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Doc. No. 1972.002 The Statute Law Society, Sweet and Maxwell
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Statute Law:
A Radical Simplification

Second Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom

Published on behalf of the
Statute Law Society by
Sweet & Maxwell

Published in 1974
for the Statute Law Society
by Sweet & Maxwell Ltd.
11 New Fetter Lane, London
and printed in Great Britain
by The Eastern Press Limited
of London and Reading

SBN: 421 20610 1

AUSTRALIA
The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Agincourt, Ontario

INDIA
N. M, Tripathi Private Ltd.
Bombay

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI
Malayan Law Journal (Pte). Ltd.
Singapore

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

STATUTE LAW SOCIETY

is an association of statute users which aims, by methods such as encouraging research, promoting publications and meetings, making representations and liaison with appropriate bodies and individuals:

(i) to procure and further the making of improvements in the form and manner in which statutes and delegated legislation are expressed and published with a view to making the same more readily intelligible, and,

(ii) to further education of the public in the processes and scope of legislation of all kinds and at all stages and for this purpose to gather and disseminate information on legislative processes of all kinds.

The members of the Council are set out below:

The Rt. Hon. Lord Shawcross, Q.C. (*President)*
Dame Irene Ward, M.P. (*Vice-President)*
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R. A. K, Wright, Q.C.

Inquiries as to membership should be made to the Honorary Secretary,
2 Mitre Court Buildings, Temple, London, EC4Y 7BX

The following are the members of the Committee appointed by the Society to propose solutions to the deficiencies of the present statute law system.

H. H. Marshall, C.M.G. (*Chairman*)
Professor R. M. Goode
Mark Liftman, Q.C.
Dr. G. B. F. Niblett
Miss Katherine O'Donovan
J. E. Robins
B. S. Russell
Rt. Hon. Lord Shawcross, P.C, Q.C.
Professor G. S. A. Wheatcroft, J.P. (*since December 1973*)
A. G. Woods
R. A. K. Wright, Q.C.

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STATUTE LAW SOCIETY

Memorandum presented in October 1973 to the Committee on the Preparation of Legislation by the Committee appointed by the Statute Law Society to propose solutions to the deficiencies of the Statute Law system in the United Kingdom

PART 1

SUMMARY OF RECOMMENDATIONS

1. We consider that the reform of the substantive law of the United Kingdom which is being carried out by the Law Commissions and other statutory or administrative bodies can be made more effective and useful if it is accompanied by a reform of the methods of preparation, drafting, presentation, passing, publication and amendment of the statutes of the United Kingdom. It is for this reason that we offer the suggestions set out below.

2. Statutes are potentially, and should become, an integrated body of law. They should not continue to be "framed extemporaneously to answer particular exigencies as they occur " but should be framed " as parts of a system " (See Part III para. 20 and Part VI para. 78 below). The first step towards achieving this aim is for all concerned in statute-making to adopt this outlook.

3. The aim should be that all statute law on a subject should as far as possible " be found in one place," and to achieve that aim there should be one Act for each subject and one subject for each Act (and provision, where this is not possible, for an official system of cross-referencing).

4. A preliminary step towards this goal is the carrying out of an accelerated programme of consolidation whereby the statute law of the United Kingdom will ultimately be contained in a collection of principal Acts each relating to a single subject.

5. These principal Acts should then be published in a collection of volumes entitled " The Statute Law of the United Kingdom " or, if it is desired that England and Scotland should have separate statute books, " The Statute Law of England " and " The Statute Law of Scotland " respectively.

6. Each Act should be given a separate consecutive Chapter number in the collection. Whether the Acts should be arranged alphabetically or grouped under subject titles is a matter for consideration, but the alphabetical method is recommended.

7. Additions and amendments should be made by altering an existing Principal Act where possible and not by passing another separate Principal Act with its own title. A new Principal Act would, however, be permissible

where legislation is required in connection with a new or special subject not covered by existing legislation.

8. Titles of Bills should not in future be chosen at random, inconsistently or unsystematically but should be selected by a designated person or body charged with the responsibility for this task and according to prescribed rules.

9. Provided that amendments are carried out textually, titles of amending Bills may either:

(i) be related to the titles of their principal Acts; or

(ii) bear their own descriptive titles.

10. Any Act which carries out a referential amendment should be clearly entitled as an amending Act.

11. Titles or headings of consolidated or Principal Acts should in future also be selected by a designated person or body charged with the responsibility for this task and according to prescribed rules.

12. Revised Editions of the volumes of the " Statutes of the United Kingdom " should be produced periodically, as required, by the addition to the statutes of the " new Acts concerned with special subjects " and by the embodiment in the appropriate Principal Acts of the material contained in the Acts that have subsequently amended them.

13. Reprints of single Acts can be produced as required in between the appearances of Revised Editions.

14. The use of the textual amendment system referred to below will permit the Revised Editions or Reprints to be produced by administrative action and will avoid the necessity for the invocation of the Parliamentary process of repeal and consolidation.

15. An alternative to the periodic Revised Edition is the introduction of loose-leaf bindings for the " Statutes of the United Kingdom " and the use of a continual process of updating by the "booklet" system. This, however, has distinct disadvantages.

16. The textual method of drafting should be adopted for the making of additions and amendments to the Principal Acts.

17. The referential method of addition and amendment, that "most pernicious fetish," [1] is inefficient, inconclusive and the cause of much confusion, It creates unnecessary complications which call for the expenditure or waste of time, energy and expense (and often litigation) in their unravelling. All these can be minimised if the textual method is adopted. The referential method of drafting should in future not be used for additions or amendments to Principal Acts except for emergency occasions. It will however be necessary for the referential system to be continued as a temporary measure for unconsolidated Acts which are, for one reason or another, not susceptible to textual treatment, until they, in their turn, are consolidated in Principal Acts.

18. The needs of the legislator and of the user are at present to a certain extent conflicting but can be reconciled, incompletely by the use of the Keeling Schedule and the Explanatory Memorandum, or satisfactorily by the use of either:

[1] See para. 34 of Memorandum.

(i) The Textual Memorandum; or
(ii) the Canadian method of placing explanatory annotations opposite to each clause of the Bill; or
(iii) the suspension of Standing Orders of a House to enable the consideration of a number of amending Bills at the same time; or
(iv) a combination of all the above methods.

19. The needs of the user in relation to transitional and commencement provisions may be met by the employment of the Jamaica Schedule.

20. The subject of codification is outside the ambit of this Memorandum but codes could easily be integrated into our proposed system.

21. Where the commencement date of any Act or part of an Act is fixed by statutory instrument, such date and particulars of the instrument by which it is fixed should be published in the *London Gazette.*

22. An increase of drafting staff is required and recruitment could be assisted by the judicious employment of academics.

23. A regime of verbal and constructional simplicity or "Plain Words " should be introduced by and for legal draftsmen.

24. Consideration should be given to the introduction of some form of machinery for the examination or supervision of Bills during their passage through Parliament.

25. Facilities should be given for prior consultation with interested parties on the substance and form of Bills.

26. The use of computers in the statute-making process should be investigated.

• 27. Adjustments should be made to our system of legal drafting to bring it into accord with that of the European Economic Community.

28. The subject of statutes relating to or affecting Scotland should be considered by Scottish lawyers.

The reasons for our recommendations are set out below.

PART II

INTRODUCTORY

1. The Statute Law Society was formed in May 1968. It is an association of statute users whose aims and objects are set out in Appendix[2] to this Memorandum. The names of the present members of the Council of the Society are also set out in that Appendix.[2]

2. In the same year the Council of the Society appointed a Committee under the chairmanship of Mr. (now Sir) Desmond Heap " to examine the ways in which the official system of framing, enacting and publishing statute laws of the United Kingdom Parliament fail to meet the requirements of the user." The Committee's Report, entitled " Statute Law Deficiencies " (generally known as " The Heap Report "), was published

[2] Appendix A is omitted. The material contained in it is set out on page (iii) of this Report

in March 1970. A copy of this Report is already in the hands of the Committee on the Preparation of Legislation.

3. In January 1970 the Council of the Society appointed another Committee, under the chairmanship of Lord Stow Hill, to "propose solutions to the deficiencies of the present statute law system, to consider the Report of the Heap Committee and to make recommendations." The intention was that, the Heap Committee having diagnosed the deficiencies in the statute law system, the Stow Hill Committee should make detailed proposals for its reform.

4. The Select Committee on Procedure of the House of Commons became aware of the work of the Stow Hill Committee and it was suggested to the latter Committee that it might be of value if its draft Report could be placed before the Select Committee in order that questions could be founded on it, in particular questions to Sir John Fiennes, First Parliamentary Counsel, who was to give evidence before the Select Committee. The Stow Hill Committee agreed to this course and decided to publish a first or interim Report the draft of which it made available to the Select Committee. Sir John Fiennes himself produced a memorandum and also gave evidence which covered the proposals in the draft first or interim Report. Mr. F. A. R. Bennion, the Vice-Chairman of the Stow Hill Committee, also gave evidence in his personal capacity. The general subject to which his evidence was directed was the textual amendment system. (See Second Report of the Select Committee on Procedure, Session 1970-71, H.C. 538, and Minutes of Evidence, H.C. 297.)

5. The Stow Hill Committee's First or Interim Report, entitled" Statute Law: The Key to Clarity," was duly published in October 1972. A copy of this Report also is already in the hands of the Committee on the Preparation of Legislation.

6. Thereafter a number of the members of the Stow Hill Committee, including the Chairman himself, resigned due to pressure Of other commitments. Mr. H. H. Marshall was invited to become the new Chairman, which he agreed to do. New members were also recruited. Particulars of the membership of the Committee as thus reconstituted are set out in Appendix B[3] to this Memorandum.

7. This Committee then resumed its deliberations with the intention of considering and making further Reports on the deficiencies referred to in the Heap Report which had not been dealt with in the Stow Hill Report.

8. In a letter dated June 7, 1973 the Committee on the Preparation of Legislation invited the Statute Law Society to submit observations on ways in which the preparation of legislation might be improved and on difficulties that are encountered by users of the statutes which may be attributed to the form and drafting of public Bills. The Committee further invited the Society to send two representatives to attend a meeting of the Committee and, if desired, to submit a Memorandum supplementary to the Heap and Stow Hill Reports.

9. This invitation was accepted and a Memorandum was submitted

[3] Appendix B is omitted. The material contained in it is set out on page (iv) of this Report.

to the Committee. It was brief and did not purport to be comprehensive for the following reasons:

(a) The time allowed did not permit a long or comprehensive paper to be prepared.

(b) To have prepared such a paper would have in any case anticipated the future findings of the Society's Committee without its authority.

(c) It was only intended to be supplementary to the Heap and Stow Hill Reports.

10. The Society appointed two of its members, namely Mr. H. H. Marshall and Mr. B. S. Russell, to attend a meeting of the Committee on the Preparation of Legislation which they duly did on July 25, 1973 and gave evidence.

11. At this meeting the Chairman of the Committee, the Rt. Hon. Sir David Renton, K.B.E., Q.C., M.P. requested the Society to submit to his Committee a comprehensive Memorandum summarising the Heap and Stow Hill Reports and the supplementary Memorandum and including any further material that the Society wished to place before the Committee before it reported. The present Memorandum is the response to that request and has been prepared by the Committee of the Society appointed to propose solutions to the deficiencies of the present statute law system.

12. In summarising the Heap and Stow Hill Reports we have omitted:

(a) all material which was inserted for the purpose of explaining to a wide public, which included many persons unacquainted with Parliamentary procedure or the law, some rather elementary facts relating to the nature of statutes and the processes of legislation in the United Kingdom with which the members of the Committee on the Preparation of Legislation will be familiar.

(b) all material relating to the Questionnaire circulated by the Heap Committee.

13. We now propose first to deal with the deficiencies or failings of the present statute law system and then to go on to propose remedies.

PART III

STATUTE LAW DEFICIENCIES

14. We may start by a quotation from the White Paper entitled " Proposals for English and Scottish Law Commissions "[4] as follows: "It is today extremely difficult for anyone without special training to discover what the law is on any given topic; and when the law is finally ascertained it is found in many cases to be obsolete and in some cases to be unjust . . . English law should be capable of being recast

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4 Cmnd. 2573 (1965).

in a form which is accessible, intelligible and in accordance with modern needs."

15. As a next step we set out below Part IV of the Heap Report summarising the findings of the Heap Committee:

SUMMARY OF FINDINGS OF HEAP COMMITTEE

" 99. The root of the problem afflicting statute law users lies more in the system by which law is made and expressed than in the substantive law itself. Substantive law must have a secure base and this entails efficient and effective methods of producing and communicating it.

100. THE PROCEDURES BY WHICH STATUTE LAW IS MADE AND OFFICIALLY PROMULGATED SHOULD BE GOVERNED BY THE NEEDS OF THE USER.

101. The user's basic requirements are that:

(a) all legislation, including Statutory Instruments, on a particular subject be contained in its latest form in one place;
(b) the statute law be expressed in that place comprehensively; there should be one subject for each Act, and one Act for each subject; and
(c) a convenient method exists to enable him easily to find the particular subject-matter sought.

102. Legislation is not now found in its latest form in one place because:

(a) Acts and Statutory Instruments are published separately;
(b) apart from consolidation (which is infrequent, often out of date and not comprehensive), legislation is not arranged according to subject-matter;
(c) new enactments are not usually made according to verbal (textual) amendment, but by the gloss method; and
(d) the official system of publication only exceptionally supplies an adequate method of keeping texts in their latest form.

103. The comprehensibility of statute law is adversely affected by:
(a) the use of a literary style, arising from the role of tradition and the draftsman's enjoyment of an esoteric art;
(b) the gloss method of amendment, and the corresponding failure to use the textual amendment system;
(c) the inclusion of matter required only by Parliamentary rules;
(d) the inclusion of too much detail in an attempt to cover every eventuality, and the reluctance to leave anything to the discretion of officials or the courts;
(e) referential legislation and references to superseded law;;
(f) politicians' insistence on haste, coupled with the lack of draftsmen and ancillary staff;
(g) ill-considered piecemeal amendments producing anomalies;
(h) frequent changes in laws of a' political' nature;

(i) neglect of' prefabricated ' law; (j) lack of precise instructions to the draftsman; (k) the draftsman's ignorance of the conditions forming the background to the legislation;
(1) the necessity for compliance with Parliamentary rules of procedure;
(m) the failure to outline the purpose of Acts and parts of Acts at the initial stages;
(n) the misuse of the schedule;
(0) inconsistency in the use of definition and interpretation sections, and of definitions as such;
(p) the need for a new Interpretation Act; and (q) the failure to use shorthand formulae.

