

“Criminal Justice Legislation that Everyone
Can Understand: a Flying Pig, or a Realistic
Aspiration?”

Statute Law Society
25 January 2015

Professor J.R.Spencer
Cambridge

R v Chambers (2008)

64. This case also provides an example of a wider **problem. It is a maxim that ignorance of the law is no excuse, but it is profoundly unsatisfactory if the** law itself is not practically accessible. To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it. There are four principal reasons.
65. First, the majority of legislation is secondary legislation.
66. Secondly, the volume of legislation has increased very greatly over the last 40 years. The Law Commission's Report on Post-Legislative Scrutiny, (2006) Law Com 302, gave some figures in Appendix C. In 2005 there were 2868 pages of new Public General Acts and approximately 13,000 pages of new Statutory Instruments, making a total well in excess of 15,000 pages (which is equivalent to over 300 pages a week) excluding European Directives and European Regulations , which were responsible for over 5,000 additional pages of legislation.
67. Thirdly, on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation.
68. Fourthly, there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is, or was at the date with which the court is concerned, and are entirely dependent on the parties for being able to inform them what were the relevant statutory provisions which the court has to apply. This lamentable state of affairs has been raised by responsible bodies on many occasions,

Impenetrable legislation: some of the causes

- “Binge law-making”
- Bowing to pressure from the media
- Policy objectives not well defined
- Desire to micro-manage

What The Eye Says

THE SHAME OF BRITAIN'S BINGE LAW-MAKING

BRITAIN faces an epidemic of round-the-clock law-making which threatens to plunge the country into a new Dark Age.

Evidence is mounting to show that the government's policy of 24-hour law-making is producing nothing but confusion and chaos in the streets of all our major cities.

Citizens no longer have any idea of what is or is not legal, and many, it is clear, are so bemused that they no longer even know which country they are living in.

An only too typical scene of life in Britain today was witnessed by shocked observers recently in the

heart of London's once-respectable Westminster, only a stone's throw from Buckingham Palace.

Groups of middle-aged men and women could be seen sprawling about on green, leather benches, in an all-night session of reckless law-making.

"I've never seen anything like it," said one horrified New Zealand tourist, Mary Maori, 26. "These people were totally out of control, just spewing out law after law. It was sickening."

We say this: *It is time this shameful madness was stamped out once and for all. There ought to be a law against it.*

Bowing to pressure from the media

Your Letters

Martin has rights, 1

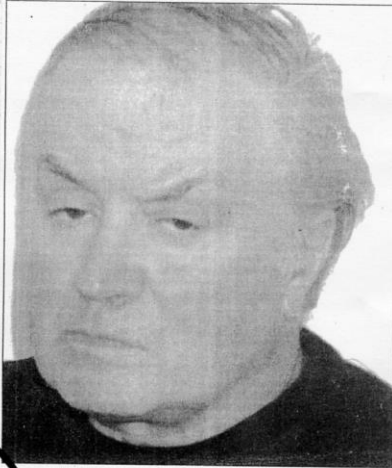
IF EVER I wanted proof that those who govern this country and enforce the law are barking mad, then the latest twist in the Tony Martin case confirms it.

For a judge to grant leave to a convicted robber, burglar and thug to sue the very person from whose house he was trying to steal, shows just how ridiculous this country now is.

After 33 years of believing that the law-abiding way of life was the correct one, I have to say that I no longer believe that to be true. The law is constantly skewed towards the criminal, and not the victim of crime.

This latest court ruling is an open invitation to criminals to thief, rob and steal without any fear of retribution. It is no longer the case that we can have any confidence in the police. They are just as hamstrung by stupid rules and regulations. In most cases, they are working with one or both hands tied behind their backs. I am not surprised by this, with in a country where people take the law into their own hands because the system has failed them.

This ruling concerning Tony Martin was supposedly in



Celebrated victim: Tony Martin.

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WELCOME BACK

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Forgotten your pass

It's official: You can batter a burglar

Tories promise change to laws



Criminal Justice and Immigration Act 2008 s.76

76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence—

- (a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within subsection (2), and
- (b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.

