THE PREPARATION OF LEGISLATION

Report of a Committee Appointed by the Lord President of the Council

CHAIRMAN : THE RT HON SIR DAVID RENTON

Presented to Parliament by the
Lord President of the Council
by Command of Her Majesty
May 1975

MINUTE OF APPOINTMENT
BY THE LORD PRESIDENT OF THE COUNCIL

I hereby appoint

His Grace the Duke of Atholl
The Rt Hon Baroness Bacon CBE
The Hon Mr Justice Cooke
Sir Basil Engholm KCB
Mr J A R Finlay QC
Sir John Gibson CB QC
Mr P G Henderson
Sir Noel Hutton GCB QC
Mr K R Mackenzie CB
Sir Patrick Macrory
Mr S J Mosley
The Rt Hon Sir David Renton KBE TD QC MP
*Mr Ivor Richard QC MP
**Mr Ewan Stewart MC QC

to be a Committee on the Preparation of Legislation with the following terms of reference:

"With a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for parliamentary procedure; and to make recommendations".

I appoint the Rt Hon Sir David Renton KBE TD QC MP to be the Chairman of the Committee and Mr A M Macpherson of the Cabinet Office to be its Secretary.

(Signed) JAMES PRIOR.

7 May, 1973.

*Mr Richard was appointed United Kingdom Representative to the United Nations in March 1974.

** Mr Stewart was elevated to the Bench as the Hon Lord Stewart in January 1975.

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Chapter I

INTRODUCTION

Appointment and terms of reference

1.1 When the House of Commons Select Committee on Procedure inquired in 1970-71 into the process of legislation they received a number of proposals aimed at improving the form and drafting of Public Bills.(*) Most of those proposals were beyond the scope of their inquiry, and they therefore recommended that the Government should appoint a committee, which would include Members and officers of both Houses of Parliament, to review the form, drafting and amendment of legislation. Following the Government's acceptance of that recommendation we were appointed on 7 May 1973 by the then Lord President of the Council and Leader of the House of Commons, the Rt Hon James Prior MP, and given these terms of reference.(**)

> "With a view to achieving greater simplicity and clarity in statute law, to review the form in which Public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for Parliamentary procedure; and to make recommendations".

No inquiry of this kind has taken place for a hundred years, the last being that held by a Select Committee of the House of Commons in 1875 (see paragraph 2.13).

1.2 We understood why the Government decided to exclude from our review the consideration of policy formulation and the management of the legislative programme since these are issues of the closest importance to the Government's conduct of its own business. We noted, however, that the Select Committee on Procedure, upon whose recommendation we were appointed, proposed that our terms of reference should be

> "to review the form, drafting and amendment of legislation and the practice in the preparation of legislation for presentation to Parliament",

which would have made it possible for us to study the way in which policy decisions on particular Bills lead to the preparation of instructions to the draftsman. This stage in drafting has a vital influence on the framing of Bills as they are presented to Parliament. The management of the Government's legislative programme also has an important bearing on the form and drafting of Bills. But these topics were excluded from our review. We quickly saw that these restrictions would prevent us from making some recommendations on the preparation of legislation which the Government might find helpful, and through our Chairman we so informed the Lord President of the Council. The Government accepted that in the course of our review we would inevitably touch on questions that might not strictly be within our terms of reference; and they agreed that if there were any matters relating to Ministerial responsibility for the drafting of legislation on which we have observations our Chairman could write privately to the Prime Minister about them. These arrangements originally made with the Government by which we were appointed, were confirmed by the present Government in April 1974.

1.3 In interpreting our terms of reference we have limited ourselves to making recommendations about the form and drafting of legislation of the Parliament of the United Kingdom, but our Report may also be of use to those who in future may be responsible for Bills presented to any assembly upon which legislative powers may be devolved. We were not concerned with subordinate legislation, which has recently been the subject of inquiry by the Joint Select Committee Legislation (The Brooke Committee).(*) As we were appointed several months after the United Kingdom entered the European Economic Community (EEC) we decided to consider what effect this would have upon the form and drafting of the legislation of the United Kingdom Parliament.

Method of working

1.4 It became clear early in our discussions that there were several topics of a specialised nature which should first be examined in some detail by smaller working groups of members of our Committee. We therefore appointed Sub-Committees to investigate the following aspects:

(i) Scotland.

(ii) Northern Ireland.

(iii) The effect of the United Kingdom entry into the EEC upon the drafting and interpretation of UK legislation.

(iv) The use of computers in relation to legislation.

(v) Parliamentary procedure affecting the drafting of legislation.

The Sub-Committees each prepared reports which were then considered and largely agreed upon by the main Committee. These are not reproduced in this Report since they were primarily intended to be working documents for the main Committee in its review of the whole field.

1.5 The main Committee has met on 47 occasions. All meetings, except for one in the House of Lords and one in the Parliamentary Counsel's Office, were held in the office in Whitehall placed at our disposal by the Government. The Scottish Subcommittee met in Edinburgh on behalf of the main Committee on three occasions to hear evidence from Scottish witnesses. Our work was interrupted and unavoidably delayed by the two General Elections in 1974.

Evidence

1.6 Shortly after we were appointed we invited a number of representative bodies whose views we felt would be of special importance, to submit written memoranda. We also received written evidence from other organisations and individuals. A list of those who submitted evidence is given in Appendix A.

1.7 We invited some witnesses to supplement their written evidence by giving oral evidence and others to discuss their views informally with us. Those witnesses who gave oral evidence or who had discussions with us are also listed in Appendix A. A verbatim record was made of all the oral evidence we heard.

1.8 Both the written evidence we received and the transcripts of the oral evidence are voluminous, and although it is of considerable interest, we have decided that we could not justify the cost of printing it for publication. We have therefore preferred when referring to evidence given, to quote the actual words used by our witnesses, whether in their written memoranda or in oral evidence. Complete sets of the written and oral evidence we have received have been deposited in the Public Record Offices in London, Edinburgh and Belfast, and in the National Library of Wales in Aberystwyth.

1.9 We are deeply grateful to the distinguished and busy people who devoted so much of their time to giving us the benefit of their knowledge and experience, especially those who came from far across the sea. Each of them took great trouble in giving us their views on the difficult and often complex problems involved. Although we have paid great attention to all of the evidence and opinions we received, we alone accept responsibility for our conclusions and recommendations.

Responsibility for Improvement

1.10 We must add that little can be done to improve the quality of legislation unless those concerned in the process are willing to modify some of their most cherished habits. We have particularly in mind the tendency of all Governments to rush too much weighty legislation through Parliament in too short a time with or without the

connivance of Parliament, and the inclination of Members of Parliament to press for too much detail in Bills. Parliamentarians cannot have it both ways. If they really want legislation to be simple and clear they must accept Bills shorn of unnecessary detail and elaboration. We cannot emphasise too strongly that the Government and Parliament have clear responsibility for the condition of the statute book.

Membership

1.11 There has been no change in the membership of the Committee since we were appointed. However, Mr Ivor Richard QC, who was a Member of Parliament from 1964 to February 1974, was appointed in March 1974 to be United Kingdom Representative at the United Nations in New York, and he has been unable to attend any of our meetings since then. The present Lord President of the Council agreed, however, that Mr Richard should remain a member of the Committee; he has received copies of all our papers and has signed this Report.

Our Secretariat

1.12 We wish to place on record our real admiration of the work done for us by Mr Angus Macpherson, our Secretary, and Mr Robert Cumming, our Assistant Secretary, both of the Cabinet Office. They have displayed outstanding skill and diligence in marshalling and mastering the large amount of evidence we received, coping with a mass of working papers and having everything promptly ready when we needed to consider it. Upon them also fell the main burden of preparing successive drafts of the chapters of our Report. We owe to each of them our heartiest thanks, as we do also to Miss G Bickford, our Clerk and Shorthand Typist, whose industry and patience throughout our work were of great value.

Chapter II

HISTORICAL BACKGROUND

THE GROWTH OF THE STATUTE BOOK

Early enactments

2.1 The classic definition of a statute by Sir Edward Coke (1549-1634) requires that it shall have received the "threefold assent" of Monarch, Lords, and Commons; but some of the earliest English legislation (including Magna Carta) did not fall within this definition. It consisted of acts established by royal authority, and there was little distinction in practice between those passed by the King in Council, or in a Parliament of magnates, or in a Parliament of magnates and commons. Something like a common form of enactment appears from the Statute of Westminster II (1285) onwards, and a clear distinction between statutes and legislative acts of less authority emerges towards the end of the 15th century. Even so, when the first official collection, *Statutes of the Realm*, was published by the Record Commission (1810-1828) the object was to include among the pre-Union English statutes all early English instruments that had been "for a long series of years referred to and accepted as statutes in the courts of law", and any intention to attribute degrees of authority to them was expressly disclaimed.

2.2 In Scotland a definition similar to Coke's was enunciated by Craig, who, writing in the 17th century, stated that "the decrees and statutes passed by the three estates of the realm with the royal assent form the proper material of the written law of Scotland". It is probable that a considerable amount of legislation before 1424 did not fall strictly within that definition, but unfortunately many of the public records relating to that period have been lost and the reliability of apparently relevant documents is sometimes uncertain. However, when in the 19th century, not long after the publication of *Statutes of the Realm*, a collection -known as the *Record Edition*- of the recognised post-1424 Scottish Acts was officially prepared, the editors, Thomas Thomson and Cosmo Innes, included in it a scholarly reconstruction of some of the earlier material (not all, strictly speaking, "statutes") compiled from incomplete and sometimes inaccurate sources.

The present statute book

2.3 The published volumes containing "the statute book"(*) are described in Chapter V. Acts of Parliament have been broadly classified in two main categories: Public Acts or "Statutes", which are applicable to the general community, and Private Acts which concern the particular interest of a private person, public company or corporation, or local authority, and now form a distinct category as "Local and Personal Acts". During the seven centuries since the enactment of the earliest statute (1235) recorded in Statutes of the Realm, many thousands of statutes (ie, public as distinct from private Acts) have been enacted; despite repeals and consolidation,(**) 3,480 "public general Acts of Parliament" were still in force in whole or in part at the beginning of 1974.(***)

THE DRAFTING OF STATUTES

England and Wales

Before 1869

2.4 In the earliest times statutes were drafted, in Latin or Norman French,(*) by a committee of judges, counsellors and officials, in response to a petition or bill which asked for a remedy but left the terms of the remedial act to the King in Council. In the 15th century the practice began of drafting bills in the form of the act desired. By the end of that century this became the established method and the earlier practice had been discontinued. After 1487, Parliament appears to have handed over the drafting of Bills (in English)(**) to conveyancers, and "from the laconic and often obscure terseness of our earliest statutes, especially when in Latin, we swung in the sixteenth, seventeenth and eighteenth centuries to a verbosity which succeeded only in concealing the real matter of the law under a welter of superfluous synonyms". During the first half of the 19th century Government departments continued to farm out Bills to members of the Bar, but in addition various individuals were employed as Parliamentary draftsmen in the Treasury, and later in the Home Office

1869 Onwards

2.5 The Parliamentary Counsel Office was established by the Treasury in 1869, and was at first staffed with the Home Office draftsman, Henry Thring, and only one assistant. They became the draftsmen of the great bulk of Government legislation. It was only in 1917 that a third Parliamentary Counsel was appointed. A fourth was added in 1930, and two permanent assistants in 1934. The Office has since grown to its present strength of 23 (see Chapter III).

2.6 Since the establishment of the Parliamentary Counsel Office, Government Bills, except those relating exclusively to Scotland or Ireland, have generally been drafted by Parliamentary Counsel. In the case of Bills applying to Scotland as well as to England and Wales there is a process of co-operation between Parliamentary Counsel and the Scottish draftsmen, outlined in Chapters III and XII. There have, however, been some famous major exceptions such as the Sale of Goods Act 1893 (Sir Mackenzie Chalmers, before he joined the Parliamentary Counsel) and the 1925 legislation reforming the law of property in land (Sir Benjamin Cherry and Sir Arthur Underhill). The present drafting arrangements (including those for Northern Ireland) are described in Chapter III.

Scotland

2.7 Scottish legal commentators do not seem to have been very interested in the method of fabrication, as distinct from the content, of the statutes and there is surprisingly little information about the history of this. Sir George Mackenzie (1636-1691), however, tells us that "the laws were drafted by those who administered them" presumably meaning the Lord Advocate and the judges of the Court of Session. From the Union until the last quarter of the 19th century it is thought that the work was commissioned from various private practitioners on an ad hoc basis. It was not until 1871 (two years after the establishment of the office of the Parliamentary Counsel to the Treasury) that any

systematic arrangement was introduced. In that year the Treasury sanctioned the appointment of a Parliamentary Draftsman for Scotland, remunerated by salary, but some work continued to be farmed out to other counsel, including the Legal Secretary to the Lord Advocate, on a fee basis, and the salaried post was at various times either unfilled, or held by the Senior Counsel to the Scottish Office for Private Legislation Procedure. In 1925 the post was formally combined with that of the Legal Secretary, and in 1934 an assistant Legal Secretary and second Parliamentary Draftsman was appointed. There are now eight full-time draftsmen, who combine their drafting duties with work as legal secretaries to the Lord Advocate.

REVISION AND REFORM

Early complaints and proposals

2.8 As long ago as the 16th and 17th centuries there were in England many expressions of dissatisfaction with, and projects for reforming, the drafting of statutes and the shape of the statute book. These early critics included Edward VI ("I would wish that . . . the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them"), Lord Keeper Sir Nicholas Bacon ("a short plan for reducing, ordering, and printing the Statutes of the Realm"), James I ("divers cross and cuffing statutes . . . [should] be once maturely reviewed and reconciled; and . . . all contrarieties should be scraped out of our books"), and Sir Francis Bacon, when Attorney General ("the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law").

2.9 In Scotland, too, there have been complaints and attempts at reform from early times onwards. In 1425 a commission was appointed "to see and examine the bukis of law of this realme . . . and mend the laws that needs amendment"; and several other commissions with similar purposes followed over the years, with differing results. In the 19th century and in recent years complaints have centred mainly on the technique of legislating for Scotland by way of a Bill altered, with varying degrees of clumsiness and complexity, to fit, more or less, into the Scottish legal system a technique which is clearly liable to cause inconvenience (at least) to Scottish practitioners.

2.10 There is a familiar ring, too, in the words of Thomas Jefferson, one of the "revisers" appointed after American Independence to survey the Parliamentary statutes pre-dating Independence and select those which the new state should re-enact. It was decided, he says, "to reform the style of the later British statutes and of our own acts of Assembly, which, from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty by *saids* and *aforesaids*, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves." The incompatibility of certainty with simplicity and clarity (see Chapter X) is no new discovery. Jefferson's own solution, which rather begs the question, was to aim at "simplicity of style . . . so far as was safe".

Statute Law Commissions

2.11 In the compilation of the *Statutes of the Realm* (1810-1828) no attempt was made to discard what was obsolete. From 1834 onwards, however, in a move towards revision, a number of commissions sat. The First Report of the Statute Law Commissioners (1835) contained some severe comment on "the imperfections in the statute law", but it was not until 1861 that the series of Statute Law Revision Acts began. These have, over the years, got rid of a large quantity of obsolete matter: one Act of 1867 alone repealed 1,300 statutes.

The Statute Law Committee

2.12 This Committee was established in 1868 to prepare an edition of Statutes Revised. Its subsequent history and activities are outlined, and the successive editions of Statutes

Revised described, in Chapter V. We recommend in Chapter XVIII that it should assume some fresh responsibilities for scrutiny of legislation.

The Select Committee of 1875

2.13 A Select Committee of the House of Commons was set up in 1875 to consider "Whether any and what means can be adopted to improve the manner and language of current legislation". This was a resumption of an inquiry which had been referred to another Select Committee in 1857 as a result of a Report from the Statute Law Commissioners. The Commissioners had criticised the confused and unsatisfactory state of the statute book, the verbose and obscure language in which statutes were drafted, uncertainties about the effects of new legislation on existing law, and confusion resulting from ill-considered amendments made in Parliament. They had suggested the appointment of an officer or Board to whom either House might refer Bills for advice on their effects on existing law, their language and structure, and the repeals and amendments to be effected by them. The 1857 Select Committee was overtaken by a dissolution of Parliament before it had made any recommendations. The 1875 Select Committee expressed approval of the institution of the Office of Parliamentary Counsel, and took the view that the evils arising from alleged imperfections of drafting were now comparatively few, though they criticised referential legislation in one of its forms: the method of drafting by which a reference is made to parts of other Acts of Parliament, "some of which are repealed, some amended and others kept alive subject to the conditions contained in the amending Bill". They rejected the Commissioners' suggestion that Bills might be referred by either House to a scrutinising officer or Board. The Select Committee's own suggestions were that Bills should be accompanied (as they now are) by explanatory memoranda; that model clauses might be prescribed for general use; that an Act dealing with interpretation should be passed (as was done in 1889); and that amendments of substance introduced in Parliament should be tidied up by the Government draftsman in consultation with the department concerned (as is now the practice, subject however to certain limitations).

2.14 A further topic dealt with by the Select Committee was consolidation: the process of repealing a group of statutes or parts of statutes relating to some particular branch of the law and re-enacting them in a single Act. In 1875 this was something of a novelty, and the Committee devoted attention to the question of the proper form of consolidation Bills and the best method of getting them through Parliament Questions put by members of the Select Committee to various witnesses suggest that they had come to think that the House might refrain from criticising technical amendments to be made by a consolidation Bill if the Bill had been examined by a Committee which had gained the confidence of Parliament.

The Joint Committee on Consolidation Bills

2.15 The practice did in fact grow up towards the end of the nineteenth century of referring specific consolidation Bills to a Joint Committee of both Houses. The Joint Committee was originally set up in 1892 to consider Statute Law Revision Bills only, and the first consolidation Bill was referred to it in 1894. It was appointed *ad hoc* and not until 1921 did it become the practice for a Joint Committee to be set up every session for all the consolidation and Statute Law Revision Bills of the session. Since the establishment of the Law Commissions in 1965 (see below) the jurisdiction of the Joint Committee has been widened so as to enable it to consider (a) consolidation Bills incorporating amendments of the law recommended by one or both of the Commissions, and (b) Bills recommended by one or both of the Commissions for the repeal of enactments which are no longer of practical utility. In 1971 the Joint Committee was established by Standing Orders of both Houses. Its present functions, and the categories of Bills referred to it, are described in more detail in Chapter IV.

Consolidation: The Parliamentary draftsmen's contribution

2.16 Until 1966 the planning and execution of programmes of consolidation (and, from 1956 to 1966, of Statute Law Revision) was in the hands of the Government draftsmen,

under the supervision of the Statute Law Committee. According to Sir William Graham-Harrison (writing in 1935), 109 consolidation Acts were passed between 1870 and the end of 1934. Between 1947 (when a separate consolidation branch was set up in the Parliamentary Counsel Office) and 1966 (when responsibility was assumed by the Law Commissions) about 100 consolidation Acts were passed, and it was estimated in 1966 that between one-fifth and one-sixth of the total of living statute law was contained in the consolidation Acts passed during this period.

The Law Commissions

2.17 In 1965 the Law Commission and the Scottish Law Commission were established by the Law Commissions Act of that year, "for the purpose of promoting the reform of the law" (section 1(1)). Section 3(1) defines their duties in the following terms:

> "It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law".

The subsection then goes on to list various specific activities to be undertaken by the Commissions in pursuance of their duties. These activities include the preparation, at the request of the Lord Chancellor (in the case of the Scottish Law Commission, at the request of the Lord Advocate), of "comprehensive programmes of consolidation and statute law revision", and the preparation of draft Bills to implement such programmes when approved. Programmes were prepared by the Law Commission in 1966 and 1971 and by the Scottish Law Commission in 1966 and 1973, and considerable progress, to which reference is made in Chapter XIV, has been made in implementing them. The general responsibility for consolidation work, and for work on the tidying up of the statute book by statute law revision and statute law repeals, is in the hands of the two Law Commissions.

Chapter III

PRESENT DRAFTING ARRANGEMENTS

THE DRAFTSMEN

Parliamentary Counsel

Status and numbers

3.1 The Parliamentary Counsel Office was established by Treasury Minute in 1869. The title of the head of the Office is First Parliamentary Counsel. Counsel are members of the English Bar or solicitors qualified in England, and are civil servants subject to the Official Secrets Act. They number at present 23 (First Parliamentary Counsel, two Second Parliamentary Counsel, six Counsel, one Deputy Counsel, six Senior Assistant Counsel, and seven Assistant Counsel). The Prime Minister, as Minister for the Civil Service, is responsible for the administration of the Parliamentary Counsel Office, but Ministerial responsibility for the drafting of any particular Bill lies with the Minister in charge of the Bill. The Leader of the House of Commons is responsible in general for the Government's legislative programme, but not for the contents of any Bill unless he is one of its sponsors.

Duties

3.2 The prime duty of Parliamentary Counsel is to draft Bills for the Government's legislative programme. In addition, under arrangements made when the Law Commissions were established, a minimum of four members of the Office should at any one time be exclusively engaged in drafting Bills (including consolidation Bills) for the

Law Commission. The intention was that a fifth member of the Office should in due course be assigned exclusively to Law Commission work. Since that time the normal practice has been for two Parliamentary Counsel and two assistant Counsel to be assigned exclusively to Law Commission work. Unfortunately, at the present time only one Parliamentary Counsel and two assistant Counsel (three in all) are assigned exclusively to Law Commission work and we revert to this matter in paragraph 8.19 below. Some consolidation Bills are drafted in the main Parliamentary Counsel Office. Draftsmen are assigned from the Office to assist, at varying stages, in the preparation and amendment of Private Members' Bills, in both Houses, that are supported, or at least not opposed, by the Government. Parliamentary Counsel also advise Ministers and officials on questions concerning Parliamentary practice and procedure, constitutional matters, and, on occasion, the interpretation of statutes. Other commitments, which have been reduced in recent years, have included the giving by members of the Office of courses of lectures, wholly or mainly for overseas lawyers, on the techniques of drafting. At one time a considerable amount of subordinate legislation was drafted in the Office, but nearly all of it is now drafted in the legal branches of Government departments, as is the case with the subordinate legislation of Scottish departments.

Scottish Parliamentary Draftsmen

Status and numbers

3.3 The Parliamentary Draftsman for Scotland and his colleagues are all members of the Lord Advocate's Department. The authorised complement is five senior and six junior draftsmen, and one part-time draftsman. There are at present in post six senior draftsmen (one on special promotion), two juniors, and a part-time draftsman who, with one of the seniors, is seconded to the Scottish Law Commission. All the draftsmen in post are members of the Faculty of Advocates, though solicitors are also eligible. The Lord Advocate has general responsibility for the draftsmen. Responsibility for any given Bill lies with the Minister whose Bill it is.

Duties

3.4 The duties of the draftsmen as such (other than those seconded to the Scottish Law Commission) are to draft Scottish Bills in the Government legislative programme, and the Scottish element of Bills applying to Scotland as well as to England and Wales. All these draftsmen are also legal secretaries to the Lord Advocate, in which capacity their work involves advising and assisting the Scottish Law Officers in the discharge of their functions (other than prosecutions); giving advice on Scots law to United Kingdom departments and some primarily English departments; work in relation to international conventions and European Community matters; and generally the work corresponding to that performed by the legal (as distinct from the administrative) side of the Lord Chancellor's Office in respect of England.

Northern Ireland Legislative Draftsmen

3.5 The Office of the Legislative Draftsmen in Northern Ireland consists of eight draftsmen and a part-time consultant on matters relating to law reform. They used to draft the Bills of the Parliament of Northern Ireland and now draft the Measures of the Northern Ireland Assembly. In the case of Westminster legislation extending to Northern Ireland they are consulted by Parliamentary Counsel, and if a Bill needs adaptations for Northern Ireland these are settled by British and Northern Ireland draftsmen in co-operation.

Other draftsmen

3.6 The First Parliamentary Counsel has authority to make arrangements for some Government Bills to be drafted by outside draftsmen. Much work has been done by former Parliamentary Counsel after their retirement from Government service, both for the Law Commission and on Bills in the Government's legislative programme. Some of

the drafting work of the Law Commission is done by lawyers who have previously been employed, not in the Parliamentary Counsel Office, but elsewhere in the public service, at home or overseas. Parliamentary Agents (normally engaged by the promoters of Private Bills) have on occasion been employed on the drafting of Government Bills, and it is hoped that they will continue to make a contribution. On the other hand, the prospects of engaging part-time draftsmen from the academic world and the practising Bar are so far not encouraging.

3.7 Private Members' Bills are usually drafted by the Government draftsmen from the outset only if they have been fostered by the Government, though any others that reach the statute book are likely to have received some measure of drafting assistance from a Government draftsman.

METHODS OF WORK

The draftsman and his clients

Government Bills

3.8 Parliamentary Counsel are in most instances instructed by the Government department most closely concerned with the subject matter of a Government Bill, through a member or members of its legal staff. The instructions may in practice be in varying degrees formal or informal, but in principle they are expected to contain a sufficiently detailed statement of what the Bill is to achieve and as much background information as may be necessary. They do not take the form of a draft Bill, and do not as a rule attempt to dictate the form or language of the Bill itself. The instructions are sent to First Parliamentary Counsel and allocated as described in paragraph 3.11 below. A draft Bill is then prepared by the draftsman in consultation with officials the instructing department, working with the draftsman as an expert team. Sizeable Bills usually go through half a dozen or more prints before introduction into Parliament, and will often be extensively amended in Parliament. There is usually great pressure to get things done quickly, both before and after introduction, and this makes the draftsman's task much more difficult. Such pressure is sometimes unavoidable, especially in the weeks following a change of government. The work of Parliamentary Counsel during the passage of a Bill through Parliament includes the drafting of financial and other motions and amendments moved by the Government; advising the department concerned with the Bill on Opposition and back-bench amendments and on questions of Parliamentary procedure; attending at sittings of both Houses (and Committees of those Houses) when the Bill is under discussion; and co-operation with Officers of both Houses.