104. The quality of statute law is further reduced by:
(a) the secrecy surrounding the initial stages of a Bill resulting in the lack of prior consultation with practitioners and specialists and the short interval between publication and detailed discussion in Parliament;
(b) the draftsman's inability to challenge the Department on the fundamentals underlying his instructions;
(c) the draftsman's ' sovereignty,' his relationship to Parliament and the Government arid his lack of liaison with the user and affected interests;
(d) the lack of ' vetting' of proposed legislation;
(e) the delayed operation of statute law and the bringing into effect of different parts of an Act at different times;
(f) the ability of private and local legislation to repeal public Acts;
(g) Governmental attitudes towards legislation as a ' status symbol' or propaganda;
(h) procedural inadequacies in Parliament, denying full discussion of Bills;
(1) the failure of many Statutory Instruments to mention the enabling power under which they purport to have been made;
(j) the lack of codification;
(k) the subject-matter of consolidation Acts being unsuitable or too wide or narrow in scope; and
(1) the present system of numbering and lettering parts of an Act.

105. The system of publishing statute law is inadequate because:
(a) Private legislation is not easily accessible, not being published with the public general Acts;
(b) the Private Acts Index is out of date;
(c) Statutory Instruments are often unavailable;
(d) official publications are often too slow in being published and are often temporarily out of print;
(e) it is classified chronologically and not alphabetically or according to titles; thus several different volumes may have to be consulted in order to discover the law;

(f) the noter-up system is difficult to keep up to date and is ' messy '; this results from the bound volume system and the failure to use the single page loose-leaf system;

(g) the present system does not provide any facilities for a separate Scottish Statute Book;

(h) Statutes Revised fails to provide annotation; and

(i) there is no gearing of the system towards the use of a computer for search and retrieval of laws, or towards the use of aids to comprehension (such as algorithms and flow charts)."

16. Some of these deficiencies and the causes of them are self-evident, or at least have been widely admitted, and will be familiar to the members of the Committee on the Preparation of Legislation. It is therefore not proposed to discuss all these at length but to select a few of the more important for further examination.

A. The procedures by which statute law is made and officially promulgated should be governed by the needs of the user but are not

[See para. 100 of Heap Summary]

17. At the present time statutes give the impression of being as to form drafted primarily with a view to their being comprehensible to those who will be asked to pass them into law *(i.e.* the members of the House of Commons and of the House of Lords) and with a view to assisting those members most effectively to comply with the rules of procedure and standing orders of their respective Houses. The drafting appears to be secondarily directed to the statement of a law and to its comprehension by its users. As Sir Noel Hutton has said:

" The same document has to be designed to satisfy two distinct 'legislative audiences': first (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 subsection 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."[5]

1.8. The need to satisfy the Parliamentary audience results in the introduction into the clauses of a Bill of explanatory and referential matter which is of use to a legislator but which is superfluous and indeed confusing to the "user" or reader of the Bill when it has been passed into law as an Act. The following is an example, taken from section 25 (3) of the Finance Act 1962, of the use of such explanatory matter:

" (3) In section twenty-eight of the Finance Act 1960 (which provides for the cancellation of tax advantages from certain trans-

[5] *Modern Law Review,* Vol. 24 (January 1961), p. 21.

actions in securities where the tax advantage is obtained or obtainable in the circumstances set out in subsection (2) of the section),

(a) the reference in paragraph (a) of subsection (2) to a person being entitled by reason of any exemption from tax to recover tax in respect of dividends received by him shall include a reference to his being by reason of section twenty (subvention payments) of the Finance Act 1953, so entitled; and

(b) the reference in paragraph *(b)* of subsection (2) to a person becoming entitled in respect of securities held or sold by him to a deduction in computing profits or gains by reason of a fall in the value of securities shall include a reference to his becoming in respect of any securities formerly held by him (whether sold by him or not) so entitled." [6]

How this situation can be remedied and the needs of the legislator and user reconciled we will explain later on, but we should note that the system at present in use of employing the terms of a clause to explain its meaning to legislators during the process of legislation is one of the reasons for the use of referential drafting, as to which we shall also say more later.

B. The user's basic requirements are that all legislation on a particular subject be contained in its latest form in one place comprehensively and that there should be one subject for each Act and one Act for each subject. This is, however, not the case

[See paras. 101,102 and 103 of Heap Summary]

19. The following are some of the reasons for the present situation.

(i) *Ad hoc drafting*

20. It was said by the Statute Law Commissioners in their First Report in 1835: "The statutes have been framed extemporaneously, not as part of a system, but to answer particular exigencies as they occurred." The statute book of the United Kingdom is therefore not a coherent whole nor has it been systematically or methodically constructed. It exists alongside the Common Law and the principles of Equity with which it constitutes the basic law of the country. It has grown up over the years since mediaeval times when the main body of the law of England was the Common Law, and statutes were exceptional events passed to meet particular situations. Even on the occasions when they were passed they did not necessarily even deal with a single subject. For example the Statutes of Westminster I and II, 1275 and 1285, as Sir William Holdsworth says, " travelled over the whole field of law—amending and constructing." [7]

[6] This section was also used as part of an example of the comparative merits of the referential and textual methods of drafting which is now an Appendix to Mr. H. H. Marshall's evidence before the Committee on the Preparation of Legislation, and which for convenience of reference is reproduced as Appendix E to this Report.

[7] *History of English Law,* Vol. II, p. 300.

21. Thus the practice of *ad hoc* drafting grew up; and each Act either deals with a new subject in the field of legislation or adds to or amends an existing Act. Amendment is sometimes effected by making the new Act an Act which in terms amends the existing Act on the subject, but frequently the new amending Act stands on its own as a principal Act. An example of this process can be taken from the law of homicide. The law relating to homicide (including murder and manslaughter) is found partly in the Common Law and partly in statute. Much of it is contained in the Offences against the Person Act 1861. The Homicide Act 1957, making radical changes in the law of murder, however, stands by itself on the statute book as a principal Act and, although sections 2 and 3 of the Offences against the Person Act 1861, were repealed by it, some sections relating to murder were left standing, and no attempt was made to integrate the provisions of the Act of 1957 with those of the Act of 1861. Similar considerations apply to the Murder (Abolition of Death Penalty) Act 1965. Similarly, the Infanticide Act 1922 and the Infant Life (Preservation) Act 1929, which created new offences in the field of homicide, stand on their own.

22. These are simple examples to make our point clear. This process is, however, carried on in relation to numerous other and far more complicated subjects in respect of which unrelated, or at least unintegrated, Acts are piled one on top of another as year succeeds year until the long and arduous process of consolidation can be carried out. In the meantime the interpretation of sometimes conflicting provisions must be effected by the user as best he may, or by the courts on his behalf— an expensive process. Of course there are statutes which deal comprehensively with a subject and these we will consider later. It may well be that the *ad hoc* method is on occasion used to save time that would otherwise be consumed in the complicated process of integrating new provisions into the existing law on a subject which itself is likely not to be " in one place " but to be scattered about among a number of statutes.

(ii) Titling

23. The process of *ad hoc* legislation is contributed to by, or perhaps is the cause of, the present haphazard and inconsistent method of choosing the titles of Bills. Many Government Bills and most Private Members' Bills seem to be titled to indicate only the immediate purpose of the Bill or to be named for an achievement. Examples are the Costs of Leases Act 1958, the Hypnotism Act 1952, and the Murder (Abolition of Death Penalty) Act 1965. All these Acts could have been integrated into existing Acts. In particular each of the four Acts relating to homicide referred to above could have been entitled an Offences Against the Person (Amendment) Act and, we might add, could have been integrated substantively and textually with the Act of 1861. But no one seems to have thought of doing this or to have considered the law of homicide as a whole.

24. Examples of inconsistency in titling can be seen from an inspection of the diverse specimens of titles included under the several headings into

25. which Halsbury's *Statutes of England* are divided. For instance under the currently relevant headings of " Statutes " and " Time " in Vols. 32 and 33 of the Third edition the following Acts relating to statutes can be found:

Acts of Parliament (Commencement) Act 1793;
Acts of Parliament (Expiration) Act 1808;
Statute Law Revision Acts;
Statutes (Definition of Time) Act 1880;
Interpretation Act 1889;
Short Titles Act 1896;
Expiring Laws Acts;
Consolidation of Enactments (Procedure) Act 1949;
Acts of Parliament Numbering and Citation Act 1962;
Statute Law (Repeals) Act 1969.

Surely either "Acts of Parliament" *or* "Statutes" should have been a common factor in *all* the above titles. There is no reason why the Statutes (Definition of Time) Act 1880, should not constitute a section in the Interpretation Act. An important provision relating to statutes as evidence is also still contained in the Crown Debts Act 1801.

25. At present there seem to be no rules controlling the choice of titles either for Government or Private Members' Bills but it is believed that the Parliamentary draftsmen have considerable influence in regard to Government Bills and advise Private Members with regard to their Bills.[8] From the foregoing it will, however, be appreciated that the good or bad choice of a title for a Bill can have a profound effect on the destination and the construction of its provisions. In some cases an apparently comprehensive title can be an illusion. An example given below is that of "Children." The Children Act 1908, showed from its contents that " Children " should not be a title at all, since children are, in relation to most subjects, a class of persons who form exceptions to most rules.

(iii) So called conglomerate Acts

26. These are Acts which deal with more than one subject. They are the source of considerable confusion because they usually amend or affect statutes relating to those subjects without amending those statutes textually and thus render alterations difficult to find. They are of several different kinds:

(a) Those which deal with more or less unrelated subjects such as Finance Bills, as Sir John Fiennes has pointed out.[9]
(b) Those which purport to deal with a subject or a class of persons and then seek to go on to deal by the referential method of drafting with all other subjects, related or unrelated, affecting the main subject or class of persons. An example is again found in the Children Act 1908 which aimed to consolidate and amend the law in respect to children and young persons. Among the existing

[8] An amusing story is told by Lord Darling of how the Infant Life (Preservation) Bill obtained its title. (See Parliamentary Debates (Lords) (1928-29) Vol. 72, col. 269.)
[9] Stow Hill Report, p. 48, para. 6.

legislation affected was that relating to nursing and maintenance of infants, coroners, life assurance, cruelty to children, powers to arrest without a warrant and to search, the detention of habitual drunkards, criminal evidence, vexatious indictments, Poor Law, reformatories and industrial schools, juvenile offenders (including bail, remand and sentence), old metals, pawnbrokers, intoxicating liquor, workhouses and variation of trusts.

By seeking to include in this Act all these matters in their relation to children, the promoters of the Act succeeded in further fragmenting the legislation relating to these subjects wherever it might be.

(c) Those which, after legislating on the main purpose and subject of the Act, go on to make consequential changes in other, often unrelated Acts. This is frequently done by referential drafting with which we deal below.

(d) Those which vary the law upon a particular subject by amending statutes affecting related subjects. An example of this is the Agriculture (Miscellaneous Provisions) Act 1972, which amended the law or statutes relating to about twenty subjects. There is less objection to a statute of this kind if the amendments are carried out textually and not referentially.

(*iv*) *Referential Legislation*

27. One of the main causes of the dispersal of legislation relating to a particular subject among a number of different statutes, and probably the chief agent of legislative confusion and obscurity, is the practice of referential legislation or legislation by reference. This occurs where an earlier enactment is added to, amended or applied by a reference to the section or part affected, indicating how it should be treated, without the wording of the changes to be effected actually being provided. Each later Act forms, as it were, a gloss on its predecessors, and they must all be read together to ascertain the law. Textual legislation on the other hand is carried out where the draftsman deletes sections, subsections, sentences and words and substitutes new ones in their place. In the latter case the draftsman completes his task; in the former he does not, but merely indicates how the alteration should be made, leaving it to the user to carry out his own textual drafting either physically or notionally. If he cannot make sense of the situation he must go to the court for interpretation. An example of referential amendment of a principal Act contained in an amendment Act is provided by section 17 of the Agriculture (Miscellaneous Provisions) Act 1963:

" 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."

28. An example of an amending Act making substantive referential amendments to a principal Act and also consequential referential amendments to a number of other Acts is the Licensing Act 1961. Having made substantive new provisions as to the power of a court to disqualify for restaurant and other licences on conviction of certain offences, section 3 goes on to provide:

" (8) Any disqualification order made before the commencement of this Act under section twenty-six of the Licensing Act 1949 shall have effect in relation to restaurant licences, residential licences and residential and restaurant licences as it is expressed to have effect in relation to licences under the Refreshment Houses Act 1860; and subsection (5) and (6) above shall apply to any such order in place of section 27 of the Licensing Act 1949."

29. Legislation by reference is usually the outcome, Craies contends,[10]

"not of negligence, ignorance or incapacity in the draftsman, but of the foibles of Parliament and is excused on the ground that it lessens political difficulties and simplifies the process of getting Bills through committee by lessening the area for amendment. The same excuse is made for the practice of putting very long clauses, elaborately divided into many sub-divisions, in what are called fighting Bills."

30. The practice of including in one Act amendments that are relevant to another and that are carried out referentially makes it very easy for an amendment to be overlooked and very difficult for all the law on a subject to be found.

31. Section 12 of the London County Council (General Powers) Act 1963 is an example of textual amendment:

" In subsection (1) of section 12 (obligation to provide dustbins) of the London County Council (General Powers) Act 1954, for the words ' any house in their district is' there shall be substituted the words ' any premises in their district are' and for the words ' the house' there shall be substituted the words ' the premises.' "

32. Among the reasons for the use of referential legislation are probably the following:

(a) Traditional. It arose centuries ago when statutes were few and simple. It was then manageable. It has remained until the present when statutes are very numerous and complex and new drafting techniques have been evolved. It is not now manageable or in line with such techniques.

(b) It is a better medium than the textual method for explaining to the legislator the purpose and intention of each clause of a Bill as

[10] *Craies on Statute Law*, 7th ed., 1971, p. 29.

it passes through Parliament. The textual method is, however, of much greater value to the user.

(c) It also assists the purposes of the legislator when it indicates all required changes in one Bill and sometimes in a single clause, thus avoiding a multiplicity of separate Bills or separate clauses to amend a multiplicity of existing Acts or sections. It thus saves Parliamentary time and complements Parliamentary procedure and the Standing Orders of the Houses.

(d) It relieves the draftsman of much work because, as stated above, he does not complete the task of amending the actual wording of the earlier legislation but merely indicates how this should be done. It thus enables him to produce a Bill, when working under pressure, in a shorter time than he could if he adopted the textual method.

