance by law reformers to admit the truth that a lay audience for raw legislation should not be envisaged, but that the public should be assisted in other ways. Until this truth is wholeheartedly accepted, necessary efforts to improve the lot of professionals (and thus indirectly of the public) will continue to be hamstrung.{For a fuller statement of the argument against treating lay persons as included in the audience for raw legislation see Bennion, 'The Readership of Legal Texts', Clarity 27, April 1993, p 18.}

II. Substitution of a Purpose Clause for the Long Title

The Report gives in its recommended new format the full text of an actual New Zealand Act, the Defamation Act 1992. It says of the long title-

> 'The long title has been omitted entirely on the basis that it no longer serves any useful function. Acts are invariably referred to not by their long title, but by their short title, and the remaining function of the long title appears to be to explain the general purpose of the Act.'{Report, p. 9.}

This is muddled. If the long title explains the general purpose of the Act it must serve some useful function. Lord Simon of Glaisdale said: 'In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity - it is the plainest of all guides to the general objectives of a statute.'{Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG[1975] AC 591 at 647.}

In the Westminster Parliament the long title continues to serve important procedural functions in connection with the passage of the Bill.{See SI, pp. 497-499. One of these functions, concerned with the ballot for private members' Bills, is referred to in the article by Euan Sutherland mentioned above (see p. 165).} If these functions are really no longer served by it in the New Zealand legislature, the utility of the long title can be looked at afresh. However the Commission treat this as if it were scarcely more than a question of layout. They say that principal Acts should include a purpose section as the first provision in the Act, and for an example they refer to section 1 of the rejigged Defamation Act 1992. However this merely reads 'The purpose of this Act is to amend the law relating to defamation and other malicious falsehoods'. That is not the purpose of the 1992 Act, but a jejune description of its effect.

There is a basic misunderstanding here. A purpose clause is not really a substitute for the long title. It is a substitute for the preamble.{As stated in SI, p. 501.}So the same objection can be levelled at the purpose clause as was long ago levelled by Lord Thring at the preamble: 'it is not as a general rule advisable to enunciate the principle of an Act in a preamble, as the opponents of the Act are sure to select it as a battleground instead of dividing on the actual provisions of the Act'.{Practical Legislation (1902), p. 93. The Commission seem to rejoice in this prospect: the purpose clause, they say, 'should facilitate parliamentary debate' (Report, p. 10).} There are other objections. Sir Anthony Stainton told the Renton Committee that 'in many cases the aims in the legislation cannot usefully or safely be summarized or condensed'. He added that a purpose clause might be 'no more than a manifesto ... which may obscure what

is otherwise precise, and exact. [Amendments to the Bill] may not merely falsify the accompanying proposition but may even make it impracticable to retain any broad proposition'. Another draftsman told the committee that 'the Act should in general explain itself'.{The Preparation of Legislation (Renton Report), Cmnd 6053 (1975), paragraph 11.7.}

III Notes to Sections

The Report makes certain recommendations regarding the inclusion in the raw legislation of notes to sections and other provisions.{Report, pp. 10-12.} Particularly welcome is the conclusion that notes about the administration of the Act should not be included (as they have been in recent New Zealand Acts) 'because they can soon become outdated and may be misleading'.{The Report refers for details to NZLC R17, paragraph 96.} As they point out, that information can be provided in a more up-to-date and convenient way in departmental publications.

However the Report does wish to see some notes included, for example giving the origin of provisions or internal and external cross-references to definition sections or the Interpretation Act. It has wider ambitions-

> 'The sample statute also features internal cross-references ... which refer the reader ... from defences and remedies to procedure, and vice versa. But the potential for notes is even greater. While the text of the act should certainly not be lost in a rash of textual aids, if a note is helpful there is no reason why it should not appear in an Act from its inception.'

But there is a reason. It will become more obvious if we continue with this recital of the Commission's views on notes to be included in the raw legislative text.

> 'Cross-references to other Acts, to cases, or to reports of law reform or other relevant bodies on which legislation is based ... might all be useful. And sometimes material from the explanatory notes which usually accompany Bills might usefully be included in notes to the Act.'

This presents a nightmarish scenario. What if the 'other Acts' are later amended? What if the 'cases' are overruled? How are explanatory notes prepared (as they mostly are) after the Bill has been introduced to be got into the text of the Bill without unduly prolonging debate? Suppose amendments to the notes are put down by MPs or they seek to insert additional notes? What if an MP claims that a note does not accurately reflect what is in the Bill?

The danger of lengthening the time needed for drafting and debate is obvious. Where is this time to come from? Where are the extra skilled drafters to be found? How will the extra cost be raised? How will law be made more simple when there are risks of discrepancy between what the text says and what the note says it says?

These are obvious questions, but there is something more fundamental at stake. The difference between the legislative text itself and any comments made on it in notes is one of kind. Only the former should constitute the law. Let the comments be added by other hands, in other ways. Then there is no risk of conflict within the body of the Act, and it is plain where law ends and comment begins.

Having said that, I ought in conclusion to address a very real problem. This is the tendency for Acts to be all cutting edge, incomprehensible without external explanations.{This drawback is particularly obvious in the draft Bill included in the English Law Commission's Legislating the Criminal Code: Offences against the Person and General Principles (November 1993), Cm 2370; LAW COM. No. 218, about which I wrote in 'The Law Commission's Criminal Law Bill: No Way to Draft a Code' [1994] 15 Stat. LR 108.} The drafter is aware of a problem which needs to be addressed by express words in the Bill. These words deal

with the problem, but no one reading them and unaware of the problem would fathom why they are there or how they are meant to work. I do think drafters need to tackle this difficulty, which gives rise to more criticism of legislation than perhaps any other. Despite the problems this involves in the press of drafting, I believe drafters need to spell out the reasons for such provisions. This should be done not in accompanying notes, but in the body of the provision itself.

I also strongly recommend the inclusion in every Act of a historical Schedule, to be updated whenever the Act is amended. This would include commencement and transitional provisions for the original Act and for each later amendment to it.{For details see SL, pp.327-328.}

[1994-004 "If it"s not broke don"t fix it: a review of the New Zealand Law Commission's proposals on the format of legislation", [1994] Stat LR 164.]