3.9 In the case of a Bill applying to Scotland only, what is said in paragraph 3.8 above applies in the same way as to the Bills there mentioned, but with the Scottish Parliamentary Draftsman taking the place of Parliamentary Counsel. In the case of Bills involving Scotland as well as England and Wales the departmental instructions are sent to the Scottish Parliamentary Draftsman as well as to Parliamentary Counsel. The Bill is initially drafted by Parliamentary Counsel, who as soon as practicable sends a copy of his draft to the Scottish draftsman. The Scottish draftsman then considers how much of the draft can be adopted as it stands for Scotland, how much can be adopted with suitable adaptations, and how much must be discarded and replaced with separate, though parallel, Scottish provisions. A process of interchange of drafts and consultation then takes place between the two draftsmen, assisted by the departmental officials and legal advisers, until the Bill is ready for introduction; and thereafter the Scottish draftsman, when necessary, provides the like services in relation to the Scottish aspect of the Bill as does the Parliamentary Counsel in relation to the Bill as a whole.

Private Members' Bills

3.10 When a private Member is given drafting assistance by the Government, minor questions of policy are likely to arise which Parliamentary Counsel (or the Scottish

Parliamentary Draftsman as the case may be) may not be able to answer without consulting at least one Government department. In practice he acts largely on instructions from officials of a department conversant with the subject matter. Where assistance is not provided by the Government draftsmen, it is for the Member himself to obtain such professional drafting help as he requires. To help meet the cost of this, a Member who has secured one of the first ten places in the ballot for Private Members' Bills is entitled to a payment of not more than £200.(*) There is no similar arrangement for the House of Lords.

Office organisation

3.11 Both in the Parliamentary Counsel Office and in the office of the Parliamentary Draftsman for Scotland, the head of the office is regarded as *primus inter pares*. He drafts some Bills himself, and allocates the others among his senior colleagues. The senior draftsmen are regarded as professional counsel with full individual responsibility for their work; juniors are each attached to and work with a senior draftsman, the ideal being that draftsmen should operate in pairs on a Bill of any magnitude. It is mainly in this way that recruits to the two offices are at present trained, though First Parliamentary Counsel has recently re-examined the possibility of assigning one senior draftsman, for part of his time, to giving more formal instruction to recruits, and hopes to try this as an experiment.

Chapter IV

OUTLINE OF PRESENT LEGISLATIVE PROCEDURE FOR PUBLIC BILLS

GOVERNMENT BILLS

Introduction into Lords or Commons

4.1 The Government decide whether a Bill is to be introduced first into the House of Lords or into the House of Commons. Finance Bills are always introduced in the Commons, as are most Bills which are regarded as politically controversial.

Procedure in the House of Commons

Introduction and First Reading

4.2 A Government Bill introduced in the House of Commons is presented by a Minister. On presentation the Bill is formally read a first time and ordered to be printed. The Bill is then published and becomes available to the House and to the public. It is usual for a Bill to have attached to it an Explanatory and Financial Memorandum, or an Explanatory Memorandum if the Bill has no financial effect. The Memorandum includes a forecast of any changes in public sector manpower requirements expected to result from the passing of the Bill; it must be framed in non-technical language and contain nothing of an argumentative character. A Government Bill brought from the Lords is deemed to have been read a first time and ordered to be read a second time in the Commons when a Minister informs the Clerks at the Table of his intention to take charge of it.

Second Reading

4.3 When Members and the public have had time to consider the Bill (and, if the Bill is urgently required, in a much shorter time) a day is appointed for the Second Reading. The debate on Second Reading is concerned with the main principles of the Bill as a whole, but reference to alternative methods of achieving the objects of the Bill is permitted. The debate normally takes place on the floor of the House, and at its conclusion the Bill is given a Second Reading (whether unopposed or on a division). It could be rejected, in which case nothing more would be heard of it. Bills relating exclusively to Scotland usually have their Second Reading debate in the Scottish Grand Committee, which includes all the Members representing Scottish constituencies. Similarly a small number of non-controversial Bills are sent for discussion of their

principles to a Second Reading Committee, consisting of 16 to 50 Members nominated for each occasion having regard to Members' qualifications and the party composition of the House. The Committee report to the House whether they recommend that the Bill be read a second time or not, and the House decides without amendment or debate whether or not to accept the Committee's recommendations.

Committee Stage

4.4 When a Bill has received a Second Reading it will in most cases be sent to a Standing Committee; although for various reasons, especially when a Bill is of a constitutional nature, it can have its Committee Stage on the floor of the House. Standing Committees consist of from 15 to 60 Members who are specially appointed for each Bill so as to reproduce as nearly as possible the party composition of the House. A money resolution providing the necessary funds must have been passed on the floor of the House, after the Second Reading of the Bill, before any clause that makes a charge on public funds can be taken in Committee.

4.5 The Committee Stage is the main opportunity for detailed consideration of a Bill, and the stage at which most amendments are moved. The proceedings are substantially the same whether this stage is taken in a Standing Committee or in Committee of the whole House. The Committee goes through the Bill clause by clause, first considering amendments to the clause (selected by the Chairman in his discretion) and then debating the motion that the clause, or the clause as amended, "stand part of the Bill"; the Chairman may, however, rule that there shall be no debate on "clause stand part" if in his opinion the principle of the clause has been adequately discussed in the course of debate on amendments. After the clauses of the Bill have been disposed of, proposed new clauses are similarly dealt with, followed by the Schedules to the Bill and proposed new Schedules, and finally the preamble, if any, and the long title. Changes in the sequence of consideration may be made if the Committee so decide. Most "Scotland-only" Bills are committed to a Standing Committee composed mainly of Scottish Members.

Report Stage

4.6 When the proceedings of a Committee of the whole House on a Bill are concluded, the Bill is reported to the House at the next sitting. In either case, a later day is usually appointed for its further consideration at what is called the Report Stage. (A Bill reported from a Committee of the whole House without amendment proceeds, however, directly to Third Reading.) At the Report Stage, the entire Bill is open to consideration: new clauses and Schedules may be added and amendments made (the new clauses being taken first), but no question is put on each clause that it stand part of the Bill unless it be a new clause. The Speaker's selection of amendments and new clauses for debate tends to be stricter than at the Committee Stage. All Government amendments will, however, normally be selected, and any non-Government amendments on subjects to which the Government had at the Committee Stage promised further consideration. When all amendments have been disposed of the Bill goes to Third Reading.

Third Reading

4.7 The motion for the Third Reading of a Bill is normally put immediately on the conclusion of the Report Stage, and the question is put without debate unless notice has been given by not less than six Members of an amendment to the question or of a motion that the question be not put forthwith so that there may be a debate. Debates on Third Reading are becoming rare, but where one does take place it is limited strictly to the contents of the Bill. Only minor verbal amendments can be made to a Bill on Third Reading: if material amendments are necessary the order for Third Reading must be discharged and the Bill recommitted to allow the amendments to be introduced in a resumed committee proceeding.

Procedure in the House of Lords

4.8 House of Lords procedure is, broadly, similar to that in the House of Commons. When a Bill is brought from the Commons or introduced into the Lords, the First Reading is moved forthwith and the Bill goes through the same stages as in the Commons. The main differences are that any amendment tabled may be moved and there is no selection of amendments. There are no Standing Committees and Bills are normally debated in Committee of the whole House, but sometimes suitable Bills are sent to a Public Bill Committee. There may be a Report Stage even where no amendments have been made in Committee, and amendments may be moved then and on Third Reading. Although all Bills to be passed by both Houses, in effect financial legislation is not scrutinised in detail by the House of Lords. The Lord Chancellor is available to advise the House on English legal points arising in the course of the consideration of Bills, but normally no Scottish Law Officer is a Member of the House. In 1969, during the Labour Administration of 1964-70, this difficulty was obviated when the then Lord Advocate was created a Life Peer and was then available to advise the House on Scottish legal matters during the remainder of that Administration's term.

Amendments made by second House

4.9 The procedure in either House for the consideration of amendments made to one of its Bills by the other House is essentially the same. If the first House agrees to all the amendments a message is sent to the other House to that effect. If not, a message is sent which may contain either reasons for disagreement or amendments to the amendments made by the second House and consequential amendments to the Bill. The second House may agree with the first House, or disagree and insist on their own amendments, and may in either event make further amendments; a message is sent to the first House accordingly. A single exchange of messages is in practice usually sufficient to secure agreement, but if agreement is not reached before the end of the Session the Bill is lost, unless the Parliament Act is invoked in the next Session.

Royal Assent

4.10 When a Bill has been finally passed by both Houses, Royal Assent is normally notified separately to each House in accordance with the provisions of the Royal Assent Act 1967, though Royal Assent may on occasion still be pronounced by Commission in the presence of both Houses. It is still possible for Royal Assent to be declared by the Sovereign in person in Parliament. The last occasion was in 1854.

PRIVATE MEMBERS' BILLS

Procedure in the Commons

4.11 A Private Member's Bill is a public Bill promoted by a back-bench or Opposition Member, or brought from the Lords after being promoted by a private Peer. Its progress depends largely on the extent to which it receives some of the restricted amount of time allowed for Private Members' business. In recent Sessions 12 Fridays have been allotted to Private Members' Bills in the House of Commons. Priority in debate on these Fridays is determined by a ballot (for Commons Bills) held soon after the beginning of each Session In addition as soon as the ballot Bills have been presented (and given a formal First Reading) and a date has been named for their Second Reading, Members may seek leave to introduce Bills on Tuesdays and Wednesdays by a motion under the "10-minute rule" procedure which allows one speech of approximately 10 minutes' duration for the proposal and one such speech against it. If the motion is carried the Bill is given a formal First Reading. After the ballot Bills have been presented, Members may also introduce Bills on any day by a simple written notice of presentation. On presentation such Bills are likewise given a formal First Reading. A Private Member's Bill is in practice unlikely to make progress in the Commons if it is opposed by the Government. Subject to that, it follows the stages described above for Government Bills.

Procedure in the Lords

4.12 In the House of Lords it is the privilege of any Peer to present a Bill without notice and without moving for leave to bring it in, and it is most unusual for any objections to be raised at that stage. Though the Government can oppose the Bill in debate, it is for the House to decide what progress the Bill shall make; this is equally true of a Private Member's Bill brought from the Commons. The Lords will always take up a Private Member's Bill that has passed the Commons, but may alter it substantially, or, on occasion, reject it.

THE JOINT COMMITTEE ON CONSOLIDATION BILLS

4.13 There are three categories of public consolidation Bills that are referred to the Joint Committee on Consolidation Bills. They are: (1) pure consolidation; (2) consolidation with corrections and minor improvements under the Consolidation of Enactments (Procedure) Act 1949; and (3) consolidation with amendments to give effect to recommendations of the Law Commissions. (In this and the following paragraphs of this chapter, "Law Commissions" means the Law Commission, the Scottish Law Commission, or both of them). They are "invariably introduced in the House of Lords, and are referred to the Joint Committee after Second Reading.

4.14 In the case of a pure consolidation Bill, the Joint Committee make any amendments necessary to bring the Bill into conformity with the existing law or to improve its form, and report to that effect.

4.15 In the case of a Bill presented under the 1949 Act, the Joint Committee may have to consider representations before considering the Bill and its accompanying memorandum and deciding what, if any, corrections and minor improvements they are prepared to approve. Provided the Lord Chancellor and the Speaker concur in the Committee's approval, the Bill is reported as consolidating the existing law with those corrections and improvements, which are then deemed for the purpose of the Bill's remaining stages to be part of the existing law.

4.16 The Law Commissions may in connection with any consolidation Bill submit a report recommending amendments of the existing law, designed to facilitate its satisfactory consolidation, that would not necessarily fall within the 1949 Act definition of "corrections and minor improvements". The Bill as presented is drafted so as to give effect to the recommendations, and the Joint Committee may approve or disapprove the recommendations or alter the manner in which the recommendations have been implemented in the Bill, reporting to that effect and that in their opinion the Bill, apart from the recommendations, is pure consolidation and represents the existing law.

4.17 Bills in all three categories are then committed to a Committee of the whole House and go through the remaining stages in both Houses described above under "GOVERNMENT BILLS". After consideration by the Joint Committee, a pure consolidation Bill may not be amended so as to alter the existing law that it consolidates. In the case of a Bill presented under the 1949 Act, the corrections and improvements approved by the Joint Committee share this immunity from amendment. In the case of a Consolidation Bill with Law Commission amendments, those parts of it that are not pure consolidation, that is to say the parts that reflect the Commissions' recommendations, are amendable.

4.18 Where a Bill re-enacts existing statutes with amendments other than those described in paragraphs 4.15 and 4.16, it is not referred to the Joint Committee and any amendments may be moved to the statutes that are to be consolidated.

4.19 Three further categories of Bills are referred to the Joint Committee. These include Statute Law Revision Bills, which are confined to the repeal of enactments that are "obsolete, spent, unnecessary or superseded"; and Statute Law (Repeals) Bills, prepared by the Law Commissions with the object of repealing enactments that in their opinion

are "no longer of practical utility". The phrase "no longer of practical utility" has been generously interpreted, and the scope of the repeals which have been effected by Statute Law (Repeals) Bills is much wider than the scope of those effected by a traditional Statute Law Revision Bill, so that Statute Law (Repeals) Bills have made an important contribution to the tidying up of the statute book. Bills in both these categories may be amended in either House after being reported by the Joint Committee. The third category comprises Bills to re-enact for Scotland only the provisions of Acts which extend to Scotland as part of the United Kingdom or Great Britain and thus eliminate the need, in the original Act, to "conflate" the adaptations required for its application to Scotland. We refer to this procedure again in paragraph 18.5 of Chapter XVIII.

Chapter V

PUBLICATION OF STATUTES

THE STATUTE LAW COMMITTEE

5.1 The Statute Law Committee, which is appointed by the Lord Chancellor, was established by Lord Chancellor Cairns in 1868 "to make the necessary arrangements and to superintend the work of preparing an edition of Statutes Revised". Originally the Committee consisted of about half a dozen officials, but by 1945 it had gradually increased in size to about a dozen members, who included two Members of Parliament, as well as the First Parliamentary Counsel and the Parliamentary Draftsman for Scotland.

5.2 Just after the war the membership was doubled, the Attorney-General, the Lord Advocate, and a number of Law Lords and legal members of both Houses being added, together with three or four of the Permanent Secretaries of Departments most concerned with the preparation of legislation, Counsel to Mr Speaker and the Counsel to the Chairman of Committees, and, a little later, the Treasury Solicitor. The Committee was given the following new terms of reference:

> "To consider the steps necessary to bring the Statute Book up to date by consolidation, revision and otherwise, and to superintend the publication and indexing of Statutes, Revised Statutes and Statutory Instruments".

A new edition of *Statutes Revised* was started, and published in 1950, and consolidation and Statute Law Revision were speeded up.

5.3 Following the setting up of the Law Commissions in 1965 it was concluded that while their statutory functions covered many (but not all) of the responsibilities previously undertaken by the Committee in the field of consolidation and statute law revision, there were important duties which remained and should remain for the Committee to perform, including the supervision of the work of the Statutory Publications Office, the general supervision of the form of Acts of Parliament, and the production of editions of *Statutes Revised*. The Chairman of the Law Commission (for England and Wales) became Vice-Chairman of the Statute Law Committee, and the Chairman of the Scottish Law Commission became a member. Liaison between the Committee and the Law Commissions is maintained by this means, and by a discussion, initiated annually in the Committee by the Chairmen of the two Commissions, on the plans and progress of the two Law Commissions in the field of consolidation. The Committee is also kept informed of the progress made by the Commissions in the excision of unwanted matter from the statute book.

5.4 The Statute Law Committee, of which the Lord Chancellor is Chairman, meets once a year, normally about the beginning of December. Sub-Committees have been appointed to investigate and make recommendations on a number of subjects connected with statute law. The new edition *Statutes in Force* (see below) was authorised by the Statute Law Committee following a proposal by a sub-committee, as was the recent edition of the pre-Union Scottish Acts, and the numbering of Acts by calendar instead of regnal

year. The preparation and publication of *Statutes in Force* is under the control of an Editorial Board set up by the Statute Law Committee.

THE STATUTORY PUBLICATIONS OFFICE

5.5 Despite its name, this Office does not publish anything. It is a compiling and editing organisation: the publishing is done by Her Majesty's Stationery Office. The Statutory Publications Office comprises an Editor and three Assistant Editors, all with English legal qualifications, and supporting staff. The work of the Office is carried out under the general supervision of the Statute Law Committee, and work on *Statutes in Force* is under the control of an Editorial Board set up by that Committee. The work of the Office is carried out under the general supervision of the Statute Law Committee. The work consists mainly of:

(a) preparing *Statutes in Force* under the general direction of the Editorial Board;

(b) preparing the Index and Table of Effects published with the annual volumes of *Public General Acts and Measures*;

(c) preparing *Annotations to Acts* (see below);

(d) preparing the annual *Index to the Statutes* and the annual *Chronological Table of the Statutes*;

(e) work connected with Statutory Instruments, including their registration and the preparation of annual volumes for the press.

ORIGINAL TEXTS

5.6 The original texts of all classes of Acts passed by the Westminster Parliaments after 1497, both printed and unprinted, may be inspected in the Record Office of the House of Lords, which can also supply typed or photographic copies of the Acts. Those texts are by tradition the authorised "master copies". Texts of most of the earlier statutes are to be seen in the Public Record Office and elsewhere. Original records of Scottish Acts from 1466 to 1707 are held by the Keeper of the Records of Scotland at HM General Register House, Edinburgh.

OFFICIAL PUBLICATIONS

Single copies of Acts

5.7 Single copies of all Acts (including local and personal Acts) after 1804 can be obtained from Her Majesty's Stationery Office. Copies of Acts printed as originally enacted, and of Acts printed as amended pursuant to a "printing clause"(*), are known as Queen's Printer's copies. Single copies of Acts as published in *Statutes in Force* can also be obtained from HMSO, as can Queen's Printer's copies of Acts of the Parliament of Northern Ireland.

Annual volumes

5.8 The texts of public Acts of the Parliaments of England and Great Britain from 1235 up to the end of the reign of Queen Anne (1713) are to be found in the edition known as *Statutes of the Realm*. All but the earliest of these texts are also to be found in the *Sessional Volumes of Statutes* going back to the year 1483, printed until 1793 in Gothic "black letter" type. These editions do not contain the texts of the pre-Union Scottish Acts, which may be found in the *Record Edition* of the *Acts of the Parliaments of Scotland*. From 1940 onwards the volumes have been annual instead of sessional and they are now called *Public General Acts and Measures*. Each contains an index and (since 1857) a table showing the effect that the Acts in the volume have on those of earlier years. Since 1926 the volumes have also included the Measures of the General Assembly (now the General Synod) of the Church of England. There are corresponding bound volumes of *Public General Acts, Northern Ireland* from 1921.

Collected editions

Statutes Revised

5.9 The first edition of *Statutes Revised*, in eighteen volumes, comprising the public Acts in force at the end of 1878, as amended, was completed in 1885. The second edition, in twenty-four volumes published by instalments between 1888 and 1929, brought the work of revision down to the year 1920. The third edition, comprising thirty-two bound volumes of statutes (and one volume of Church Assembly Measures for the years 1920 to 1948) was published in 1950 and contains in chronological order all public general enactments from 1235 onwards (other than certain enactments relating exclusively to Northern Ireland and the pre-Union Scottish Acts), as they were in force at the end of the year 1948.

5.10 The pre-Union Scottish Acts in force on 1 August 1964 are available in a small volume entitled *The Acts of the Parliaments of Scotland* 1424-1707. An earlier edition had been published in 1908.

5.11 *Statutes Revised, Northern Ireland*, contains the relevant statutory law from 1226 to 1950 (including amendments made up to the end of 1954) and comprises Acts or portions of Acts of the Westminster, and earlier, Parliaments that extend to Northern Ireland, and the Acts of the Northern Ireland Parliament up to 1950.

Statutes in Force

5.12 An official revised edition of the extant public general Acts is currently being published in a new form, consisting of a series of booklets, one for each Act, contained in binders which permit the booklets to be replaced. The Acts are printed so as to incorporate textual amendments and repeals, and are arranged in groups and sub-groups according to their subject-matter. Within groups and sub-groups, Acts are arranged in chronological order. The edition is called *Statutes in Force* and is being published in instalments. The first of these, comprising Acts relating to Agriculture and to Compulsory Acquisition, appeared in 1972, together with a Guide to the whole Edition. The second instalment, published in 1974, comprises Acts relating to property in England and Wales and Acts relating to land tenure, conveyancing, trusts and liferents in Scotland. The third instalment, to be published in spring 1975, comprises Acts relating to income, corporation and capital gains taxes and the sale of goods. The edition is kept up to date by issuing new Acts within the scope of groups already published, new editions of Acts (within those groups) that have been extensively amended, and an annual cumulative supplement containing, in separate parts, one for each published group, particulars of new legislation affecting Acts in the group.

5.13 *Statutes in Force* includes pre-Union Acts of the Parliaments of Scotland, but does not generally include Acts of the Parliament of Northern Ireland, or - with a few exceptions - Westminster enactments relating exclusively to Northern Ireland that were passed before 3 May 1921 or deal with reserved land purchase matters.

5.14 The edition is being printed by computer-assisted typesetting. We discuss in Chapter XVI the resulting possibility of using the "computerreadable" magnetic tapes produced for this purpose for retrieving information from the text, thus enabling draftsmen and others rapidly to search all current public general statute law through the computer.

Annotations

5.15 *Statutes Revised, Third Edition*, and the *Public General Acts and Measures* since 1948, can be brought or kept up to date by means of *Annotations to Acts*, an annual publication containing instructions for striking out repealed matter and noting textual and other amendments. We are told that it is estimated that the annotation, from scratch, of a complete set of volumes would take a trained clerk nearly a year to complete, and that the

Parliamentary Counsel Office are therefore having instead to use *Halsbury's Statutes* - see paragraph 5.27 - for the extra sets of statutes they need. The annual cumulative supplements to *Statutes in Force* provide an updating service for users of that publication.

Indexes and tables

Index to the Statutes

5.16 This is an annual publication in which all the public general statute law (including pre-Union Scottish Acts from 1424) in force at the end of the previous year is collected under some 1,000 main subject headings, with over 20,000 cross-references.

5.17 A corresponding work for the statute law affecting Northern Ireland, called *Index to the Statutes in Force affecting Northern Ireland*, is published triennially.

Chronological Table of the Statutes

5.18 This is a cumulative annual publication that lists, in chronological order, all the public general Acts since 1235 (including pre-Union Scottish Acts from 1424, and Measures of the Church of England Assembly and the General Synod since 1920). The Table shows whether an Act is still in force and, if it is, gives details of all partial repeals, amendments, applications and similar matters that affect it.

5.19 There is a corresponding work called the *Chronological Table of the Statutes affecting Northern Ireland*, published triennially.

Annual Volumes

5.20 The annual volumes of *Public General Acts and Measures* contain, each year, in addition to the Acts and Measures themselves, an alphabetical Index to the short titles and contents of the year's public general Acts and Measures, Tables containing alphabetical and chronological lists of short titles (including an alphabetical list of Local and Personal Acts), Tables of Derivations of the year's consolidation Acts,(*) and a Table showing the effect that the year's legislation has on that of previous years. The Index and Tables are also published each year in a separate booklet.

Statutes in Force

5.21 Each subject group has its own index, except for a few large groups, each sub-group of which may have its own index. When the work is complete, there will be an index to the work as a whole. There are also general alphabetical and chronological lists of the Acts so far published in the work. Revised indexes and general lists of Acts are to be issued as required.

Statutory Instruments

5.22 Statutory Instruments sometimes amend statutes, and are used in many instances to appoint dates for their commencement. Both commencement orders and instruments that amend statutes are noted in the Tables of Effect at the end of the annual volumes of *Public General Acts and Measures* and in *Annotations to Acts*.

5.23 It may, therefore, sometimes be necessary, in order to ascertain the statute law in force at a particular date, to refer to Statutory Instruments. These have appeared in a series of indexed annual volumes since 1890, and there is an official collected edition of instruments in force at the end of 1948. A subject index - the *Index to Government Orders* -, including a table of statutory powers to make instruments, is published in alternate years, and there is a cumulative annual table showing amendments and revocations. Annual, monthly, and daily lists of Statutory Instruments are also published. Each subject group of *Statutes in Force* has a companion list of the general Statutory Instruments made under the Acts in the group.

Local and Personal Acts

5.24 These do not fall within our terms of reference, though it is to be noted that they

may, as respects the locality or body concerned, amend or otherwise affect the provisions of public general Acts. There is an official index for the period 1801-1947, a supplementary index for 1948-1966, and, from 1948 onwards, an annual booklet containing an index and tables. The Law Commissions have now started work on the compilation of a chronological table of all the Private Acts passed since 1539.

DEPARTMENTAL COMPILATIONS

5.25 Certain Government departments make available to the public collected editions of statute law administered by the department. One of these editions is *The Taxes Acts*, compiled by the Inland Revenue and published by Her Majesty's Stationery Office. This contains Acts and Statutory Instruments relating to income tax, corporation tax, and capital gains tax, or affecting the application of those taxes. A new edition, in several paperback volumes,(*) is published each year. Each edition is cumulative and replaces the previous year's edition, repealed matter and amendments being indicated typographically and by footnotes. Earlier versions of particular passages are often given. The work is indexed and includes cross-references between consolidating and consolidated enactments, as well as tables of rates of taxes and allowances

5.26 The Department of Health and Social Security has produced three separate compilations (all published by the Stationery Office). These are *The Law Relating to Family Allowances and National Insurance, The Law Relating to Supplementary Benefit and Family Income Supplements*, and *The National Insurance (Industrial Injuries) Acts and Regulations*. Each contains the relevant Acts and Statutory Instruments and is in a loose-leaf format, kept up to date by the issue, as required, of supplements comprising new and replacement sheets for insertion in the binders.