33. The Select Committee of the House of Commons of 1875 defined the imperfections arising from the mode in which Bills were prepared into those which were accidental and those which were intentional, and included among intentional imperfections one kind of referential legislation, *viz.* the method of legislating by means of a reference to parts of one or more Acts of Parliament, some of these being repealed, some amended and others kept alive subject to the provisions contained in the amending Bill. " This practice," the report of the Committee said, " seems to be increasing, and when carried to excess makes the statute so ambiguous, so obscure and so difficult of comprehension that the judges themselves can hardly assign a meaning to it, and the great mass of people for whom, of course, it is primarily intended, are unable to follow it without legal advice. Such a mode of legislation has been described as a Chinese puzzle, and the only justification offered for it is the difficulty of getting a Bill through Committee without such references. It may be doubted whether that difficulty is not somewhat exaggerated. But all events, care should be taken that this mode of drawing should be had recourse to as sparingly as possible." [11]

34. Craies points out[12] that with this parliamentary criticism judicial opinion coincides and refers to the following example. In *R. v. Goswami*[13] Salmon L.J. said:

> "It will be observed that before the [Customs and Excise] Act of 1952, in order to discover whether contravention of section 22 of the [Exchange Control] Act of 1947 was made an offence, and, if so, what were the penalties for such an offence, you would have had to go to section 34 of Part VI of the Act of 1947 which in turn refers you to Schedule 5 to the Act. One would then have had to search through that schedule until one arrived at Part 3. You would then have had to read paragraphs 1 (1) and 3 of that part very carefully, which in turn would have sent you to section 186 of the [Customs Consolidation] Act of 1876, the effect of which you would have dis-

[11]. 1875 C. 208.
[12] *Supra*, para. 29 note 10.
[13] [1969] 1 Q.B. 453,460.

covered had been altered by section 15 of the Finance Act 1935 and section 12 of the Finance Act 1943. Since the Act of 1952 you would have to go still further afield. This is a shockingly circuitous and obscure way of creating an offence—and one for which there is no excuse. It would have been so easy and so simple to have added a section to Part IV of the Act of 1947 providing that a contravention of any of the prohibitions or restrictions contained in that part of the Act constitutes an offence punishable by a penalty not exceeding three times the value of the things illegally imported or exported and imprisonment for two years. The machinery for enforcement, namely compulsory detention, seizure and forfeiture, etc., could have been appropriately dealt with in one of the schedules to the Act. It is a great pity that simplicity and clarity, which ought to be the chief aim of parliamentary draftsmen, are so often sacrificed, as here, to a most pernicious fetish—legislation by reference."

In passing we should mention that the textual method has also been in use for a long time at Westminster but to a minor degree. It is now being increasingly adopted as we shall indicate later.

(v) *The incompleteness or ineffectiveness of some consolidating statutes*

35. It is good to note that a major programme of consolidation has been in force for some time but several problems arise here. First, when consolidation does take place it should be comprehensive in the inclusion of all relevant Acts. There have been many instances of recent consolidations which have not been comprehensive: for instance the Rent Act 1968, which perpetuates instead of replaces the statute law that it is supposed to consolidate and leaves unresolved doubts and uncertainties inherent in the prior legislation.

36. Secondly, it must be remembered that consolidation is a process whereby the provisions of many statutes dealing with one branch of the law are reduced into the compass of one statutory enactment. Codification, on the other hand, is the process whereby all statute and common law on a subject are reduced into statutory form. There comes a stage in the growth of the law on a particular subject when consolidation is not enough and codification is the only obvious remedy. For instance Professor Gower has said of the Companies Act 1948:

" One of the reasons for the complication and difficulty of the English Act is its lack of completeness. No one by reading it could glean any real understanding of company law. Nowhere are the fundamental principles enunciated. Exceptions are laid down to rules which are never stated and which have to be found from a study of the decided cases. The true position emerges, if at all, only when the Act is read against the background of a vast number of decisions, some of which are virtually irreconcilable. All this makes for complication and confusion, not for simplicity and certainty." [14]

[14] Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana, 1961, para. 16.

37. Thirdly, when an attempt is made to reform the law on a subject and reduce it to statutory form the result is often incomplete, as was the case with the Occupiers' Liability Act 1957. This enacted rules in the place of the rules of the common law to regulate the duty of an occupier of premises to his visitors *(i.e.* persons formerly known as invitees or licensees) but did not alter the common law rules as to the persons on whom a duty is so imposed or to whom it is owed, nor did it regulate the duty of an occupier to trespassers.

C. The use of a literary style arising from tradition and the use of complicated methods of drafting

[Heap Summary para. 103(a)]

38. This style is further described in paragraph 82 of the body of the Heap Report in which it is stated that the style is a cause of one of the most frequent complaints about legislation, since it is one of the principal factors which affect comprehensibility. The style, legalistic, often obscure and circumlocutious, requires a certain type of expertise in order to gauge its proper meaning. Sentences are long and involved, the grammar is obscure; and archaisms, tortuous language and a penchant for the double negative over the single positive, abound. Numerous examples could be given, and indeed the subject is the cause of frequent comment by the Bench, practising lawyers, the Press and the public generally. Space, however, permits of only a few.

39. On the whole question of the style and structure of English drafting we may refer to the following quotation by Professor Rene David [15]:

> " The style of the [Brussels Maritime] Conventions has also been frequently criticised. Let us quote an eminent French maritime law specialist[16]:
>
> > ' The (English) influence is apparent in the drafting of some conventions. One can sense the desire to foresee everything and to set everything out, which makes the convention disproportionately large. Also, each sentence is unusually long: it contains the principal and the accessory, the reservations and the counter-reservations, the particular cases and the general rule; and these are inserted in a succession of enumerations and parentheses which are so intermixed with the minimum of punctuation, that one sometimes wonders which part of the sentence which other part is intended to qualify, and what finally results from the whole. The Convention on Bills of Lading is a masterpiece of this type, both generally speaking and in several of its articles, such as articles 3 (7) and 6, where the English text reads like a comical exaggeration. Texts like articles 5 and 7 of the so-called Madrid Convention are not noticeably better. It is possible that the Anglo-Saxons find their way easily in this labyrinth, but others are forced to perform somewhat arduous exercises in grammatical analysis.'"

[15] *International Encyclopaedia of Comparative Law,* Vol. II, Chapter 5, p. 155, para. 405.
[16] *L'unification du droit maritime et le C.M.I.,* p. 751.

40. An instance of the kind of ambiguous, badly-framed legislation which must be avoided was provided by the Wills Act 1968. The object was to enable a beneficiary who had witnessed a will to take under the will provided that there were two other witnesses not involved as beneficiaries. The relevant section reads:

> "The attestation of a will by a person to whom . . . there is . . . made [any testamentary disposition] shall be disregarded if the will is duly executed *without his attestation."*

As one correspondent states:

> " The use of the word ' without' suggests that the attestation is not there, whereas the whole point of it is that it *is* there. Modern usage would call for ' apart from,' and if these words had been substituted for ' without,' it would not be necessary to read the section several times in order to find out what it is trying to say."

41. An instance of a style involving tortuous language is provided by section 139 (2) of the Transport Act 1968:

> "' direct access' means access otherwise than by means of a highway which is not a special road, and ' indirect access' means access by means of such a highway as aforesaid."

The expression " otherwise than by means of something that is not," presumably means " by means of something that is," and it would have been equally accurate but less confusing to say "' direct access' means access by means of a highway which is a special road, and ' indirect access ' means access by means of a highway which is not a special road."

42. The late Sir Henry Wells, sometime Chairman of the Land Commission, gave an example from the Land Commission Act 1967 (since repealed). He said [17]:

> " More serious and very confusing to the lay and, I suspect, the legal reader, is the treatment of the terms ' current use value' and ' material development,' both of which are fundamental terms to the whole Act. 'Current use value ' does not appear in the main body of the Act at all, not even in the interpretation sections. It makes its bow in Schedule 4 (para. 3 (2)) and the definition is given in paragraph 3 (1). But this definition in turn depends on the meaning of ' material development.' In effect, ' current use value ' is the value on the assumption that you can do anything to the land except carry out' material development.' There is however what purports to be a definition of ' material development' in section 99 (2), but it would be better described as a non-definition. In the first place it merely bats the ball back to current use, by saying that material development is any development other than (a), (b) and (c). But even more serious is that (a), (b) and (c) do not give the reader any information of substance. To find out what types of development are not material he has to look at the General Development Order, Schedule 3, to the

17 In a lecture to the Statute Law Society on June 5, 1969.

Town & Country Planning Act 1962, section 1 (4) of the Town & Country Planning Act 1963, and lastly the Material Development Regulations made under the Land Commission Act itself. This is really dreadful drafting by any standards.
There is an obvious difficulty in setting out in an Act a definition that depends on statutory instruments—but should a definition of this kind which defines the limits of what is chargeable to levy, and which is so important to the whole construction and intention of the Act, be done by statutory instrument? "

43. An example of excessive and confusing cross-referencing comes from section 14 (2) of the Prevention of Fraud (Investments) Act 1958, which reads as follows:

" (2) The preceding subsection shall not apply:

(a) in relation to any distribution of a prospectus to which section thirty-eight of the Companies Act 1948, applies or would apply if not excluded by paragraph *(b)* of subsection 5 of that section or by section thirty-nine of that Act or section four hundred and seventeen of that Act applies or would apply if not excluded by paragraph (/>) of subsection (5) of that section or by section four hundred and eighteen of that Act, or in relation to any distribution of a document relating to securities of a corporation incorporated in Great Britain which is not a registered company, being a document which:

(i) would, if the corporation were a registered company, be a prospectus to which the said section thirty-eight applies or would apply if not excluded as aforesaid; and

(ii) contains all the matters and is issued with the consents which, by virtue of sections four hundred and seventeen and four hundred and nineteen of that Act it would have to contain and be issued with if the corporation were a company incorporated outside Great Britain and the document were a prospectus issued by that company;

(b) in relation to any issue of a form of application for shares in, or debentures of, a corporation, together with:

(i) a prospectus which complies with the requirements of section thirty-eight of the Companies Act 1948, or is not required to comply therewith because excluded by paragraph (6) of subsection (5) of that section or by section thirty-nine of that Act, or complies with the requirements of Part X of that Act relating to prospectuses and is not issued in contravention of section four hundred and nineteen of that Act, or,

(ii) in the case of a corporation incorporated in Great Britain which is not a registered company, a document containing all the matters and issued with the consents mentioned in subparagraph (ii) of paragraph *(a)* of this subsection,

or in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures, or

(c) in relation to any distribution of documents which is required or authorised by or under any Act other than this Act or by or under any enactment of the Parliament of Northern Ireland, and shall not apply in relation to any distribution of documents which is permitted by the Board of Trade."

D. Defects in the structure of statutes

[Heap Summary para. 103 (m), (n) and (o)]

44. Frequently Acts of Parliament are drafted without any regard to rational sequence in relation to their subject-matter. In particular:

(i) the subject matter, instead of being treated sequentially in the order expected by the user, is laid out in a manner appearing to have no internal logic, being neither chronological (in terms of the operations it seeks to control), nor alphabetical nor geographical. Ideally the sequence should be *functional* so that, for example, if one had a consolidation of landlord and tenant law, one could start with definitions and then go on to the formalities of contract, restrictions on contract terms, rights of the parties, termination of a lease, remedies for breach, etc.;

(ii) definitions are scattered all over the Act, when they should be collated, preferably at the beginning of the Act;

(iii) the relationship between the body of the Act and the Schedules is not the subject of any coherent drafting policy, and all too often Schedules, instead of being limited to detail that would clutter up the body of the Act, contain wide provisions of a general nature whose absence from the body of the Act is seriously misleading.

E. The necessity of complying with Parliamentary rules of procedure and Standing Orders [Heap Summary para. 103 (1)] *the present system of numbering and lettering parts of an Act* [Heap Summary para. 104 (1)]

45. These two defects are related and can be considered together. One of the main restrictions on the draftsman's freedom of expression is the necessity for compliance with the Standing Orders of Parliament. The form of his draft is likely to be heavily influenced by these, in so far as, being a Government servant, he must have the utmost regard to the conserving of Parliamentary time and the practicability of ensuring that the Bill goes through with the least possible difficulty. For example, Standing Orders require a decision to be taken on each clause of a Bill which offers the opportunity for a division to be taken and the consequent requirement for Hon. Members to assemble in the division lobbies. The need to minimise the necessity for this time-consuming procedure encourages the drafting of long sections and sub-divisions. A number of sub-sections and paragraphs, which would more properly be contained in separate sections, are often inserted in a single section. An example of

such an offending statute is the Law Reform (Married Women and Tortfeasors) Act 1935.

46. It would be impractical to present a Bill in a structurally perfect form but one which would provoke so much Parliamentary upheaval that members would refuse to accept its provisions. Such considerations have in the past prevented Bills from being arranged in the best possible way and have, for instance, necessitated controversial provisions being placed near the end, and the subject matter being arranged in as few clauses as possible. The user's interests have tended to be subordinated to the need to secure that the proposed legislation became law.

47. One example of this type of legislation is section 39 of the Leasehold Reform Act 1967; this is not relevant to the main provisions (for enfranchisement and extension) but is tucked away towards the end of a measure dealing primarily with other matters. For this reason Parliament passed it with very little comment, although its repercussions on the sale-ability of long leasehold flats and houses with an accepted capital value have been serious, and new legislation has been accepted as necessary to solve these problems. It may be doubted whether section 39 would have been passed in its form if there had been proper consultations beforehand.

F. The time factor in Parliamentary drafting

[Heap Summary paras. 103 (f) and (h)]

48. Perhaps the crux of the present problems relating to unsatisfactory drafting lies in the amount of time allotted to the draftsman in which to complete his assignment. (The " lack of time " factor also reflects the lack of draftsmen and ancillary staff engaged in this important work.) As a key servant of a Government, whose duration is necessarily limited, his work must be performed according to a strict timetable.

49. To add to these problems a great deal of modern legislation has a political significance which creates a likelihood that it will be subjected to frequent alteration on account of the changes in the political complexion of Governments. Such changes often follow a General Election, and their implementation is often required at short notice. (Some Bills are even drafted before the Government are in. power—while they are still in opposition.) Instructions are consequently passed to the Parliamentary Counsel to complete the task within extremely tight schedules, and this in turn inevitably reduces the quality of the drafting.

> " There is for each Bill an irreducible period for preparation . . . as the time is cut down the quality deteriorates so that ultimately the point is reached where no Bill fit for introduction can be produced."[18]

We have seen above that the shortage of time may also be one of the reasons for the frequent adoption of the referential system of drafting as contrasted with the textual.

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18 E. Driedger, in the Preface to *The Composition of Legislation.*

G. Secrecy surrounding a Bill in its initial stages, lack of prior consultation with interested parties; and the short interval between publication and detailed discussion in Parliament

[Heap Summary para. 104 (a)]

50. While it is frequently the practice of the Government to set forth its *policies* for discussion with, and criticism by, interested parties and experts, and also on occasion by the general public *(e.g.* in so-called Green Papers), the current practice of the Government is generally to keep secret the *terms* of the proposed legislation. This subsequently creates problems for the user and for Members of Parliament as the Bill takes its normal course under the shadow of the strict Parliamentary timetable. Little time is left between publication and the detailed consideration in Parliament, and subsequently there is a comparative lack of opportunity for outside bodies to digest the proposed legislation and to make their views felt. A greater degree of advance publicity and consultation with appropriate bodies would obviate this situation, although in relation to certain types of legislation (for example fiscal) there may exceptionally be a special need for secrecy. The highly complex Finance Bill of 1965, for example, was debated in the House only two weeks after it was first published.

51. We note that in recent years the Law Commissions and some other law reform bodies have developed the practice of appending draft Bills to their recommendations. A recent example is the Eleventh Report of the Criminal Law Revision Committee on Evidence (General) (Cmnd. 4991, 1972). This practice is most welcome and should be extended wherever possible. If greater use were made of the system of laying a White Paper with detailed proposals well in advance and with a draft Bill attached the quality of the legislation would improve.

