

## **The Law Commission's Criminal Law' Bill: A Good Start for the Criminal Code J. C. SMITH\***

The Law Commission's Draft Criminal Law Bill<sup>1</sup> is intended to be the first step on the road to the long-awaited codification of the criminal law. In an article in this Review<sup>2</sup> Mr Francis Bennion condemns the Bill as 'over-technical, poor on exposition and a sore puzzle from beginning to end'. 'This', he says, 'is no way to draft a code.' It is a 'disaster'. As Mr Bennion is himself a draftsman of great experience and a leading authority on statutory interpretation, this is very worrying. The law of non-fatal offences against the person, with which the Bill is principally concerned, is in urgent need of reform. There is no doubt that the Bill, whatever its deficiencies, would be an immense improvement on the present law in this area and anything which unnecessarily delays its enactment is to be deplored. We have had to put up with the absurdities of the 1861 Offences against the Person Act for far too long already. It is submitted, however, that Mr Bennion's article provides no reason whatever for delay. It does not even begin to substantiate the sweeping condemnation made.

Mr Bennion says that 'The Bill goes wrong from its highly complex opening sentence of 115 words containing two internal paragraphs each broken down into two sub-paragraphs.' This sounds bad; but the reality is different. Clause 1 is a definitions section ('Definition of fault terms'). Its length pales into insignificance compared with the 3,000 plus words of the single sentence in the definitions section 189 (1) of the Consumer Credit Act 1974, drafted, I believe, by Mr Bennion. I do not, however, criticize section 189 (1). It is perfectly intelligible because it is never necessary to read that prodigious sentence as a whole. And the same is true of clause 1. Suppose that a person is charged under clause 4 of the Bill with intentionally or recklessly causing injury to

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another. It is alleged that he threw a beer glass, being reckless whether it injured another. It is surely very easy for the magistrate, counsel or judge to discern the appropriate words in clause 1:

'a person acts recklessly with respect to a result, when he is aware of a risk that it will occur and it is unreasonable, having regard to the circumstances known to him, to take the risk.'

The omitted letters, brackets and dashes derided by Mr Bennion, guide the reader swiftly to the words relevant to the question in issue. I must leave it to others to judge whether the result is comprehensible. It looks easily comprehensible to me.

Mr Bennion criticizes the definitions of offences, taking clause 4 as an example, as 'absurdly over-simple, being almost entirely drained of content by definitions and other provisions placed elsewhere'. No one knows better than he that, in a large bill—and we are contemplating a substantial code—it is essential to have general definitions. Section 16 of the Consumer Credit Act (Exempt agreements), for example, uses no fewer than nineteen terms for which we have to turn to section 189 (1) to find the definition. Again, I make no criticism of that. This is not a case of the pot calling the kettle black; the kettle may well be gleaming. I am quite prepared to believe it was necessary to draft the Consumer Credit Act in that style. And in the Criminal Code it is necessary to have definitions of terms like 'injury' because it would be impossibly cumbersome to spell out its meaning in each section in which it is used. It would of course be quite possible to begin each offence-creating provision with the words, 'Subject to any defence available to him,' as Mr Bennion wishes, but is it really necessary or desirable to repeat this again and again—in the complete Code, perhaps several hundred times? Parliamentary draftsmen currently use, or do not use, words and phrases incorporating general defences—such as 'without lawful authority or excuse' or simply

‘unlawfully’—in a totally haphazard and inconsistent way.<sup>3</sup> The courts cope somehow. The consistent practice of the Code should greatly ease their task.

Then Mr Bennion asks: ‘Why does not the definition of “intentionally” deal with the case where a person intends to injure A but mistakenly injures B instead?’ He concedes that perhaps he has not ‘scoured the Report with sufficient concentration’. There was no need to scour the Report. It was only necessary to read the Bill, which he has failed to do. The matter is quite clearly dealt with in clause 32 (Transferred fault and defences). The problem is not confined to intention but extends to other fault elements and to defences, so it is best dealt with in a general provision—one which will, in due course, apply throughout the criminal code. That provision might perhaps be more conveniently located—as it was in earlier drafts.

Mr Bennion’s remarks about the definition of intention seem to me to show unawareness of all the problems and discussion to which the ‘ordinary mean-

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ing’ of that word has given rise in the cases and of the necessity to get rid of a meaningless direction with which judges are currently required, in certain types of case, to confound juries. It is simply a mistake to say of the definition in the Bill that it is ‘a cruel puzzle to inflict *every time* anyone is concerned with the nature of intention’. In the great majority of cases the intention alleged is a purpose to cause the result and there will be no more need to refer to clause 1 than there is now to refer to *Moloney*<sup>4</sup> and its successors or the seven pages of *Archbold*<sup>5</sup> discussing the matter. The achievement of the short definition is to eliminate all that abstruse law. In the exceptional case where something wider than a purpose of causing the *actus reus* is alleged to amount to an intention, it will be necessary to refer to the few relevant lines of clause 1 (a) and possibly to the two pages of the Report. I am sorry Mr Bennion does not understand the definition of intention even as explained in the Report. And very surprised. I really do believe that magistrates will do better—and jurors too when it is related by the judge to the facts of an appropriate case. It is, perhaps, unfortunate that the Report does not include the illustrations or examples accompanying earlier reports. Recourse to these will of course be proper for those who do not find the present Report sufficiently clear.