COMMERCIAL PUBLICATIONS

5.27 General collections of annotated statutes include *Halsbury's Statutes* (a bound revised edition arranged by subjects, with an annual supplement) and *Current Law Statutes* (annual bound volumes from 1947 onwards, published also periodically through the year, with a cumulative annual "Citator" showing the effect of repeals and amendments). *Butterworth's Annotated Legislation Service* comprises selected legislation considered to be of general interest to the legal profession; Acts published in the series that have been wholly repealed are noted in a biennial index.

5.28 Collections of annotated statutes on particular subjects include *Lumley's Public Health* (legislation concerning local government generally, arranged chronologically and published in bound volumes with an annual continuation volume and cumulative supplement), and a number of loose-leaf collections each updated about three times yearly. These include *Simon's Taxes* (enactments relating to income tax, corporation tax, and capital gains tax), De Voil on *Value Added Tax*, Mahaffy and Dodson on *Road Traffic*, Shawcross and Beaumont on *Air Law*, and Harvey on *Industrial Relations*; the *British Tax Encyclopedia*, the *Encyclopedia of Value Added Tax*, the *Encyclopedia of Labour Relations Law*, and the *Encyclopedia of European Community Law*; and the *Local Government Library* comprising *Encyclopaedias of Compulsory Purchase and Compensation, Factories Shops and Offices Law and Practice, Highway Law and Practice, Housing Law and Practice, Public Health Law and Practice, Road Traffic Law and Practice*, and *The Law of Town and Country Planning*. All the collections mentioned in this paragraph also contain relevant Statutory Instruments and departmental Circulars.

5.29 It should be noted, however, that whilst *Current Law Statutes* includes Scotland-only legislation *Halsbury's Statutes* (with minor exceptions) does not; neither do the collections mentioned in paragraph 5.28, except the *Encyclopedia of Factories Shops and Offices Law and Practice* and the *Encyclopedia of Road Traffic Law and Practice*.

5.30 Both branches of the legal profession, chartered accountants, lawyers in central and

local government, and others involved in the practical application of statute law, rely heavily on the commercial publications, for (in the absence of a computerised information retrieval system) they provide the quickest means of finding relevant statutory provisions and the cases in which they have been interpreted by the courts.

EUROPEAN COMMUNITIES

5.31 The main treaties governing the three European Communities have been published as Command papers. Other treaties relating to the Communities have been published by HMSO in the ten volumes of *European Communities, Treaties and Related Instruments* (1972). The basic treaties, brought up to date as at 1 January 1973, are also available in English in a single volume published by the Communities in 1973 (*Treaties establishing the European Communities; treaties amending these treaties; documents concerning the Accession*).

5.32 Community secondary legislation is published in the "L" (Legislation) series of the *Official Journal of the European Communities*, which usually appears daily. Although only regulations are required to be so published,(*) other instruments the publication of which is not obligatory are in practice included. The "C" (Communications) series of the *Official Journal* contains draft instruments, notices, and various other items of information. It usually appears about three times a week. A monthly supplement covering both series contains what is called a "methodological table", in which instruments in the "L" series are listed in numerical order under the headings "Acts whose publication is obligatory" and "Acts whose publication is not obligatory" and the more ephemeral ones are distinguished typographically. Single copies of the *Official Journal* are sold by HMSO, and subscriptions are arranged by the Office for Official Publications of the European Communities in Luxembourg.

5.33 Community secondary legislation in force on 31 December 1972 is to be found in *Secondary Legislation of the European Communities, Subject Edition* (HMSO, 1973; 42 volumes). Secondary legislation published in the *Official Journal* during 1973 is indexed in *Secondary Legislation of the European Communities, Subject List and Table of Effects 1973* (HMSO), in which instruments are listed by subject under the volume titles used in the *Subject Edition* (see above); the Table of Effects lists instruments amended or repealed by instruments published in 1973. The *Subject List and Table of Effects* for Community instruments published since 1973 follows the same scheme, but publication has been by monthly parts, which will cumulate into a single volume at the end of each year.

5.34 Commercial publishers are also active in this field. In the loose-leaf *Encyclopedia of European Community Law* (see paragraph 5.28), Vol. A, published in 1973, contains the European Communities Act 1972 and other United Kingdom sources; Vol. B (1973) contains the main treaties; and Vol. C, part of which will be published this year, will contain secondary legislation (excluding regulations on agriculture and customs duties). *Halsbury's Statutes* (see paragraph 5.27) is to be expanded by the publication of *European Continuation Volumes*, the first of which will appear shortly and will contain the texts of the three main treaties and the amending treaties, and the more important secondary legislation from 1952 to 1972. Summaries of some less important instruments will be included, but not of instruments of a purely ephemeral nature. The material will be arranged under the existing *Halsbury's* subject titles. There are to be annual supplements containing lists of all instruments, additional texts, and a noter-up. Further continuation volumes, containing texts and summaries as in the initial volume, will be published for groups of years. The work will be cross-referenced to the main body of *Halsbury's Statutes*. It will also be published as a separate work, under the title *European Legislation*.

Chapter VI

THE CRITICISM

INTRODUCTORY

6.1 Our terms of reference imply a widespread concern that much of our statute law lacks simplicity and clarity. This concern has been expressed to us in evidence by the judiciary, by bodies representing the legal and other professions, by the Statute Law Society,(*) by non-professional bodies and by prominent laymen familiar with the problems of preparing legislation. First, let us try to assess the strength and substance of the criticism.

6.2 The complaints we have heard may be broadly grouped as follows:

(a) *Language.* It is said that the language used is obscure and complex, its meaning elusive and its effect uncertain.

(b) *Over-elaboration.* It is said that the desire for "certainty" in the application of legislation leads to over-elaboration.

(c) *Structure.* The internal structure of, and sequence of clauses within, individual statutes is considered to be often illogical and unhelpful to the reader.

(d) *Arrangement and amendment.* The chronological arrangement of the statutes and the lack of clear connection between various Acts bearing on related subjects are said to cause confusion and make it difficult to ascertain the current state of the law on any given matter. This confusion is increased by the practice of amending an existing Act, not by altering its text (and reprinting it as a new Act) but by passing a new Act which the reader has to apply to the existing Act and work out the meaning for himself.

In the following paragraphs we set out some of the criticism we have received under each of these heads.

LANGUAGE

6.3 The Statute Law Society criticise the language of the statutes as:

> "legalistic, often obscure and circumlocutious, requiring a certain type of expertise in order to gauge its meaning. Sentences are long and involved, the grammar is obscure, and archaisms, legally meaningless words and phrases, tortuous language, the preference for the double negative over the single positive, abound".

The representatives of the Society who gave oral evidence were unable to support this general condemnation; but we are impressed by other evidence that the legislative output of Parliament is often incomprehensible even to those who are most familiar with the subject matter of the legislation, as the following quotation illustrates. Referring to section 121 and Schedule 26 of the Finance Act 1972, an expert on tax law has recently written an article which includes the following passage:

> "But even if tidied up, Schedule 26 will still be incomprehensible on first reading - and probably on many readings - to anyone who is not thoroughly familiar with estate duty law and practice. The writer, who has worked closely with estate duty statutes for over forty years, has had to devote hours of time to the production of this article, and even now is not sure he has got it right. The ordinary solicitor, to whom estate duty is only one of numerous bodies of law with which he has to deal, must find it extremely difficult to comprehend section 121 and Schedule 26 by simply reading their texts, given the limited time he has available".(*)

Parliamentary drafting which requires such a high degree of intellectual penetration to construe has been described to us as an "arcane art" by one of our witnesses, Lord

Molson: and has called forth the following observation from another of our witnesses, the Chief National Insurance Commissioner, Sir Robert Micklethwait QC:

> "A statute should not only be clear and unambiguous, but readable. It ought not to call for the exercise of a cross-word/acrostic mentality which is able to ferret out the meaning from a number of sections, schedules and regulations".

One example of what the Chief National Insurance Commissioner may have had in mind is the type of enactment which operates by way of hypothesis. This is often the best and sometimes the only method of drafting the enactment correctly, but it puts considerable strain on the general reader, especially if he is left to find his own way to (and through) the specific provisions which govern the hypothetical situation, and not less so if one hypothesis is piled on another as in the footnote to Part II of Schedule I of the National Insurance Act 1946 to which we were referred by Lord Simon of Glaisdale:

> "For the purpose of this Part of the Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person".

It is of course unfair to parade an enactment such as this out of its context and ask the general reader to guess what it means. The footnote did its work economically and accurately, and it may be presumed at least that Parliament has been satisfied with it, having re-enacted it without alteration over and over again. But it is fair comment that any enactment of this type is liable to be provocative, and the more so the more skilfully it is compressed.

6.4 The complexity and obscurity of much statute law has given rise to numerous pleas in evidence we have received that Acts should be written in plainer language. For example, the Master of the Rolls, Lord Denning, said:

> "If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence which goes into ten lines is unnecessary. It could be split up into shorter ones anyway, and couched in simpler language. Simplicity and clarity of language are essential".

Lord Denning's views were echoed by most of the judges who talked to us about the drafting of statutes, and it is not difficult to find in the law reports cases in which interpretation problems caused by obscurity or complexity of language have arisen. In Appendix B we list some examples of cases which have caused the courts problems on this score. Several private individuals have also sent us memoranda which suggest that the language in which the statutes are drafted is an impediment to a better understanding of the law by lay people; and we have had evidence from such non-legal bodies as the Council of the National Citizens' Advice Bureaux and the Trades Union Congress which bear out this conclusion.

OVER-ELABORATION

6.5 Another source of difficulty frequently mentioned is the tendency on the part of Parliament to try to provide for every foreseeable contingency. Because of this tendency statutes are drafted in elaborate detail which makes them difficult to understand. This has called forth criticism from a number of sources. The Lord President of the Court of Session, Lord Emslie, and the Lord Justice Clerk, Lord Wheatley, for example, put this criticism in the following way:

> "Most of the problems encountered by the Courts flow directly from the tendency of Parliament to ignore the virtue of enacting broad general rules in which the principal and over-riding intention can be readily seen, and to try to

> legislate in detail for particular aspects of the mischief which presumably the statute is intended to curb. It is an eternal truth that one can seldom foresee every combination of circumstances which may arise, and the practical consequence of attempting to do so and of drafting a statute so as to concentrate unduly on foreseen examples is more often than not to conceal the general intention and the ambit of that intention in a welter of detached provisions which leave one in doubt as to whether a particular combination of circumstances not expressly provided for was intended to be covered at all. It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This, with respect to them (the Parliamentarians), is wholly unfounded. Indeed, so far as Scots judges are concerned, the strength of their common law system lies in its reliance upon broad statements of principle, and there is no reason to suppose that similar broad statements of principle in statute law would not, in their hands, be applied to the facts of any given case, to achieve the will of Parliament".

These comments are the result of endeavours on the part of the legislature to ensure against the possibility that the legislation will be construed by someone, in some remote circumstances, so as to have a different effect from that envisaged by those preparing the Bill in question. As one Parliamentary draftsman has put it: "The object is to secure that in the ultimate resort the judge is driven to adopt the meaning which the draftsman wants him to adopt. If in so doing he can use plain language, so much the better. But this is often easier said than done".

6.6 The criticism that Acts of Parliament are couched in excessive detail does not come from the judiciary alone. As an example of the same criticism from other sources we quote the words of the National Farmers' Union in relation to the restrictive trade practices legislation. They say that this legislation

> "attempts to set out in great detail the rules governing the question of whether or not an arrangement is registrable and the issue of whether or not any arrangement is against the public interest, to mention two examples. It is a common feature of anti-avoidance legislation to deal with matters in such detail, but it is questionable whether the statutory provisions on restrictive trade practices should be looked upon as coming within this class of legislation. It is concerned with such variable factors as the public interest, the national economy, and fair trading activities. These can vary from time to time and from place to place and they depend, amongst other things, on the subject matter of the arrangement in question and the sizes of the businesses involved. Such matters cannot adequately be covered in detail by statute. There is a need for more flexibility; more scope for administrative discretion".

6.7 The practice of legislating in too much detail is a main cause of complexity and of some of the obscurity in our statute law. There are three ways of lawmaking in detail:

(a) to set out detailed provisions in sections in the body of the statute;

(b) to set them out in schedules, having stated the principles in the sections: as to this see Chapter X;

(c) to leave it to the Government to make detailed provisions by Statutory Instruments.

Whichever of these three courses is adopted, Parliament cannot apply the law to individual cases in which there may be doubt. That is the function of the courts, and when they are interpreting statutes in cases which come before them, they have to exercise powers and responsibilities in questions of detail, however Parliament may decide to make its intentions plain on such matters.

6.8 If the first of those three methods can be avoided, the body of the statute becomes

more readable. If the third method is used, then despite the requirements of the Statutory Instruments procedure, the control of Parliament over the details of legislation is to some extent diminished. Moreover, there is no advantage to the user since he still has to acquaint himself with the detailed provisions of the Statutory Instrument, and may have the additional difficulty of finding it.

STRUCTURE OF ACTS AND SEQUENCE OF CLAUSES

6.9 Each Act has, or should have, an inherent logic, and its provisions should be arranged in an orderly manner according to that underlying logic. But this ideal, it is said, is not always realised. From a logical point of view, the main purpose of a Bill should be made clear early on. This statement of intent, whether it takes the form of the enunciation of general principles or otherwise, is desirable both for the legislators to help them to understand what they are being asked to pass into law, and for the courts to help them to understand the intention of Parliament when they are interpreting the legislation. Statements of intent would also assist those who must obey and advise on the legislation. The intention is now, however, rarely spelt out in the statute itself, although in continental and EEC legislation this is often done in the form of a preamble or in other ways; and we consider this later in Chapters IX, XI and XIX.

6.10 Many of the witnesses have said that more attention should be paid to the logical sequence of the provisions of statutes, and that there should be a consistent approach to such questions as what kind of provision should go in the main body of the Act and what in the Schedules, so that people could more easily find their way about them. There is also the criticism that sentences are sometimes too long, and complicated by too many subordinate phrases, and that there should be greater readiness to break up clauses into separate subsections. We are impressed by the unanimity of opinion that the structure of our statutes is capable of improvement and we deal with this further in Chapter XI.

6.11 Another criticism relates to the geographical extent of statutes or of individual sections of statutes. Sometimes this is not expressed in words but is left to be inferred, as a matter of construction, from the context or by reference to external sources. For example, a provision carrying in itself no indication of its extent may in fact extend only to England and Wales because it consists of an amendment to an existing Act which extends only to England and Wales. It has been represented to us that this is one of the factors which make for obscurity, and that all provisions of this kind should carry express words indicating their extent specifically. It has also been suggested that extent clauses governing Acts as a whole, or Parts of Acts would be more easily found if they were placed at the beginning of the Acts or Parts in question, rather than (as at present) near the end of the main text but before any Schedules, and that this should be the normal place for them. We discuss these questions further in Chapter XVIII.

6.12 Nearly all statutes have "interpretation clauses" in which appear definitions of words and phrases used in those statutes. The present practice is generally to insert such clauses at the end, but it has been suggested to us that these should also be placed earlier as is the general practice in drafting delegated legislation. This too is discussed in Chapter XVIII.

ARRANGEMENT AND AMENDMENT

6.13 The fourth main ground of complaint in the evidence we have received relates to the collective grouping of the statutes and the manner in which they are amended - two matters which, as will appear, are closely related to one another. It is said that among the new statutes which are added to the statute book year by year there are many which are more or less intimately connected with existing statutes and that insufficient assistance is given to the reader in the task of collation which results from the purely chronological arrangement. It becomes increasingly difficult to locate the relevant Acts on any given topic; and, more seriously, once the relevant Acts have been located they may well be

found to be distributed among three or four separate volumes, so that reading them together becomes - physically as well as mentally - a formidable task.

6.14 Our attention has been directed by the National Farmers' Union to the various Acts dealing with trade practices as illustrating defects of arrangement in statute law. In particular, two common defects of arrangement can be illustrated by reference to these Acts:

(1) The Fair Trading Act 1973 is an example of the lumping together of disparate subjects in a single statute. The National Farmers' Union say:

> "The connecting factor is that the administration of the law on the various subjects concerned will be in the hands of one official, who will deal with restrictive practices, with monopolies and mergers, and with certain aspects of consumer protection. These various subjects, however, would be much better dealt with by separate measures with one or more statutes dealing with each".

(2) In section 44(2) of the Agriculture (Miscellaneous Provisions) Act 1968 the expression "co-operative association" is defined by providing that it has the meaning assigned by subsection (9) of section 70 of the Finance Act 1965. The context of subsection (9) (now section 340(9) of the Income and Corporation Taxes Act 1970) is wholly different from the context of section 44(2) of the Act of 1968. Thus, the reader is not only subjected to the inconvenience of having to look at two Acts instead of one, but he is also left with the problem of deciding how the definition of "co-operative association" is to be construed when it is applied in a context different from that for which it was originally devised.

6.15 But there is another problem. New laws frequently amend existing statutes. Such amendment, however, by no means always takes the form of substituting a fresh and amended text in the statute which is being amended. The "non-textual" amendment of legislation has been criticised by many of our witnesses, though some of them conceded that its use may be unavoidable. Amendments drafted non-textually have been described as being:

> "Drafted in a narrative or discursive style producing an inter-woven web of allusion, cross-reference and interpretation which effectively prevents the production of a collection of single Acts each relating to a particular subject, otherwise than by the legislative processes of consolidation and repeal. Often Act is heaped upon Act until the result is chaotic and almost completely unintelligible. Indeed much of the confusion existing in the Statute Book today is directly attributable to referential legislation".(*)

The other method of amending previous legislation which several witnesses have commended to us is the system of "textual amendment". By using this method new statutes which alter the provisions of earlier Acts give effect to such alterations by enacting fresh portions of text which are then added to or substituted for the earlier version.

6.16 Some judges have also been critical of the non-textual amendment system. Lord Denning had this to say on the matter:

> "I would like to have the whole [Act] printed out with the complete new amendment written in. I do not like legislation by reference whereby you amend by saying that in such a previous Act you shall have some other thing taken as so-and-so. I think that ought to be avoided as far as possible. It is a far more difficult task to interpret when you have legislation by reference. I do not like incorporation by reference at all. I would rather say 'in place of such-and-such a section we shall have this'. That is often done".

Lord Emslie, expressing a strong preference for textual amendment to be used wherever possible, said that this makes it

> "so much easier to discover what the law is. Instead of having your fingers in about three different statutes at one and the same time, you get in an ideal textual situation the final form of the live statute which you have to deal with, and when you want to discover the history of the final form you look back to the earlier one. What I think from the point of view of the user is invaluable, is to be able to look at the amended form of the section in a complete state instead of having to look here, there and everywhere at the same time".

The Lord Chief Justice, Lord Widgery, told us that he wholeheartedly supports textual amendment and that when complex legislation was amended textually, it was of enormous help to the judges.

6.17 From the comments we have outlined in the foregoing paragraphs it appears that the users of the statutes are thus in the main critical of Acts which amend existing legislation non-textually. They find these inconvenient and confusing, and they complain that much time is wasted in the attempt to track down what the current law is on a subject on which there has been much legislation. These are serious complaints about the legislative products of Parliament. So far as the form and content of a Bill are concerned, the needs of the legislator are temporary, but the ultimate user may have to put up with an Act that causes him permanent inconvenience and difficulty.

6.18 Some of our witnesses consider that there should be a separate, easily identifiable, principal Act for each subject on which there is legislation and that every time the law on any subject is changed the change ought to be effected by textual amendment of the principal Act for that subject. The up-to-date statute law on each subject could thus be found easily in one place. This would however be difficult to achieve for a variety of reasons. First, there is no agreement about the way in which the multifarious topics on which there is legislation might be grouped together under main headings each of which would be the subject of one of the suggested principal Acts. Such a lack of agreement is not surprising. Different requirements call for different groupings. The boundaries of jurisdiction of different courts of law, the limits of departmental responsibilities, the fields of interest of those who consult the statutes, the market-conscious concern of publishers all suggest particular schemes of grouping, but by no means all of them coincide.

6.19 Secondly, a major programme of consolidation would need to be vigorously pursued before the current statute law could be arranged under principal headings. We have received evidence that there are practical difficulties which prevent much speedier consolidation. There is pressure on the draftsmen, on the Joint Committee on Consolidation Bills, and on the Government departments who play a major part in the preparation of consolidation Bills. We see these problems as presenting a serious obstacle to the achievement of a more intelligible statute book. It has been persuasively brought to our attention that greater progress in consolidation, and other vital improvements which we recommend, depend upon there being many more draftsmen.

ANGLO-SCOTTISH LEGISLATION

6.20 There is considerable criticism among Scottish practitioners of the difficulties they have to face in construing legislation which attempts to combine in a single Act policy intended to have effect in Scotland as well as in England and Wales. We deal with this matter in Chapter XII.

CONCLUSIONS ON THE CRITICISM

6.21 In paragraphs 6.2 to 6.20 we have recited numerous criticisms which have been brought to our attention. In doing so, however, we in no way intend to reflect upon the skill and dedication of the Parliamentary draftsmen, which we greatly admire. They

have to work under pressures and constraints which make it very difficult for them, with the best will in the world, to produce simple and clear legislation. They are inadequately staffed and are often given gigantic tasks to perform in a race against time. They are required to resolve conflicting attitudes which cannot always be reconciled. For example, a Bill may have to be made short enough and narrow enough in scope to get through Parliament in the face of strenuous opposition, while at the same time containing as much detail as may be needed to enable the legislators to see what its effect will be in a wide variety of circumstances. Even in the face of such difficulties many statutes are well-drafted and give no grounds for criticism in respect of clarity and simplicity; indeed some of our witnesses have praised the drafting of a number of recent Acts. Not all of the criticism we have heard in relation to particular Acts has turned out, on close examination, to be entirely valid. Nevertheless, after making all due allowance, there remains cause for concern that difficulty is being encountered by the ultimate users of the statutes, and this difficulty increases as the statute book continues to grow.

Chapter VII

FACTORS TO BE TAKEN INTO ACCOUNT IN SUGGESTING REMEDIES

7.1 In subsequent chapters of this Report we examine various remedies to deal with such of the criticisms recounted in the previous chapter as we think are valid. Before solutions can be considered however, it is necessary to take account of several factors which have an inescapable effect on the situation.

THE MASS OF LEGISLATION

7.2 A prodigious mass of statute law is enacted each year by Parliament. Some idea of the current flow of new legislation can be obtained from the number of pages added to the statute book in the three decades from 1943 to 1972. The figures are:

1943 to 1952	15,600
1953 to 1962	11,000
1963 to 1972	18,000
The total for 1973 is	2,248

These figures give some measure of the burden on Parliament and on the Government machine over the past thirty years. The accumulation of statute law is formidable, and figures worked out in 1965 showed that the "live" statute book consisted then of some 33,000 pages of current law, parts of it dating back 700 years.

7.3 There is hardly any part of our national life or of our personal lives that is not affected by one statute or another. The affairs of local authorities, nationalised industries, public corporations and private commerce are regulated by legislation. The life of the ordinary citizen is affected by various provisions of the statute book from cradle to grave. His birth is registered, his infant welfare protected, his education provided, his employment governed, his income and capital taxed, much of his conduct controlled and his old age sustained according to the terms of one statute or another. Many might think that as a nation we groan under this overpowering burden of legislation and ardently desire to have fewer rather than more laws. Yet the pressure for ever more legislation on behalf of different interests increases as society becomes more complex and people more demanding of each other. With each change in society there comes a demand for further legislation to overcome the tensions which that change creates, even though the change may itself have been caused by legislation, which thus becomes self-proliferating.

7.4 Although matters of policy and the legislative programme are not within our terms of reference, we feel entitled to comment on the volume and scope of the legislative output of Parliament, because these matters have a direct influence on the form of Acts of

Parliament. The more legislation there is and the more such legislation tries to deal with complex situations, the more likely it is that it will itself be complicated and therefore difficult to understand. It may be said that some degree of complexity and indeed obscurity may be the price we have to pay if society feels it necessary to satisfy the demands for more and yet more statute law. For our part we would point out that the price is a high one and we would urge that it should not be paid too readily. It is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear. To the extent that the law does not satisfy these conditions, the citizen is deprived of one of his basic rights and the law itself is brought into contempt. Whatever may be the pressures to increase the volume and extend the scope of legislation, it is our firm view that legislation which is complex and obscure may for that very reason be oppressive. Our constitution (unfortunately, as some people think) contains no entrenched provisions for the protection of the citizen against the dangers inherent in such legislation. A reduction in the volume and scope of the legislative output could well lead to an improvement in its simplicity and clarity. We think that there are some measures which can be taken towards greater simplicity and clarity, even if the volume and scope of the legislative output remain undiminished. It is our object in this Report to consider what those measures are. We would only add that if the volume and scope of the legislative output continue to increase, the prospect of improving the situation by these or any other measures is far from encouraging.

THE PROBLEM OF EXPRESSING COMPLICATED CONCEPTS IN SIMPLE LANGUAGE

7.5 Ideally statutes should be written in ordinary straightforward English that can be readily understood by lawyers and laymen. However, although there is a discernible trend towards a more colloquial style in current statutes (which we welcome), it is not possible to deal in simple non-technical terms with subjects which are themselves technical and involved. Ordinary language relies upon the good offices of the reader to fill in omissions and give the sense intended to words or expressions capable of more than one meaning. It can afford to do this. In legal writing, on the other hand, not least in statutory writing, a primary objective is certainty of legal effect, and the United Kingdom legislature tends to prize this objective exceptionally highly. Statutes confer rights and impose obligations on people. If any room is left for argument as to the meaning of an enactment which affects the liberty, the purse, or the comfort of individuals, that argument will be pursued by all available means. In this situation Parliament seeks to leave as little as possible to inference, and to use words which are capable of one meaning only. When therefore it is necessary to express in language bound by these requirements concepts as complicated as those of, say, Schedule 26 of the Finance Act 1972 (referred to in paragraph 6.3 of the previous chapter) it is not surprising that simplicity is hard to achieve. For these reasons statutory phrases often irritate or baffle the reader, either because they state the obvious or because the "punch-line" is delivered with such economy that it is intelligible only to those who have the time and inclination to inform themselves of the whole context on which it operates.