H. The delayed operation of statute law and the bringing into effect of different parts of an Act at different times

[Heap Summary para. 104 (e)]

52. Even when legislation has received the Royal Assent its coming into effect is often delayed in one of several different ways. There is no logical system underlying this delaying effect in Acts. Sometimes the date is mentioned in the Statute or later in an Instrument made under it. Often it is dependent on a string of Commencement Orders, different parts of an Act coming into effect at different times. Of this practice, the Law Reform Committee of the Council of the Law Society say:

> " It is hardly necessary to stress the problems which are caused for practitioners by a multitude of different commencement dates for different parts of statutes. The confusion which often results is amply attested by the continuous flow of enquiries . . . on whether various recently enacted statutory provisions are yet in operation."

By the time these orders become available the operation of the Act is often in practical terms retrospective. It becomes a matter of some

considerable research to determine whether or not a particular Act or particular provisions have come into force. This situation is not improved by the Stationery Office's failure at times to provide an adequate service. The Heap Committee and ourselves were informed by correspondents in relation to their own experiences that the Companies Act 1967 and the Fair Trading Act 1973 had been in force about three weeks and four weeks respectively before copies could be purchased. Often Statutory Instruments and prescribed forms are found to be out of print.

53. What is needed, as a minimum, is publication in the *London Gazette* of (i) the commencement date of any Act or part of an Act, where such date is not specified in the Act itself, and (ii) details of the statutory instrument by which such commencement date is prescribed.

PART IV

THE POSITION WITH REGARD TO SCOTLAND

A. PRELIMINARY REMARKS

54. This has been touched upon in paragraph 72 of the Heap Report in the following words:

> " Again particular problems arise in relation to Scotland because of the peculiarities of her position within the United Kingdom. There is no separate Scottish Statute Book and this often creates difficulty in determining whether particular provisions apply there. The limited degree of law reform applying solely to Scotland causes rag-bag amending legislation dealing with several subjects such as the Law Reform (Miscellaneous Provisions) (Scotland) Acts and also the practice of amending Scots law by tacking on inconspicuous provisions in predominantly English Acts."

As a body consisting almost entirely of English lawyers this Committee would have been reluctant to enlarge on a subject upon which it is more appropriate for Scottish lawyers to offer opinions. In view of the fact, however, that the question of Scotland was raised during the course of the appearance of Mr. Marshall and Mr. Russell before the Committee on the Preparation of Legislation, this Committee of the Statute Law Society offers the further information upon the present position of legislation relating to or affecting Scotland set out below and suggests that it be left to the Scottish legal profession to make suggestions as to the solution of their problems including the controversial question of the desirability of the creation of a separate statute book for Scotland.

B. GENERAL

55. The considerations that we have set out above apply with equal force to Scotland as to England and Wales since the Parliament of the United Kingdom legislates for both countries. The situation with regard

to Scotland is, however, further complicated by the fact that Scotland has its own separate system of law and separate system of courts. Nevertheless the law with regard to some subjects (mostly modern in character) is common to both countries. In the framing of statutes, therefore, consideration is given to this situation; and special provision is made where necessary for Scotland, either by the passing of a separate Act or by making exceptions and inserting special clauses in an Act applying to both England and Scotland. The position can be explained in more detail as follows.

C. The Component Parts of Scots Law

56. Scotland has at the present time a system of substantive law composed of the following main component parts:

(1) The customary law consisting of the common law of Scotland. This, like the English common law, is an " unwritten " or judge-made law but its origins are different from those of the English common law.

(2) The statute law consisting of:

(a) The Acts of the Scots Parliament passed before the Union of Scotland with England in 1707.

(b) Such Acts of the English Parliament passed before the Union as have been specially applied to Scotland by a United Kingdom Act passed after the Union, *e.g.* the Treason Act 1351, which was applied to Scotland by the Treason Act 1708.

(c) Public general statutes of the United Kingdom Parliament passed since the Union. As to these Gloag and Henderson say[19] : " There is a general presumption in the absence of any express provision on the point that a public general statute applies generally to Great Britain and Northern Ireland. The presumption may be rebutted, and the statute held not to be applicable to Scotland either on the ground that it is expressed as an amendment of a statute in which Scotland was expressly excluded or, with less force, that it is expressed in technical terms of English law without an interpretation clause giving the equivalents in the law of Scotland."

(d) Public general statutes of the United Kingdom Parliament which are expressed to apply to Scotland in part, *e.g.* the Justices of the Peace Act 1968. (See Section 6.)

(e) Public general statutes which are stated not to extend to Scotland " save as therein expressly provided," *e.g.* Children and Young Persons Act 1933, section 109 (3). Sections 25 and 26 of the Act were *(inter alia)* applied.

(f) Public general statutes which are varied in their application to Scotland either:

(i) as to whole parts or sections, *e.g.* section 25 (2) of the Gaming Act 1968;

or

(ii) as to particular words, *e.g.* as in section 44 (3) of the same Act.

[19] *Introduction to the Law of Scotland,* 1968, p. 2.

(g) Statutes which apply exclusively to Scotland, *e.g.* the Summary Jurisdiction (Scotland) Act 1954 and the Social Work (Scotland) Act 1968.

(h) Public general statutes which are expressed to apply to Scotland in part but which amend statutes which apply exclusively to Scotland, *e.g.* Housing Act 1964 (as to which, see note below).

57. It will thus be appreciated that:

(i) There is no separate statute book for Scotland;

(ii) Apart from the statutes which apply exclusively to Scotland, *i.e.* items 2 (a) and (g) above, the statutes of the United Kingdom which apply to Scotland may either be general statutes applying in full both to England and Scotland, or in full to England and in part only to Scotland or with variations to Scotland.

(iii) Legislation applying to Scotland is thus confusingly interwoven with that applying to England.

D. THE AMENDMENT OF STATUTES APPLYING TO SCOTLAND

58. The amendment of statutes applying to Scotland can be effected by any public general statute of the United Kingdom; and a statute of any of the particular categories mentioned above need not necessarily be amended by a statute of a similar category. The following are examples of how this works out in practice.

(a) The Police (Scotland) Act 1956 was a consolidation Act which applied exclusively to Scotland and regulated the Scots police. The Police Act 1964 was an Act the purpose of which was mainly to regulate the English police, but it provided in section 59 that the Police (Scotland) Act 1956 should " have effect subject to the amendments set out in Schedule 7 to this Act." In addition section 65 (5) provided that the following should apply to Scotland:

" Part III; section 59 and Schedule 7; section 63 and Schedule 9, so far as they relate to enactments extending to Scotland; section 64 and Part II of Schedule 10; and this section." Thereafter the Police (Scotland) Act 1966 further amended the Police (Scotland) Act 1956. The Police (Scotland) Act 1967, however, was another consolidating measure and mercifully repealed all the above legislation. It, however, introduced a new complication in that some of its sections, *e.g.* those relating to the execution of warrants in border counties, were by section 53 (2) declared to apply to the whole of Great Britain.

If proper drafting methods had been employed, none of the provisions of the Act of 1964 should have been applied to Scotland but a separate Act should have been passed to amend the Act of 1956. Similarly none of the provisions of the Scottish Act of 1967 should have been applied to Great Britain as a whole, but a separate Act should have been passed to effect the required purposes.

(b) The Housing Act 1964 is an even more glaring example of legisla-

tion by reference and by patching. It amended numerous earlier Housing Acts including that of 1961. So far as Scotland was concerned the following are some examples of its provisions:

(i) Section 27 (10) provided: "This section shall apply to Scotland subject to the following modifications "—and here followed seven detailed paragraphs lettered *(a)* to *if);*

(ii) Section 28 (5) provided: " Subsection (4) of this section shall not apply to Scotland."

(iii) Section 71 (1) provided: " Part II of the [Housing] Act of 1961 shall apply to Scotland subject to the adaptations set out in Part I of Schedule 3 to this Act, and for the purpose of amending the said Part II in relation to Scotland sections 64 to 70 of this Act shall apply to Scotland subject to the adaptations set out in Part II of that Schedule."

(iv) Section 107 set out certain provisions that required to be observed in applying the Act generally to Scotland.

(v) Section 108 provided: " This Act may be cited as the Housing Act 1964, and—

(a) The Act of 1957, the Act of 1958, the Act of 1959, the Act of 1961 and this Act may be cited together as the Housing Acts 1957 to 1964; and

(b) The Housing (Scotland) Acts 1950 and 1962 and this Act may be cited together as the Housing (Scotland) Acts 1950 to 1964."

(vi) By Schedule 5, part of the Housing (Scotland) Act 1950, was repealed.

This confusion was however largely cleared up by the Housing (Scotland) Act 1966.

59. A few comments may be permitted on the Act of 1964 so far as it affected Scotland:

(1) It inextricably intermixed and confused English and Scottish legislation by adding each to the other.

(2) By its form it rendered the Scottish law on the subject unavailable in clear terms and made it virtually incomprehensible unless it were to be reprinted with adaptations incorporated. In effect Parliament said: " We are not giving the Scots an Act. We will give them the English Act and tell them to adapt it for themselves in the way we indicate."

(3) It made the Act part of two different series of Acts and gave those series two separate names.

60. The method of amendment adopted in each case may of course have been prompted by the desire to save parliamentary time and to carry out changes by a single Act instead of by several. It had the advantage of, once again, demonstrating to Members of Parliament the intention and general purpose of the Acts without explaining the detailed effect of each. It is doubtful, however, whether any but a few members would be expected fully to understand even the general effects of such a mountain of confusion. It is also true that the confusion was cleared

up some years later by the framing of the consolidating Acts of 1967 and 1966 respectively. It may be that " patching " Acts are intended to be only temporary, but even this reason would scarcely justify the employment of such methods of drafting.

E. SCOTLAND'S REQUIREMENTS

61. In conclusion we suggest that Scotland is entitled to require conditions for the preparation and publication of its statute law as favourable as those which are maintained for England.

PART V

THE CAUSES OF THE PRESENT SITUATION IN THE UNITED KINGDOM

A. TRADITIONAL

62. In our view the main cause lies in the traditional nature and historical origin of our institutions. These have evolved through slow growth and adaptation to changing conditions. This process has obscured the necessity for, and postponed the adoption of, any comprehensive or long-term planning. This is very much in accord with our national predilection for the approach which is gradual and pragmatic as opposed to that which is comprehensive and based on general principles. The result is untidiness and a considerable measure of disorder, confusion and inefficiency.

63. As we have seen, the statute was originally the exceptional phenomenon in a legal system based on the Common Law. Now statutes are very common and rival the Common Law as the main portion of the basic law of the country. The volume has increased over the years without a full appreciation on the part of legislators of the change in the essential nature of the body of law that the accumulation of this vast and unwieldy bulk has brought about. Statutes are accordingly still generally treated as individual, and sometimes wholly separate, " Acts " (an illuminating word if considered in its essential meaning) of the United Kingdom Parliament. They are not considered as part of a co-ordinated body of law.

B. PARLIAMENTARY

64. Parliament itself is a traditional and historical growth which has been reformed and changed gradually and from time to time as occasion has required. Parliamentary procedure and Standing Orders have evolved in the same way and have their own case law and precedents. Such evolution has of course been directed to suit the convenience of Parliament. Bills and their form have therefore been fitted in to suit the overall needs of the Parliamentary machine—or the convenience of Governments, as we shall see below.

C. GOVERNMENTAL

65. The Government of the day has its policies which must be implemented within its term of office, of which it can only be sure of a maximum of five years. Its Bills must therefore be passed within the shortest possible time. Every device must therefore be used to economise time and in particular to reduce the amount of time-consuming opposition. This affects the priorities of subjects, the substance of the Bills which are presented, the manner of their presentation and their internal form or structure. Insufficient attention is paid to their ultimate destination or form as completed Acts or to the place that they will take in the scheme of the statute book (or lack of it) or to the needs of the users. The aim is" to get the Bill through."

66. This is one of the main causes of the defects in our statute law. For a demonstration of this and of the way form affects substance we cannot do better than reproduce below the speech of Mr. Herbert Samuel (as he then was) on the moving of the first reading of the Children Bill (a measure to which we have already referred) in the House of Commons on February 10, 1908.[20] He said:

> " The present law for the protection of children and the treatment of juvenile offenders is in some confusion. It is spread over a large number of statutes, and it urgently needs consolidation. Experience has shown the need of a considerable number of amendments and extensions of the law. The Government have decided not to introduce a series of small Bills in successive years, but to ask Parliament to enact, in one large and comprehensive measure a thorough codification, and amendment, of the law relating to children. A Bill of this scope could not in a crowded session like this expect to pass into law unless it commanded, more or less, the favour of all sections in the House and we have therefore excluded from it all the subjects which might properly be described as controversial. Even the question of children in public houses, with regard to which there is a general measure of assent, we have thought it wiser to defer to be dealt with in the Licensing Bill. The question of the employment of children, whether in factories or elsewhere, raises important industrial questions on which unhappily there is not complete agreement. The question of extradition naturally belongs to the Extradition Acts and there are other subjects which we might have liked to include but which we have been obliged to omit. But even with these omissions the Bill is a somewhat voluminous one. It contains 119 clauses, covers 70 pages, and consolidates 22 statutes and parts of many others together with a number of new provisions. For the convenience of the House and of the public who are interested, I have prepared a White Paper which will show clearly clause by clause the effect of this Bill on existing legislation and which will be circulated at the same time as the Bill." [21]

[20] This is supplementary to the evidence given by Mr. H. H. Marshall to the Committee on the Preparation of Legislation on July 25, 1973 when another aspect of the Government's reasons for the presentation of the Bill in this form was considered.

[21] Parliamentary Debates (Commons) (1908), Vol. 183, cols. 1432, 1433.

67 From this it will appear that:

(a) The decision by the Government to introduce this measure on this particular subject was made because it was part of its policy of social reform; and its decision to introduce it at this time was made because it would command the favour of all sections of the House.

(b) The decision to introduce it in the form of a " conglomerate " Bill was made because the matters included in it were non-controversial and could thus be easily passed through the House. Other topics were reserved for other Bills at other times.

(c) The decision to give the Bill its particular title was to show that reform was being comprehensively undertaken in regard to children, even though this added to the complexity of the law relating to the other topics covered in the Bill and would not have occurred if the Government had decided " to introduce a series of small Bills in successive years."

(d) Substance, form, title, shape and further confusion of the statute book therefore resulted from Government policy and not Parliamentary drafting.

68. In passing we may point out that the Bill was not a " thorough codification " since it did not embody in itself all the statute law and case law on the subject or even all the statute law.

