

Appendix: Factual Outline of Bennion's Life-Long Involvement with ('Zeal for') Statute Law in General, and Special Knowledge of 1974 Act in Particular

by Ross Carter*

Francis Alan Roscoe Bennion⁵² was born on 2 January 1923 at Wallasey, Cheshire, England. He attended preparatory school and school at Harrow from 1931-39. From 1940-41, he was a bank clerk at Gosling's Branch of Barclays Bank, 19 Fleet Street, London EC4. He did Royal Air Force Volunteer Reserve Aircrew training at St Andrews University, Scotland, in 1941, and was an RAFVR commissioned pilot from 1941-1946. After university study at Oxford (Balliol College) from 1946-48, and being an editor of *Halsbury's Statutes* with Butterworths in 1948, he was awarded a BA in law in 1949, and called to the Bar of England and Wales in 1951.

Bennion practised law at that Bar from 1951-94 (except 1965-73), and held office as a parliamentary counsel (drafter of UK government legislation) twice, initially from 1953-65, then again from 1973-75. In 1956, Bennion did constitutional

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drafting in Pakistan. From 1959-61, he drafted on secondment in Ghana (including the Constitution turning it into a republic under the notorious Dr Nkrumah), produced a new (looseleaf) system of publishing statutes and statutory instruments, and wrote *Constitutional Law of Ghana* (1962).

Back in the United Kingdom, Bennion founded the Statute Law Society in 1968, and the Statute Law Review in 1980. His publications include *Bennion on Statute Law* (1st edn 1980, 2nd edn 1983, 3rd edn 1990); *Bennion on Statutory Interpretation* (1st edn 1984, 2nd edn 1992, 3rd edn 1997, 4th edn 2002, 5th edn 2008), and *Understanding Common Law Legislation* (2002). He was (until retiring on age grounds) a Member of the Law Faculty of the University of Oxford and Congregation from 1984-2002. Since 1984, he has been a Research associate at the University of Oxford Centre for Socio-Legal Studies. In 2007, he said 'In 2009 I shall (if spared) celebrate sixty years of professional working in the field of statute law - as parliamentary draftsman, academic, adviser, advocate and writer. This may seem a lengthy period for one man, but I find that the longer I go on the more I discover about the subject'⁵³

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⁵² Biographical information is from 'About FB': <http://www.francisbennion.com/fb/aboutfb.htm>.

⁵³ 171JPN (13 October 2007) 715, 715: <http://www.francisbennion.com/2007/022.htm>.

Bennion's First Period as Parliamentary Counsel

First Parliamentary Counsel (at UK PCO or OPC) since 1947

1947-1953: Sir Alan Ellis	1953-1956: Sir John Rowlatt
1956-1968: Sir Noel Hutton	1968-1972: Sir John Fiennes
1972-1977: Sir Anthony Stainton	1977-1981: Sir Henry Rowe
1981-1987: Sir George Engle	1987-1991: Sir Henry de Waal
1991-1994: Sir Peter Graham	1994-1999: Sir Christopher Jenkins
1999-2002: Sir Edward Caldwell	2002-2006: Sir Geoffrey Bowman
2006-: Sir Stephen Laws	

Bennion's experience at the Westminster PCO⁵⁴ in the 1950s is discussed in published extracts from his journal from 1953-58.⁵⁵ 'When I entered the Westminster

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Parliamentary Counsel Office in 1953', Bennion recollected much later, in 2008, 'I received no formal instruction in legislative drafting... it was learnt on the job, a tyro working in conjunction with an experienced drafter [(initially Sir Alan Ellis KCB QC)] in what Americans call the buddy system'.⁵⁶ In 1980, Bennion dedicated his book *Bennion on Statute Law* to Sir John Rowlatt (First Parliamentary Counsel 1953-56), saying 'What he would have thought of this/I cannot say, but he knew how to encourage, and he knew how to inspire'.⁵⁷ This article focuses, however, on Bennion's second period as a Parliamentary Counsel, from 1973-75, as it was in that period that Bennion drafted the Consumer Credit Act 1974 (United Kingdom).