THE CONFLICTING NEEDS OF DIFFERENT AUDIENCES

The needs of the user

7.6 The user of the statute book who turns to it for information about the way in which the law affects his or his clients' interests should be able to find this information without undue trouble. There will of course be certain Acts which are not readily intelligible and it will usually be necessary for the layman to seek the advice of a professional lawyer. It should be possible for a professional adviser to find his way in the statute book without difficulty, and unnecessary obstacles ought not to be placed in his path. He has a right to expect that statutes should be drafted and arranged in a way which makes plain to him the relevance of the law, even of complex provisions, to the

problems of his clients. From the evidence we have received however it is clear that the needs of such users of the statutes are not being met. We have paid particular attention to the views of the eminent judges who have discussed these matters with us because they, of all users, might be expected to give a balanced opinion as to how well or badly our legislation may be understood. We have discovered that even they often find it difficult to understand the intention of legislation passed by Parliament. If this is so, it is likely that practising lawyers find that the way in which the law is drafted presents at times an impenetrable barrier to understanding it; and we have indeed had evidence to this effect. If lawyers find the law difficult, how can the layman expect to fare? To the ordinary citizen the provisions in the statute book might sometimes as well be written in a foreign language for all the help he may expect to obtain there as to his rights and duties under the law. And this in an age, as we have pointed out, when the statute law has a growing effect on practically every sphere of daily life.

The needs of the Government

7.7 We are precluded by our terms of reference from considering matters relating to the Government's legislative programme. We take this to mean that we are not prevented from describing generally how the management of this programme may affect the legislative output of Parliament.

(a) Management of the legislative programme

7.8 The average length of a Parliamentary session in recent years has been about 160 working days. Just under half of this time has, on the floor of the House of Commons, been devoted to the consideration of Bills (including Private Members' Bills), the remainder being taken up by general debates, supply and Private Members' non-legislative time. A substantial part of what is available for legislation is taken up by the Finance Bill; and when Private Members' Bills are also taken into account, the time available to the Government for its *own* programme (excluding the Finance Bill) is reduced to about 60 days. These 60 days allow for the discussion, mostly on second reading and report stages, of about 50 Government Bills of all types, including consolidation Bills. In practice therefore the amount of time at the disposal of the Government is commonly not enough to pass all the legislation for which a reasonable case can be made. This situation has two effects which are inimical to the satisfactory drafting of legislation from the user's point of view.

7.9 First, in the limited time available, it is of great importance to the Government that its Bills shall not be unduly held up by debate about their provisions. From the Government's point of view, "Bills are made to pass, as razors are made to sell" (to use Lord Thring's aphorism), and if there are conventions of drafting which are thought to limit discussion and increase the chances of getting Bills passed, they will be used, whatever the final result may be like for the user. Sir John Fiennes, formerly First Parliamentary Counsel, put it to us thus:

> "One of the jobs of the draftsmen is to present changes in the law to Parliament in a debatable form.... You have to arrange a Bill, be it a new Bill or an amending Bill in a form in which it is capable of rational debate in the House all through its stages; if possible so that the main debates occur at the right places, mopping up the subsidiary debates which will therefore not occur. If you have the subsidiary debates first they will probably blow up into the main debates, and you will then have the main debates again in their proper places afterwards".

The draftsman must therefore carry out his work with one eye to the drafting of proposals that will commend themselves to the favour of a critical legislature, and the other to the eventual product as it will appear in the hands of the user. Sir Courtenay Ilbert commenting in 1901 on the choice before a Minister when presenting a Bill had this to say:

> "The Minister in charge of a Bill will often insist, and wisely insist, on departure from logical arrangement with reference to the exigencies of logical discussion. He will have considered how he intends to present his proposals to Parliament, and to defend them before the public, and will wish to have his Bill so arranged and expressed as to make it a suitable text for his speech. If the measure is at all complicated, he will desire to have its leading principles embodied in the opening clause or clauses, so that when the first fence is cleared the remainder of the course may be comparatively easy. In settling the order of the following clauses, he will consider what kind of opposition, and in what quarter, they are likely to evoke. He will prefer a few long clauses to many short ones, bearing in mind that each clause has, as a rule, to be separately put in Committee. His theoretical objections to legislation by reference will often yield to considerations of brevity. He will eschew technical terms, except where they are clearly necessary, remembering that his proposals will have to be expounded to, and understood by, an assembly of laymen.... The draftsman has, of course, to bear in mind all these considerations".(*)

This is a classical description of the shifts to which a Government is driven by the need to get its legislation passed by Parliament whatever shape the Bill may be in when it receives the Royal Assent. Although the passage was written over 70 years ago it enshrines an attitude which still seems to have much influence, as the criticisms to which we have earlier referred amply bear out.

7.10 We recognise that any Government has a paramount interest in getting its legislation, and much other business, through Parliament; whether the legislation derives directly from a political commitment in a manifesto, or from the pressure of events, or whether it grows naturally out of the ordinary work of Government departments. Indeed, we concede that there is substance in the views advanced so long ago by Sir Courtenay Ilbert in the passage to which we have referred. But if shortage of Parliamentary time tends to lead to the enactment of measures which do not adequately meet the needs of those who have to use it, then one of two courses will have to be adopted. Either the flow of legislation must be staunched so that the draftsmen may have more time in which to make their Bills more intelligible, or, if this is impossible, then in spite of the shortage of time, statutes must be enacted by Parliament in a form that will make it easier for them to be understood by those to whom they are addressed.

7.11 However, some Parliamentarians feel strongly that nothing should be done to hasten the legislative process. If there is now too much legislation, they consider that it would only make matters worse if the Government were to have at its disposal Parliamentary procedures and drafting practices which permitted even more legislation to be produced in a given time. The aim must therefore be to achieve greater clarity without removing from Parliament the power to legislate as it thinks fit, in the hope that such power will be exercised with restraint, responsibility and full regard for the need to achieve greater clarity in the drafting. In Chapter XVIII we have applied our minds to Parliamentary procedure to see whether ways may be found of achieving a better result by changing the existing machinery, as our terms of reference enjoin us to do.

(b) Pressure imposed on the draftsman by lack of time

7.12 Next, the shortage of time available for preparing Bills often puts great pressure on the Parliamentary draftsman; and since draftsmen are human, the corollary is that the quality of their work is often at risk. First Parliamentary Counsel expressed this in the following way:

> "All this makes for an undigested text, and a logical structure which is imperfectly worked out. Moreover, the pressure makes it difficult for the drafting team to prepare material to help in understanding the Bill when it first appears.

> Even drafting an Explanatory Memorandum may be a considerable task for a big Bill. The preparation of the occasional White Paper by way of giving more detailed explanations of the text can be a burden so great that it interferes with the main object of getting the Bill right".

Sir John Fiennes recounted this experience:

> "There was one occasion, on a Finance Bill, when I sat down on a Sunday at home and rewrote a whole Part of a Finance Bill. It went to the printer on Monday night, and the text was handed in at tea-time on Tuesday. The Revenue never saw the final version of that until the Bill was published".

The needs of Parliament

7.13 Members of Parliament in both Houses are busy people who have many exacting demands on their time. Although some are highly skilled in the law, most Members are not familiar with legal concepts. It is therefore in their interests that Bills presented to them for enactment should be in a form which is conducive to easy understanding of their effect. Mr Ian Percival QC MP who gave evidence to us stated:

> "The more simple and clear a Bill is when presented to Parliament, (a) the better it will be understood, and therefore the better it may be considered and discussed; (b) the less time it will take, and (c) the more simple and clear it will be at the end".

We take this to indicate that Members of Parliament are just as keen to have a comprehensible Bill to consider as the users are to receive a comprehensible statute. It should not be supposed that, in considering draft legislation, Members are principally interested in scoring political points off their opponents with little regard for the final shape of a Bill as it leaves their House. On the contrary, Members often help to improve a Bill even when they are opposed to it. Nevertheless, "simplicity" from the point of view of a legislator is not necessarily the same thing as it is from the point of view of a practising lawyer or a judge.

7.14 When a Member of Parliament is faced with a new Bill he wants to know two things about it fairly quickly. First, what the Bill is intended to do, and secondly how it affects the interests of the constituents he represents. It has until recently been assumed that it should be possible to gather this information from a study of the Bill itself, and that it should be the aim of the sponsor, whether this is the Government or a Private Member, to ensure that all the important information required is to be found within the pages of the Bill without the need to read existing legislation on the same subject. Ever since their Office was established in 1869, the Parliamentary Counsel, and their Scottish colleagues, have worked on the principle that, in the words of Lord Thring:

> "It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of a Bill in order to comprehend its meaning".

7.15 How far Members of Parliament are able to understand the general purpose of many Bills without reference to other documents we could not discover, but one of our witnesses, Mr Francis Bennion, has expressed the view that:

> "if Members were asked whether as a contribution to clarity they would be prepared to give up the four corners doctrine, provided adequate alternative means of providing information were designed, my own feeling is that they would readily accept".

If this is so, it would make it easier to amend existing enactments by the textual amendment method. The effect of the amending Bill would be shown either in a Keeling Schedule or in an accompanying memorandum (a "textual memorandum")

which would reprint passages of the earlier Act showing in a different type the amendments proposed to be made to those passages. Keeling Schedules have been used occasionally since 1938 and a textual memorandum has been used once. We do not believe either device has given rise to complaints by Members of Parliament that they were not being given adequate information about the new measures they were enacting.

7.16 Members of Parliament have a duty to criticise Bills presented to them and to amend them as they consider necessary. Sometimes their objections may be on grounds that the legislation adversely affects the interests of those they represent; sometimes they have personal experience which is relevant to the subject matter of the Bill. Frequently amendments are designed to ensure that the Bill will have a particular effect in certain circumstances. Few Bills pass through Parliament unaltered. When amending them Parliament's paramount interest is with the substance rather than the form. But, even when agreed amendments are drafted by the draftsman in charge of the Bill, the final product may still not be satisfactory to the user. Several witnesses have suggested to us that there should be a stage at which Parliament scrutinises the drafting of a Bill after it has been considered and amended, but before it is enacted. We examine this possibility further in Chapter XVIII.

DIFFICULTY OF ATTRACTING ENOUGH SUITABLE PARLIAMENTARY DRAFTSMEN

7.17 The drafting of legislation is an exacting vocation which demands a high degree of intellectual ability, a sound knowledge of the law, the ability to write good English and an unlimited capacity for sustained hard work. These qualities do not often come together in the same individual, and lawyers with such gifts will have other attractive opportunities for advancement in their profession. Though we believe that there can be few more worthwhile careers for able lawyers on both sides of the Border than the work of constructing the statutory law, we are bound to recognise that the attractions of private practice at present make it more difficult to interest good candidates in taking up appointments as draftsmen. Our terms of reference do not permit us to consider how this situation might be altered, but it is obvious that the quality of our legislation depends largely on the quality of our draftsmen. Also, if there are not enough good draftsmen to cope with the regular flow of new legislation, this will make it more difficult to release some of them to carry out consolidation which is so urgently necessary if the statute book is to be brought into orderly shape within a reasonable period of time. We deal with the recruitment and training of the draftsmen in Chapter VIII.

CONCLUSION

7.18 As we have surveyed the criticism we have received and the factors which have to be taken into account in suggesting remedies, we have become conscious that no great improvement in the preparation of legislation is likely to come about solely as a result of changes in Parliamentary procedure or drafting conventions, useful though some such changes might be. The words of Sir Granville Ram, formerly First Parliamentary Counsel, writing in 1946, sound a note of warning:

> "The chaotic condition of the statute book has been the subject of complaint for at least four hundred years, and it must be acknowledged that the long history of the intermittent attempts to improve its form and arrangement is, in the main, a story of failure".

However, nearly all those who have given evidence to us agree that something must be done to improve matters, and according to their different responsibilities have made suggestions as to what this might be.

7.19 We have found a great willingness on the part of some of those who have different tasks to perform in relation to statute law to accommodate each other's difficulties.

Thus the judges would be glad to face the problems of interpretation if statutes gave less detailed guidance but were more simply drafted and more fully expressed the general intentions of Parliament; and the team engaged in preparing the legislation would be more ready to draft by expressing general principles appropriate to the subject matter if Government and Parliament were less demanding in their desire to have every foreseeable circumstance met by detailed drafting which confuses the outline of the draftsman's scheme.

7.20 But much more than good will and self-restraint are needed to make the statute book an orderly repository of reasonably intelligible law: Governments must give the state of our legislation a much higher priority in their responsibilities. The legislative process is the main instrument of political change in our rapidly changing democracy, but it has for many years been incapable of efficiently meeting the demands made upon it. Serious defects of the process are the shortage of Parliamentary draftsmen and the resulting pressure imposed upon them. Until that shortage is overcome and the pressure reduced, the instrument will become even more inadequate and ineffective, and political change will continue to be made under stress, in some confusion, and with unwelcome results.

7.21 The ideal solution of the problems we have described might be to have all statutes drafted in clear and simple language which the layman could understand and which at the same time achieved the certainty of effect in law which Parliament expressly intended, however conflicting these two praiseworthy objects may be. There are also those who advocate a "crash programme" of consolidation with a view to rearranging the statute book. The argument is that such a rearrangement would facilitate the amendment of Acts by the textual amendment method and would make it easier for the user to find the enactments in which he is interested. We deal with this suggestion more fully in Chapter XIV, and at this stage we merely point out that such a programme of consolidation could only be achieved by recruiting and training many more draftsmen. Even if this were done, and even if enough lawyers achieved enough drafting skill, Parliament would have to stop legislating for a good many years in some areas of law so as not to confuse the consolidation programme by interim amendments of existing legislation. Such an exercise is therefore in the realm of fantasy, and meanwhile we have to approach our task by making realistic assumptions in the search for remedies which take account of the factors we have mentioned above.

Chapter VIII

THE DRAFTSMAN'S PRESENT DIFFICULTIES

8.1 In the previous chapter we referred in passing to the Parliamentary draftsmen and the crucial part they play in the preparation of legislation. We now turn to consider certain factors which govern and in some cases inhibit the effective application of their skill.

8.2 The draftsman of a Bill requires (i) adequate instructions; (ii) adequate consultation at all stages with the departmental team working on the Bill, and (iii) above all, adequate time to study the legislative background to the Bill, to consider the best structure for it, and to prepare the draft, which if the Bill is long or complex or both may involve weeks of sustained concentration. The first and second of those requirements are generally met. As regards the second requirement, we would emphasise that the Minister who presents a Bill to Parliament is finally responsible for its drafting, and that while the draftsmen welcome the opportunity of discussion with the Minister the amount of such discussion that takes place depends on him. The third requirement is often lacking, and drafting suffers as a result.

PRESSURE OF TIME

8.3 Nearly all Bills in the Government's legislative programme are prepared under

pressure, generated either by the need to keep to a predetermined Parliamentary timetable for the Session as a whole or by the urgency of the particular Bill. Consequently the draftsman's life is an arduous one, and his hours of work are often long and unpredictable. Although we have had no complaints on that score from any of those draftsmen who gave evidence to us, the draftsmen are the first to recognise that the pressures under which they work may affect the quality of their output. As First Parliamentary Counsel put it: "By the time instructions are received, there may not be much room for the draftsman to take decisions which will make for simplicity or clarity. I find it frequently comes as a surprise to a member of the public, and even to members of the legal profession, to hear how little elbow room the draftsman has ... The pressure to get things done quickly is usually great".

8.4 Political exigencies will continue to demand immediate legislation, and some system of programming will continue to be necessary for all legislation. Given that programming is necessary the date of introduction into Parliament becomes important. Indeed it can become more important than the initial content of the Bill, so that (probably to the detriment of the structure and expression of the Bill) the process of drafting will have to be continued after introduction by means of Government amendments moved in Parliament. Our terms of reference do not permit discussion of the legislative programme as such, but we feel free to take note that sheer pressure of time constitutes a formidable obstacle in the way of any significant improvement in the readability of Acts of Parliament. Accordingly we would urge that by forward planning and early starting of legislative projects everything possible should be done to see that the unavoidable pressure is not increased by avoidable factors.

INSTRUCTIONS TO DRAFT

The "grey area"

8.5 Our terms of reference also exclude "consideration of matters relating to policy formulation", but between the taking of policy decisions and the start of the drafting process, and shading into that process, is what First Parliamentary Counsel has called "the grey area". This is the area in which policy decisions are translated into instructions to the draftsman, and instructions may be modified, more or less substantially, in the course of conferences and exchanges of letters between the draftsman and the instructing department or departments. It seems to us that what happens in the grey area is relevant to the attainment of clarity and simplicity in the legislation emerging from it and should therefore be among the things considered by us.

Departmental expertise

8.6 Of the grey area First Parliamentary Counsel has said:

> "If there is more than one way of carrying out some feature of the policy, those responsible for the instructions must be able to assess well in advance how the choice will be reflected in the Bill. If some policy decisions seem likely to lead to some complexity, and that can be foreseen, there may be room for a review of the position and a request to Ministers to reconsider the policy. Some minor change may make things simpler".

If this be right (as we think it is) those concerned in this area should be given adequate time for their work and should possess a high degree of skill and legal experience. The draftsman should have some part in it, even if only by way of suggesting modifications of his instructions in order to obtain greater simplicity and clarity. Clearly, the more expert the departmental lawyers and administrators in the official team instructing him, the easier the draftsman's task will be; and this is likely to be reflected in the quality of the Bill.

Stage at which draftsman becomes involved

8.7 Several witnesses, among them the experienced draftsmen mentioned below, have

suggested to us that the draftsman should always become involved at an early stage. Professor Driedger described the practice in Canada, where "the person who ultimately will be the draftsman is frequently brought into discussions with officials and ministers when the policy is being developed, and he then has a chance to say what can be done, what cannot be clearly expressed, what will work and what will not work", and where "there is perhaps a closer and less formal relationship between draftsmen, officials and ministers at all stages of a drafting process"; he thought that this did "contribute something to the form and clarity of the statute". Professor Dickerson believes that "if brought in early enough, a draftsman, as a legal architect and engineer, can ... help the policy makers formulate a better and more workable idea ... If the draftsmen are not brought in until the end, they cannot be as helpful as they might be ... When the matter begins to crystallise in its general architecture, the draftsman should be on hand to help formulate this, because the mechanics of formulating general structure ... floats to the surface many overlaps, gaps and discrepancies that it is valuable to discover at the outset".

8.8 We understand that in principle participation by the draftsman in Westminster legislation does not begin until he has received written instructions in which the policy to be given effect to by a Bill (or part of a Bill) has been more or less fully worked out. First Parliamentary Counsel told us that the question of earlier involvement was at present governed by considerations of manpower; it might be looked at again if the manpower position became easier, though he thought that even then there was a strong case for not bringing in the draftsman at an earlier stage. Although in cases where pressure was great the draftsman was in fact coming in long before the legislative scheme was fully settled, as a matter of policy the question did not arise at the moment. On the other hand, bearing in mind the pressure already referred to, it is important that time should not be lost in departmental and interdepartmental discussion of draft instructions to the point where all except the draftsman have agreed upon matters on which his advice would have been useful or even decisive. There is a dilemma here. Premature instructions may be worse than useless: but time spent on revising and polishing draft instructions reduces both the time available to draft the Bill itself and the utility of the draftsman's contribution.

8.9 It is not for us to suggest any general rule governing the precise stage at which the draftsman should begin to take part in the preparation of legislation. To the extent that an answer is not dictated by circumstances, it seems to us that the question is one for the First Parliamentary Counsel and the First Parliamentary Draftsman for Scotland to consider in making the best use of their colleagues' time.

8.10 At present a special problem exists for the Scottish draftsman who has to adapt an English Bill to Scotland, for in such a case, under the existing practice, the Scottish draftsman enters the scene somewhat later than the English. If, however, our recommendations in Chapter XII for Bills affecting both jurisdictions are adopted there would be a complete abandonment of the present method of preparation whereby legislation designed only for England and Wales is adapted for application to Scotland. The new method we propose would mean that such a Bill would involve both draftsmen from the start, and the question of the stage at which the Scottish draftsman should become involved would in that even cease to be a special problem.

THE STATE OF THE STATUTE BOOK

8.11 Each draftsman has to have a complete set of the statutes, fully amended. No draftsman can do his work properly without being thus equipped: the statute book is his workbench. The draftsmen need a clean edition of the statute book if they are to do their work properly, and they have not now got it. The official editions of the statutes have been described in Chapter V. Until a large part of *Statutes in Force* has been published, the official editions on which the draftsmen must mainly rely are the third edition of

Statutes Revised, containing in chronological order all English public general enactments from 1235 to 1707 and public general enactments of the United Kingdom Parliament from 1707 (all as they were in force at the end of 1948) other than certain enactments relating exclusively to Northern Ireland; the second revised edition of *The Acts of the Parliaments of Scotland 1424-1707*, containing all Scottish public general enactments in force in 1966; the annual volumes of *Public General Acts and Measures* for 1949 and subsequent years; and Queen's Printer's copies of recent enactments not yet incorporated in the latest annual volume. First Parliamentary Counsel estimates that "the draftsmen, and all others in the Government service, will still be using the third chronological edition [of *Statutes Revised*] at least 30 years after its publication", in other words that although it "is on its last legs ... it will probably have to remain in use for at least five or six years".

8.12 The drafting offices thus have to contend with two major difficulties: the first is the clerical burden of maintaining completely annotated sets of this material for the draftsmen's use (21,000 entries per set over the last five years), and the near impossibility of annotating additional sets from scratch if the number of draftsmen increases. (As we have said in paragraph 5.15 above, it is estimated that the annotation of a complete set would take a trained clerk nearly a year). The second is the intellectual (and to some extent, no doubt, physical) difficulty of operating on this mass of unintegrated material in drafting both new and consolidating Bills.

8.13 The physical untidiness of the statute book can be, and is being, tackled by the production of the new collected edition, *Statutes in Force*. Completion is hoped for by 1980. First Parliamentary Counsel accepts, with some hesitation, that this edition will serve the draftsmen's purpose when complete. He tells us that the Statutory Publications Office will be offering an updating service of a different kind from that available for the third edition of *Statutes Revised*; the annual supplement to the whole edition will be on the lines of the supplement to *Halsbury's Statutes*.

8.14 The production of any form of collected edition, however, can do no more than tidy the statute book in a physical sense. Repealed matter would be omitted, and textual amendments incorporated in reprinted versions of the Acts amended. Other amendments, applications, and the like, would continue to be found separately from the provisions to which they refer. The intellectual burden of conflating separate enactments to discover their combined effect would, in a large measure, remain. First Parliamentary Counsel says: "A tidy statute book is very necessary as a background for satisfactory legislation. If a Bill must operate on an untidy code, it slows up the team handling the Bill, and makes it more difficult for the legislator and the public to understand the Bill". In assessing the degree of untidiness of the present statute book he arrived at an estimate, for the years from 1921 to 1960 alone, of between 350 and 400 Acts so heavily amended and fragmented (and consequently so heavily annotated) that they could properly be described as being in an unsatisfactory state and in need of consolidation. We agree with most of our witnesses in attaching importance to consolidation, the repeal of spent enactments, the use of textual amendment wherever practicable. We consider textual amendment and consolidation in more detail in Chapters XIII and XIV. We discuss in Chapter XVI the potential advantages of a computerised statute book.

MANPOWER

Recruitment and training

8.15 The staffs of the Parliamentary Counsel Office and the office of the Parliamentary Draftsman for Scotland (the Lord Advocate's Department) are small (details of their composition are given in Chapter III). There is an acknowledged shortage of draftsmen in the public service and the aim is to achieve an increase in the strength of the Parliamentary Counsel Office if possible. The Parliamentary Draftsman for Scotland also has difficulty in securing enough recruits of the required calibre.

8.16 Reasons suggested for these recruiting difficulties include a lack of interest in statute law in the universities. We understand that the whole question of closer contacts

between universities and the legal civil service is under consideration at the moment. The encouragement of an interest in statute law as part of the academic training of lawyers would be regarded by the drafting offices and by us as helpful to recruiting. We have also given thought to the possibility of setting up in this country a post-graduate course of training in legislative drafting such as the one-year course for seven or eight graduates provided by Professor Driedger at the University of Ottawa.(*) Training has up to now, in both the English and the Scottish offices, been mainly a matter of working with a senior colleague in order to develop the necessary specialised skills on the job. We agree that pupillage of this kind is indispensable to the training of a draftsman to the stage at which he could draft a big Bill under pressure; but we consider that a course such as Professor Driedger's could be helpful in providing preliminary training so as to reduce the period of apprenticeship and to ease the burden of the senior draftsmen in training new recruits from scratch, and that serious consideration should be given to the possibility of setting one up. It might help to attract more young lawyers into the drafting offices and to promote a better understanding of drafting problems. Experience shows that only a trained draftsman can provide such a course, and this presents a difficulty which must not be underestimated.

Outside help

8.17 The suggestion has come to us from a number of quarters that the Government draftsmen could be relieved of some of their burden by entrusting the drafting of some Government Bills to lawyers outside the public service, including practising members of both branches of the legal profession (including Parliamentary Agents) and academics. As we mentioned in Chapter III, First Parliamentary Counsel now has authority to make arrangements for some Government Bills to be drafted by outside draftsmen. An experimental scheme has recently been evolved under which the drafting of some Government or Government-supported Bills, and the subsequent responsibility for them, can be "farmed out" to a member of a panel of Parliamentary Agents. First Parliamentary Counsel thinks there is a prospect of some success in this field; although it is not easy to fit the Parliamentary Agents in for a number of reasons they have, he says, been most co-operative and helpful and he hopes to go on getting a contribution from them. For a number of reasons it has not proved possible to get work done by practising members of the Bar. First Parliamentary Counsel told us that he thought that on the whole the experience of the practitioner at the Bar could no longer be said to be of much value in the general field of legislative drafting; although we feel that specialists in particular branches of the law would often be able to give advice on draft Bills which would give warning of pitfalls or loopholes, and that the practice of consulting them should be encouraged.