D. DRAFTING

69. As we have seen (paras. 45-47 above), the draftsman is considerably influenced in carrying out his task by the necessity for compliance with Standing Orders and Parliamentary Procedure. As we have also seen (paras. 23 and 65 to 67 above), he is also controlled as to "form and title by Governmental policy and Private Members' choice. It is clear therefore that much of the blame and odium heaped on him in the past has been undeserved and was due to his critics' lack of knowledge of the conditions under which he works and also to a lack of adequate analysis of the real causes of our present legislative plight. Further, the draftsman is himself largely controlled by the traditional methods of drafting that he has inherited from the past and which are in many respects too cumbersome and complicated for modern conditions. As Mr. Justice Scarman (as he then was) said[22] :

> "The draftsman is not to be blamed if the results of his labours are sometimes unintelligible. Quite apart from the complexity of the subject-matter that besets him . . . he acts only on instructions. If neither Parliament nor the society which it represents has formulated any consistent policy as to what it wants from the statute book and if—as must reluctantly be conceded—drafting statutes has become largely an attempt to restrain these ' hydra-headed presumptions of the courts in favour of the common law,' piecemeal, ill-adjusted, and at times unintelligible legislation is bound to be the result."

[22] *Law Reform,* p. 51.

70. On the other hand the draftsman undoubtedly takes some considerable share in shaping the Bill; and in large measure the function of the Parliamentary Counsel is divorced from any direct responsibility arising from the implementation of his work. Having received his instructions from the departmental lawyers he has a large degree of " sovereignty " over the course of his work until he produces the end result within the appointed period. On legal points he is responsible to the Attorney-General, but he retains a real control over the style of drafting, the amount of detail inserted, the use of referential legislation, the degree to which statutory powers are to be delegated and indeed to most aspects of statute law. In large degree statute law is the draftsman's creation.

71. On the other hand again, this state of "sovereignty" has its corresponding disadvantage whereby he is not in a position to challenge the Department on the fundamentals underlying his instructions.

> " Too often in practice, the Parliamentary draftsman is not in a position to recommend basic simplification or radical revision of the scheme which he is instructed to carry out, but simply has to follow his instructions even if the result is a very complicated and difficult piece of drafting " (The Law Reform Committee of the Council of the Law Society).

72. Finally it must be remembered that, although the draftsman provides a necessary product for the user, he serves the Government and Parliament; and the interests of the user may be subordinated to prevailing political motivations and the exigencies of form and procedure.

E. Shortage of Time

73. Shortage of time is a factor which affects the actions and methods of all three classes of participant in the legislative process, Parliament, Government and Draftsman, and it runs like a scarlet thread through almost everything that we have written above. We think therefore that it merits a special reference here.

F. Collective Action for Solutions

74. We submit that, as responsibility for the causes of the present situation is spread out among several institutions and classes of individual, so adequate solutions to our problems can only be devised and made effective by the full participation of all involved in the legislative process working towards one end. How this may be accomplished we will describe in Part VI of this Memorandum.

Part VI

SOLUTIONS TO THE DEFICIENCIES OF THE STATUTE LAW SYSTEM

75. We do not propose to follow the classification of the topics and the numbering of the paragraphs in Part III of this Memorandum in

setting out our proposals for solutions, nor to set solution against deficiency seriatim and in order. The reasons for this course are:

(a) Causes and effects are so intertwined in the origins of the deficiencies referred to and there are so many factors that contribute in whole or in part to others that any such close comparison would be repetitive and wasteful.

(b) In the Stow Hill Report, *Statute Law: The Key to Clarity*, the Committee made two recommendations, namely: (1) a crash programme of consolidation, and (2) the introduction of textual drafting for new (" clean ") Acts and consolidation Acts. A number of the deficiencies set out in the Heap findings have thus been dealt with.

Our proposals will therefore take the form of a number of concrete recommendations designed to alleviate all deficiencies.

76. We desire to emphasise in the strongest possible terms that most of our ideas are not new but have been adopted in some shape or form in almost all overseas Commonwealth countries where they have been well-tried and have stood the test of time. These countries do not suffer from the same deficiencies that afflict the United Kingdom, or at least not to the same extent. The United Kingdom is in this respect the backward state and the odd man out.

77. In setting out our proposals it will not be necessary to go into excessive detail or overload this Memorandum with examples since much detail and many examples have already been given in the Stow Hill Report and in other publications to which reference will be made as appropriate and with which the Committee on the Preparation of Legislation have been or will be supplied.

A. STATUTES AS AN INTEGRATED BODY OF LAW

78. We repeat the statement made by the Statute Law Commissioners in their First Report in 1835 and quoted in paragraph 20 above: " The statutes have been framed extemporaneously, not as parts of a system, but to answer particular exigencies as they occurred." The results of this approach and the confusion that it has caused have been examined in Part III of this Memorandum. The statute law of the United Kingdom at the present time can be likened to a large number of Gordian Knots located in an Augean Stables situated at the centre of a labyrinth.

79. In our opinion the first step towards obtaining a rationalised statute book is the adoption, by all concerned in the legislative process, of a fresh outlook towards statutes, regarding them not as individual Acts dealing with particular situations but as, potentially, parts of a coherent whole which for convenience can be divided up under a number of subject-headings but which are nevertheless interrelated. The first step, in other words, is to induce a state of mind.

80. By this we are not suggesting the immediate creation of a code or series of codes, although the case for ultimate codification cannot be rejected and will be touched upon below. What we do propose is the

creation of a body of consolidated statutes to be contained in a comparatively few volumes setting out the up-to-date statute law on every subject in respect of which legislation has been passed, so that all the statute law on each subject can be " found in one place."

81. If this appears to be a visionary ideal we can only say that this aim was attained many years ago in practically all other Commonwealth countries and, given time and patience, can be attained in the United Kingdom also. We set out below the means by which, it is suggested, this can be achieved.

B. One Act: One Subject; One Subject: One Act

82. The aim that there should, subject to certain exceptions, be only one Act for each subject and one subject contained in each Act involves, in its first stage, a large programme of consolidation whereby all the statute law relating to each subject, wherever it is to be found, shall be collected together, integrated and harmonised in a single Act which will deal exclusively with that subject. In this respect we would refer to our recommendations in paragraph 87 below. It is encouraging to note that a programme of consolidation has already been launched and has made considerable progress. As we have seen in Part III of this Memorandum, however, consolidations are not always thorough and complete. For the success of our scheme consolidations must be comprehensive in their inclusion of all the relevant statute law. (Proposals for an accelerated programme of consolidation are dealt with in more detail below.)

83. Our aim also involves the preservation of the integrity of this consolidation so that, once it had been achieved, new legislation relating to a particular subject would not be found in any statute relating to another subject.

84. This brings us to the second stage of the consolidation process namely when it will be the practice for all additions to or amendments of the law relating to a particular subject to be effected by amendment to a single consolidation Act.

C. A Body of Consolidated or Principal Acts Arranged According to Subject Matter

85. The third stage in the process would come when all the statute law on every subject had been successfully consolidated into a series of principal Acts. Then these would be assembled together in a series of volumes entitled " The Statutes of the United Kingdom " or some such name. Each statute would be a principal Act and would be given a title and a number identifying it as a particular chapter in the complete collection of the statute laws of the United Kingdom. We deal with the subject of titles below. Whether the statutes should be arranged alphabetically or grouped under category title headings is a matter of policy. Suffice it to say that examples of sets of statutes arranged in this way can be seen in the " Revised Statutes " of almost every overseas Commonwealth country. Identification of a statute by its date would thus disappear

except in the case of those contained in the supplementary annual volumes, but these also would in due course disappear when their contents had been incorporated in their respective principal Acts on a periodical Revision or Reprint and when the " skeleton " of formal parts that remained had been authorised to be omitted from the new Revised Edition (See also below).

86. Criticisms have been levelled at the above system on the ground that it is never possible to achieve the perfection of the embodiment of all the statute law on a particular subject in one Act. This difficulty has been exaggerated, as all those who have operated the system are aware. It is true that there must be exceptions but they are only minor ones. These fall into two broad categories:

(a) *Penalty Clauses*. Purists will say that the principle of one subject one Act, and, one Act one subject is destroyed if, for instance, clauses creating offences and penalties for infringements of statutory provisions are included in the Act containing those provisions and not in the otherwise comprehensive Crimes Act or Penal Code that would have been passed. This is true, but it is a minor exception and is largely a matter of convenience. A decision can be taken in each particular case on the question: " Is it more convenient and practical for this offence to be inserted in this Act or to be transferred to the Crimes Act with a cross-reference to this Act? " The answer will depend in some degree on the gravity of the offence, whether it is of a general or specialised nature and whether it is of a similar kind to, or a sub-category of, a crime already to be found in the Crimes Act.

(b) *Incidental references.* Some statutory provisions inevitably deal in one clause with several subjects because they are interrelated. Usually, however, one subject is the primary subject and the others merely incidental. For instance an Act relating to Gaming may incidentally affect existing legislation relating to liquor licensing, Sunday observance and advertisements (see *e.g.* the Gaming Act 1968, sections 6,18 and 42). It is not permissible or proper to repeat the relevant clause in all Acts concerned, and so a decision must be made as to whether the clause should be inserted in Bill A or as an amendment to Acts B, C, and D. The test must be " which is the primary purpose of the clause and which is the incidental? " In whichever measure the provision is inserted it can be complemented by a cross-reference or annotation in the other.

87. Our recommendations are therefore that, in so far as it can be achieved, the aim should be to embody all the statute law on a particular subject in one Act. To the extent that this aim cannot be achieved for any reasons, such as those set out in sub-paragraphs (a) and (b) above, a system of annotations and cross-references should be introduced such as is iii force in the statute books of a number of the Australian States. For instance the volumes of the South Australian Revision of 1936 contained the authoritative text of the statutes of that State and the Government took responsibility for the corrections of this text. The Law Book

Company of Australasia Ltd., had, in addition, pursuant to arrangements made between that company and the Government and subject to limitations imposed by the Government, included in the work a great deal of material to help in the interpretation of the statutes and information as to regulations, proclamations and other subordinate legislation in force. It is understood, however, that this material had no official status.

D. TITLING OF BILLS

88. Under our proposed system the problem of titling would not disappear but would assume a different form. We have seen that in the past the choice of titles for Bills has been to a certain extent arbitrary both in respect of Government Bills and Private Members Bills and that the title of a Bill may be changed either at the instance of the Parliamentary draftsman or by amendment in a House. In no case, however, is the choice of title necessarily consistent, systematic, methodical or scientific. We have seen (paragraphs 23-25 above) that a wrong or unwise choice of title can have the effect of adding confusion to the statute book where the referential system is in force, *e.g.* by making an Act a principal Act when it should be an amending Act.

89. Under the proposed new system we recommend that the choice of title should be regulated and that some person, or body of persons, should be charged with the responsibility of allocating a suitable title to each Bill in accordance with a prescribed set of rules. We do not wish to be dogmatic as to the person or body of persons who should have this responsibility but consideration might be given to office holders such as Parliamentary Counsel or the Clerks of the Houses of Lords and Commons.

90. The aim in titling would be to assist in steering the Bill into its appropriate niche in the existing body of statute law and to supplement the work of the draftsman in implementing the One Act : One Subject principle. To refer back to examples given by us in Part III, under the proposed system if a Bill to make infanticide or child destruction an offence were prepared it would have to be in form an amendment to whatever at the time was the principal Act *(e.g.* the Offences against the Person Act or a new Penal Code). With such a form there would be no difficulty in choosing a title, such as the Offences against the Person (Amendment) Bill or the Penal Code (Amendment) Bill.

91. Descriptive titles would not be ruled out, however, if they were desired. The above Bills could alternatively be called the Infanticide Bill or the Infant Life Preservation Bill but each would in terms amend the principal Act and would not be a principal Bill in its own right. When the contents of the Bills had been merged with the principal Act at the next Revision the amending Bills and their titles would disappear. Thus used, descriptive titles would be transitory and not the means of creating new and unrelated portions of statute law. In some cases descriptive titles would be a positive advantage in indicating the nature of a Bill which, to effect a given purpose, textually amended a number of different Acts. For instance Bill C-252 of

1971 of the House of Commons of Canada was entitled the Protection of Privacy Bill but it textually amended (1) the Criminal Code to create certain new offences and to establish certain rules regarding the admissibility of evidence, (2) the Crown Liability Act to provide for civil liability of the Crown in certain circumstances and (3) the Official Secrets Act to provide for the interception or seizure of communications in certain circumstances.

E. TITLING OR HEADINGS OF CONSOLIDATION OR PRINCIPAL ACTS

92. If Consolidation or Principal Acts, arranged according to subject matter, are in future to form the body of our statute law and if there is to be a rule that new law, whether additional or amending, is as far as possible to be incorporated into the appropriate Consolidation or Principal Act, it follows that widely agreed headings for classifying the law or, in other words, recognised titles for Consolidation or Principal Acts, must be worked out.

93. No problems of classification exist where the consolidation involves the combining together of a series of Acts amending one principal statute only. However, most major consolidation involves much more than a principal Act and a set of amending statutes. In such cases the problem becomes one of reorganisation of the statute law and the selection of an appropriate category for the reorganisation. On what basis should the selection of headings for the consolidation of statutes be made? In our view the approach can only be on a pragmatic basis. In particular, attention should be given to the purpose for which one is classifying, and too much should not be expected of single schemes of classification. Problems of classification affecting consolidation of existing legislation may be different from those affecting the classification of the law generally. This is because in existing statutes one already has subject headings. In these circumstances, any scheme of classification which would involve a large degree of " chopping up " of statutes and their distribution under different headings would be unrealistic and would make the task of the consolidator difficult. The nature of legislation already on the Statute Book ought, as far as possible, to dictate the choice of subject-matter. In some cases this may lead to wide sub-divisions, as for example would be the case with Corporations or Road Traffic; in others they will be fairly narrow, for example, the legislation on the White Fish Industry.

94. In the approach to classification for the purposes of consolidation too much attention should not be paid to the attainment of theoretical perfection. It is not a matter of reducing the number of statutes on the statute book to a small number of highly structured consolidation Acts. It is a matter or rationalisation of the Statute Book.

95. In our opinion, in this case also some person or body of persons should be charged with the responsibility of preparing and maintaining an authorised and official list of titles or headings of Consolidation or Principal Acts with which all engaged in the legislative process would be required to conform.

F. THE PRODUCTION OF REVISED EDITIONS OF STATUTES

96. The introduction of the principle of One Act : One Subject and One Subject : One Act; the system of textual amendment; and the establishment of a body of consolidated principal Acts, enable periodic Revised Editions of these Acts to be prepared as required. Whereas Acts that have been referentially amended can only be produced in a revised form by the processes of repeal and consolidation and the invocation of the legislative process, Acts that have been textually amended can be revised by administrative process and reprinted by the Government Printer. This can be done from time to time as required for individual Acts; or periodically for all Acts when a new Revised Edition is to be introduced incorporating in each principal Act all additions and amendments made to such Acts in the years since the previous Revision. This is a regular feature in most Commonwealth countries and used to occur at intervals of roughly every ten years. An account of the process appears in an article entitled " Statute Law Revision in the Commonwealth." [23]Recently some such countries have adopted the loose-leaf, as opposed to the conventional, method of binding. It is not necessary at this stage to consider in detail the relative merits of the arrangement of statutes in a Revised Edition according to Groups or Categories as opposed to alphabetically.

G. TEXTUAL AMENDMENT

97. The success of the One Act: One Subject; and One Subject: One Act principle depends on the use of the system of textual amendment. We have touched upon textual amendment in the Heap Report and in Part III of this Memorandum and we have considered it at length in the Stow Hill Report. For completeness, however, and in view of its great importance we will repeat here some of the paragraphs of the last mentioned Report.