(2) The defences are—

- (a) the common law defence of self-defence;
- (aa) the common law defence of defence of property; and
- (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

- (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
- (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—
 - (i) it was mistaken, or
 - (ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

- (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
- (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsections (6A) and (7) are not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(8A) For the purposes of this section “a householder case” is a case where—

- (a) the defence concerned is the common law defence of self defence,
- (b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),
- (c) D is not a trespasser at the time the force is used, and
- (d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

- (a) a part of a building is a dwelling where D dwells,
- (b) another part of the building is a place of work for D or another person who dwells in the first part, and
- (c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

- (a) a part of a building is forces accommodation that is living or sleeping accommodation for D,
- (b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and
- (c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C)—

“building” includes a vehicle or vessel, and

“forces accommodation” means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.

(9) This section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in subsection (2).

(10) In this section—

(a) “legitimate purpose” means—

- (i) the purpose of self-defence under the common law,
- (ia) the purpose of defence of property under the common law, or
- (ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);
- (b) references to self-defence include acting in defence of another person; and
- (c) references to the degree of force used are to the type and amount of force used.

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

Collins v Justice Secretary [2016] EWHC 33 (Admin)

TRENDING

Good News for British Homeowners: Okay to Use Lethal Force on Intruders



BY MICHAEL WALSH JANUARY 19, 2016

4 COMMENTS



REC

Policy objectives not well defined

Coroners and Justice Act 2009 ss.54-56

54 Partial defence to murder: loss of control

(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

Political desire to micro-manage

Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (New South Wales)

25A Assault causing death

(1) A person is guilty of an offence under this subsection if:

- (a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
- (b) the assault is not authorised or excused by law, and
- (c) the assault causes the death of the other person.

Maximum penalty: Imprisonment for 20 years.

(2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.

Maximum penalty: Imprisonment for 25 years.

(3) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

YJCEA 1999 s.21

21.— Special provisions relating to child witnesses.

(1) For the purposes of this section—

(a) a witness in criminal proceedings is a “*child witness*” if he is an eligible witness by reason of section 16(1)(a) (whether or not he is an eligible witness by reason of any other provision of section 16 or 17 ; [and]

[...]

(c) a “*relevant recording*”, in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

(2) Where the court, in making a determination for the purposes of section 19(2), determines that a witness in criminal proceedings is a child witness, the court must—

(a) first have regard to subsections (3) to [(4C)] below; and

(b) then have regard to section 19(2);

and for the purposes of section 19(2) , as it then applies to the witness, any special measures required to be applied in relation to him by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 19(2)(a) and(b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his evidence.

(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—

(a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and

(b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.

(4) The primary rule is subject to the following limitations—

(a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 18(2) of the special measure in question in relation to the witness;

(b) the requirement contained in subsection (3)(a) also has effect subject to section 27(2);

(ba) if the witness informs the court of the witness's wish that the rule should not apply or should apply only in part, the rule does not apply to the extent that the court is satisfied that not complying with the rule would not diminish the quality of the witness's evidence; and

(c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4A) Where as a consequence of all or part of the primary rule being disapplied under subsection (4)(ba) a witness's evidence or any part of it would fall to be given as testimony in court, the court must give a special measures direction making such provision as is described in section 23 for the evidence or that part of it.

(4B) The requirement in subsection (4A) is subject to the following limitations—

(a) if the witness informs the court of the witness's wish that the requirement in subsection (4A) should not apply, the requirement does not apply to the extent that the court is satisfied that not complying with it would not diminish the quality of the witness's evidence; and

(b) the requirement does not apply to the extent that the court is satisfied that making such a provision would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4C) In making a decision under subsection (4)(ba) or (4B)(a), the court must take into account the following factors (and any others it considers relevant)—

(a) the age and maturity of the witness;

(b) the ability of the witness to understand the consequences of giving evidence otherwise than in accordance with the requirements in subsection (3) or (as the case may be) in accordance with the requirement in subsection (4A);

(c) the relationship (if any) between the witness and the accused;

(d) the witness's social and cultural background and ethnic origins;

(e) the nature and alleged circumstances of the offence to which the proceedings relate.

YJCEA 1999, Part II ('special measures' provisions)

“First... they are extraordinarily complicated and prescriptive. I can only assume that those drafting them have no idea of what judges and criminal practitioners have to cope with in their daily work of preparing for and conducting a criminal trial or of what they need as practical working tools for the job.”