Bennion's first period as a parliamentary counsel at Westminster started in 1953 and ended (in year 9 of Sir Noel Hutton's 12 years as First Parliamentary Counsel) in 1965. From 1965-68, Bennion was Chief Executive at the Royal Institution of Chartered Surveyors (RICS). 'This position brought me into contact', Bennion has said, 'with other professional bodies, such as the RIBA [(Royal Institute of British Architects)], the Law Society and the Institute of Chartered Accountants, whose members, like those of the RICS, were heavily involved in the operation of Acts of Parliament. I speedily realised that there was great dissatisfaction among the professions with the state of our

⁵⁴ The data in the above table of UK First Parliamentary Counsel is drawn from sources including: B McGill, 'A Victorian Office: The Parliamentary Counsel to the Treasury, 1869-1902' (1990) 63 (150) *Historical Research*, 110: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2281.1990.tb00875.x/abstract>; A G Donaldson, 'High Priests of the Mystery: A Note on Two Centuries of Parliamentary Draftsmen' in W Finnie, C Himsforth, and N Walker (eds) *Edinburgh Essays in Public Law* (Edinburgh University Press, 1991) 99 ('Donaldson'); G Engle, 'The Rise of the Parliamentary Counsel' (1996) 16 *Parliaments, Estates and Representation* 193; A Samuels, 'Henry Thring: The First Modern Drafter' (2003) 24(1) *Stat LR* 91; 'Editorial: Henry Thring—A Hundred Years on' (2007) 28(1) *Stat LR* iii; *CALC Newsletter* August 2006, 22-23: <http://www.opc.gov.au/calc/docs/CALCNEWSLETTER-August2006v2.doc> and the notice of appointment at <http://www.number10.gov.uk/Page8953>. See also "History of OPC" at <http://www.cabinetoffice.gov.uk/parliamentarycounsel/history.aspx>. Page [2009] PL 790,791 says 'Parliamentary Counsel Office [(PCO)] appeared to be the official name for the [UK's law drafting] Office until 2007 when it changed to Office of Parliamentary Counsel [(OPC)]'. The Office was set up in 1869 as the Office of [First and other] Parliamentary Counsel to the Treasury. See also C Ilbert, *Legislative Methods and Forms* (1901) ch. 5; H Kent, *In on the Act: Memoirs of a Lawmaker* (1979), described by Bennion as 'the only autobiographical work produced by a member of the Parliamentary Counsel Office in the [then] 111 years of its existence': (1980) 130 *NLJ* 56& 243: <http://www.francisbennion.com/1980/004.htm> and <http://www.francisbennion.com/1980/001.htm>. On the UK PCO and law reform Bills, see Hutton (1961) 24 *MLR* 18; Cretney (1996) 59 *MLR* 631 and Law, Law Reform and the Family (1998); and <http://www.francisbennion.com/1964/001.htm> and <http://www.francisbennion.com/1988/002.htm>.

⁵⁵ <http://www.francisbennion.com/1958/001.htm>.

⁵⁶ 172 *JPN* (6 December 2008) 802; <http://www.francisbennion.com/2008/031.htm>.

⁵⁷ 'Sir John Rowlatt often said "We'll have to take a flying fuck at this one"': Bennion (1980) 130 *NLJ* 243: <http://www.francisbennion.com/1980/004.htm>. See also Bennion's remarks on Rowlatt's death of a heart attack on 4 July 1956: <http://www.francisbennion.com/1958/001.htm>.

statute law, and the difficulties it caused for professional people. Indeed, I was informed by Sir Henry Wells, the RICS President, that one reason why they had appointed a draftsman as Secretary was the hope that he might be able to do something about it'.⁵⁸

Bennion's Making His Critical Views Known

From 1965-75, Bennion grew increasingly critical, publicly, of the Westminster PCO's then current legislative drafting techniques and style.⁵⁹ He founded the Statute Law Society in 1968, which called unsuccessfully for programmatic consolidation.⁶⁰ From 1968-71, he was also a member of the official working party on Classification of UK statutes, and a member of the Heap Committee and the

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Vice-Chairman of the Stow Hill Committee (both set up by the Statute Law Society—and whose reports advocating reforms, in particular greater use of textual amendment, were published in 1970 and 1972 respectively). 'Statute law today is what Parliamentary counsel have made it', said Bennion in a 1970 book, 'Its virtues and defects reflect their own, and their responsibility is correspondingly great'.⁶¹ Speaking in 1971 on the Stow Hill Report,⁶² and to the Commons Select Committee on Procedure, he said 'I feel my position is a little delicate because some of the views I hold on the subject under discussion tonight differ from the views of Sir John Fiennes who was a senior and very much respected colleague of mine in former days. But such is my zeal for the statute law that I feel such things should not prevent me making my views known'.