8.18 We think that the scope for the employment of draftsmen outside the public service on Bills in the Government legislative programme must remain limited by such factors as the need for the draftsman to be in a position to nurse his Bill through Parliament. The scope for their employment on consolidation Bills may be somewhat greater, though even there the difficulties which would be experienced by a practitioner should not be underestimated: they include the obtaining of ready access to an up-to-date set of the official volumes of statutes (see paragraph 8.11 above) and to the draftsman's papers on the Acts to be consolidated. We should in any case deprecate any large-scale transfer of drafting work away from the Government draftsmen, as being liable to result in a return to the pre-1869 situation (the legislation of the eighteenth and early nineteenth centuries has been described by one of the present draftsmen as "a jungle ... drafted by different people who neither knew nor cared how the other performers were framing their legislation"). The centralisation of English drafting in the Parliamentary Counsel Office, staffed by full-time professionals, has been favourably contrasted by Professor Reed Dickerson with the situation in Washington:

> "Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer or a partly experienced lawyer whose drafting duties are a mere incident to his other duties .... Certainly the most fertile single source of confused, difficult-to-read, overlapping and conflicting statutes is the lack of uniformity in approach, terminology and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London".(*)

Professor Dickerson also developed this theme in the evidence he gave to us:

> "Most legislation in the United States is drafted by people who, however good they may be in their substantive specialities, have only fleeting acquaintance with the expertise required for good drafting. This is perhaps the main reason why so much of American legislation is inadequate ... You are light years ahead of us in this respect".

It therefore seems to us that it would be better to increase the strength of the draftsmen's offices than to rely to any great extent upon outside help.

Other duties

8.19 Whilst Parliamentary Counsel, and in particular the First Parliamentary Counsel, have certain other duties as well as their primary function (see Chapter III), we are told that these are not particularly burdensome. Drafting work for the Law Commission ought not to be in direct competition with work on the current legislative programme, and on the establishment of the Commission arrangements, described in paragraph 3.2 above, were made with that end in view. However, we have been informed that the exigencies of the Government's current legislative programme, coupled with other factors which have affected the balance between drafting resources and the demands made upon them, have led to the temporary withdrawal from the service of the Law Commission of one senior draftsman who had previously been assigned exclusively to Law Commission work. This is a misfortune for the causes of law reform and of consolidation, and *we recommend* that the Law Commission's drafting strength should be restored and, indeed, further increased at the earliest possible moment.

8.20 The position of the Scottish Parliamentary Draftsmen is rather different. In addition to a commitment to provide draftsmen for the Scottish Law Commission, the draftsmen have very substantial non-drafting duties as legal secretaries to the Lord Advocate, as described in Chapter III. We have been told by the Parliamentary Draftsman for Scotland that although this work is shared by his staff, the main burden of the more confidential and sensitive work falls on him as Legal Secretary, and that for more than a decade it has tended to absorb the greater part of his and his predecessors' time; a similar process (especially in relation to European Community matters) is now happening to the Deputy Legal Secretary (the second Draftsman), with the result that the two most experienced draftsmen are having less and less time to devote to legislation. Whilst the Parliamentary Draftsman for Scotland saw some advantage in close contact with the Law Officers, he could see no other reason why the two offices of Parliamentary Draftsman and Legal Secretary - which had become combined as the result of the historical development outlined in Chapter II - should remain combined. We feel considerable sympathy with that point of view.

8.21 The giving of drafting assistance for Private Members' Bills is a call on the resources of the two offices which we think should be confined at present to Bills which enjoy Government support or which the Government do not overtly support but which they consider may reach the statute book. With the larger work force which we recommend, the Government could and should then give more generous departmental and drafting support in future to Private Members' Bills which the Government do not actively oppose.

Conclusion

8.22 The shortage of draftsmen is one of the main obstacles to the improvement of the form and clarity of legislation, and *we recommend* that all available methods should be used to recruit and train more draftsmen as a matter of high priority.

PARLIAMENTARY AND OTHER CONSTRAINTS

8.23 There are certain other factors which may present the draftsman with difficulties but which we deal with in later chapters. These are the demand for certainty both from the Government and from Parliament (Chapter X), the requirements of Parliamentary procedure and tactics (Chapter XVIII), and the interpretation of statutes by the courts (Chapter XIX).

Chapter IX

BRITISH EUROPEAN APPROACHES TO LEGISLATION

THE APPROACH IN EUROPEAN LAW

9.1 European law is basically very different from English law, founded as it is on another legal tradition deriving largely from Roman law, later developed to suit modern needs by, for example, the Code Napoleon. The style of the Code is illustrated by many of the codifications of the nineteenth century. The deliberate aim in these codes was to confine the statement of terms to principles of wide application, and to practise a deliberate restraint in the proliferation of detailed rules. An extreme example of this is to be found in Article 1382 of the French Civil Code which states "Any act whatsoever by a man that causes damage to another obliges the person at fault to repair the damage".

THE APPROACH IN ENGLAND AND WALES

9.2 In England and Wales there has grown up over the centuries what may be described as the "detailed" approach to legislation. For a variety of reasons Governments tend to propose, and Parliament to elaborate further, legislation which spells out how a principle of law which is being enacted should apply in a great variety of circumstances. The rationale of this approach is that it is only fair to those whom the law will affect that they should be able to see how Parliament requires the law to be applied in differing circumstances, and that it creates uncertainty if the detailed application of a general principle is left to be interpreted by the judiciary, or to be worked out by the Executive in regulations embodied in subordinate legislation. Sometimes the statutes contain a mass of detail without clearly expressing the purpose or the principles which have prompted it.

THE APPROACH IN SCOTLAND

9.3 The law of Scotland has enough in common with European tradition for the substantive as distinct from the procedural law still to be recognisably within the family of the civil law. A very considerable part of the present law of Scotland, however, comprises statutes of the United Kingdom Parliament, which in general follow the English approach, and it is this part of the law with which we are concerned. The fact that the common law of Scotland has stronger affinities with civil law systems of Europe than that of England does not affect the validity in this context of discussing English and Scottish statute law together.

THE APPROACHES EXAMINED

9.4 In the following paragraphs we examine these differences in tradition more closely and assess how far they are reflected in the present practice of Western European countries and of the European Communities.

9.5 It has been put to us by Sir Charles Davis(*) that it is still true to say that whilst in English statute law more emphasis is placed on certainty, in the legislation of Continental countries and of the European Communities the emphasis is on clarity in the expression of broad intention and principles. Sir Charles said:

"English law, being for historical reasons so firmly based on the doctrine of *stare decisis* has an inherent tendency, in my view, towards achieving certainty - sometimes indeed at the expense of logic - and this is reflected not only in our Common Law but also in our legislation, both original and delegated. This is customarily drafted with almost mathematical precision, the object (not always attained) being in effect to provide a complete answer to virtually every question that can arise. Community law on the other hand, being based on the legal systems of the original six member states, and being thus derived from the Code Napoleon and indirectly from Roman law, adopts an entirely different approach. With the Community law, certainty - in other words the ability to answer almost every question that can arise by textual analysis - is much less important, and the main desideratum appears to be the logical formulation of an idea so that the general objective of the legislation is never lost sight of.... Both systems have their advantages and disadvantages. Under our own system the goal of certainty is sometimes achieved at the expense of a complexity which it is hard (and sometimes virtually impossible) for the layman to master. On the other hand Community secondary legislation which is fully reasoned in recitals (as indeed it is required to be under Article 190 of the Treaty of Rome), and with its much more generalised legislative provisions, is easier to understand at first reading, but suffers from the corresponding disadvantage that it is often impossible by reference to the text alone to say exactly what is the answer to a particular problem. This makes for doubts and uncertainties which can in the last resort only be resolved by the European Court - whose guiding principle it seems to be to look to the intent rather than to the form.... Essentially, the dilemma seems to me to be a choice between two eminently desirable but mutually exclusive objectives namely clarity and certainty".

9.6 The difference between the English and Continental traditions is also recognised in a memorandum we received from the Foreign and Commonwealth Office:

"The drafting of Community legislation is largely influenced by traditions of legislative drafting which have for long prevailed in other European countries but which do not prevail in the United Kingdom. The tradition in many other European countries is to draft in more general terms than is customary in this country, and consequently to leave more scope for the interpretation of the law by the courts; the continental judge is accustomed to interpret legislation in the light of official or academic commentaries. Because of this difference of approach, the form and language of Community legislation does not readily lend itself to emulation in the United Kingdom where the courts and legal professions are accustomed to more precise drafting, and interpretation or construction keeps more strictly to the statutory text".

9.7 Of European Community legislation Sir Charles Sopwith(*) says:

"Given the circumstances in which that legislation has been adopted, the Community legal order corresponds to expectation. The Treaties were arrived at by negotiation and compromise; in the result they are ample on aims but tend to lack precision. The draftsmen of the secondary legislation have no doubt been accustomed to a less precise system of drafting than that aimed at in this country; and much of this secondary legislation is also the subject of debate by and negotiation between the representatives of the Member States and to eventual compromise so that again great precision can not always be expected".

And Professor D Lasok(**) confirmed in a letter to us that:

> "It can be said, generally, that the Community legislation follows the continental pattern, ie translating policies into rules of general application and proceeding from the general to the particular. The legislation is not as tightly drafted as our own statutes, allowing those who apply the laws a certain "margin of appreciation" in the interpretation of the rules of law".

9.8 A feature of Community secondary legislation (though not of examples of European national legislation that we have examined) is the invariable use of a preamble, now rare in British statutes. It is, as Sir Charles Davis points out, obligatory under Article 190 of the Treaty of Rome. Sir Charles Sopwith suggests that

> "It seems probable that the original purpose of requiring the 'reasoning' to be stated was not so much to assist interpretation as to enable Member States and persons affected by Community instruments to ascertain that the Council or Commission was acting properly within its powers.... These preambles have, however, no doubt come to have an important effect on interpretation against the background of the (European) Court's method of interpretation which seeks to give effect to the purposes of the legislation, on which a preamble may well be expected to furnish valuable help. But while the preambles in Community legislation are not so likely to furnish help on particular verbal difficulties, they do undoubtedly give a good deal of help towards the general intelligibility of a Community instrument".

9.9 The difference between the two drafting traditions is clear. In practice, however, when British legislation is compared with both Community legislation and the national legislation of Continental countries, the differences between the products of the two traditions are seen to be sometimes blurred. Whilst British legislation for the most part aims at precision or certainty, and consequently tends to be elaborate and detailed, one can in certain fields find Westminster legislation that is expressed in statements of general principles. An example of this is the Occupiers Liability Act 1957, mentioned by the distinguished comparative lawyer Professor Otto Kahn-Freund in the passage quoted in the next paragraph.

9.10 Of national legislation on the Continent, Professor Kahn-Freund said to us in oral evidence:

> "If I take the two countries I know best, France and Germany, I would agree that there is this type of legislation which is designed to lay down general principles and to do what the courts are supposed to do in this country. I pointed out that there are statutes in this country such as the Occupier's Liability Act, which is a totally different style of legislation, but on the other hand you find in the continental countries the type of detailed minute legislation, not terribly different from what you find in this country. If you take France and if you take what the French call public law, which means administrative law, you will not find the general principles in the statutes - you will find them in the case law of the Conseil d'Etat and the statutes are a chaotic mass of detail not all that different from what we have here. The same could be said about Germany. This is not so much a question of something else being substituted for what we have here but rather one could say there are two different kinds of legislation - there is legislation designed to establish the broad principles, and there is legislation for example tax law, which goes into the greatest possible details."

For example, the Federal German Added Value Tax Law of 1967 runs to some 57 pages of print, despite a deliberate effort to keep it short by incorporating the provisions of other laws by reference in more than 50 instances (and according to the editors of an English translation it "can hardly be understood without professional advice").

9.11 On the content of European Community secondary legislation, the Foreign and Commonwealth Office memorandum quoted in paragraph 9.6 has this to say:

> "Community Regulations often contain matters normally found in both primary and secondary legislation, with the result that in addition to the very general provisions already referred to there will frequently be minutely detailed provisions, sometimes of a purely administrative character, in the same instrument".

And clarity is sometimes sacrificed to expediency:

> "Like the Treaties themselves, this so-called secondary Community law is sometimes ambiguously or incompletely drafted. Political compromises are often attained by the use of ambiguous words".(*)

9.12 Although much European legislation is also detailed and complex it does tend, in contrast with our own, to set out the objectives to be achieved, leaving the detailed methods of application to the courts or to detailed rules laid down by the Executive within the powers conferred upon it. This difference in traditional approach between Europe and this country in the formulation of law has also led to a difference in the rules of interpretation applied by the courts. In Europe since the tendency is to rely more on general principles, it is perhaps natural that the rules of interpretation permit the courts to look beyond the statute to ascertain the intention of the legislature, and doing this they may use various documents other than the statute, classified under the general heading of *travaux preparatoires*. The judge in European countries has for his support a number of interpretative guides. When interpreting the provisions of codified legislation he is by training and experience imbued with the spirit of that legislation, its intention and its historical setting. He can reason by analogy from other articles. He can look at *travaux preparatoires*, where they exist. He has the persuasive, but not binding, assistance of whatever jurisprudence (ie case-law) has been built up upon the matter in point. He can interpret in changed social conditions in the way that best corresponds with the contemporary view of social justice, provided that he does not do too much violence to the literal meaning of the words being interpreted. It is also to be borne in mind that the European judge (unlike the United Kingdom judge) need not take account of what the law was before the passing of the particular enactment with which he is concerned. Legislation is, on the matters to which it extends, for him the unique source of law: it is not an intruder into an area of common law.

9.13 In this country on the other hand, since the tendency is to spell out the law in great detail, the rules of interpretation are narrower and - though perhaps less so in the case of the Scottish courts - the courts look at the meaning of the words of the statute and do not tend to go behind those words in order to establish the intention of the legislature. In other words the courts presume that the legislature knew exactly what it wished to do and has done it, and no filling in is required.

9.14 In the light of this explanation it can be seen that the traditional approach in Europe has been to express the law in general principles, relying upon the courts and the Executive to fill in the details necessary for the application of the statutory propositions to particular cases, in the light of the general intention of the legislature expressed in preambles, recitals and other documents. This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide. Here on the other hand the traditional approach has been to spell out in the statutes themselves the precise way in which the law is to apply in differing circumstances. This gives greater certainty in respect of the circumstances provided for, and it is not necessary to wait for rulings by the courts on particular applications; but it leads to more complex legislation which is less clear to the ordinary reader.

Chapter X

CONFLICTS

CONFLICTING NEEDS: THE BILL AND THE ACT

10.1 As we have said in Chapter VII, there is often a conflict between the needs of legislators when they have to carry a Bill into law and those of the ultimate users of the Act which the Bill then becomes. One aspect of this conflict was described some years ago by a member of our Committee:

> "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 section 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".(*)

We would qualify this by adding that in most spheres the ultimate users of the Act will include not only the professionals, but also the ordinary citizen who is bound by, and presumed to know about, the provisions of the Act of Parliament; and that the professional and other users of the Act need the picture for some purposes and the Bradshaw for others. In other words the conflict is not only between the needs of the legislators and those of consumers: it is also between differing needs of consumers on different occasions.

10.2 The conflict between the needs of the Minister or Member in charge of the Bill and those of the ultimate users was described by Sir Courtenay Ilbert, in a passage from which we have already quoted at greater length, as follows: "A Bill ... may be regarded from two points of view. From one point of view it is a future law. From another point of view it is a proposal submitted for the favourable consideration of a popular assembly. And the two points of view are not always consistent". The second of these points of view has hitherto been the dominant one.

10.3 *We recommend* that in principle the interests of the ultimate users should always have priority over those of the legislators: a Bill, which serves a merely temporary purpose, should always be regarded primarily as a future Act, and should be drafted and arranged with this object in view. We discuss in Chapters XIII, XV, and XVIII some possible ways of reconciling the conflict, where it occurs, in accordance with this general principle.

CONFLICTING OBJECTIVES: SIMPLICITY AND CLARITY V. IMMEDIATE CERTAINTY

The demand for immediate certainty

10.4 The prime duty of the draftsman of a Government Bill, and of the officials instructing him, is to make sure (i) that the Bill accurately achieves the legal effects which the Government wants, and (ii) that as far as possible those effects can be recognised immediately, without confirmation by decisions in the courts. These two desiderata, taken together, we refer to as "immediate certainty".

10.5 Instructions normally go into considerable detail, and where they do not the draftsman will usually feel obliged to ask for them to be amplified. The instructing department may in turn question whether a clause as drafted achieves the desired result in particular cases and with sufficient certainty, and may draw attention to possible ambiguities and methods of avoidance. All the doubts and criticisms that emerge in "the grey area"(*) - and during the passage of the Bill through Parliament - have to be taken

seriously, and may be found to call for more detail in the Bill. All this makes for complexity: there are few occasions, says First Parliamentary Counsel, when the draftsman and the instructing department "can confidently assure the Government that something relatively brief will do what they want".

10.6 The demand for elaboration comes not only from the Government and the instructing department but also from Parliament itself. First Parliamentary Counsel put the position to us in these words—

> "For good reason, Parliament is rarely ready to accept a simplification if it means potential injustice in any class of case, however small. In particular, this is true of everything in a Bill which intervenes in private life, or in business. Powers of entry, and powers of obtaining information, will be looked at jealously. And much detail will often be needed before the Government is likely to be able to persuade Parliament that in this field no more than essential powers are being taken by the proposed legislation In many of the fields in which legislation is frequent, broad propositions may be, or may appear to be, oppressive. Parliament may insist that the rights of the citizen should be spelt out precisely and may well refuse to accept the argument that the way the legislation is to be worked out can be left to the courts".

On the other hand we have not failed to notice that individual Parliamentarians are often vehement in their condemnation of detail and elaboration. As we said in paragraph 1.10, they cannot have it both ways.

10.7 The draftsman is at present often constrained by this approach to include a good deal of detail, in order to provide expressly for different combinations of circumstances, and so to express himself as to eliminate or reduce to the minimum the need for clarification by the courts and the risk of judicial interpretation in a sense contrary to that intended. Of course, judges endeavour in the interpretation of Acts of Parliament to give effect to the intentions of the legislature as expressed in the Act, but in modern times when the State intervenes to regulate the life of the individual with very great minuteness those intentions will not necessarily be clear unless spelt out in very great detail. At any rate that feeling is undoubtedly held in some quarters, and has influenced the style of much contemporary legislation. In a recent case(*) Lord Simon of Glaisdale, supported by Lord Kilbrandon, repeated a suggestion he had made in evidence to us that—

> "Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject matter of specific statutory enactment - unless, indeed, it were too obvious to need expression".

If, as we recommend (paragraph 19.26), there is to be no change in the rule about the non-admissibility of Parliamentary proceedings for interpretation, such a convention might seem to be helpful to the courts; but it would at the same time tend to add a further element of undesirable elaboration to the statutes. This effect could perhaps be mitigated, and the number of occasions on which the convention would operate be kept to the minimum, if more use were made of examples showing how a Bill was intended to work in particular situations, and if such examples were ordinarily set out in Schedules as we recommend, for matters of detail generally, in paragraph 10.13.

10.8 These pressures for immediate certainty through detailed drafting are reinforced by the tradition of English law, which attaches relatively great importance to the common law as against statute law. It is a presumption that nothing but a precise and explicit statutory enactment can modify a common-law concept. In Scotland the tradition is different and it may well be that the approach of the Scottish courts to the task of

applying a broadly drafted statutory provision would not be so strict. In their evidence to us Lord Emslie and Lord Wheatley concurred in saying: "So far as Scots judges are concerned the strength of their common-law system lies in its reliance upon broad statements of principle, and there is no reason to suppose that similar broad statements of principle in statute law would not, in their hands, be applied to the facts of any given case [so as] to achieve the will of Parliament". But the modern statutory law of Scotland emanates from the same legislature as does that of England and notwithstanding the difference of tradition the style is at present the same for both countries. In Chapter XIX we discuss further the effect on drafting style of the courts' approach to the interpretation of statutes.

The consequences of aiming for immediate certainty

10.9 The striving after certainty often results in legislation which is complex and not readily intelligible, and obviously the objective of achieving immediate certainty may conflict with the objectives of "simplicity and clarity" mentioned in our terms of reference. As we have indicated above, there are two features of the pursuit of immediate certainty, either of which may result in a lack of simplicity and clarity. One is the avoidance of ambiguity in what is stated: "being unambiguous ... is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one, the further you are likely to get from the other".(*) The second feature is the attempt to ensure that what is stated is exhaustive. These two features can lead to statutes, and individual provisions, of indigestible length and elaboration. If a less exacting standard of immediate certainty were accepted the draftsman would be free to draft in a more readable style.

Conclusions on conflicting objectives

10.10 The enactment of law in the form of general principles, however clearly expressed and apparently easy to comprehend, may prove deceptive when it comes to applying the statute to particular circumstances. Compare, for example, the Bankruptcy legislation of England with that of Germany. In England, we have an exhaustive list of acts of bankruptcy. German law merely states that if the debtor is insolvent or if the debts or liabilities exceed the assets certain things can be done; insolvency is left to be defined by the courts. The German statute law looks much simpler, but the lawyer who has to apply it must consult the case-law (although it is of persuasive but not binding force) in order to see how the courts have interpreted "insolvent". Where a statute has been in force for some time, any gain in apparent clarity and simplicity in the statute itself may be found merely to have shifted the complex task of ascertaining its precise effect, in a particular case, further into the area of case-law. Where the statute is a new one, there may be a period of greater uncertainty while the lines on which the principles stated in the statute should be applied are being settled by the courts, often at considerable personal expense to individual litigants. As long ago as 1875 it was estimated that it had cost the country at least £100,000 to ascertain the meaning of the Statute of Frauds.

10.11 At the same time, too much weight should not be given to possible uncertainty about the application of general principles to particular factual situations: even where legislation is framed so as to deal with specific instances, as it generally is in this country at present, some situations are almost sure to be overlooked, thus leaving an area of uncertainty, and it may be more difficult for the courts to decide how those situations should be dealt with than it would have been if the legislation in question had been framed in broad terms with clear statements of the principles intended to apply. Also, we have no doubt that British courts would have little difficulty with legislation framed in the latter way, even if some modification of the traditional approach to interpretation were necessary. However, it could well be that any substantial alteration of the balance between the function of law-making on the one hand and that of working

out the application of the laws on the other hand would be unacceptable to Parliament and possibly to public opinion.

10.12 As we have pointed out in paragraphs 10.4 to 10.6, there are demands for immediate certainty in legislation from the Government, who want to be sure that the Bill gives complete and predictable effect to policy; also from Parliament, particularly where the Bill intervenes in private life or in business, and broad propositions may be seen as oppressive. We think these demands have often been more insistent than was necessary. Legislating by statement of general principle may however be more acceptable for private law governing the dealings of individuals and non-State corporations one with another, than for public law sanctioning fiscal(*) or other intervention by the State in those dealings or governing relations between the State and its individual or corporate subjects. Law Reform Bills offer scope for the method of drafting which relies on simple statements of principle, and this is apparent in the draft Bills which the Law Commissions produce.

10.13 The adoption of the 'general principle' approach in the drafting of our statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted wherever possible. We accept, however, that this approach to a large extent sacrifices immediate - though not eventual - certainty and places upon the courts a heavier responsibility in identifying the intention of the legislature when applying legislation to particular circumstances. We recognise that this is unlikely to be acceptable to the executive and the legislature in certain types of legislation, particulary fiscal and other public law which defines the rights and obligations of individuals in relation to the State, and we consider that it would in any event be unreasonable to draft in principles so broad that the effect of the statute could not be assessed without incurring the expense of litigation to determine an issue. But *we recommend* that encouragement should be given to the use of statements of principle, that is to say, the formulation of broad general rules, whether or not the subject matter of the Bill is considered by the Government to call in addition for detailed legislative guidance, through one method or another (see paragraphs 6.7, 6.8). Where such detailed guidance is required in the Bill it should be contained in Schedules, and the main body of the statute should be confined to statements of its principles. This would enable those concerned primarily with principle to find it set out uncluttered by the details of its application and qualifications.

Chapter XI

DRAFTING TECHNIQUES

11.1 Sir Arthur Quiller-Couch, in the preface to his lectures *On the Art of Writing*,(*) said: "Literature is not a mere Science, to be studied; but an Art, to be practised". This is true also of legislative drafting. Each draftsman is a skilled professional lawyer with a style of his own, and once he is beyond the apprentice stage he must act on his own responsibility. That does not mean, however, that he should ignore either the traditions and practice of the office or suggestions made by the consumers of his products. It is in that spirit that we consider in this chapter various techniques which we think can often, in suitable contexts, make for improved readability.

SIMPLICITY OF STYLE

11.2 The most important technique, if the least tangible, is simplicity of vocabulary and syntax. Varying degrees of emphasis have been placed by witnesses on the need for this. Lord Simon of Glaisdale formulated the ideal in the following terms: "Desirably the language of legislation should be as near to ordinary speech as precision permits". But he recognised that "most ordinary terminology contains ambiguity". Another formulation (by Mr Ian Percival QC MP) is that "wherever possible, what is intended should be set out in the simplest terms, in the language nearest to that which would be used by those affected by it". The Statute Law Society suggest that "clarity of

expression, of grammar and construction should be a primary consideration". According to the Faculty of Advocates "The solution here must . . . lie in a compromise between the precision of technical language and the ready comprehensibility of the ordinary use of words . . . The words used should be reasonably simple . . . the sentences should be reasonably short". A number of other witnesses have expressed a preference for simpler language than is to be found in most statutes at present. Many witnesses recognise, however, that it may be difficult or even impracticable to achieve it in some kinds of legislation, notably in fiscal statutes.