‘Recklessly’ is said to present problems, ‘with its reference to “a circumstance” and “a result”.’ Maybe, but the fact is that the law does recognize recklessness as to a circumstance (as in rape and offences of obtaining by deception), as well as a result, as a fault element and the Code is bound to provide for it. I do not pursue the criticism of the Bill’s reliance on ‘reasonableness’ (in my opinion, inevitable) which, like much of the article, relates to the content of the substantive law and has nothing to do with principles of codification.

Mr Bennion makes a number of points about the definition of injury which seem to me to amount to nothing more than quibbles. Whether we categorize pain and unconsciousness as physical or mental is neither here nor there. The only thing that matters is that they are included in ‘injury’. The objection that ‘causes injury’ may include aiding and abetting reveals ignorance of the present law of secondary participation—a person who procures another to cause grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861 is not a principal offender. The matter is specifically dealt with in clause 17 (3) of the Draft Criminal Code.<sup>6</sup>

Mr Bennion complains about the absence from the Bill of reasons for provisions. I find this quite baffling. His discussion of his selected clause, clause 25 (Duress), gives no clue as to what he wants. One could, of course, write a little essay about the need for, or the desirability of, a defence of duress; but there is no place for such a thing in a criminal code. When we turn to the specific items of complaint, we find nothing about reasons for the provision

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of a defence of duress. The first complaint is that section 25 (1) describes the defence as defence by ‘threats’ when—as the subsection makes clear—a single threat is enough. When, there are so many issues of substance to solve in codifying the criminal law, it is hard to take this complaint seriously-. There is no particular reason why we should not refer to ‘duress by *threat*’ and ‘duress of *circumstance*’ because one is enough in either case; but the traditional term, in use for centuries, is

‘duress *per minas*’, not ‘duress *per minarri* and, so far as I know, no one has ever thought the use of the plural worthy of comment, let alone complaint. Secondly, Mr Bennion says that subsection (2) shows that the only threats relevant are life-threatening ones and that the subsection, should say so. Has he not read the clause which he actually quotes and which says plainly ‘a threat ... to cause death or serious injury’? To change this to ‘threat to life’ would be to alter the nature of the defence substantially, both under the Bill and the present law. Thirdly, he asks why the defence is ruled out only by the availability of ‘effective official protection’ —and what does that mean? These may be fair questions but they have nothing to do with the principles of codification. Everyone who has given the matter any thought knows that, however well a code is drafted, there must remain a lot of room for judicial interpretation.

Mr Bennion modestly suggests that it is not too late for the Law Commission to follow his proposal of 1986 that they should conduct ‘a thorough preliminary inquiry ... as to the nature of the various codification techniques used by other countries, and the success or failure they have encountered’. So the Commission should go back to square one and begin all over again! Has it not occurred to Mr Bennion that the Law Commission and the Code Team<sup>6</sup> looked closely at previous codifications and attempted codifications here and elsewhere at the outset of the exercise and kept an eye on current developments in other jurisdictions—notably the interesting work of the (now sadly defunct) Law Reform Commission of Canada?<sup>7</sup> As to these ‘experts on techniques of codification’ to whom Mr Bennion refers, where have they been hiding all these years? There has been plenty of opportunity for them to tell the Commission where they were going wrong. Do they exist? If the parliamentary draftsmen are meant I take leave to doubt, in the light of my efforts to grapple with their work over the years, whether they have the expertise to codify the criminal, law.

Mr Bennion concludes by observing that what really matters is whether his objections are of substance. I agree. In my opinion, they are of no substance.<sup>8</sup> None of them goes to any great issue of principle and in my opinion they are irrelevant or wrong.

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<sup>1</sup> In *Legislating the criminal Code: Offences against the Person and general Principles*, Law Com. No. 218, 1993.

<sup>2</sup> (1994) 15 Stat LR 108.

<sup>3</sup> See J. C.. Smith, *Justification and Excuse in the Criminal Law* (1989), ch. 2.

<sup>4</sup> [1985] AC 905, HL.

<sup>5</sup> 1994 edn. 2/20-2/27.

<sup>6</sup> See Law Com. No. 143, *Codification of the Criminal Law: A Report to the Law Commission* (1985) by a team of academic lawyers.

<sup>7</sup> The definition of intention which causes Mr Bennion so much difficulty was influenced by the work of the Canadian codifiers.

<sup>8</sup> I agree with him on one point: ‘a more emphatic title such as “the Criminal Code (No. 1) Bill” . . . would better reflect the Law Commission’s long term intention.’