Bennion's written evidence to the Renton Committee, which reported in May 1975, was given when Bennion was a parliamentary counsel, but Bennion said it 'was prepared, and is submitted, entirely as my personal evidence to the Committee. It does not represent in any way the views of the Parliamentary Counsel Office, or any other official body. I am grateful to Mr. A. N. Stainton, C.B., First Parliamentary Counsel, for permission to prepare and submit the paper, given without his having seen it'.⁶³

'I was rendered free to write', Bennion recollected in 2005, 'by giving up my official drafting post in the Whitehall Parliamentary Counsel Office'.⁶⁴

In 1979, the Statute Law Society published a book called *Statute Law: Renton and the Need for Reform*. 'Ten years after the founding of the Statute Law Society', said the book's introduction, 'it has to be admitted that little progress has been made in attaining its objects. In Britain the drafting of legislation remains an arcane subject. Those responsible do not admit that any problem of obscurity exists. They resolutely reject any dialogue with statute law users. There is resistance to change, and to the adoption (or even investigation) of new methods'.⁶⁵

Bennion's criticisms of, or disappointment with, the UK PCO continued (after it had, as the Renton Report⁶⁶ recommended, switched to textual amendment as the preferred method of amendment) in an article at (1980) 130 NLJ 56,⁶⁷

⁵⁸ <http://www.francisbennion.com/1979/004/pt3and4.htm>.

⁵⁹ As shown by Bennion's written evidence to the Renton Committee: <http://www.francisbennion.com/1979/004/pt3and4.htm>.

⁶⁰ <http://www.francisbennion.com/1968/001.htm>; <http://www.francisbennion.com/1983/002.htm>.

⁶¹ F Bennion, *Tangling with the Law* (Chatto & Windus London 1970) 9. See also F Bennion *Reforming Statutory Drafting* (University of Ottawa Press Ottawa 1971) 115: <http://www.francisbennion.com/1971/002.htm>.

⁶² <http://www.francisbennion.com/1972/002.htm>.

⁶³ <http://www.francisbennion.com/1979/004/pt3.htm>.

⁶⁴ (14 May 2005) 169 JP 368,368: <http://www.francisbennion.com/2005/028.htm>.

⁶⁵ <http://www.francisbennion.com/1979/004/intro.htm>.

⁶⁶ See Bennion (1975) 119 SJ 346 (<http://www.francisbennion.com/1975/002.htm>) and (1975) 125 NLJ 660 (<http://www.francisbennion.com/1975/003.htm>). See also Simon (1985) 6(1) Stat LR 133; Renton (1985) 6(3)

in his book *Bennion on Statute Law* (1st edn, 1980) (17-20), and also in later articles.⁶⁸

Bennion's Second Period as Parliamentary Counsel

In these circumstances, it might be wondered how, precisely, Bennion came to hold office as a parliamentary counsel at Westminster a second time, from 1973-75. Perhaps agreeable to Bennion's return was Sir Anthony Stainton, who at the UK PCO in 1956 shared with Bennion the same room,⁶⁹ who was Bennion's predecessor on secondment from London to Ghana,⁷⁰ and who (Bennion said) displayed an interest in Bennion's use of a computer to draft the Bills for the Children Act 1975 and the Sex Discrimination Act 1975.⁷¹ In any event, in a 2003 blog (and in 2004 evidence to the Commons' Public Administration Committee considering the UK Honours System), Bennion said 'I am the only person who has resigned twice from [the Westminster Office of Parliamentary Counsel], having been invited back in 1973'.⁷²

Bennion on 1974 Act: Clarity and Availability, Composite Restatement, Redaction, and so on

'The [Act's] system', Bennion has observed,⁷³ 'was not complete without the mass of regulations, orders and other subordinate instruments made under it. Inevitably, the final structure was complex and elaborate. Yet it had to be operated without undue difficulty (and with expert advice when needed) by hundreds of thousands of people forming a wide cross-section of our commercial life.

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The [Act] was drafted with that fact very much in mind. Statutory regulation inevitably adds to the costs of the traders it governs. Such costs are ultimately borne by the consumer and, since it is pointless to give people financial protection with one hand while dipping heavily into their pocket

Stat LR 60; Renton (2006) *Clarity* 56, 5 and 6 (<http://www.clarity-international.net/journals/56.pdf>); the Times obituary of Lord Renton at <http://www.timesonline.co.uk/tol/comment/obituaries/article1837821.ece>; Cutts (2007) *Clarity* 57,24 (<http://www.clarity-international.net/journals/57.pdf>); and Quint (2007) *Clarity* 58, 10 and 11 (<http://www.clarity-international.net/journals/58.pdf>).