11.3 In paragraphs 6.3 and 6.4 we quoted criticisms of current drafting style by the Statute Law Society and other witnesses, and referred to the examples in Appendix B of particular statutory provisions that had caused difficulties of interpretation in the courts. On the other side of the scales should be placed the following tribute by Professor Driedger:

> "With a new British statute, where I understand the subject matter and the social background, I really have no problems and no difficulty in reading and understanding the statute. Of course, if it is a statute dealing with your building societies, or your rent regulations, I would not understand it because I do not understand your practices, but an ordinary statute that deals with a familiar subject, or with a legal subject, I really have no difficulty in understanding. I think on the whole they are well written and well organised, and can be understood by anyone who is familiar with the subject matter of the statute and the circumstances that gave rise to it".

We would, moreover, mention here that Parliament does not always take kindly to the homely phrase. In a recent Bill the expression "the owner has tried his best to let the building" was not well received in the House of Commons,(*) which preferred the more orotund "used his best endeavours".

11.4 In the 1940s and 1950s, when those who are now senior draftsmen were learning the craft, there was still a general belief that the language, or rather the style, must be formalised, on mere grounds of decorum; and that the precision needed to attain immediate certainty overrode every other consideration. In both respects the belief has since weakened. Language is increasingly informal. As to certainty, the need for it remains amply recognised (as it must be); but certainty is obtainable at two different levels. One is where the draftsman deliberately words his clause so that at no point can it possibly be challenged for ambiguity, even by a reader (or legal practitioner) so perverse, or having such a professional interest in finding a way round the law, that he is resolved to find an ambiguity which to any ordinary reader is invisible. At this level of certainty, language becomes by gradations more and more convoluted, and the legislative proposition obscured. At the other level, sufficient certainty is obtained for a fair-minded and reasonable reader to be in no doubt what is intended, it being assumed that no one would take entirely perverse points against the draft, or that such points would be brushed aside by the court. Most of us are satisfied that there has been a substantial and desirable retreat from the first level, with resultant simplification and abbreviation of language.

11.5 On the other hand, the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain. The courts may hold, or a Government department be driven to conclude, that the Act which was intended to mean one thing does not mean that thing, but something else. Where this occurs, the draftsman's discomfort is considerable, and he will instinctively guard against its happening to him a second time.

AIDS TO UNDERSTANDING

Statements of purpose

11.6 A number of witnesses have suggested to us that express statements of purpose would help to explain and clarify both complex legislative provisions which provide in detail for specific instances and legislation framed in terms of general principles. Statements of this kind can take various forms, such as a general preamble to an Act, a general statement of its purpose in one of the opening sections of an Act, or specific statements of purpose and preambles prefacing particular sections or groups of sections or Parts of an Act.

11.7 Among the advocates of statements of purpose are those whose task it is to pronounce or advise on the effects of legislation: members of the judiciary, practising lawyers, and teachers of law. The draftsmen themselves are less enthusiastic. First Parliamentary Counsel takes the view that "in many cases the aims in the legislation cannot usefully or safely be summarised or condensed", and that "there may be a temptation to call for something which is no more than a manifesto, and which may obscure what is otherwise precise and exact". He also points out that "detailed amendments to a Bill after introduction may not merely falsify the accompanying proposition but may even make it impracticable to retain any broad proposition". The Parliamentary Draftsman for Scotland adopts the same view: apart from certain special circumstances, he says "the Act should in general explain itself". New Zealand's Chief Parliamentary Counsel told us that preambles were rare in public Acts in New Zealand; purpose clauses, forming part of the text of the Act, were sometimes used, but were not thought to aid comprehension Professor Reed Dickerson thinks that "most purpose clauses are quite unnecessary"; that general purpose clauses tend to "degenerate into pious incantations . . . such as . . . the one in a recent ecology Bill, which in substance said 'Hurray for Nature '"; but that "in prefatory language in individual sentences such as 'For the purpose of this', or 'For the purpose of that', or 'In order to do this', you may have an economic, focused purpose statement that is of some use".

11.8 We agree that statements of purpose can be useful, both at the Parliamentary stage and thereafter, for the better understanding of the legislative intention and for the resolution of doubts and ambiguities. A distinction should, however, be drawn between a statement of purpose which is designed to delimit and illuminate the legal effects of the Bill and a statement of purpose which is a mere manifesto. Statements of purpose of the latter kind should in our view be firmly discouraged. We think that statements of purpose in preambles are particularly vulnerable to the "manifesto" type of drafting, and we should not like to see a reversion to the archaic use of preambles as a means of declaring or justifying the objectives of public Bills. The preamble can be valuable as a means of reciting facts, such as the terms of a relevant treaty. But when a general statement of purpose is appropriate, we think it should be contained in a clause in the Bill. This has advantages at the Parliamentary stage, since a purpose clause can be amended (or omitted) exactly like any other clause. Preambles are subject to special rules. For the reasons we have given, we think that purpose clauses can be helpful, but that they should be used selectively and with caution. We refer in paragraph 19.39 below to one particular class of legislation in which we recommend that statements of purpose should be generally used. Apart from that, *we recommend:*

(a) that statements of purpose should be used when they are the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation;

(b) that when a statement of purpose is so used, it should be contained in a clause in the Bill and not in a preamble.

Presentation

Length of sentences

11.9 Several of our witnesses have suggested that a legislative statement in the form of a long sentence with a number of subordinate clauses is more difficult to understand than the same thought expressed in a number of short sentences. First Parliamentary Counsel tells us that the draftsmen in his office aim at keeping sentences short and avoiding dense blocks of type. He points out, however, that there is bound to be some price to pay: there may have to be more cross-references, and sections may come out longer, or with more subsections. He regards it as too soon to say whether the experiment will be a success. Sir John Fiennes, his predecessor, also sounds a note of caution: "Shorter sentences are easier in themselves, and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence two sentences away, which, if you have it all in one sentence, is really done for you by the draftsman".

11.10 We think it would be unwise to lay down any general rule about drafting in short sentences, or to suggest that draftsmen should impose limits of length on themselves. We would, however, emphasise the desirability of reducing to a minimum the number of subordinate phrases having to be read before the grammatical subject of a sentence is reached or intervening between the subject and its attendant verb, at any rate where the sentence is not "paragraphed" (see paragraph 11.12).

11.11 In current drafting practice a subsection, or a section that does not contain subsections, is usually punctuated as a single sentence; or, to put it in another way, every time a full stop is reached a new numbered provision is begun.(*) We think this is generally sound: where a thought has come to an end - as is normally the case at the end of a sentence - it is better to emphasise the break in this way. There may however be instances where the thoughts in two or more grammatical sentences are so closely linked that it would be wrong to arrange the sentences as separate numbered provisions. Where that is so it may often be better to join the sentences by a co-ordinating conjunction (preceded by a semicolon), thus emphasising the link (and in some cases avoiding repetition), than to separate them by a full stop. We recognise nevertheless that there are cases where it is natural for a full stop to occur in the middle of a numbered provision, and we do not think there should be any rule or convention precluding this.

"Paragraphing" of sentences

11.12 We agree with the general consensus among our witnesses that dense blocks of type are extremely indigestible and should be avoided. Whilst we see no fundamental objection to longish sentences as such, we think that where one occurs it should be visually broken up into inset "paragraphs" and (if necessary) "sub-paragraphs", each labelled with its own letter or number, so as to bring out the grammatical structure of the sentence. The technique (termed "paragraphing" by Professor Driedger and "tabulation" by Professor Reed Dickerson) may be illustrated by an example. The following (section 38(2) of the Finance Act 1974) was criticised in a London evening paper as "one example of the grotesque language used by the Treasury draughtsmen":

> "Where a gain accrues to a person on a disposal of an interest in land to which this section applies, so much (if any) of the gain as by virtue of this Chapter is a development gain shall be treated for all the purposes of the Tax Acts as income arising at the time of the disposal and as constituting profits or gains chargeable to tax under Case VI of Schedule D for the chargeable period in which the disposal is made, and (except for the purpose of computing the development gain, if any, accruing in respect of the disposal) shall not be a chargeable gain".

We think this sentence is easier to grasp if set out (with no alteration in wording, but one slight alteration in word order) in the following way:

> "Where a gain accrues to a person on a disposal of an interest in land to which this section applies, so much (if any) of the gain as by virtue of this Chapter is a development gain:
>
> (a) shall be treated for all the purposes of the Tax Acts as income arising at the time of the disposal and as constituting profits or gains chargeable to tax under Case VI of Schedule D for the chargeable period in which the disposal is made; and
>
> (b) shall not (except for the purpose of computing the development gain, if any, accruing in respect of the disposal) be a chargeable gain."

Not surprisingly, it is still not possible to appreciate the effect of this provision without some knowledge of the previous income tax and capital gains tax legislation on which the section operates, and it is possible that some of the language used could have been simplified (though much of it may have been dictated by the previous legislation). But the gain in clarity from "paragraphing" alone seems to us to be considerable. This device is already used extensively by British Parliamentary draftsmen, and long blocks of unbroken type are now unusual. Unusual though they are, however, they do occur occasionally and we think it worth emphasising that they should be avoided.

Arrangement generally

11.13 As Professor Driedger said to us, "A draftsman can contribute a great deal to comprehensibility by arranging the provisions of a statute logically and orderly, dividing it into parts in some cases and inserting headings, subheadings and marginal notes . . . as guide-posts. If a statute is carefully arranged and if these visual aids are supplied, then a reader, by scanning the statute, can at first glance get a fairly good idea of what the subject matter is, and what the scope of the Act is". This seems to us unexceptionable as a general proposition; we would only emphasise that in deciding on the arrangement the draftsman ought to have the convenience of the ultimate users constantly in mind. The logical arrangement of Acts is sometimes impeded by Parliamentary considerations, which we discuss in Chapter XVIII. In the following paragraphs (11.14 to 11.25) we look at some particular aspects of arrangement and presentation.

Position of extent, interpretation, and similar provisions

11.14 Lord Thring regarded the logical place for these formal and recurring provisions (known as "common-form clauses") as being together, and at the beginning of the Act "as the reader cannot understand the Act till he is master of the definitions or explanations of the terms used in the Act".(*) Later writers broadly agree.(**) Parliamentary requirements, however, are said to dictate that these provisions should come at the end of the Bill "as a definition frequently narrows or widens the whole scope of an Act, and Parliament cannot possibly judge whether such narrowing or widening is expedient till they are acquainted with the Act itself".(***) We consider this question in Chapter XVIII.

Definitions

11.15 Conflicting views have been expressed to us about the use of definitions. Some witnesses have complained that there are not enough definitions, and there have been objections to definitions that are not exhaustive but merely "include" specified things in the defined expression. Others, including Professor Reed Dickerson, think that definitions should be used sparingly, and that the "includes" form is often preferable: "Occasionally you need a full-blown definition, but most of the time definitions need only to stipulate meaning in the area of marginal uncertainty". Professor Driedger

advocates the use of definitions not only for extending or fixing the boundaries of meaning but also as a drafting technique to remove descriptive material from the body of a sentence, and thus leave the main sentence in a simpler form. We agree with him, but think that these matters must be left to the judgement of the draftsman.

11.16 A common complaint is that expressions are often defined by reference to other statutes. Professor Reed Dickerson recommends "either saying nothing or repeating the specific language you need". Both these alternatives should be considered by the draftsman, but there are occasions when the need for certainty weighs against the first and the need for brevity weighs against the second. In such cases the definition of an expression by reference to another statute will often be justifiable, especially when the other statute enacts a general code or is otherwise well-known. On the other hand, the definition of an expression by reference to another statute which is obscure or obsolescent should so far as possible be avoided.

11.17 Although it is usual to gather the definitions used in a statute into one section which appears at the end with the other common-form provisions, some definitions occur in closer proximity to the provisions to which they primarily refer. It may be inconvenient to users that all definitions used in a statute are not to be found in one place; but we accept that occasions arise in large and complex Bills where it is for the convenience of the user if definitions are placed in those Parts of a Bill to which they relate. It would not always be helpful to the user to suggest that there should be a firm rule which laid down that all definitions should be gathered into one section; and the draftsman must be allowed the discretion of deciding where particular definitions are to be placed. In current practice, if all the definitions are not set out in one interpretation section at the end of the Act the outlying ones are usually indexed in the interpretation section. In a lengthy Act the practice is the same except that each Part may be treated like a separate Act. In the exceptional case of the Reservoirs Bill of 1974, where all the definitions are outlying ones, tabulated indexing in a Schedule was adopted as the most convenient arrangement for the reader. *We recommend* that, except in very short Acts, definitions occurring in the body of the Act should always be indexed in one or another of these ways.

11.18 It has been suggested to us by a number of witnesses that expressions defined in an Act should be printed in italics or some other distinctive type wherever they occur in the text of the Act. First Parliamentary Counsel has reservations about this: he thinks that special type might merely be a distraction, particularly if several kinds of type were used for this and other purposes. We agree, but consider that the possibility of signalling a definition by some other means (such as a marginal reference to the defining provision) should be explored. We revert to this in paragraph 11.21 below.

Internal cross-references

11.19 We agree with a number of witnesses that these should take the form of precise references to numbered provisions, as they normally now do, and that it is often helpful if, in big Acts, they include a short parenthetical description of the subject-matter of the provision referred to, as is done when making external references to other legislation.

Mathematical formulae

11.20 We welcome the increased use of fractions and other formulae where this enables the draftsman to avoid a verbal description - necessarily complicated - of a mathematical process, provided the formulae are simple ones that can be readily understood by people who are not expert mathematicians. The attractions of the technique ought not to be allowed to lead to the use of elaborate mathematical forms of expression, which might do more harm than good.

Typography

11.21 We have already discussed (in paragraph 11.18) one suggestion for the use of

special type. It has also been suggested to us that a distinctive type should be used to indicate amendments where amended provisions are recapitulated in an amending Act, and (by the House of Lords Select Committee on Procedures for Scrutiny of Proposals for European Instruments, in their Second Report)(*) that those portions of ordinary departmental Bills that propose to translate Community law into United Kingdom law, and the corresponding portions of the resulting Acts, should be printed in such a way that they are easily recognisable. Without having made a careful technical analysis, we agree with First Parliamentary Counsel that the cumulative effect of a number of different types used for different distinguishing purposes could be distracting and confusing. We agree with the Select Committee's suggestions about European Community provisions, but we think that some other convention (possibly footnotes or marginal symbols) may be preferable for distinguishing passages of other kinds. *We recommend* that the Statute Law Committee should consider what visual aids and pointers could be helpful in the light of available type faces, page space and technology generally.

11.22 First Parliamentary Counsel has drawn our attention to the sizes of type in which Acts and their Schedules are printed and we have considered whether any change would contribute to the convenience of users. We consider that the type at present used in the Schedules is inconveniently small and *recommend* the use of a larger one.

Amendment Schedules

11.23 A Schedule of amendments is normally set out as a series of paragraphs. The advantages claimed for this form, as compared to a Schedule in the tabular form used for repeals, are that it takes up less space, and is more flexible and lends itself more readily to special cases such as amendments that insert whole new sections into existing Acts. We think that amendment Schedules in tabular form would, nevertheless, often be clearer from the user's point of view and would make the mechanical job of noting-up the amendments easier. Whilst we do not suggest that there should be any inflexible rule, *we recommend* that the practice should be to set out amendment Schedules in tabular form unless there were strong reasons for not doing so in a particular case.

Shoulder notes

11.24 Where an Act is divided into Parts, each page of a Queen's Printer's copy of the Act, and of the Act as printed in *Public General Acts and Measures*, at present carries a shoulder note showing the number of the Part in which the text on that page is contained. Where Parts are subdivided into Chapters, the shoulder note also gives the Chapter number. In neither case, however, do the shoulder notes include section numbers; and where the Act is not divided into Parts there are no shoulder notes at all. We think it would be a small but valuable aid to users if Queen's Printer's copies of all Acts, and *Public General Acts and Measures*, were to carry on each page a shoulder note showing section and, where applicable, Part and Chapter numbers, on the lines of those to be found in *Statutes in Force* and *The Taxes Acts*; and *we recommend* accordingly.

Detail

11.25 We have concluded in paragraph 10.13 that encouragement should be given to the use of broad statements of principle wherever possible. We recognise, however, that much legislation will continue to include a good deal of detail. It is already the practice for much of this to be relegated to Schedules and to subordinate legislation, thus simplifying the substantive sections of the Act. There is a wide range of opinion among our witnesses about the ways in which such material should be distributed between sections, Schedules, and subordinate legislation We agree with the view expressed by the Law Society to the Select Committee on Procedure,(*) and repeated to us, that:

> "It is desirable to cut down the amount of detail at present contained in Bills . . . But where a considerable volume of detail is essential to the legislation we think that so far as possible this should be contained in Schedules to the Bill rather than in separate statutory instruments, as this makes the statutory provisions more easily accessible as a whole . . . the body of the Bill itself should contain the general principles set out as clearly and simply as possible; detailed provisions of a permanent kind should be contained in Schedules to the Bill; and only details which may require comparatively frequent modification should be delegated to statutory instruments".

MODEL PROVISIONS

11.26 We mentioned in Chapter II (paragraph 2.13) the suggestion by a Select Committee in 1875 that model clauses might be prescribed for general use. Our attention has also been drawn to the Second Report from the Joint Committee on Delegated Legislation (Session 1972-73),(*) which recommends (paragraph 26) that standard formulae should be enacted for the two most common types of statutory provision conferring power to act by way of affirmative instrument. Paragraph 23 of the Joint Committee's Report states that "There is a particularly strong case for a standard provision to be attracted by a specific short formulae in parent Acts, in respect of" Statutory Instruments which expire after a certain period unless approved within that period. We think it right to draw attention in this chapter to the Joint Committee's recommendation.

LEGISLATION BY REFERENCE

11.27 Our witnesses have been almost unanimous in condemning "legislation by reference", or "referential legislation", as a source of confusion and irritation both to legislators and to other users. They have not always, however, been very clear about what they mean by those terms.

11.28 Sir William Graham-Harrison, in an address delivered in 1935 to the Society of Public Teachers of Law,(*) quoted Sir Courtenay Ilbert as saying:

> "Legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or fragment of a chapter, of a body of law. It involves reference, express or implied, to the rules of common law, or to the provisions of other statutes on the same subject".

Sir William went on to classify legislation by reference as follows:

> "(1) Enactments which
>
> (a) apply to a new set of circumstances law originally passed for dealing with another set of circumstances, or
>
> (b) apply to some matter a code originally passed for the purpose of being applied from time to time to that kind of matter.
>
> (2) Enactments which affect an existing enactment in any way, whether by modifying it or continuing it in force, or by getting rid of it altogether.
>
> (3) Enactments containing descriptive references, such as 'a company within the meaning of the Companies Acts' ".

11.29 Of these, we regard class 1(b) as entirely unobjectionable, at any rate where the code is applied without modification. Where there are modifications of the code as applied to the particular matter, the clarity of the result may depend on the technique by which they are effected.

11.30 We have already touched on class (3) in paragraph 11.16, but it covers more than

mere definitions (eg "'act of bankruptcy' has the same meaning as in the Bankruptcy Act 1914")(*). It covers every case where the situation to be dealt with by a new enactment is created or circumscribed by an earlier one (eg "A purchaser shall not be prejudicially affected by notice of any instrument or matter capable of registration under the provisions of the Land Charges Act 1925")(**). We do not think that this class of legislation by reference can be dispensed with. We recommend, however, that it should not be used when the matter which is being referred to can simply and shortly be incorporated in the later Act.

11.31 Section 6(1) of the Agriculture (Miscellaneous Provisions) Act 1944 is an example of class 1(a). It reads as follows:

> "The improvement of Live Stock (Licensing of Bulls) Act 1931 shall . . . apply to pigs as it applies to cattle, and for that purpose references therein [to various matters shall be construed as references to other matters]".

The broad distinction between class (1)(a) and class (2) is obvious, though there is an area where the two classes overlap. Legislation in class (1)(a) is often objectionable, particularly where the previous Act or Acts applied are not specified (as in section 8(1) of the Finance Act 1894). Most of the controversy about class (2) concerns the methods (textual and non-textual) by which amendments are made to existing enactments. To this topic we devote a separate chapter (Chapter XIII).

Chapter XII

ANGLO-SCOTTISH LEGISLATION

INTRODUCTION

12.1 Parliament frequently legislates in a single Act for the whole of Great Britain. In such a case, the initial draft of the Bill is prepared by Parliamentary Counsel (who is of course not a Scottish lawyer)(*) to fit into the framework of English law, and then passed to a Scottish draftsman who adapts it to Scottish law. England and Scotland have separate legal systems with different backgrounds, and so this way of producing legislation may cause difficulties of presentation that interfere with its clarity and simplicity, particularly for the Scottish practitioner. The technique has been tersely described by the late Lord Cooper of Culross (Lord President of the Court of Session from 1947 to 1954) as:

> "... the legislative practice adopted at Westminster through pressure of work whereby statutes are normally drafted by English lawyers for England, and then applied with the minimum of "adaptation" to Scotland, the tacit assumption being that whatever England wants must be good enough for Scotland, and that statutes should also conform as closely as possible to a uniform pattern, capable of being understood and applied from London by one set of officials".

Lord Cooper continued:

> "In the purely administrative and governmental sphere this legislative technique is an intelligible consequence of the political Union between the two countries, and often does no harm. But in the last fifty years the statute book will reveal not a few instances of the forcible compression of Scottish legal principles into English moulds without much regard for the resulting strains and distortions. Every translator knows that there are many terms in one language which have no exact equivalent in another; and what is true of language is also true of law".(**)

The Law Society of Scotland have drawn our attention to the evidence they submitted to the Kilbrandon Commission on the Constitution(***) in which, referring to the conflation required to construe a passage along with its related Scottish application clause, they said:

"Whereas an English practitioner has a clear run-through of the legislation, the Scottish practitioner has to engage in a most time-consuming and frustrating process of elimination and amendment before he can make sense of the new legislation".

Evidence to like effect was given to the Kilbrandon Commission by the Faculty of Advocates, and from our own general knowledge we are aware that these criticisms reflect complaints which have been voiced from time to time by most users of the Scottish statutes. The Chairman of the Scottish Law Commission, Lord Hunter, has recently(****) stressed that the Scottish content of United Kingdom legislation is just as much the law of Scotland as any other statutory constituent of Scots law, and has pointed out that some large Whitehall departments are not sufficiently equipped to ensure that legislation affecting Scotland for which they are responsible takes account of this. We have therefore considered the system of drafting this type of legislation and we suggest a number of changes which, in our view, would lessen the incidence of resulting difficulty for the Scottish user. The objective should be a technique of preparation of those Bills which will secure for Scotland as well as for England and Wales observance of the fundamental principle that legislation ought to be so framed as to fit harmoniously into the legal background into which it is to be incorporated.

THE PRESENT SYSTEM OF DRAFTING OF ANGLO-SCOTTISH BILLS

12.2 The instructions for the drafting of a Bill which is to apply to Scotland as well as to England and Wales are prepared by the department promoting the Bill, or if the Bill deals with a subject, for example agriculture, for which there are separate English and Scottish departments, by these two departments in co-operation. Sometimes a Great Britain department has no Scottish legal adviser to assist in the preparation of instructions to draft. In such cases it is unlikely that the instructions will take account of any difficulties peculiar to the Scottish legal system, so that the framework of the draft Bill based on these instructions may be inappropriate in a Scottish context and may make a Scottish adaptation more awkward than it need be. It is much more difficult to alter the framework of a Bill at a later stage than to produce a satisfactory draft in the first place, especially when there is great pressure on time. Great Britain departments contemplating the preparation of an Anglo-Scottish Bill should therefore have available a Scottish legal adviser, specialising in the department's field, to work closely with his English counterpart in the preparation of instructions for the draftsman and at all subsequent stages.

12.3 Whatever the source of the instructions, it is important that the Scottish draftsman, even though he will not be producing the first draft of the Bill, should see them as soon as they are ready, so that he can study the proposals and background material and identify at an early stage any points of particular relevance to Scotland. A copy of the instructions is therefore sent to the First Parliamentary Draftsman for Scotland as well as to First Parliamentary Counsel. On receipt of the instructions the Parliamentary Counsel proceeds, usually without previous discussion with the Scottish draftsman, to get out a first draft of the Bill as a measure suitable to apply in England and Wales. When he has completed this first draft, he sends copies to his Scottish counterpart, and there then begins a process of consultation and interchange of drafts between the two with the object of adapting the original draft to make it workable for Scotland without creating difficulties for England and Wales.

12.4 Apart from studying the instructions and drafting any provisions for purposes peculiar to Scotland, there is nothing the Scottish draftsman can do under this system until he receives a copy of the English draft. He often in practice has to work within restraints imposed not only by shortage of time but also by the English framework in which the Bill has taken shape, and sometimes also by politically imposed limitations upon the number of clauses allowed. The First Parliamentary Draftsman for Scotland has described the situation as follows:

> "The Scottish draftsman ... must work as it were within an English framework. He has to wait for Parliamentary Counsel to issue a draft of the Bill before he can start to function, and there is naturally correspondingly less time to sort out the necessary Scottish provisions. There is a further difficulty that when the draft Bill comes to the Scottish draftsman he is in a sense tied by the English draftsman's approach though it may not altogether suit the Scots".

12.5 Where it is shown from the outset that a Bill is to extend to Scotland, the first draft will be prepared with that in mind. But this is not always the case. First Parliamentary Counsel, when discussing with us the consultation that takes place between the Scottish and English draftsmen on a Bill, said:

> "Sometimes the question has been put by a draftsman - 'Will this apply to Scotland?'- and the answer is 'We shall not know for another three weeks'. In such circumstances you cannot be scrupulous to take account of the Scottish interests".

This seems to us to pin-point one of the underlying causes of the difficulties complained about.

12.6 Even if it is arranged that the English and Scottish provisions will be enacted in parallel in separate parts of the Bill, the Scottish draftsman may still run into difficulty. If he adopts a different approach in passages where this is not necessary for strictly technical reasons, he may encounter problems arising from the rule of interpretation that where Parliament, in one and the same Act and *in pari materia*, uses different language it must generally be presumed to intend a different result.(*) In the result he may be obliged to follow a text which in his own view could well be improved upon regardless of any difference between the two legal systems. To some extent the same applies when the whole Bill is to be enacted separately for Scotland.