98. The Statute Book may be altered in any of the following ways:

(1) by amendment of existing legislation;
(2) by repeal of an Act;
(3) by consolidation;
(4) by codification; or
(5) by enactment of an Act dealing with a new subject.

Acts in the last three categories are termed principal Acts. They deal comprehensively with a single subject arranged in logical order. It is with principal Acts mainly that the textual amendment system is concerned. For the system to operate effectively not only must the Acts be principal ones, they must also be what we might call " clean." In other words they must have been amended (if at all) according to the textual amendment system. The use of this system enables the logical arrangement of the principal Act to remain unimpaired by amendments. Amendments must at some stage be physically incorporated in the user's copy of the Act but,

[23] By H. H. Marshall in *International and Comparative Law Quarterly,* Vol. 13, p. 1407 (October 1964).

assuming this to have been done, the law with which it purports to deal continues to be incorporated in the one Act, logically arranged.

99. As we have seen, one of the ways of altering the law is by amendment of the existing Act, whether it be a principal or amending one. One method of amending statute law is the referential system which is described and illustrated in the Heap Report (paras. 91 *et seq.).* The process consists in the amendment of an existing principal or amending Act by mere reference to the provisions affected without directly altering their wording. If One assumes the existence of a principal Act in the first place (which is not necessarily so under this system) a series of amendments renders further consolidation necessary—perhaps after only a short time. This is so because the original principal Act, when the referential system is used, becomes gradually so overlaid with fresh statutes introducing legislative changes, otherwise than by making the appropriate alteration in the actual text of the principal Act, that it is in effect replaced by a whole corpus of fresh laws all of which have to be read together with the original principal Act which accordingly loses its purpose. If, however, the textual system of amendment is used, the principal Act remains, with its altered wording the whole source of the existing law, and is thus in effect maintained in a state of " perpetual" consolidation.

100. Assuming that we have an unamended principal Act in force, the question then arises how to amend it in such a way as to maintain the coherence of its structure and arrangement. It is submitted that this can be done by the use of the textual system of amendment. Basically there are three ways of so amending a principal Act:

(a) by repeal of a provision in the Act;
(b) by insertion of a new provision in the appropriate place in the arrangement of the Act; or
(c) by alteration of the wording of a provision.

Insertions are made in the appropriate place in the Act. Where new sections or subsections are inserted, the original number may require to be supplemented as for example by letters of the alphabet, so that there may be section numbers 50A, 50B, 50C and so on. The arrangement is thus left unimpaired.

101. We turn to the mechanics of the textual process. In essence, the amending Act comprises a list of directions to the user of legislation. These directions instruct him to read the principal Act subject to specified amendments. Typical directions may read as follows:

> " Section 28 of the principal Act is amended by the deletion from subsection (3) of paragraph (b) "; or
>
> " Section 10 of the principal Act is amended by the substitution for the words ' twenty pounds,' occurring immediately after the words ' fine of,' of the words ' forty pounds or a term of imprisonment not exceeding three months.'"

The amending Act is therefore no more than a piece of machinery for enacting changes to the principal Act. In practice most users will wish to alter their text of the principal Act so as to give effect to the directions and then discard the amending Act.

102. It may be that an Act requires such a high degree of amendment that it becomes easier to repeal the principal Act and to enact a new one. Except where the degree of amendment is very great we do not consider such a system has any advantage over the orthodox textual amendment system, and it suffers from the disadvantage of obscuring the changes made by the amending Act. The same applies to the repeal and re-enactment (with modification) of a portion of an Act.

103. The adoption by Parliament of the textual amendment system as a general practice must not of course be allowed to derogate from Parliament's power to legislate as it thinks fit. There may arise some emergency where the textual system is required to be dispensed with in the interest of speed. Bills have sometimes been drafted and become law on the same day. In such cases referential amendment may be not only excusable but absolutely necessary. Where this is so, we would recommend that amending Acts be enacted as soon as possible to replace such referential amendments with textual ones, thus reverting to the " clean Act " principle at the first practical opportunity. This could only be done, of course, if Members were prepared to accept a convention under which such amending Bills were treated as in general not debatable, as in the case of consolidation Bills.

104. The textual amendment system, if widely adopted, would, we believe, greatly conduce to keeping the Statute Book in a form that is logical and coherent. It would also obviate much of the physical and intellectual difficulty involved in finding the appropriate law and then applying it efficiently once found. A great advantage to be derived from the textual method of amendment is that, no matter at what period, short or long, the Government decides to reprint any particular Act with its amendments incorporated, every user of that Act can in the intervening years make his own " reprint " by inserting the textual amendments in his own copy of the Act. Each owner of a set of statutes can, by a simple process, whether by pasting in amendments as they are made or by substituting a loose-leaf page incorporating amendments as they are reprinted, keep his own set of statutes up to date year by year. So the user has at his disposal at any time a copy of the statute right up to date on the particular branch of the law in which he is interested. This exemplifies the difference between the system whereby periodic reprints are necessary and that whereby periodic consolidations are necessary. This in turn is of importance because the consolidation process requires the services of administrators, departmental lawyers and draftsmen, and the use of Parliamentary time, whereas the reprint process does not. Reprints of a statute can easily be made as soon as a sufficient number of amendments have been made to make it worthwhile to bring the statutes up to date with all the amendments. Reprints of whole Acts can, in fact, be made without reference back to Parliament, either by the Stationery Office or the commercial publishers. It follows that an official edition such as the *Statutes in Force* (now in preparation) could be in a much more useful form than is possible under the present system.

105. The simplification and reduction in bulk of statute law which

would result from adoption Of the textual amendment system would, in our opinion, have a significant effect in facilitating the ascertainment of legal relationships and might even reduce the need for and cost of litigation. The greater intelligibility of the law would have advantageous results in spheres such as the instruction of students, its appreciation by foreign lawyers and in the adaptation to systems which might be imposed by entry into the European Economic Community. It would also facilitate the task of the legislator, since he would more easily understand the law and how it would be affected by changes.

106. The textual amendment system has been adopted by almost all Commonwealth countries with a large measure of success. Britain is the only major country in the Commonwealth which does not use the system extensively. In fact, the system has been used here in a limited number of cases, although its use in conjunction with the referential system has reduced its effectiveness. By contrast Canada, for instance has, by the full use of the textual amendment system coupled with complete revision of the statutes every ten years, equipped itself with a far more satisfactory Statute Book than our own despite the twin handicaps of having to enact every statute in two languages and the federal system which divides legislative power between the provinces and the centre.

107. We beg leave to refer to the evidence of Mr. F. A. R. Bennion (formerly Vice-Chairman of the Stow Hill Committee) before the Select Committee on Procedure of the House of Commons,[24] Questions 1126, 1127 and 1128, in which he is reported as having agreed that the Stow Hill Report's advocacy of textual amendment was really directed at the amendment of Consolidation Acts; that he had no objection to referential amendments to the ordinary Acts being introduced; and that the Stow Hill Committee saw no advantage in textual amendment except where the law was already consolidated or " a brand new Act on a special subject" was being amended. We would like to add a few words of clarification to what was necessarily a limited statement, in order to clear up any misunderstanding. Our position is as follows.

(i) It is common ground that there are many Acts of Parliament, or portions of Acts, on the statute book which are not susceptible of amendment by the textual method, either because they are very old and have been drafted in archaic language or because, although not so old, they have been drafted in a language, style or construction (including the referential) which does not permit of the use of the "slot" method in amendment. Such Acts must continue to be amended by the referential method, where required, until they in their turn are repealed and consolidated in new principal Acts. This is a transitional stage that cannot be avoided but which we hope will be brief.

(ii) We agree with Mr. Bennion that Consolidation Acts and "brand new Acts on special subjects " should be amended only by the textual method, but we would go further and say that there is no

[24] Second Report of Select Committee on Procedure," Session 1970-71, H.C 538 and the Minutes of Evidence to the Select Committee, H.C. 297.

objection to the employment of the textual method of amendment to portions of Acts other than these if such portions are susceptible to such treatment. It often happens that an Act contains some sections that are " clean " and straightforward, and there is no reason why these should not be amended textually. In fact this is increasingly the case at Westminster where the textual method, at one time largely confined to minor or consequential amendments, is now often used for amendments to the main texts of statutes. An outstanding example can be seen in the Town and Country Planning (Amendment) Act 1972.

(iii) We would like to emphasise the importance of establishing a rule that once an Act or portion of an Act of the kinds mentioned above has been passed in a " clean " and clear-cut form it should never again be amended by the referential method (subject to the temporary exceptions such as the emergency situations mentioned above). To do so would undo the good work carried out by consolidation and textual amendment; and our proposed system would relapse into the state of confusion which now exists but which we hope will soon be a thing of the past. In this connection it will be recalled that the late Sir William Graham Harrison, sometime First Parliamentary Counsel to the Treasury, said in 1935 [25] that there were cases of referential legislation which were intolerable, and he instanced the Unemployment Insurance Act 1920, which when it was passed contained the whole law relating to unemployment insurance, but which was subject to amendment between 1920 and 1932 by more than twenty Unemployment Insurance Amendment Bills, and a considerable number of amending enactments in other Bills. These completely destroyed the compendious nature of the Act of 1920.

108. We have mentioned the admissibility of exceptions to the rule as to textual amendment even in the proposed new system and in this connection we also envisage the necessity for the use of occasional referential drafting to assist the legislator in the House in the circumstances outlined below.

H. The Reconciliation of the Needs of the Legislator and the User

109. As we have seen, many interpolations and parentheses in the clauses of Bills and much referential drafting are inserted for the purpose of informing the members of the Houses of the purposes and effect of Bills. On the other hand the quality of Bills suffers by reason of the inclusion of material required only for purposes of Parliamentary procedure; and the present system of attempting to marry the text with commentaries and explanations produces confusion and additional bulk. In several ways a Bill is an inadequate vehicle for debate of the principles behind it.

110. Nevertheless we are the first to admit that the introduction of the

[25] *Journal of the Society of Public Teachers of the Law* 1935, p. 29.

textual method of drafting would have the effect, if it stood by itself, of giving the legislator even less information than he has under the present system. It is obvious that during the Parliamentary stage the system demands some kind of explanation in order to make the meaning and effect of each direction in the amending Bill comprehensible to members of Parliament.

111. One system which is currently used on occasions is the Keeling Schedule. This forms a schedule to the amending Bill and sets out the principal Act as amended in accordance with the list of directions. The main drawback is that the Schedule remains part of the law and, since the amendment will already have been made in textual form in the main body of the Act there is a duplication—an unnecessary cluttering up of the law itself. The theory behind the Keeling Schedule is sound, but its contents would more satisfactorily be dealt with if the explanation of the effect of the amendment were contained in some document which were not part of the text of the amending statute itself.

112. Each Government Bill on its introduction into Parliament is accompanied by an explanatory memorandum which is drafted by Parliamentary Counsel or the Departmental lawyers on behalf of the appropriate Minister. On its introduction into the House it thenceforth belongs not to the Minister but to the House. The Minister no longer has any power to alter it in any way. As the Heap Report states (para. 52) the memorandum is not sufficient for the purpose of explaining to Members the meaning and effect of the whole Bill or the individual provisions of it, and in fact it makes no real attempt to do so. Furthermore since, after introduction, the Minister no longer has any responsibility for it, no steps are taken to alter it to take account of any amendments during the passage of the Bill through the House. It follows therefore that the present type of explanatory memorandum is an unsuitable medium for the explanation of textual amendments.

113. What is needed is a document which explains the effect of each textual amendment and is kept up to date by being reissued with suitable modifications every time the Bill is reprinted in amended form. Such a document which we call the " textual memorandum " would be entirely separate from the usual explanatory memorandum. It would explain in an entirely factual and non-controversial manner the effect in the existing law of each amendment to be made by the Bill. This would normally (but not necessarily or exclusively) be done by giving the text of each provision of the principal Act sought to be amended and how it would appear with the amendment incorporated.

114. We propose that, like the present explanatory memorandum, the textual memorandum should initially be prepared by the Minister or private member responsible for the Bill. (In the case of a Government Bill the actual work would no doubt be done by departmental civil servants advised by the draftsman.) The clerks in the Public Bill Office would, as in the case of the present explanatory or financial memoranda to the Bills, scrutinise the text of the memorandum to see that it was in order. Once the Bill had been introduced, however, the duty of revising

the textual memorandum to fit amendments made by Parliament to the Bill would be likely to fall upon the clerks in the Public Bill Office, though we would expect them, in accordance with usual practice, to receive the ready advice of Parliamentary Counsel. Since the Bill is now in the possession of the House it would not be proper for the member in charge of it to make amendments to the memorandum, and the only alternative seems to be to regard this as part of the service to be rendered by officials of the House to those whom they are appointed to assist.

115. A further problem of the textual amendment system arises in connection with amendments put down on the order paper during the passage of a Bill through Parliament. Let it be supposed that an amending Bill introduced into the House of Commons contains ten different textual amendments to the principal Act. Each of these is explained in the textual memorandum which accompanies the Bill when introduced. The Bill receives a second reading and is then committed to a standing committee. In standing committee, two amendments to the Bill are put down on the Order Paper. The first of these (" amendment A") proposes to insert in the Bill an eleventh textual amendment to the principal Act. The other (" amendment B ") proposes to alter the wording of one of the ten textual amendments to the principal Act already contained in the Bill as introduced. Just as members require, and are given, information on the meaning and effect of the ten amendments in the original Bill so, it can be argued, they should have similar information about amendment A and should be told what difference amendment B makes. On the other hand, amendments to a Bill are often prepared in great haste and tabled at short notice. They may be extremely numerous, and, many of them may have little chance of being adopted. It seems impracticable to suggest that every amendment put down on the order paper should be accompanied by an explanatory memorandum. Moreover, many amendments to Bills put down under the present system are far from being self-explanatory, yet no rule compels any explanation of them to be given until they are debated. We conclude, therefore, that no rule should be adopted to *compel* a textual memorandum to be attached to amendments to Bills—indeed, we think that the textual memorandum to a Bill itself should, like the present explanatory or financial memorandum, be in theory optional, though it is probable that it would be almost universally adopted. We see no reason, however, why machinery should not be devised whereby it is possible for a member putting down an amendment to cause there to be circulated with it a textual memorandum in cases where he wishes to do so. Where, in the case of Government amendments, it is likely that the amendment will be accepted this would, where time permits, seem to be a convenient practice, facilitating the task of the clerks in later revising the textual memorandum to the Bill, and shortening the time spent by the House in debate. The form in which a textual memorandum to an amendment would be circulated would be a matter for Parliament to decide.

116. The words in the last paragraph are taken from paragraph 35 of the Stow Hill Report which appeared in October 1972. Since they

were written, at least one such textual memorandum has been issued. It accompanied the Furnished Lettings (Rent Allowances) Bill 1972, and was numbered Cmnd. 5183.