⁶⁷ <http://www.francisbennion.com/1980/001.htm>. See also <http://www.francisbennion.com/1980/004.htm>. Bennion criticizes in particular Sir Noel Hutton, with whom Bennion worked on the drafting of the Law Commissions Act 1965: <http://www.francisbennion.com/1964/001.htm>. Hutton, says Donaldson, 114, 'went to the Law Commission when he retired and, emulating Brougham and Ilbert, drafted the Interpretation Act 1978. Another public duty he performed was to sit on the Renton Committee on the preparation of legislation, assessing the evidence of his two immediate successors (Fiennes and Stainton)...'. In *Bennion on Statute Law* (1980) at 19 and 20, Bennion criticizes the 1978 Act as a 'straight consolidation' and thus a lost opportunity for reform, and says 'it is not the best arrangement to make [legislative drafting] what Sir Noel Hutton has called [(in (1979) LX *The Parliamentarian* No. 4)] "a life engagement"'.
⁶⁸ See, for example, Bennion, 'The controversy over drafting style' (1983) LSG 2355,3211: <http://www.francisbennion.com/1983/005.htm>. See also [1986] 7 Stat LR 57-58 and [1987] 8 Stat LR 68: <http://www.francisbennion.com/1987/003.htm>.

⁶⁹ <http://www.francisbennion.com/1958/001.htm>.

⁷⁰ VCRAC Crabbe, *Legislative Drafting* (1st edn 1993, 1994 reprint), acknowledgements, i: http://books.google.co.nz/books?id=NprQb_1M9u8C&pg=PT3&lpg=PT3&dq=francis+bennion&source=bl&ots=n-PkNo_6o6&sig=MfhI4ywaUOC9Hr8jS8r6e0tKvBQ&hl=en&ei=h4BSS4KjBcqLkAXYn_SsCg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAcQ6AEwADhG#v=onepage&q=francis%20bennion&f=false..

⁷¹ See <http://www.francisbennion.com/1979/016.htm>; F Bennion, 'A computer experiment in legislative drafting' (November 1975) *Computers and the Law*: <http://www.francisbennion.com/1975/004.htm>; and *Bennion on Statute Law* (1st edn 1980) 19.

⁷² See <http://www.francisbennion.com/2003/056.htm> and

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublicadm/212/212we85.htm>.

⁷³ <http://www.francisbennion.com/2009/043.htm>.

with the other, every effort was made to keep them to the minimum. One obvious way of keeping down costs is to make the legislation as comprehensible to the profession as possible, and we tried hard to do this. It was for that reason that I departed from the usual anonymity of the legislative drafter and over the years published a number of explanatory books and articles.⁷⁴ . . . One contribution was the four-volume looseleaf work *Consumer Credit Control* in which I tried to help the profession by including a composite restatement of the legislation.⁷⁵ Through amalgamations the book came in time to be owned by a publisher who also owned another large work on the same subject, so it bit the dust’.

In those remarks on the Act, Bennion contemplates making legislation comprehensible not to non-lawyers, but instead only ‘to the [legal] profession’. ‘Non-lawyers ought’, Bennion has said, ‘to be able to understand the law that binds them, and in a perfect world they would. In our world they can’t. Not fully, and safely. If they think they can, and act on that, they may find they have inadvertently broken the law, or taken on an unwanted obligation, or missed an entitlement, or suffered in some other way. So they had better not try. Many lawyers rail against this situation. Here is an example from the judiciary relating to an Act I drafted myself, the Consumer Credit Act 1974 (“the CCA”). The drafting was criticized by Clarke LJ, who started one of his judgments with the following: “These appeals raise a number of issues under [the CCA] which has recently provided so much work for the courts. Like others, this case demonstrates the unsatisfactory state of the law at present. *Simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike.* At present it is certainly not comprehensible to the former

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and is scarcely comprehensible to the latter.”⁷⁶ With his legal training and experience, Clarke LJ ought to know that he is demanding the impossible here. It simply is not practicable for legislation which is required to do the work that the CCA is required to do to be “comprehensible to the layman.” It would be dangerous for lay persons to think they could extract the legal meaning of such texts without skilled help. . . . a movement that wishes the public to read and act on raw legislation without professional guidance obviously does not truly believe law to be an expertise’.⁷⁷ In 2009,

⁷⁴ See <http://www.francisbennion.com/topic/consumercreditact1974.htm>.