PROPOSED CHANGES

12.7 We believe that there should be a change in the system whereby Anglo-Scottish legislation, where it is required to be contained in a combined Bill, is first designed for use in England and Wales and only then adapted for Scotland. There is no constitutional reason for this arrangement, whatever may be the day-to-day pressures imposed by the requirements of the legislative programme. A bicycle intended to be ridden by two people ought to be designed as a tandem from the outset, and not as a solo to which a second seat will later be attached. As a first step towards an improvement, *we recommend* that Great Britain departments sponsoring Anglo-Scottish Bills should issue instructions to both English and Scottish draftsmen in time to allow adequate consultation between them to take place, and that as soon as they receive their instructions they should both begin to plan the Bill from the start in consultation with each other. In this process neither draftsman should feel inhibited, either by fear of lengthening the Bill with apparent duplication or by giving undue weight to the presumption above mentioned, from discarding a provision suggested by the other if it cannot be accommodated harmoniously to the legal system with which he is primarily concerned. *We recommend* therefore that each should be free to produce corresponding but separate provisions. A recent example of an Act in which this method has been followed with successful results is the Domicile and Matrimonial Proceedings Act 1973. Where a minor variant as between England and Scotland occurs within a clause *we recommend* that the technique of using a Scottish substitution or other adaptation should be avoided; and instead the English and Scottish versions should be set out separately, as has been done for example in section 42(2) of the Fair Trading Act 1973.

DECISIONS BETWEEN "COMBINED" FORM AND "SEPARATE" FORM OF ANGLO-SCOTTISH LEGISLATION

12.8 The criticisms which we have mentioned in paragraph 12.1 do not apply to all

Anglo-Scottish Acts, some of which involve little or no difference either in approach or technicalities between the two legal systems. Moreover, legislation intended for both England and Scotland is sometimes enacted in the form of two parallel but separate Acts, and the choice of this method eliminates most of the drafting difficulty inherent in combined legislation. This is the form which in our view should be preferred whenever a combined Bill cannot be drafted for both countries without complicated adaptation, and *we recommend* that it should be regarded as the standard choice in such circumstances. No doubt the choice is often in fact determined by factors arising from the management in Parliament of the Government's legislative programme; and indeed we were informed by First Parliamentary Counsel that often enough advice offered by him against a combined Bill is rejected for political reasons. In our view the choice should never be made in favour of a single combined Bill without the advice of the English and Scottish draftsmen having been sought; nor, if such advice is against the use of the combined method, without proper weight having been given to the probable result in terms of complexity and obscurity. We were told that at present advice on this question is not sought systematically, and we *recommend* that it should be.

12.9 The enactment of separate Acts applying equally to England and Wales and to Scotland need not take up as much Parliamentary time as would be required under existing procedures. In paragraph 18.4 we outline a procedure for the enactment of separate parallel Acts which would in our view save Parliamentary time and make it easier for the Government not to legislate in the form of combined Anglo-Scottish Acts with the difficulties that these sometimes cause. *We recommend* that the adoption of that procedure should he considered.

RE-ENACTMENT OF SCOTTISH VERSIONS OF COMBINED ACTS

12.10 There may on occasion be such urgency to enact a particular piece of legislation, and such shortage of Parliamentary time, that it is necessary, in spite of the considerations which we have urged in the foregoing paragraphs, to instruct the draftsmen to prepare an Anglo-Scottish Bill which turns out to require an unacceptable degree of alteration to make it suitable for Scotland. For such Bills, and we hope that they would be few, *we recommend* that a procedure should be adopted such as we describe in paragraph 18.5 which would permit the speedy re-enactment of a Scottish version.

Chapter XIII

AMENDING EXISTING LEGISLATION

13.1 Few Bills are enacted which do not in some way refer to earlier legislation, and a great many of them amend existing Acts. The way in which such amendments are made has a bearing upon the ease with which the combined effect of the original and the amending legislation can be grasped. In this chapter we examine the methods by which Acts are or could be amended and their possible effect on the resulting state of the law.

13.2 In the United Kingdom, a common method of amending an Act has been to enact in the amending Bill the substance of the change proposed to be made without altering the text of the Act being amended. The amending law does not become part of the previous statute, nor does it lose its separate identity in the statute book. This method of legislative amendment we describe as "non-textual amendment". It is less usual in English speaking countries outside the United Kingdom. Commonwealth countries and the United States prefer to amend their legislation by expressing amendments in the same way as corrigenda or addenda in books, that is in the form of directions to strike out particular words or sentences from an enactment, and to add others. This method we describe as "textual amendment". The expression "legislation by reference" is often used as if it meant exactly the same as non-textual amendment, but strictly speaking it includes both non-textual and textual amendment. Whichever method of amendment is chosen by the draftsman, some inconvenience for the reader of the statute is inevitable.

13.3 A fairly simple example of an identical amendment drafted both non-textually and

textually may be found in the Town and Country Planning Act 1968. Section 149 of the principal Act, the Town and Country Planning Act 1962, is amended non-textually by section 37(3) of the 1968 Act which reads as follows:

> "For a person to be treated under section 149(1) or (3) of the principal Act (definitions for purposes of blight notice provisions) as owner-occupier or resident owner-occupier of a hereditament, his occupation thereof at a relevant time or during a relevant period, if not occupation of the whole of the hereditament, must be, or, as the case may be, have been occupation of a substantial part of it".

A corresponding textual amendment of section 149 of the principal Act is effected by section 38 of the 1968 Act (with Schedule 4):

> "*Section 149*
>
> In subsections (1)(*a*), (1)(*b*), (3)(*a*) and (3)(*b*), for the words 'the whole or part' (wherever occurring) there shall be substituted the words 'the whole or a substantial part' ".

13.4 Whether an Act is amended non-textually or textually, the reader must acquaint himself with the provisions both of the original Act and the amending Act until he is provided with a consolidation of the statute law on the subject in question. We use the word "conflation" to describe this process of reading related enactments together. The conflation of several enactments by the user of the statutes may be inconvenient, indeed difficult, for him. The draftsman and Parliament must therefore have regard to the way that the statute law on any subject will appear once the amending legislation they are preparing and passing has been added to the statute book. It may be that a provision operating upon an earlier Act is reasonably clear as it stands, but the mere fact that the existing Act has to be read in conjunction with a later measure is at the least bothersome, and may at times cause great difficulty. There must however inevitably be a certain amount of cross-reference between Acts. When the draftsman gets down to the actual wording of new legislation he is faced with the problem of how to handle this cross-reference, bearing in mind the more immediate but transient needs of the legislator and others concerned with the Bill during its passage through Parliament, and the long-term permanent needs of the ultimate user.

13.5 So far as the legislator is concerned, the draftsman will want to give him, in brief compass, an accurate account of how the proposed legislation will affect existing Acts. He can do this by providing a succinct summary, or by writing out in precise terms the changes in existing legislation that are proposed. Clearly the choice will depend to some degree on the subject matter. The ultimate user, on the other hand, may be less concerned to be given a descriptive summary of the effect of the proposed legislation on existing enactments. His purpose may frequently be better served by an Act which spells out exactly the changes to be made in the text of the existing legislation so that he can continue to use the existing Acts, thus amended, as authoritative expressions of the statute law on their particular subjects. In the following paragraphs we consider in more detail how far the differing needs of those concerned with the Bill, and the ultimate user of the Act are respectively met by the two main methods of amendment.

NON-TEXTUAL AMENDMENT

Non-textual amendment and the needs of the legislator

13.6 The Westminster tradition has been to draft measures that are as far as possible self-explanatory, so that Members of Parliament coming to a Bill for the first time can fairly quickly grasp the purpose of any new law they are being asked to enact and any changes in the existing law that require their consent. The argument is that Members of Parliament and others concerned with Bills are busy people, and it would be a misuse of their time to send them searching to find out how a Bill before them affects existing

legislation if this can be indicated in the Bill itself. A distinguished Parliamentary draftsman, Sir Courtenay Ilbert, expressed this point as follows:

> "The ordinary method of amending an Act is to state in the amending Bill the effects of the amendment proposed to be made. This is the commonest mode, and for Parliamentary purposes the most convenient, because under it every Member of Parliament who knows anything of the subject, learns at once the nature of the amendment proposed".(*)

13.7 From the point of view of the legislator, an amending clause in a Bill drafted in a narrative, non-textual style can often be better understood on its own, and it is not difficult for Parliament to engage in a logical and orderly debate about the issues raised by the proposal, whether this debate takes the form of a general discussion of the broad policy, as in a second reading debate, or a detailed scrutiny of particular points in committee. Another advantage is the ease with which alterations to the clause can be proposed while it is passing through Parliament. An amendment to a Bill must take the form of a proposal either to insert certain words, or to leave out certain words, or to leave out certain words and substitute others. Proposed alterations to Bills in effect take the form of textual amendments of those Bills, and it is a comparatively straightforward matter to draft and move such amendments when the text of the Bill is reasonably self-contained.

13.8 Mr Ian Percival QC MP was of the opinion that the present bias is too much in favour of non-textual amendment, though he was not prepared to go so far as to say that it should never be used. He was speaking not only as a legislator but also as a practising lawyer and a frequent user of the statutes. Lord Molson, who has wide experience of legislating, also expressed the opinion that when amending existing legislation a statute should state its meaning clearly and not produce its intended effect by reference. It is our understanding that Lord Molson would favour a greater use of the method of textual amendment of existing legislation.

Non-textual amendment and the needs of the user

13.9 Many users of the statutes have made it clear to us that the non-textual amendment of legislation gives rise to practical difficulties for them. Criticism has come not only from the judiciary and some members of the legal profession, but from non-legal bodies as well. The Institute of Taxation, submitting evidence to us on the preparation of revenue legislation, pointed out that "legislation by reference places a great and obvious burden on the practitioner", and went on to suggest that the draftsman of a Bill should as far as possible try to reproduce the relevant passages from earlier statutes that have to be referred to in the Bill itself.

13.10 We have already mentioned in paragraphs 6.15 and 6.16 the complaints we have received about the excessive use of non-textual amendment and the inconvenience this causes to users of the statutes. On the other hand, we have received evidence from the General Council of the Bar in England and Wales to the effect that:

> "There is a substantial section of the Bar which would feel itself in sympathy with the *criticisms* made of the Statute Law Society's proposal that all the alterations to the law contained in an existing statute, particularly if it is a consolidation statute, should be effected by textual amendment of the existing statute and not by direct enactment of the intended change. Certainly, if it is not possible to provide the textual memorandum proposed by the Society, direct enactment of the intended change is more readily assimilated by a lawyer with some knowledge of the existing law".

The Law Society, representing the solicitors' branch of the legal profession in England and Wales, in discussing the respective merits of the non-textual and textual systems of amending previous legislation said that:

> "Our impression is that the textual system is now generally used where possible, but we think that there are clearly cases where it is not suitable. We would certainly not regard it as a panacea, as we think many of the difficulties experienced by the 'consumers' of legislation have nothing whatever to do with the question whether amendments are referential or textual".

The two corresponding Scottish bodies, the Faculty of Advocates and the Law Society of Scotland, expressed objections to the non-textual amendment of previous legislation and supported the Statute Law Society.

TEXTUAL AMENDMENT

13.11 Legislation which amends earlier enactments by the textual method does so by enacting the words that are to be inserted into or substituted for the text of the earlier Act. The example of a textual amendment we gave in paragraph 13.3 demonstrates that neither the legislator nor the eventual user can form a very clear idea of the purpose of the provision at first sight. Before the reader can grasp this, he must go back to the original Act and dovetail into it the new provisions now to become part of the law. This labour can of course be done for him by an editor. The legislator can be provided with a "textual memorandum" accompanying the Bill, or a Schedule, showing how the original Act would read as amended, with the textual amendments indicated in a distinguishing type: and the user can be given a reprinted copy of the previous Act as amended.

Textual amendment and the needs of the legislator

13.12 Assuming that it is agreed that the textual method should be preferred for the amendment of existing legislation, let us consider how far the practice would meet the needs of the legislator. An amending Bill, or part of such a Bill, drafted entirely as a collection of textual amendments to a parent Act would, on its own, be largely unintelligible. It might therefore be necessary to present the Bill to Parliament with an accompanying memorandum (a "textual memorandum") which would indicate the passages in the existing Act to be repealed and the additions and substitutions to be inserted, and thus show how the amended legislation would look if the proposals being considered by Parliament were to be enacted. (An alternative to such a memorandum would be the incorporation into the Bill of a "Keeling Schedule", a device which we discuss in paragraphs 13.21 and 13.22). A complicated and lengthy Bill drafted entirely on the textual amendment system would need to be accompanied by a textual memorandum. The legislator would therefore be presented with two documents, the Bill itself and a textual memorandum probably even longer than the Bill demonstrating the precise effect of the Bill on the existing legislation.

13.13 First Parliamentary Counsel has said that the work of producing such a textual memorandum could represent a further burden on the team of officials handling a Government Bill, and in particular on the Parliamentary draftsman. There are already heavy demands on the draftsman and we do not believe that he should spend too much of his time preparing collateral explanatory material. The drafting of the Bill itself is of much greater importance and a draftsman will rarely have enough time to spend on that. With a large and complicated amending Bill the draftsman would need to cope with the additional burden of preparing and amending a textual memorandum, and this should be an important consideration in deciding how far the use of textual amendment is practicable. Whatever assistance might be available to the draftsman, the final responsibility for the contents of the textual memorandum would have to remain with him. Private Members would also need to have assistance in the preparation of textual memoranda to their Bills.

13.14 Another matter of concern to Parliament is the ease with which amendments to Bills can be drafted and moved. It may be more difficult to draft an amendment to a

proposal which is itself drawn in the form of a textual amendment than it is to draft an amendment to a provision whose purpose is reasonably self-evident. Moreover, a Member of Parliament seeking to amend a Bill will want to see, and to let others see, what the precise effect of his amendments will be on the text both of the Bill and of the legislation to be amended. Where a Bill drafted in the textual amendment style was accompanied by a textual memorandum this could be done by re-writing the accompanying textual memorandum, or part of it. But that would be a laborious matter if many amendments were tabled, especially since only a small proportion of these amendments might be carried.

Textual amendment and the needs of the user

13.15 Does the textual amendment system help the user of the statutes by providing him with clearly stated, easily understood legislation? The amending Act, drafted textually, is by itself just as incomprehensible to the user as the Bill originally was to the legislator. Certainly a diligent user with time available can make "scissors and paste" amendments of the parent Act using the textual directions in the amending measure. But until he has done so (and the task would in some cases be laborious), or until the original Act has been reprinted as amended (either in *Statutes in Force* or otherwise), the user is faced with precisely the same difficulty and inconvenience of constantly having to refer from one Act to another about which there is presently so much complaint. The usefulness of the textual amendment system relies heavily on the systematic and prompt reproduction of edited versions of amended statutes. An important test therefore of the value to the user of textual amendment is whether it will be possible to give him, fairly soon after the new provisions have become law, an edition of the amended code which will reflect the amendment in a handy form.

13.16 Fortunately, an answer is provided in the new official revised edition of the statutes called *Statutes in Force* which is compiled on a loose-booklet system that not only allows newly enacted Acts to be inserted and repealed Acts removed, but also enables an Act that has been amended to be replaced by a new booklet incorporating the amendments. The Edition is being published by instalments, and editorial resources are at present concentrated upon the task of getting the whole work out, but even now it is possible to bring out new revised booklets where necessary. When the whole of the work has been published, it is hoped in about five years' time, there will be ample resources to produce revised booklets in all cases where it is thought desirable. To supplement the issue of revised booklets, there is an annual cumulative supplement for those Acts that have been published in the Edition, giving details of all amendments that have been made to those Acts since they were last published in the Edition. The amending Acts themselves are reprinted in skeleton form (the textual amendments having been carried into the parent Acts or into the annual supplement), but any savings, transitional provisions and other matter that is still in force are printed in full. With the publication of each new instalment the number of Acts reprinted increases, and it is thought that within two, or at the most three years from now, at least one-half of the total number of Acts will have been published in *Statutes in Force*.

NON-TEXTUAL OR TEXTUAL AMENDMENT?

13.17 In so far as there is a conflict between the respective needs of the legislator and of the eventual user of the statutes, we have concluded that the needs of the user must be given priority when proposals for amending previous legislation are being framed. Many statutes are already difficult enough to understand in themselves without making their sense even more abstruse by amending them in a manner which further perplexes the user. There is no doubt that the non-textual amendment of existing legislation often adds to the burdens of the user, particularly when the consolidation of heavily amended Acts is held up for one reason or another. However, it is also clear that in present circumstances the adoption of a rule that amendments to existing legislation should

always be made textually would create difficulties. Apart from the fact that there are many cases where the amendment of existing law can be achieved more compendiously by non-textual amendment, the present state of the statute book is far from conducive to the exclusive practice of textual amendment. An inflexible rule requiring this system always to be adopted would not be in the interests of the user, nor would it be workable for the reasons we give in the following paragraph.

13.18 One suggestion put to us was that there should be a new Standing Order in both Houses of Parliament in the following terms:

> "A Bill amending any enactment shall do so by directly altering its text, unless this is impracticable".

The point of such a Standing Order would be that a Bill containing unnecessary non-textual amendments would be out of order, as would be any attempt to move an amendment to a Bill in a non-textual form, unless textual amendment were impracticable. A formidable difficulty in this proposal is that it offers no workable criterion of what is to be regarded as "impracticable". Apart from that, we do not think that it would in practice be helpful. A rigid rule might not be suitable for a number of reasons. It might be impossible to enforce because a Bill had to be prepared at great speed, or had to be kept short, or because urgency or other considerations made it impossible to provide the necessary aids outside the text. A rigid practice might prevent the Government from making a concession, perhaps at a late stage in a Bill, because an amendment to effect that concession would take that much longer to draft or to handle in the House. Moreover, there are cases where textual amendment would be useless or worse than useless; for example, transitional provisions and temporary laws might not be readily susceptible of textual amendment. There will also be cases where the same result could be achieved more compendiously by non-textual amendment. For example, an amendment operating in the same way in several different contexts may be much longer if it has to spell out the changes to be made in each context. We do not believe that a Standing Order which could have these results would commend itself, least of all to a Government committed to a heavy legislative programme. The risk that a Bill might be delayed or even lost would be unacceptable. Such an Order might also be unacceptable to the Members of each House, depending on how it was applied to amendments to Bills and in particular unofficial amendments. At the least, much time and effort would be required to make the Order work, thus imposing an extra burden on Members, House officials and civil servants. For these reasons, we are unable to recommend that Parliament should consider making a Standing Order on the lines proposed to us.

13.19 Another problem, which has been mentioned in paragraph 13.14, is the difficulty of framing and moving amendments to Bills employing textual amendment; but Parliament as a whole is now more familiar with handling amending legislation than it was, for example, when the 1875 Select Committee reported, and we believe that Members of both Houses would be prepared to grapple with the possible difficulty of proposing amendments to Bills drafted on the textual amendment system, particularly when it is made clear to them that such Bills are drafted in this way for the convenience of the ultimate user.

13.20 Having considered the problems on both sides of this question, we have concluded that the practice of using the textual method should be applied as generously as possible, and *we so recommend*. We are encouraged and pleased to hear that in fact the Parliamentary draftsmen, having regard to the needs of the user of the statutes, already make it a practice to amend legislation textually wherever convenience permits. (The adoption of this practice was, we are told, partly prompted by the decision to publish *Statutes in Force* and by the Law Commissions' suggestion that the draftsmen should take account of the requirements of the new edition). *We further recommend* that the Editorial Board of *Statutes in Force* should be encouraged to reprint without delay loose copies of Acts as amended where this would be for the convenience of the users.

THE KEELING SCHEDULE

13.21 In paragraph 13.12 we mentioned, as a possible alternative to a textual memorandum, the device known as the Keeling Schedule. This device is of comparatively recent origin. It was adopted as a trial in 1938 to meet a complaint by several Members of the House of Commons headed by Mr E H Keeling (later Sir Edward Keeling) and Mr R P Croom-Johnson (later Mr Justice Croom-Johnson, father of the present judge) that there was far too much legislation by reference which Members could not understand without the texts of the principal Acts referred to as they would appear if amended. Among their proposals for improving the situation was a suggestion that in every Bill which amended previous enactments, those enactments should be re-enacted, with the amendments made by the Bill, in a Schedule which would be preserved against amendment or debate by new Standing Orders. In effect the Schedule would serve the same purpose as a textual memorandum to an amending Bill drafted exclusively on the textual amendment principle. By direction of the Prime Minister these and other proposals were discussed at a meeting between Mr Keeling and Mr Croom-Johnson and Sir Granville Ram, then First Parliamentary Counsel. The outcome was a Question and Answer in the House of Commons on 26 July 1938. In practice it was not found necessary to amend Standing Orders since the form of the clause by which the Keeling Schedule was introduced ensured that no amendments could be moved to that Schedule except those which were strictly consequential upon amendments to the substantive provisions of the Bill.

13.22 The Keeling Schedule has never been considered to be capable of universal or even wide application. It is only used where the changes made by the Bill in the previous enactments are exclusively textual amendments or repeals; and even then it is not used if the previous enactments have been amended non-textually by any intervening Act. Again, it would be quite impracticable, and generally quite useless, to reproduce in a Keeling Schedule all the previous enactments in which merely consequential amendments and repeals are made. This would add enormously to the length of Bills and Acts, for very little purpose, since consequential amendments and repeals are generally taken pretty well on trust. Accordingly, the occasions when it has been both useful and practicable to include a Keeling Schedule have been relatively few, but there has been a fairly steady flow over the past 35 years averaging about 1½ per Session. The Keeling technique not only shows, in the Schedule, how the law will look once it is amended, but also makes clear, in the text of the Bill itself, how the law is being amended. Material proposed to be omitted from an existing Act is indicated in the Schedule by a series of dots. Lord Gardiner in his evidence to us complained of the inconvenience of not being able to see at a glance from the Schedule what was to be left out, and suggested that material to be omitted should be printed in distinguishing type. We agree with this suggestion, and *we recommend* that it should be followed in future.

CONSOLIDATION AND ITS EFFECT ON AMENDMENT

13.23 The value of textual amendment to the user of the statutes in helping him to a clearer understanding of the law depends, as we have already said, on the availability of good editions which will accurately reflect the changes being brought about. This in turn depends on the state of the statute law being amended. There is less scope for textual amendment if the draftsman is operating on a code which is in need of consolidation; and thus in the case of certain amendments it would not at present be possible to use the textual method because the amendments would need to be written into texts which are unconsolidated. The adoption of textual amendment as the general practice whenever convenient will not therefore have its full effect until the programme of consolidation has been speeded up. We are told that the prospects for this are not good. Over the past 25 years the average number of pages of consolidation Acts passed in one year has been 400, and this has probably not kept pace with the rate at which legislation is

being amended. First Parliamentary Counsel estimates that in the whole Statute Book there may be not less than 8,000 pages of legislation needing to be consolidated. We deal in Chapter XIV with the problems confronting those responsible for the consolidation programme. We would stress here that there is a close link between the pace of consolidation and the rate at which textual amendment can have a beneficial effect on the clarity and simplicity of our legislation; and we consider that speedier consolidation is an objective to which the highest importance ought to be attached. In paragraph 14.36 we recommend that the pace of consolidation should be accelerated.

CONCLUSION

13.24 During the past few years there has been a change of emphasis in the method of drafting Bills to amend existing legislation. Before that change, the commonest method of amending an Act was to state in the amending Bill the substance of the amendment proposed to be made without altering the text of the Act to be amended. Since that change, it has been the practice to amend legislation textually whenever convenience permits. We welcome the new practice and recommend that it should be applied as generously as possible. Where a Keeling Schedule or a textual memorandum can assist members of Parliament or others in understanding amendments made by the textual method, such a Schedule or memorandum should be provided whenever it is reasonably practicable to do so.

Chapter XIV

CONSOLIDATION

THE NEED FOR CONSOLIDATION

14.1 We have received from many sources evidence to the effect that much of the difficulty encountered by users of the statute law arises from the fact that the provisions relating to a given matter are to be found not in one self-contained Act but in a series of Acts piled one upon another at different dates, so that the investigation of a particular problem requires simultaneous reference to a number of separate Acts, probably scattered among a number of separate annual volumes. Often some of these Acts deal primarily with matters other than the one in question.

14.2 These difficulties have not been by any means ignored and for many years efforts have been made to tackle the problem by "consolidation" - that is, by rewriting the scattered provisions on a given matter in the form of a single Act. Unfortunately however legislation does not stand still and it inevitably happens that sooner or later after a consolidated Act on a particular matter has been produced further enactments on that matter make their appearance, thus eventually producing a state of affairs which again calls for consolidation. So the need for consolidation is perpetual.

14.3 Unfortunately, too, the resources of manpower needed to produce consolidation Acts are limited and the output has never overtaken the backlog of work requiring to be done, and indeed does not keep pace with the amount of work called for by the continuing flow of new legislation. First Parliamentary Counsel has given us "a very rough estimate" that there are about eight thousand pages of Acts which are in need of consolidation. If the output of consolidation does not keep pace with the additional need for consolidation which is being created by the continuing flow of new legislation, then the backlog must inevitably increase. We regard it as self-evident that the backlog ought to be eliminated as soon as possible. First Parliamentary Counsel has said that, on a very rough estimate, to work off the backlog would call for a trebling of the current rate of consolidation for not less than ten years.

14.4 One of the arguments in favour of the textual method of amendment (discussed in Chapter XIII) is that, if it is accompanied by the swift production of edited prints of the amended Acts, it will to some extent diminish the need for consolidation. However, we do not believe that it will ever eliminate the need - if only because (as we have

concluded in Chapter XIII) there can be no rigid rule that amendment must always be effected textually and so there is bound to continue to be some flow of legislation having non-textual effects on earlier legislation on the same matter.