[Auld LJ, Criminal Courts Review (2001)]

Impenetrable drafting: causes within the draftsman's control

- Drafting in excessive detail
- Referential drafting
- Overlooking basic principles of criminal law and criminal procedure
- Absence of a standard template

SOA 2003 - VOYEURISM

67. (1) A person commits an offence if-

- (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and**
- (b) he knows that the other person does not consent to being observed for his sexual gratification.**

(2) A person commits an offence if-

- (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and**
- (b) he knows that B does not consent to his operating equipment with that intention.**

(3) A person commits an offence if-

- (a) he records another person (B) doing a private act,**
- (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and**
- (c) he knows that B does not consent to his recording the act with that intention.**

(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).

(5) A person guilty of an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;**
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.**

68. (1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and-

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,**
- (b) the person is using a lavatory, or**
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.**

(2) In section 67, "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

Doing it more simply ...

“(1) It is an offence to spy, without consent, or lawful authority, on another person’s private bodily parts or private bodily functions.

(2) To do so is punishable with two years’ imprisonment on indictment, or six months’ imprisonment and a fine not exceeding the statutory maximum on summary trial.”

Serious Crime Act 2007 Part II (‘assisting or encouraging’)

- 24 sections
- 3,458 words (5,130 including the Schedule)
- three times the size of the Criminal Attempts Act 1981
- Court of Appeal cannot understand it: *Sadique* [2011] EWCA Crim 2872; *Sadique (No 2)* [2013] EWCA Crim 1150

Could it have been done more simply?

- A single offence
- “A person commits the offence of facilitation if he provides or offers to provide another person with equipment, information, advice or any other kind of assistance, intending, knowing or believing that it will be used for the commission of a criminal offence”
- No defence to say that the offence he envisaged was a different one, if the maximum penalty is the same, or more severe.

Referential drafting

SCA 2007 s.48

Proving an offence under section 46

(1) This section makes further provision about the application of section 47 to an offence under section 46.

(2) It is sufficient to prove the matters mentioned in section 47 (5) by reference to one offence only.

(3) The offence or offences by reference to which those matters are proved must be one of the offences specified in the indictment.

(4) Subsection (3) does not affect any enactment or rule of law under which a person charged with one offence may be convicted of another and is subject to section 57.

Overlooking basic principles of criminal law and criminal procedure

- Sexual Offences Act 2003 s.5

5 Rape of a child under 13

(1) A person commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and

(b) the other person is under 13.

(2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

(*R v G* [2008] UKHL 37; [2008] 1 WLR 1379)

Absence of a standard template

- James Richardson, on the Bribery Act 2010 (2010 14 CLW, no.6)

"If the draftsman was not the draftsman of Part 2 of the Serious Crime Act 2007, then he would certainly seem to belong to the same school of tortured drafting. Just as the provisions of Part 2 of the 2007 Act are likely to prove a dead letter on account of their preposterous complexity, so prosecutors are likely to look to any other charge rather than risk drowning in the complexities of this Act, other than in the most straightforward and obvious cases. Such is the price to be paid for legislation without proper scrutiny when all the principal political parties are happy to abdicate their responsibilities in the scramble for popularity with the electorate."

- **1 Offences of bribing another person**

(1) A person (“P”) is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

Absence of a “general part”: Criminal Attempts Act 1981

1 Attempting to commit an offence.

- (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
- (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.
- (3) In any case where—
 - (a) apart from this subsection a person’s intention would not be regarded as having amounted to an intent to commit an offence; but
 - (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

(1A) Subject to section 8 of the Computer Misuse Act 1990 (relevance of external law), if this subsection applies to an act, what the person doing it had in view shall be treated as an offence to which this section applies.

(1B) Subsection (1A) above applies to an act if—

(a) it is done in England and Wales; and

(b) it would fall within subsection (1) above as more than merely preparatory to the commission of an offence under section 3 of the Computer Misuse Act 1990 but for the fact that the offence, if completed, would not be an offence triable in England and Wales.

1 Attempting to commit an offence. (Current version – alas!)

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(1A) Subject to section 8 of the Computer Misuse Act 1990 (relevance of external law), if this subsection applies to an act, what the person doing it had in view shall be treated as an offence to which this section applies.