⁷⁵ On the composite restatement method (‘where the text of an Act is conflated with the texts of delegated legislation made under it’) see ‘Statute Law Processing: The Composite Restatement Method’ (1980) 124 SJ 71,92 and Bennion on Statute Law (2nd edn 1983), ch 27 and Appendix B: <http://www.francisbennion.com/1983/006/ch27.htm>, <http://www.francisbennion.com/1983/006/apb.htm>. The method is designed to help statute law users comprehend text by addressing the vices of statute law that Bennion calls ‘compression’, ‘anonymity’, ‘distortion’, and ‘scatter’. Bennion envisaged such restatements being produced and promulgated in a range of subject areas and by an official body such as the Law Commission, or a body set up for the purpose. In 1983, Bennion gave an account of the only practical demonstration of it there had so far been: ‘This was my book *Consumer Credit Control*, published in loose-leaf by Oyez Publishing Ltd in 1976. In the following seven years, no less than 15 looseleaf supplements have been needed to keep it up to date’. (Section 192(4) of the Act (unusually) required the Secretary of State to make an order bringing into operation the Act’s repeals and amendments, but did not say when that must be done, and it was 11 years before the Act was brought fully into force—Bennion has said that ‘This long delay attracted criticism. It is arguable that it is unlawful as being unreasonable’). In 2009, he said composite restatement as a proposed reform of statute law had been met with indifference by the legal profession, ‘not having proved popular’: <http://www.francisbennion.com/2009/011.htm>.

⁷⁶ *McGinn v. Grangewood Securities Ltd* [2002] EWCA Civ 522 at 1. Italics added.

⁷⁷ <http://www.francisbennion.com/2009/011.htm>. See also <http://www.francisbennion.com/2009/043.htm> (‘It simply is not practicable for legislation which is required to do the work that the [Act] is required to do to be comprehensible to the layman’) and <http://www.francisbennion.com/2007/018.htm>, where Bennion in 2007 said ‘it is not the function of a legislative text to explain the law. Explanations should be given *aliunde* [(from another person or place; from elsewhere)], as we lawyers say. They naturally lie outside what they explain. In New Zealand the authorities have recently departed from classic doctrine and begun inserting explanations as an integral part of legislative texts. This is a mistake’. (Compare the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* (2003) para. 4.1: ‘good legislative style is the succinct expression of the key ideas of

Bennion suggested ‘a practical alternative to the admittedly unsatisfactory position that, while ignorance of the law is no excuse for the citizen, he or she cannot expect to know the law without professional assistance’. Bennion’s proposal (which ‘builds on [his] device of composite restatement’) is ‘that when an Act is passed it should be accompanied by an official redaction of it which is in the nearest thing that can be managed to plain English’.⁷⁸

Website: www.franciscbennion.com

Doc. No. 2011.004.NFB

For full version of abbreviations click ‘Abbreviations’ on FB’s website.

the text. Illustrative clauses, intended to make the text clearer for the reader, may give rise to problems in interpretation’) Bennion does not, in that 2007 article, make explicit whether he had by 2007 also come to regard as ‘a mistake’ the legislated examples in Schedule 2 of the Consumer Credit Act 1974 (UK).

Adler (Aug 2008) *The Loophole* 15,34 regards that 1974 Act, with its unusual legislated examples, as ‘only one instance of [Bennion’s] own commitment to clarity’:

http://www.opc.gov.au/calc/docs/Loophole/Loophole_Aug08.pdf.

In 2010, Bennion indicated that, in the Sex Discrimination Act 1975 (another Act he drafted), he ‘pursued my policy of inserting examples wherever I thought it would be useful’.

On UK Bills’ explanatory notes, expanded for and after 1998-1999 Parliamentary session, see: http://www.cabinetoffice.gov.uk/parliamentarycounsel/bills_and_acts/explanatory_notes_article.aspx. For Bennion’s views on them, see <http://www.franciscbennion.com/specialism/plainlanguagelaw.htm>.

⁷⁸ ‘Complex Legislation: Is Redaction The Answer?’ (2009) 18 *The Commonwealth Lawyer*, 23, <http://www.franciscbennion.com/2009/011.htm>.