117. As an alternative to the use of the Textual Memorandum we suggest the adoption of the method in vogue in the Parliament of the Dominion of Canada. Under this method textual amendments are carried out to the relevant sections of each and every Act concerned, and this is done in a single Bill which, as stated above, may or may not have a descriptive title. (In this case there is no objection to several Acts being amended in the same Bill because each Act is amended individually and textually and the referential system is not used.) The left hand page of each " opening" of the Bill is used for the text of the Bill and the opposite or right hand page is used, where necessary, for Explanatory Notes which explain in detail the purpose of the amendments and their origin or background. The Explanatory Notes also give, where necessary, the text of the section to be amended as it exists at the time, thus enabling the members of the legislative houses to compare them with the proposed textual amendments. Extracts from a Canadian Bill are included in Appendix E to the Stow Hill Report.

118. This is a variation of the textual Memorandum proposed earlier in this Part and is more compendious and possibly more convenient. It will be appreciated that the Explanatory Notes on the right hand side of the Bill do not form part of the Bill and are not reproduced in the Act when the Bill has been passed into law,

119. What is important is that under both the Textual Memorandum and Canadian systems explanatory material is eliminated from the text of the Act when it has been passed instead of remaining part of it, as it does under the referential Westminster system.

120. A further alternative method of making textual amendments and explaining their effect to members of legislative houses is in use in the Parliament of the Commonwealth of Australia. The attention of the Chairman of the Heap Committee was drawn to this by Mr. D. C. Pearce of the Faculty of Law of the Australian National University to whom we are indebted for the following particulars. He says [26]:

> " May I . . . mention a matter to you that has caused me difficulty when using United Kingdom statutes. I refer to the practice of including in one Act amendments that are relevant to another, for example, the amendments of the Customs and Excise Act that were included in the Dangerous Drugs Act 1967. When this practice is followed, it is very easy for an amendment to an Act to be overlooked. Under a Cabinet direction, Acts of the Commonwealth Parliament now contain only amendments of the Principal Act to which the amending Act relates. Where consequential amendments are required to other Acts, these are effected by separate amending Acts. This seems to me to be a desirable approach.
>
> It may be objected that this entails the passage of a greater number of Bills through the Parliament. While this is true, the difficulty is

[26] Letter dated April 29, 1969.

more apparent than real as the practice is to suspend standing orders to enable the related Bills to be dealt with together. I enclose a copy of a statement of this practice from an official handbook of the procedure of the House of Representatives. The other major difficulty that I, along with all others to whom I have spoken, have encountered is the practice of amending legislation by means of separate substantive Acts rather than amending Acts that may be incorporated into the Principal Act."

A copy of the statement referred to is set out in Appendix C hereto. (The comments contained in paragraphs 1 and 4 of Mr. Pearce's letter confirm the criticisms of the United Kingdom drafting contained in Part III of this Memorandum. In fact United Kingdom methods are regarded with incredulity in almost every other Commonwealth country.)

I. The Transitional and Commencement Problem

121. Where the referential system of amendment is used, a feature of the legislation is that the texts of statutes tend to embody a large number of commencement and transitional provisions. These indicate the time factors involved and the provisions which apply pending the coming into operation of permanent provisions. Most statute users are not concerned with this temporary matter and it clutters up the legislation unnecessarily. Commonwealth countries which use the textual amendment system have generally made no significant attempt to solve this problem. They normally use the system whereby in published versions of the statute law an asterisk marks the provision affected and refers the user to a footnote which gives the commencement date. Temporary matter still, however, appears in the main body of the Act. So the problem still exists where a principal Act has, or acquires, a large number of commencement dates and transitional provisions.

122. A new solution to the problem has been adopted for tax legislation in Jamaica. Since 1970 the system has been there used whereby all commencement and transitional provisions and repeals in the income tax law are dealt with in a special schedule. The " Jamaica " Schedule is part of the principal Act and is correspondingly altered whenever the principal Act is amended. It contains the following component parts:

(A) A preliminary paragraph dealing with overall commencement of the principal Act. In informs the user when, subject to the remainder of the schedule, the Act comes into force;

(B) Column headings as follows:

(a) " Section " (or " Schedule ")—this indicates the number of the section of the principal Act being referred to;

(b) " Subsection " (or " Paragraph ")—this indicates the number of the subsection of that section (or the number of the paragraph where the Jamaica Schedule refers to a schedule of the principal Act);

(c) " Provision "—this indicates any one of the following:

(i) The commencement date of a section, etc., where this differs from the overall date in the preliminary paragraph;
(ii) The repeal of a provision and the date from which it is repealed;
(iii) Transitional and commencement provisions and their commencement date arid date of lapse;
(iv) Provisions (if any) formerly in the principal Act, but subsequently repealed, with relevant dates, where circumstances require their continued publication for some special reason; for example, former rates of income tax;

(d) "No. of amending Act"—this indicates the chapter number and year of the amending Act.

123. The Jamaica Schedule is used in the following way. There is nothing in the body of the principal Act to indicate the date when the principal Act or any amendments came into force. The user, therefore, has to consult the Jamaica Schedule under the appropriate section. If, however, there is nothing mentioned under the appropriate section, the relevant commencement date is that mentioned in the preliminary paragraph of the Schedule. Every principal Act has a Jamaica Schedule, although a completely new Act with a single commencement date may contain only the preliminary paragraph and it would be left to the first amending Act to insert the headings and other matter. Where there is a consolidation Act there are two alternatives:

(a) to insert a Jamaica Schedule containing all the historical commencement dates, etc., of the Acts consolidated, or
(b) to adopt the simpler procedure of bringing all the consolidated provisions into force on the passing of the Act leaving pre-Act situations to be dealt with under the previous law. It would, therefore, depend on the relevant date at which the particular law applied as to whether the new consolidation Act or the old consolidated Acts were consulted.

There may be advantages in using either of the methods depending on the circumstances. The first method may be modified by including only historical material relevant to a limited period, say, the preceding five years. An example of a Jamaica Schedule is given in Appendix D to the Stow Hill Report.

J. PROMULGATION OF THE LAW

124. It is inherent in the textual system that there be available to users the text of the principal Act fully updated with all amendments incorporated. But in addition to this, all amending Acts should continue to be available in the Annual Volumes of Statutes issued as at present on a chronological basis. It would always be possible, therefore, as it is now, to ascertain the law oh a past date by referring to the principal Act as originally enacted, together with each amending Act passed before the date in question, and working out the state of the law on that date.

K. A CRASH PROGRAMME OF CONSOLIDATION

125. We have indicated above that the complete consolidation of all the statute law of the United Kingdom is essential to our scheme and must be carried out before that scheme can work effectively in all its aspects. We think that this is the place in this Memorandum where we should consider the present state of consolidation and the prospects for its future.

126. Over recent years a considerable measure of consolidation has taken place and the record has been very creditable. But in spite of this the consolidation of the Statute Book has in our view not been sufficiently comprehensive adequately to keep pace with the output of new statutes. The Stow Hill Committee was informed by the Law Commission in February 1970 that the pace of consolidation in recent years might be gauged by the following figures:

	Consolidation Acts (No. of pages)	*Current Legislation (No. of pages)*
1935-39 (excluding Vol. II of 1939 which is emergency legislation)	*1,558*	*4,347*
1950-54	*1,843*	*2,658*
1964-68	*2,234*	*5,774*
Exceptional years		
1936	*918*	*1,414*
1952	*923*	*510*
1965	*615*	*667*
1967	*662*	*716*

127. On the assumption that most if not all legislation in force ought ideally to be embodied in consolidation Acts the Stow Hill Committee considered whether this ideal is likely to be achieved under the existing arrangements.

128. On the basis of the calculations set out in paragraphs 11, 12 and 13 of the Stow Hill Report, which we need not repeat here, it was then calculated that it would take approximately sixty years to complete consolidating legislation in force at that time if work were carried on at the rate of the last few years. This ignored the additional problem posed by new legislation.

129. These figures show that the process of consolidation is in danger of falling behind the volume of annual new statutory legislation, and if the process continues on this scale the gap between the statutes enacted and those included in consolidation measures will gradually widen instead of being closed. It would thus be unlikely that in the forseeable future an inclusion of virtually the whole corpus of statute law in the consolidation measures would be achieved. With the growing strain and pace of contemporary life and the increasing need for Parliamentary intervention by statute it may be that the gap could widen considerably and become virtually impossible to overtake. Moreover it is always possible that we may live through another crisis period such as 1945-50 when there was an enormous output of legislation; in which case the growing gap might become almost unbridgeable.

130. 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, in other words, a crash programme. This would be designed to produce the result that the entire statute law (excluding the relatively few provisions that are incapable of consolidation) would be contained in principal Acts, each dealing comprehensively with one major topic. It would, we think, be sensible to contemplate progress upon the basis that we use and build upon the work of existing institutions and of course the foremost among them is the valuable work being undertaken by the Law Commissions. This being so, the Stow Hill Committee took up with the English Law Commission the question whether they would contemplate the formulation of a crash programme of consolidation, with a view to determining what it would involve. That Law Commission in response to the enquiry pointed to the fact that there exist very considerable difficulties in the way of undertaking any such general crash programme. Those difficulties We think could be broadly coalesced into two major categories. The first consists in the fact that in the case of every proposed principal Act included in the initial programme of consolidation it is to be anticipated that in the coming years major changes in that field of legislation would take place which would hopelessly distort the programme, thus making it unattainable in the sense of following out the successive steps envisaged for its completion. The second difficulty consists in shortage of draftsmen. Our correspondence with the Law Commission on this head was with their permission reproduced in Appendix B to the Stow Hill Report. It would, in our opinion, be of great value if a major effort could be made, in the first place, to work out a comprehensive programme for consolidation and then to carry this programme into effect, and if the result of such an operation could be that, within a reasonable period of years, virtually the whole body of statute law or a very substantial part of it could be included in consolidation statutes. It would be particularly advantageous if this process of consolidation could be so managed that individual broad categories of subjects could be included in single consolidation statutes. Each subject would be identified by the title of the Act. We fully appreciate the practical difficulties involved in including in single consolidation measures what may normally be regarded as single branches of our legislation system. The question of classification is however a separate one and should be considered in the full context of the proposals of the Statute Law Committee with regard to the new edition of the Statutes in Force. (The Heap Report (para. 25) outlines these proposals.)

131. We think it would be highly desirable to draw up an initial scheme containing the following particulars:

(a) A list of titles of future consolidating Acts, indicating which existing Acts would be included in each title. This would be the essence of the whole scheme and, with minor exceptions, would cover the whole of the statute law passed since, say, 1870. Legislation passed before that date is often not capable of consolidation

without changing the law, and forms a very small proportion of the whole. The exceptions would cover Acts, such as the annual Consolidated Fund Acts, which it would be unnecessary to consolidate. This process would settle the number of consolidation Acts which would be required to consolidate the existing Statute Book, But the initial listing would not preclude new titles being added as a result of fresh topics being legislated about or even a rearrangement of existing categories taking into account supervening developments. The fact that the titles for a consolidation programme lasting perhaps ten or fifteen years might need adjustment from time to time does not prevent their being formulated. A main purpose of their formulation would be to determine the exact Scope of the problem,

(b) A time-table which would indicate the priorities for consolidation and the period within each stage and ultimately the whole exercise might be expected to be accomplished.

(c) An indication of manpower and other requirements with suggestions as to how these might be met.

(d) An estimate of the financial implications, that is the direct costs and the expected savings which might result from the greater efficiency of a fully consolidated Statute Book.

L. CODIFICATION

132. The subject of codification is probably outside the ambit of the matters which are for immediate consideration in this Memorandum, and therefore little will be said about the subject here.

133. Consolidation is the process whereby the provisions of many statutes dealing with one branch of the law are reduced into the compass of one statutory statement of the law. Codification, on the other hand, is the process whereby all statute and common law on a subject are reduced into statutory form,

134., We have mentioned in Part III of this Memorandum that a time may come when consolidation of the statute law of a particular subject is not enough and that the logical course is to proceed to codification. We understand that projects are already afoot in the United Kingdom for the preparation of a number of codes including a Penal Code and a Code of Criminal Procedure.

135. Codification would not be inconsistent with our proposed new statutory structure particularly if it took the form of a series of small codes such as were envisaged by Lord Devlin[27] and which are found in some overseas Commonwealth countries.

M. DRAFTING STAFF

136. Closely connected with the problem of the practicability of a " crash," or at least an accelerated, programme of consolidation is, as we

[27] *Samples of Lawmaking*, p. 117.

have seen in section K above, the problem of shortage of staff to carry out the work of drafting. This is a Commonwealth-wide problem the causes of which we need not enter into here. It is clear that an immediate necessity is the recruitment of a considerable number of additional Parliamentary draftsmen.

137. Professor W. **L.** Twining, one of the members of our committee, has suggested that this shortage might in part be remedied by the employment of academics in law reform, consolidation, codification and related activities. He said:

> "At present individual academic lawyers and Law Faculties as institutions represent a seriously under-used resource relative to their potential contribution to law-reform, law revision and consolidation. The combination of specialist knowledge, relative freedom from the daily pressures of practice, and their concern with the total picture, suggest that some of them, at least, have an important contribution to make, especially to the preliminary stages of this kind of activity. Thought needs to be given to ways and means of exploiting this potential. If academic lawyers are to be given greater opportunities for obtaining relevant experience, and if they are to be entrusted with greater responsibilities in this area, new procedures and institutions Will need to be developed. In particular, some of the unnecessary secrecy and mystique that surrounds the drafting process (see Heap Report p. 42) will have to be eroded. Joint appointments, the contracting out of particular projects, and the setting up of special machinery and procedures for the drafting of major codes are among the devices which may be worth considering. The widespread participation of academics in this kind of activity will be healthy for legal education as well as for the statute book."

He has also drawn our attention to some suggestive precedents of which he has personal knowledge. These are set out in Appendix D hereto. He has also drawn our attention to the procedures of the American Law Institute in this connection.

N. Simplicity of Language and Construction

138. Reference has been made at some length in the Heap Report and in Part III of this Memorandum to the complaints and criticisms that are being continually voiced in all quarters because of the complexity and obscurity of the language and construction used in the drafting of United Kingdom statutes. We do not suggest that technical terms and legal language can be discarded and that layman's language can take their place. Of course these must remain but we ask that (in the use, and in the framing of the structure, of legal language, technical terms and ordinary language) clarity of expression, of grammar and of construction should be a primary consideration. To accomplish this aim we suggest that, the draftsmen of statutes should initiate for themselves a regime of Plain Words similar to that advocated by Sir Ernest Gowers for civil servants.

0. Publication of Commencement Dates

139. As we have indicated in para. 53, when any Act or part of an Act is brought into force by Statutory Instrument, the commencement date and particulars of the Instrument prescribing the commencement date, should be published in the *London Gazette.*

P. Examination and Supervision of Bills

140. No procedure exists in the United Kingdom whereby the proposed legislation is vetted by experts for such purposes as consistency with prior legislation and adequacy of form. Lord O'Hagan as early as 1877 recommended the institution of

> " a Department by which Bills, after they have passed Committee, might be supervised and put into intelligible arid working order, arid then submitted for final revision to Parliament before they passed into law."