(1B) Subsection (1A) above applies to an act if—

(a) it is done in England and Wales; and

(b) it would fall within subsection (1) above as more than merely preparatory to the commission of an offence under section 3 of the Computer Misuse Act 1990 but for the fact that the offence, if completed, would not be an offence triable in England and Wales.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where—

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

An example of a *well* drafted
criminal statute:

- Fraud Act 2006

Say goodbye to unwanted Theft Acts with new

Fraud 2006

Available in your legal supermarket from 15 January 2007

- Obtaining property by deception (s.15 TA 1968)
- Obtaining a money transfer by deception (ss.15A and 15B TA 1968)
- Obtaining a pecuniary advantage by deception (s.16 TA 1968)
- Procuring the execution of a valuable security by deception (s.20(2) TA 1968)
- Obtaining services by deception (s.1 TA 1978)
- Evading liability by deception (s.2 TA 1978)



s 1 Fraud

(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).

(2) The sections are-

(a) section 2 (fraud by false representation),

(b) section 3 (fraud by failing to disclose information), and

(c) section 4 (fraud by abuse of position).

s 2 Fraud by false representation

- (1) A person is in breach of this section if he-
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation-
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

- (2) A representation is false if-
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.

- (3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of-
 - (a) the person making the representation, or
 - (b) any other person.

- (4) A representation may be express or implied.

- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

s 3 Fraud by failing to disclose information

A person is in breach of this section if he-

- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (b) intends, by failing to disclose the information-
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

s 4 Fraud by abuse of position

- (1) A person is in breach of this section if he-
 - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position-
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

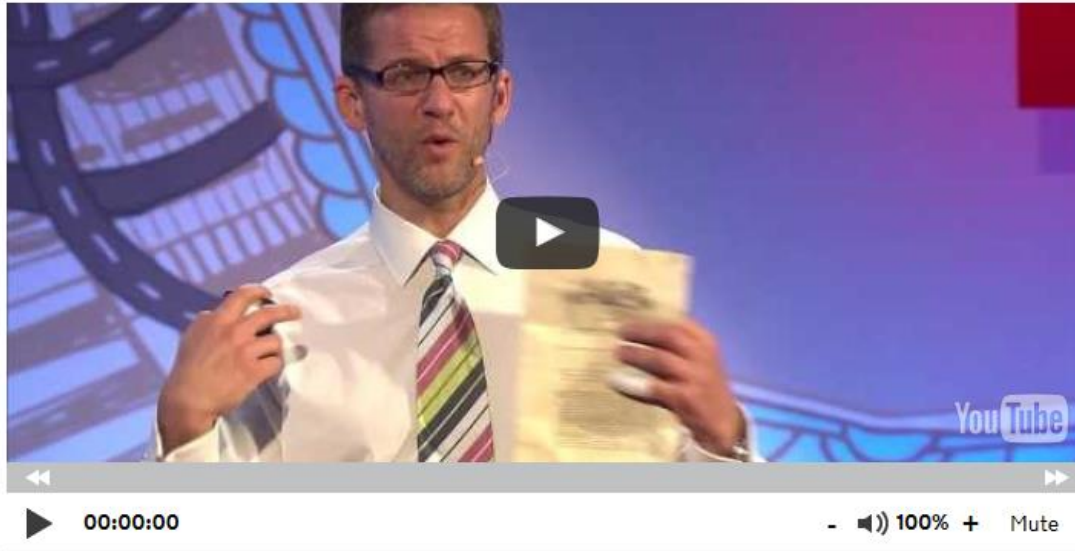
s 4 Fraud by abuse of position

- (1) A person is in breach of this section if he-
 - (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position-
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

Any signs of improvement?

- Criminal Procedure Rules
- The Good Law Initiative

TEDx Houses of Parliament speech by former First Parliamentary Counsel Richard Heaton



Good law: the challenge

People find legislation difficult. The volume of statutes and regulations, their piecemeal structure, and their level of detail and frequent amendments, make legislation hard to understand and difficult to comply with. That can hinder economic activity. It can create burdens for businesses and communities. It can obstruct good government, and it can undermine the rule of law.

This is not a new problem, and many things have been done to address particular aspects of it. More people now get involved in the legislative process, through the publication of draft Bills; this is good for democracy and also improves the quality of legislation. Parliamentary Counsel use a plain English style for writing laws, and are

But what we really need: a Criminal Code