Latterly, Lord MacDermott, Chief Justice of Northern Ireland, has suggested a team of " clause-tasters " without any prior knowledge of the draftsman's instructions, to scrutinise draft Bills. Also Mr. Justice Scarman has proposed the institution of-a Department of Justice; this would examine the quality of proposed legislation at its formative stage. Other countries such as Sweden have adopted systems whereby Judges or special Ministers peruse the legislation beforehand for such purposes. This would go some way towards providing that logical continuity in drafting which is lacking in United Kingdom legislation.

141. We recommend that consideration be given to the creation of some form of machinery for the examination and supervision of Bills suitable to conditions existing in the United Kingdom.

Q. Prior Consultation With Interested Parties

142. We have indicated in Part III that we consider that there is insufficient consultation by the Government with interested parties on the terms of individual Bills although there is considerable consultation on policy. We consider that outside bodies can provide thoroughly expert services of a secondary nature such as digesting, commenting on, criticising and making recommendations on proposed legislation and resolving-and: pointing out practical difficulties right at the outset, all of which might; have the effect of improving the end product. Some trade, industrial and professional (particularly legal) associations such as the National Chamber of Trade, the Bar Association for Commerce, Finance and Industry, the Bar Council and the Law Society have committees which specialise in the subject of law reform and which invite the opportunity to comment on and make representations relating to proposed legislation. Comparatively little use is made by the Government of this free, highly valuable service, and it often seems that the advice given is disregarded, *The Times* once said: " This Parliament has a bad record of social legislation without the benefit of preparatory inquiry commensurate with the importance of

the issues involved." [28] Greater use of these facilities would probably have the effect of considerably reducing the amount of errors in legislation, and also possibly the work-load of members of the Civil Service. These effects could be achieved by the advance submission of a draft set of sufficiently detailed proposals, or a draft Bill with explanatory notes with requests for views either generally or on particular points. These would provide a basis for fruitful consultations which would materially assist Parliament and the draftsmen in their comprehension of the problems involved.

143. We think it essential that ways are found whereby users can so far as possible be properly consulted (a) before a Bill is drafted, (b) when it is being drafted and (c) at all stages of its passage through Parliament.

144. An example of useful consultation was found in the consultation papers circulated by the Department of Trade and Industry setting out their proposals for a partial implementation of the Crowther Report on Consumer Credit. These papers were not only the subject of written comment but were closely examined at trade conferences. No Government Department legislating in any major sphere can have that degree of familiarity with trade or other relevant practices which is necessary to the understanding of the workability of the proposed legislation. Given the opportunity to comment and criticise, it will be essential for industrial, commercial, trade and professional associations (in particular those representing the legal profession) to seize every opportunity of constructively commenting upon and criticising the terms of proposed legislation.

145. Evidence has been supplied to us from different quarters of the need for timely exposure of new legislative proposals for public comment and debate before they are inserted into the Parliamentary machine, and specific instances cited to us by professional bodies where a more satisfactory legislative result would have been produced by prior consultation with them (among them the Leasehold Reform Act 1967, the Matrimonial Homes Act 1967, the Divorce Reform Act 1969, the Finance Act 1969 and the Income and Corporation Taxes Act 1970). We have also had evidence showing that advance consultation is practised assiduously in foreign and Commonwealth countries.

146. The allied accountancy bodies advocate not only that there should be time for adequate discussion of legislative proposals before the Parliamentary procedure begins, but that such proposals should be first examined by a Parliamentary Select Committee, with power to call witnesses.

147. The idea that, quite apart from any prior consultation that there might have been, so far as possible no legislation is to be enacted unless it has been minutely screened by some body, either within or without Parliament, not directly concerned with those promoting the legislation, was also expressed by the then Chairman of the Law Commission at the Annual Conference of *Justice* in 1970. His view was that there should be available to the Government some independent, highly expert opinion,

[28] Leading article entitled " The Right to Good Laws "; in issue of January 16, 1970.

completely divorced from the policy-makers, which would be concerned with both substance, presentation and relation to existing legislation.

148. One of the duties to be laid upon such a body could in our view be to satisfy itself that the consultative process for which we plead had been properly followed. If not so satisfied, it should be empowered to summon witnesses before it and question them in an effort itself to operate the process of consultation. If so satisfied, we share the view of Scarman L.J., that it would still be necessary for the body closely to scrutinise the detailed form and content of the legislation not only to rid it of inherent impurities but also to ensure that it fitted into the general corpus of the law of which it was to form a part.

149. In our view, the body best fitted to perform the function of scrutineer would be the Law Commission. It would doubtless have to be substantially expanded for the purpose, but its composition and record suggest that it would be well qualified for this role.

R. COMPUTERS

150. A whole range of possibilities has been opened up by the development of electronic methods of analysing and searching the text of statutes. Since we understand that the newly established Society for Computers and Law is to submit a Memorandum exclusively devoted to this subject we confine ourselves to the following remarks.

151. We warmly welcome the decision to produce the new edition of Statutes Revised using computer typesetting methods so that a machine-readable copy of the full text of the statutes will become available as a by-product of the printing process. It is in our view essential that this magnetic tape edition of the statutes be regularly up-dated. The availability of the statutes in this form will then provide significant advantages. In particular it should be possible for other published versions of the statutes, or selected parts of them, to derive from the original master copy thus ensuring that each published version is an accurate one. Changes in the size and style of printing can be made readily and cheaply by modifications to the computer typesetting programmes.

152. We are impressed, by the advantages of using computers to analyse and search the full text of statutes and statutory instruments. One of the reasons why the textual amendment method is not more often employed is that, using conventional searching techniques, the text to be amended cannot always be located with certainty. Using a computer this difficulty is minimised since every word or combination of words can readily be found.

153. A typical example of the way computers could help the draftsman is provided by the draft Forgery and Counterfeit Currency Bill designed to implement the recent (July 1973) recommendations of the Law Commission relating to forgery and kindred offences. Schedule 2 to the draft Bill lists a large number of repeals to some 37 Acts extending from The Servants' Character Act 1792 to the Road Traffic Act 1972. It was necessary in drafting: the Bill to search the statute book for such words as "forge," " forges," " forged," " forgery," "forging," "counter-

feit," "counterfeits" and so on, in order to establish whether consequential amendments or repeals were required. Using a computer, references to all the sections in which these words occurred, either alone or in combination with other designated words, would be available in a matter of minutes with no errors or omissions. This example illustrates in an elementary way how computers can aid the draftsman and the Member of Parliament. We recommend that official encouragement be given to the development of computer methods applied to statutes and statutory instruments.

S. The Impact on Legal Drafting of the United Kingdom's Entry into the Common Market

154. The full impact of entry cannot be ascertained for some time. But immediate problems of interpretation and approach do arise, if only because some EEC documents such as Articles 85 and 86 of the Treaty of Rome, governing competition and monopolies, and an increasing number of directives on many subjects are binding in the United Kingdom. Cases of particular difficulty may arise where Parliament has endeavoured to embody the provisions of directives into United Kingdom legislation. An example is section 9 of the European Communities Act 1972, which radically alter the rules of English law on *ultra vires* and the powers of directors to bind their companies.

155. Some difficulty may also arise over the movement for uniformity in commercial law, to which impetus has been given by the EEC. An example is the Uniform Laws on International Sales Act 1967, of the United Kingdom, giving effect to two Hague Conventions of 1964.

156. In this state of affairs, some consideration must be given to reconciling the United Kingdom and Continental approaches to legislation, lest the present differences give rise to troublesome and expensive conflicts. The former approach seeks certainty, but at the cost of complex provisions seeking to cover every contingency, and to leave as little area as possible to officials of the Courts. Certainty is an admirable goal. But it may be thought that in the United Kingdom it is sought to include too much detail in statutes. Not every contingency can be foreseen, and if everything depends on interpretation of detailed and complex legislation, a citizen may only be able to discover his rights as a result of the accident of litigation with all its attendant anxiety and expense. Such litigation often turns not on general principles but on rules of construction which the citizen may find technical and incomprehensible. (See also Heap Report para. 69.)

157. The latter, or Continental system of legislation, prefers to state general principles, giving a more creative role to the Courts. The legislation is more readily comprehensible to the public. The Court has power to fill in the gaps so as to give effect to the purpose of the legislation, for which purpose it can look at all the circumstances including parliamentary records. The powers of the Courts are increased by the fact that the Courts are not bound by precedent, which have persuasive power only. Regard can be had to learned commentaries. The result may be a more

logically coherent system of law. But on points of fine detail a citizen may be less certain of his position.

158. A good example of the Continental approach is to be found in Article 1 of the Preliminary Chapter of the Swiss Civil Code:

> " The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he himself had to act as legislator.
>
> Herein he must be guided by approved legal doctrine and case-law."

159. Compare Article 17 of the First Schedule to the Uniform Laws on International Sales Act 1967, of the United Kingdom:

> " Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

160. Legislation is a complex art not to be governed by rule of thumb. It is impossible to say at this stage where the balance between the two approaches will come to rest. But in fields in which United Kingdom legislation will be subject to Community legislation, directives or rules, it would be at least prudent for Parliament to have regard to the Continental approach when framing its own legislation, when in the last resort such legislation will be governed by the Courts and tribunals of the Community. In other words, unless and to the extent that the Community adopts the United Kingdom approach, it is prudent for Parliament to consider and follow as far as possible the Continental approach in fields in which the final decision lies on the Continent.

T. STATUTES RELATING TO OR AFFECTING SCOTLAND

161. We suggest that recommendations be invited from Scottish lawyers as to the solution of statute law problems affecting Scotland in the light of the points made by us in Part IV of this Memorandum. For the reasons there stated, we do not make any recommendations as to the desirability of a separate statute book for Scotland or otherwise.

APPENDICES

[APPENDICES A AND B HAVE BEEN OMITTED FOR THE REASONS SET OUT IN FOOTNOTES 2 AND 3 ON PAGES 3 AND 4]

APPENDIX C

[SEE PARAGRAPH 120]

EXTRACT FROM AN OFFICIAL HANDBOOK OF THE PROCEDURE OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH , OF AUSTRALIA

BILLS TAKEN TOGETHER <

It is not unusual, to meet the convenience of the House, for the standing orders to be suspended to enable the related Bills to be considered together. The suspension of the standing orders may, depending on the particular circumstances, provide for:

(a) a group of Bills to be presented together and taken through their various readings and the committee stage together;

(b) the calling together of several orders of the day for the second reading of various Bills with provision that they be taken through their remaining stages together; or

(c) the calling on together of several orders of the day for the second reading of various Bills with provision for the moving of one motion,

; , That the Bills be now passed. In such a case as the group of more than thirty related Bills dealing with decimal currency, and in other cases where the passing of a number of related Bills is a formal matter, this form of procedure is of much advantage in saving the time of the House.

APPENDIX D

[SEE PARAGRAPH 137]

PROJECTS OF LAW REVISION IN WHICH THE SERVICES OF ACADEMICS HAVE BEEN ENLISTED

(a) *The Northern Ireland Land Law Working Party*

In 1967 the Office of the Director of Law Reform at Stormont (the local equivalent of the Law Commission) " contracted out" to the Queen's University of Belfast the task of preparing a report on the Land Law of Northern Ireland in respect of areas roughly equivalent to those covered by the Birkenhead Reforms of 1923-6. A Working Party was set up under the Chairmanship of Professor L. A. Sheridan consisting of four members of the Faculty who had special interests in the area. After working intensively for three years the Com-

mittee produced a 398 page report which contained draft legislation for the whole area. In addition at the request of Stormont the Committee undertook a number of incidental law reform and law revision activities in connection with land law. Close liaison was maintained throughout with the Office of the Director of Law Reform, the Office of the Parliamentary Draftsman, the relevant Ministries and the English Law Commission. The Committee heard evidence from practising lawyers, Building Societies, the Chartered Land Societies Committee (N.I.) and numerous other experts and interested parties; drafts were widely circulated for comment and criticism before the Final Report was drawn up.

The Report was published under the name of " Survey of the Land Law of Northern Ireland " H.M.S.O. 1971. The preliminary reactions to the efforts of the Working Party were enthusiastic and the Faculty has been asked to undertake a second project, and work on this has been started. Under this a working party drawn exclusively from the Faculty of Law, is studying the *Statutes Revised, Northern Ireland* with a view to drawing up detailed recommendations to Stormont for repeal, revision and consolidation—an exercise which, it is hoped, will lead to production of the urgently needed new edition of the *Statutes Revised.*

The Land Law Working Party is relevant to the present discussion for the following reasons

(i) It is an example of a major piece of law reform being entrusted to a single Law Faculty;

(ii) The energy and enthusiasm with which the project was tackled (for long periods the Committee was meeting daily for sessions of two or more hours) confirms the impression that within Law Faculties is to be found an underexploited pool of talent and energy waiting to find constructive outlets.

(iii) Within limits this kind of activity is actively encouraged by the University authorities, not least because it helps to build up a healthy working relationship between members of the Faculty (on occasions students as well as staff) and lawyers in government and in private practice. This in turn can have a generally beneficial influence on other aspects of the work of the Faculty.

(iv)

(b) *Joint Appointment Queen's University—Stormont*

A post at Assistant Lecturer level was established some years ago, which involved the incumbent spending half his time working on Law Faculty duties and half his time in the Office of the First Parliamentary Draftsman. The expenses are shared equally by Stormont and the University. This has worked well and has had a number of side-benefits resulting from closer contact between the two institutions. Short-term secondments of senior academics to the Office of the Parliamentary Draftsman and the Office of the Director of Law Reform are also contemplated. This kind of arrangement could well be developed in Britain and might, *inter alia,* help to erode the isolationist tradition of legislative draftsmen, while providing valuable experience for academic lawyers.

APPENDIX E

[SEE PARAGRAPH 18 FOOTNOTE 6] REFERENTIAL AND TEXTUAL METHODS COMPARED IN **RELATION TO A GIVEN ITEM OF LEGISLATION**

Referential amendments contained in section 25(3) *of the Finance Act* 1962	*The same amendments converted into textual form*
(3) In section twenty-eight of the Finance Act 1960 (which provides for the cancellation of tax advantages from certain transactions in securities where the tax advantage is obtained or obtainable in the circumstances set out in subsection (2) of the section)—	(3) Subsection (2) of section 28 of the Finance Act 1960 is hereby amended in the following respects—
(a) the reference in paragraph *(a)* of subsection (2) to a person being entitled by reason of any exemption from tax to recover tax in respect of dividends received by him shall include a reference to his being by reason of section twenty (subvention payments) of the Finance Act 1953, so entitled; and	(a) by the insertion in paragraph *(a)*, after the word " income," of the words "or by reason of section 20 of the Finance Act 1953 "; and
(b) the reference in paragraph *(b)* of subsection (2) to a person becoming entitled in respect of securities held or sold by him to a deduction in computing profits or gains by reason of a fall in the value of securities shall include a reference to his becoming in respect of any securities formerly held by him (whether sold by him or not) so entitled;	(b) by the insertion in paragraph *(b)*, after the word "him," of the words " or formerly held by him (whether sold by him or not)."