14.5 Opportunities for using the textual method of amendment are greater, in relation to any given matter, if the existing provisions relating to the matter are contained in a consolidated Act than if they are scattered through a number of separate Acts. We have concluded that the use of the textual method of amendment is desirable; it follows that consolidation is also desirable to provide a base for the use of that method of amendment, as well as for the direct benefits which it brings on its own account.

A CRASH PROGRAMME?

14.6 In these circumstances everyone is agreed that the work of consolidation is extremely important and should be pressed on with. Opinions, however, differ as to the scale on which efforts for this purpose should be based. On the one hand some, notably the Statute Law Society, urge that the entire corpus of the statute law should be rewritten in the form of a small number of "principal" Acts or codes, each dealing with a single branch of the law, or "subject". The Statute Law Society's evidence to us included a statement that:

> "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."

The Society went on to urge that there should be:

> "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 ... Our aim also involved 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."

They further urge that this programme of consolidation should be what they call a "crash programme", planned to cover the whole work within a limited number of years. On the other hand others regard this as impracticable and feel that if an unrealistic target were set the prospect of achieving anything useful would be jeopardised.

14.7 We do not think that the consolidation of the statue book on a "one Act, one subject" principle is feasible. The proposal is, in our view, based on the erroneous assumption that every statute can be completely intelligible as an isolated enactment without reference to the provisions of any other statute. It is not reasonable to expect the law on a given subject to be set forth completely in a self-contained Act of Parliament; and even if it could be, a major problem would be to settle a generally acceptable division of the corpus of the statute law into the broad "subjects" which the suggestion envisages. This last point is not so simple as it may sound. The problem is to determine the breadth of the "subjects". At first sight it might seem that, for example, "Customs and Excise" is a branch of the law which might form a "subject". But the person who is interested in duties on hydro-carbon oil will not want to pay for, and wade through, an enormous Act containing the whole of the customs and excise legislation; he will be much happier with a slim volume consolidating the enactments relating to the duties on hydro-carbon oil and like substances - which under the present system he can find in the Hydro-carbon Oil (Customs and Excise) Act 1971. What such a person wants is the needle without the haystack. Examples can be multiplied. The breeder of dachshunds will want an Act about dogs but will not want one which covers also cock-fighting and the export of ponies, under the omnibus "subject" of "Animals".

There are many Acts on the statute book dealing with films. At first sight "films" might appear to be an attractive subject for a principal Act. But further study would show that the Acts fall into two distinct classes: (*a*) those dealing with the financing of the production of films, and (*b*) those dealing with their exhibition. Some users of the statute book would be interested in both these subjects, but many would be interested in one of them only. In those circumstances a principal Act dealing with films generally is not the ideal solution. What is required is two separate Acts consolidating (*a*) and (*b*) respectively.

14.8 Moreover it would be a prerequisite of such a rearrangement of the statute book that there should be a system of perpetual consolidation envisaged by the Statute Law Society in their evidence to us. It is of the essence of the suggested scheme that each "principal" Act, once it has reached the statute book, should be maintained perpetually as a self-contained unit - ie that any future legislation touching on the "subject" concerned should be effected by a textual amendment of the "principal" Act. This system would also require the insertion into the parent Act of self-contained passages which were not amending it but which might suitably be consigned to the Act if it were being consolidated. Drafting of this kind is sometimes called "slotting in". It is rarely found in legislation at Westminster; but in some Commonwealth countries the method is employed to rewrite large portions of an Act. For example, in the Canadian Income Tax Act of 1971 no less than 600 pages, or 237 sections, are drafted as a single insertion to be made in the main Income Tax Act. But we believe that, however well the original framework of a "principal" Act is designed, there will inevitably be occasions when new provisions on the subject are required but cannot easily be cast in the form of textual amendment or addition; and that even if all such provisions are cast in that form there will sooner or later arrive a stage at which they will distort the original to an unacceptable extent. We therefore do not believe that a system of perpetual consolidation as proposed by the Statute Law Society would be practicable. But even if it were possible to attempt such a perpetual consolidation, we do not accept that Acts framed in this way would necessarily be clearer or simpler for the user.

14.9 Finally, it is clear that a crash programme of the kind suggested would require the recruitment and training of a large number of draftsmen; and while we have recommended that the number of draftsmen should be increased (see paragraphs 8.22 above and 14.18 below) we do not think that an increase on the scale required for a programme of this nature could in practice be achieved in the foreseeable future.

14.10 Agreeing as we do, therefore, with those who think that while a faster rate of consolidation is highly desirable the suggestion made by the Statute Law Society, interesting though it is, is neither practicable nor desirable, we turn now to consider whether the present system is adequate as it stands or is susceptible of realistic improvement. First we outline briefly what the present system is.

THE CURRENT ACHIEVEMENT

14.11 As we have mentioned in Chapter II the direction of consolidation work has since 1965 been in the hands of the two Law Commissions. Under the Law Commissions Act 1965 the Commissions have a general duty to review the law with which they are respectively concerned with a view (among other things) to the reduction of the number of separate enactments; and in particular they are required to prepare from time to time at the request of the appropriate Minister (or Ministers) comprehensive programmes of consolidation and to undertake the preparation of draft Bills pursuant to programmes approved by him or them. In practice some of the projects contained in approved programmes have for a variety of reasons had to be dropped; but on the other hand a considerable number of Bills outside these programmes have been undertaken and completed. In preparing programmes and in initiating projects outside the programmes the Commissions consult with the Government departments concerned, whose co-

operation in the preparation of the Bills is of course an essential element and is generously given so far as possible.

14.12 The necessary drafting work is undertaken partly by the Parliamentary draftsmen attached to the Commissions; and partly by those in the office of the Parliamentary Counsel and in the Lord Advocate's Department, who in the course of their other work have opportunities of seeing and suggesting possible subjects for consolidation, and sometimes for effecting in ordinary Bills changes which will eventually facilitate future consolidation. Of the draftsmen currently attached to the English Law Commission two devote their time wholly or mainly to consolidation projects, but this arrangement is liable to be upset by the demands of law reform at a time like the present when the Law Commission's complement of draftsmen is below full strength. In the case of the Scottish Commission all this work has to be fitted in, as and when possible, with work on draft clauses for law reform Bills.

14.13 When a consolidation Bill has been prepared it has to be submitted to Parliament for enactment. For this purpose there are special procedures, designed to ensure either that no change in the law is being made or that only changes of a minor nature, required to produce a satisfactory and coherent result, are introduced. The Joint Committee on Consolidation Bills, the procedure provided by the Consolidation of Enactments (Procedure) Act 1949, and the procedure for consolidation with amendments to give effect to recommendations of the Law Commissions have been described in Chapters II and IV (paragraphs 2.15, 4.13 to 4.17). Under this system and the broadly similar procedure which preceded it a considerable amount of consolidation has been achieved since 1965. We give in Appendix C a list of the consolidation Acts from 1966 to 1974, amounting to 61.

14.14 This list represents a considerable achievement and in our view it demonstrates that within the limitations imposed by the available resources great efforts have been made to forward the work of consolidation as fast as possible. For this we pay tribute to all concerned. Nevertheless the work in our opinion is so important for the attainment of clarity and simplicity in the statute law as it develops that we have endeavoured to identify and evaluate the obstacles which prevent the system from reaching an even higher rate of output.

THE MAIN OBSTACLES

Shortage of draftsmen

14.15 It is wide of the mark to suppose that consolidation can be carried out by any competent lawyer with the aid of scissors and paste. It is highly skilled work. One of the objects of consolidation is to produce clear and unambiguous drafting, sometimes from very unpromising material. What Lord Thring said to a Select Committee in 1875 is still true today:

> "consolidation... is really a matter very often of extreme difficulty, more than the Committee would imagine . . . There is very great difficulty in getting it done; it is a task requiring exceedingly skilled and rare labour, and the labour of months ... skilled labour of a character which I cannot always get; it is not altogether a question of money".(*)

14.16 The Law Commission's requirement for draftsmen is basically met by the Parliamentary Counsel Office, who normally supply at least four draftsmen on secondment to do a two-year tour of duty at the Law Commission. We have already adverted in paragraphs 3.2 and 8.19 to the fact that the number of draftsmen supplied to the Law Commission in this way is at the moment below what is normal and below what is desirable. The Law Commission have, with the help and support of the First Parliamentary Counsel, sought to supplement the supply of draftsmen in several ways. To reinforce the regular draftsmen they have recruited, to the limits of what is possible,

retired members of the Parliamentary Counsel Office.. In addition, they have a departmental lawyer of great experience who is engaged (with the assistance of a former Commonwealth public servant with special skill in these matters) on the highly important work of statute law repeal. The "farming out" of consolidation work has already achieved one consolidation, and further experiments with "farming out" are now being made.

14.17 As mentioned in paragraph 14.12 above, the Scottish Law Commission have no draftsmen specifically for consolidation work. This work, so far as Scotland-only projects are concerned, is undertaken as and when possible by the one whole-time and one part-time draftsmen who are at the Commission's disposal primarily for drafting clauses for proposed law reform Bills. The Scottish aspect of Anglo-Scottish consolidation projects is attended to, along with their other work, by the Scottish Parliamentary Draftsmen in co-operation with the English counsel attached to the English Commission. These resources, limited as they are by the general difficulty of recruiting draftsmen, are not, in our opinion, sufficient for a proper attack on the consolidation work needing to be done.

14.18 Although it does indeed require skill, there seems to be agreement among those best qualified to know that the drafting of consolidations is not quite so exacting as the drafting of major current Bills, for which additional skills and experience are needed. *We recommend*, therefore, that the Law Commissions and the Parliamentary draftsmen should continue to explore the possibility of recruiting and training for consolidation work lawyers with the necessary aptitudes who have not had the full training of Parliamentary draftsmen.

Pressure on departmental officials

14.19 Without the assistance of departmental lawyers and administrators consolidation cannot be carried out. For instance, in the consolidation of social security legislation recently undertaken, many administrators have to be consulted as part of the process of ensuring that the consolidation accurately reflects the existing law. This requires at the departmental end the direction of a senior official. It is not uncommon for a consolidation project to be held up because the administrators concerned are engaged on other matters.

14.20 We understand, however, that both Commissions press with vigour and success the interest of the public in the rapid advance of consolidation work and the strong claim which that work has, even when weighed with other claims, on departmental resources.

Pressure on the joint committee on consolidation Bills

14.21 The functions of the Joint Select Committee on Consolidation Bills have already been described (paragraphs 4.13 to 4.19). These functions require from the members of the Committee, and especially from its Chairman (at present Lord Simon of Glaisdale), a tremendous amount of work, for which the public is deeply indebted to them. But there is of course a limit to the number of Bills which the Committee, with the best will in the world, can consider in a Session and we believe that (after the shortage of draftsmen) this constitutes the second most significant impediment to speedier progress. Anything which might ease the Committee's workload should therefore be considered.

14.22 An important contribution towards easing the load on the Joint Committee is the close liaison between the Law Commissions and the Chairman of the Committee, to ensure that the work is spaced as well as possible to suit the Committee's convenience. All concerned have taken great care over liaison arrangements, and we believe that they work well.

14.23 We accept that the Joint Committee as it normally operates could not undertake a much greater volume of work. We understand, however, that the Committee have on

occasion, when faced with an unusually heavy volume of work, made arrangements whereby, in effect, they sit in two divisions. The Chairman takes the chair in one and a Deputy Chairman is appointed to take the chair in the other. *We recommend* that this practice should be adopted whenever the flow of consolidation measures exceeds the capacity of the Joint Committee for dealing with them under their ordinary mode of operation. We recognise, however, that if the flow of consolidation measures increases to the extent that we hope it will, some further means of providing for the necessary expansion in the Parliamentary machinery may have to be found.

Need for prior amendment of the law

14.24 In many cases there is a need for amendment of the law before consolidation can be proceeded with. This is an old problem. The Law Commissions have made a major contribution towards solving it, by devising the technique of consolidation with amendments to give effect to recommendations of the Commissions (outlined in paragraphs 4.13 to 4.17). This technique has proved of great value, and has been used in at least nine consolidation Bills, including such important measures as the Town and Country Planning Act 1971, the Town and Country Planning (Scotland) Act 1972 and the Road Traffic Act 1972.

14.25 A further technique recently invented and as yet untried is to confer power on Her Majesty to make by Order in Council amendments of Acts of Parliament required to facilitate consolidation. At present there are two enactments conferring such powers: section 57(6) of the National Health Service Reorganisation Act 1973 and section 7 of the Pensioners' Payments and National Insurance Act 1973. In both these cases orders made in the exercise of the powers are subject only to negative resolution. We think this device might be more acceptable with stronger safeguards, and therefore *we recommend* that if other powers of this nature are to be conferred their exercise should be made subject to affirmative resolution, and that no such resolution should be taken in the House of Commons until the relevant order had been reported by the Joint Committee on Statutory Instruments.

Need to repeal obsolescent law

14.26 The process of consolidation can be slowed down by the presence on the statute book of obsolescent law which clearly relates to the subject matter to be consolidated but is of dubious meaning and uncertain practical utility. This has in the past been a significant obstacle to consolidation. It was not dealt with satisfactorily by the old type of Statute Law Revision Bill, the purpose of which was merely to facilitate the production of a revised edition of the statutes by striking out unrepealed provisions which had become inoperative.

14.27 Here again, the Law Commissions have initiated a change of major importance. They now regularly prepare for presentation to Parliament Statute Law (Repeals) Bills which repeal not only matter which is inoperative, but also matter which is no longer of practical utility. These Bills are accompanied by a very full report of the Law Commissions and are referred to the Joint Committee on Consolidation Bills.

New and prospective legislation

14.28 It frequently happens that a major consolidation, once embarked on, has to be postponed because of current Government programme legislation in the same field. This has been experienced in several important fields, including local government (now happily dealt with in a comprehensive Act), the National Health Acts, and, very recently, the Housing Acts. At the end of June 1972 a draftsman was engaged by the Law Commission to undertake the consolidation of housing legislation in England and Wales. The work was well advanced on the consolidation Bill, which would have included over 350 clauses and over twenty schedules, when the Government decided to introduce substantial new housing legislation. Work on the consolidation Bill has in

consequence had to be suspended. The Housing Acts were listed as a priority topic for consolidation in the Law Commission's second programme. This experience illustrates the ease with which a programme of consolidation can be upset by policy decisions involving major amendments of the existing law. Such decisions can upset the programme not only by interfering with programmed consolidations which are already under way, but also with programmed consolidations which are immediately in prospect. And the instability of a programme of consolidation, of course, increases with every increase in the number of subjects it covers.

14.29 The Law Commissions have compensated for this inherent weakness of the "programme" approach to consolidation by an alert seizure of opportunities as they present themselves. That the compensation is not negligible is shown not only by the quantity of consolidation achieved, but also by the fact that it includes such major topics as town and country planning (Town and Country Planning Act 1971) (which had not been included in the programme) and the current Criminal Procedure (Scotland) Bill (which was not included until the preparation of the Bill was far advanced).

14.30 It is not only a decision to introduce new legislation which may hold up consolidation projects. Once reform of a particular part of our statute law is under consideration by a Minister, or is even "in the air" as a result of the report of a Royal Commission or departmental committee, or as a result of departmental cerebration, the Minister and the department may, we are told, show a marked and, indeed, pertinacious reluctance to consolidate the law as it stands. Such reluctance can have the same effect on the programme of consolidation as an actual decision to introduce major amending legislation.

14.31 We regard these two factors, together with the need for amending legislation, as most inimical to the orderly and expeditious carrying out of any programme of consolidation. Even here, however, the Law Commissions have demonstrated their resource and flexibility by the speed with which they have been able to turn from a consolidation which has become temporarily impossible to one or more consolidations which can be carried out at once. In this way they have been able to maintain a strong momentum for consolidation.

14.32 It is evident that the risk that a consolidation may need to be postponed for the reasons discussed in paragraphs 14.28 to 14.31 is greater where a wide field of legislation is chosen for consolidation, and we think that it might therefore be prudent in many cases to select a relatively narrow field provided this was consistent, in the particular instance, with users' needs (see paragraph 14.7).

CONCLUSIONS

14.33 We agree that the more consolidation there is the better will our legislation become, but as we have pointed out there are real difficulties about increasing the present speed of consolidation within present resources, which we consider should be increased as soon as possible. We accept that responsibility for consolidation should continue to rest with the Law Commissions who, as well as commanding great expertise, approach this task with dedicated enthusiasm as law reformers. Even if it were within our terms of reference to do so, we would not recommend that responsibility should, as has been suggested to us, be transferred to a new body.

14.34 While we do not consider that "a crash programme" to consolidate the entire statute book would be feasible, we nevertheless emphasise that as and when opportunities arise for increasing the amount of consolidation, such opportunities should not be missed. The size of the programmes of consolidation has to be governed by the realities of the situation and a pragmatic approach seems to be inevitable, but every effort should be made to overcome the various difficulties to which we have referred so that a real advance can be made in the speed of consolidation.

14.35 In view of our recommendations that textual amendment should, so far as

possible, come to be regarded as the normal method of amending statutes, we feel bound to point out that this process would be facilitated by more rapid consolidation; but we do not consider that the present pace of consolidation need hamper the further introduction of textual amendment.

14.36 In short *we recommend* that the pace of consolidation should be accelerated. There are no instant ways of overcoming all the various impediments we have discussed, but given time and willpower these difficulties could be largely overcome.

Chapter XV

EXPLANATORY MATERIAL

15.1 Explanatory material, external to the text of an Act (either at the Bill stage or later) is often provided by the Government to assist both the legislator and the eventual user. This material is not part of the Act and may not necessarily influence the form in which the Act is drafted. It is thus strictly speaking beyond our terms of reference. But it does contribute indirectly to the ease with which the Act can be understood.

15.2 The degree of complexity in legislation and the specialisation of its subject matter vary greatly. So too (as we showed in Chapter X) does the nature of the audience to whom aids to its understanding have to be addressed. Whereas in all cases due weight must be given to the needs of Parliament, the range of other persons whose needs require to be taken into account may extend from members of the public who want a broad, general picture of what is involved, to specialised, professional or trade interests which require a highly technical and precise explanation to enable them to assess the detailed legal effect of the legislation. The question whether any, and if so, what kind of external explanatory material should be provided is best considered separately for each statute, and we are told by the Lord President of the Council that this is the Government's practice.

15.3 Material of this kind is provided by the Government at three stages of the process of legislation: at the pre-Parliamentary consultative stage; during the passage of the Bill through Parliament; and after Royal Assent. We deal with each of these stages in turn.

BEFORE THE INTRODUCTION OF THE BILL

15.4 We referred in paragraph 8.5 to the "grey area", using this expression to describe the formative stage at which policy decisions are translated into instructions to the draftsman. The decisions that are taken then will have a vital bearing on the form of the legislation as it is presented to Parliament. At this stage, in the case of important legislative proposals, the main features are normally foreshadowed by a Government statement or policy document, for example, a White or a Green Paper. Such a document is intended to serve as a basis for informed discussion, in Parliament and elsewhere, of the general aims of the proposed legislation. In the case of law reform Bills proposed by the Law Commissions, the reports of these Commissions are also available to Parliament and the general public.

15.5 We warmly approve of the increasing readiness of Governments to produce Green or White Papers in advance of legislation. In many non-contentious fields the Government's proposals could be published in some detail. We believe that this practice should greatly help those who will eventually be using the legislation to a better understanding of its purpose. The discussion which this generates should also help the drafting team to anticipate difficulties that might not otherwise have been foreseen. *We accordingly recommend* that this practice should be still further extended. (The first part of Appendix D lists the documents published by the Government before the Local Government Bill 1972 was presented to Parliament.)

DURING THE PASSAGE OF THE BILL

Explanatory and financial memoranda

15.6 A further aid to the understanding of legislation, primarily directed towards Parliament, but also available for wider circulation, is the practice of printing a

memorandum attached to a Bill explaining its contents and objects. This is prepared, in the case of Government Bills, by the department whose Minister is introducing the Bill. It must be drafted in non-technical language and contain nothing of an argumentative character.(*) All Government Bills involving expenditure must be accompanied by a financial memorandum setting out briefly the financial effect of the Bill and containing an estimate, where possible, of the amount of money to be spent and of any increase in manpower resulting from it. The nature and extent of the information provided in such memoranda depends upon the subject matter of the legislation concerned.

15.7 The Select Committee on Procedure of the House of Commons in its Second Report for 1970-71(*) recommended that explanatory memoranda should be drafted to give a description of the purposes and effect of a Bill and, where appropriate, of the White Paper or Report from which it originated; and that in the case of long or complicated Bills, detailed explanations should be provided in a separate White Paper. The Government of the day undertook to implement this recommendation as far as practicable.(**) The impression we have received from First Parliamentary Counsel is that explanatory memoranda are perhaps rather longer now than they were before. Evidence we have had from other witnesses clearly indicates that an expansion of the information provided in explanatory memoranda to Bills would be welcomed by many organisations outside Parliament who wish to understand the effect of the proposals of the Bill. The National Farmer's Union, for example, have suggested that—

> "explanatory memoranda set out at the front of new Bills could with general advantage be considerably expanded and made much more explanatory".

The National Citizens' Advice Bureaux Council have told us that—

> "explanatory notes at the front of Bills are very helpful. They do give some indication of the purpose of the legislation and what changes will be effected. We wonder if this could not be expanded a little so that it is easier for the layman to establish the current position and how it is proposed to change it".

The Accountancy Bodies have submitted to us that there is, in relation to revenue law,

> "a great need for the publication with each Finance Bill of an explanatory memorandum which goes into much greater detail than anything hitherto available... Our ability to make helpful representations to the Inland Revenue during the early stages of a Finance Bill would be much enhanced if we had access to a document which explained in detail, clause by clause, and with appropriate examples, the reasons for and the effect of the proposed legislation".

While we consider that the concluding part of this last suggestion may go too far to be practicable, what the accountants have said about the need for more detailed information on the provisions of Finance Bills reinforces the views expressed by the two bodies mentioned previously, and by other witnesses, that explanatory memoranda could be amplified. *We therefore endorse the recommendation* of the Select Committee that such memoranda should provide more information about the Bill. We deal with the Committee's recommendation about the publication of explanatory White Papers in paragraph 15.11 below.

15.8 The Joint Committee on Delegated Legislation in its Second Report to Parliament in Session 1972/73(*) (paragraphs 53 and 54) recommended that "in order to assist Parliament to check that the instruments proposed are made subject to the appropriate procedure ... there should be included in the explanatory memorandum which is normally attached to every Public Bill a section headed 'Delegated Legislation' containing a list of all delegated powers to be conferred by the Bill, with an indication of the category into which each power falls. This section would ... follow the normal form of explanatory memorandum in being purely factual". They added (paragraph 54) that the

Committee "trust that this matter will be brought to the attention of the Committee on the Preparation of Legislation as a recommendation of Your Committee, rather than as a tentative proposal". In their memorandum to that Committee, the Leaders of both Houses suggested that this proposal "might appropriately be considered" by us. We cannot see how such a requirement would help to achieve greater simplicity or clarity in the Bill, but we realise that it could be a convenience to Members of Parliament, and accordingly we raise no objection.

Other explanatory material provided during the Bill stage

15.9 A variant of the practice of printing explanatory memoranda at the beginning of the Bill proposed by several witnesses is that explanatory notes on individual clauses should be printed on the pages of the Bill opposite the clauses to which they refer. We have had evidence of how such an arrangement is operated in Canada. On several recent occasions, notably when the Local Government Bill 1972 was going through Parliament, the Minister in charge of the Bill has made available to Members of both Houses the notes on clauses prepared for his own use by his department to assist him in dealing with questions raised in debate. A suggestion was in fact made in the Commons debate on the Second Reading of the Nullity of Marriage Bill(*) by Mr A W Lyon that it would have been helpful to the House if the Bill had been published in the form in which the Law Commission's draft Bill had been published in the Appendix of their Report,(**) that is to say, with the explanatory notes printed opposite the clauses to which they related. This proposal was considered by the House of Commons Select Committee on Procedure in 1970-71. They thought that explanatory notes on clauses, even in technical and non-controversial Bills, would almost certainly be argumentative, as their purpose would be to give reasons for the adoption of the clauses. On a controversial Bill it would be even more difficult to exclude argument. (As we have explained in paragraph 15.6, the rule stated in Erskine May is that an explanatory memorandum should be framed in non-technical language and should contain nothing of an argumentative character.) For these reasons the Select Committee stated in their Second Report for 1970-71 that they did not consider any change was desirable in the practice of the House on this matter.(***)

15.10 Nevertheless, the provisions of the Local Government Bill 1972 to which we refer in paragraph 15.9 were extremely complex, they affected a great many other enactments, and they were of great significance to all English and Welsh constituencies. The Minister felt that Parliament would find it more than ordinarily difficult to understand the effects of the Bill, and so additional explanatory material in the form of notes on clauses, maps and explanations of major amendments was made available to Members of the Commons Standing Committee and to Peers generally for Committee stage debates. (These are listed in the second part of Appendix D.) This has been done on one or two other occasions. We think that this is a very helpful practice, and *we recommend* that it should be developed. If this can be done with complex and even controversial Bills, we find it hard to believe that in the case of uncontroversial Bills the rule against argument would be difficult to observe. *We also recommend* that a trial should be made, initially with uncontroversial Bills, of printing explanatory notes opposite the clauses to which they refer.

15.11 The recommendation of the Select Committee on Procedure to which we refer in paragraph 15.7 also urged(*) that in the case of long or complicated Bills, detailed explanations should be provided in a separate White Paper, and we have enquired about the number of occasions on which White Papers have been published for this purpose since the Government, in November 1971, agreed to implement this recommendation wherever possible. Between that date and March 1974, only four White Papers were published (all in 1972) with the express purpose of explaining Bills that they accompanied. These were memoranda on:

(a) The provisions of the Electricity Bill 1972 (Cmnd 4877, January 1972)

(b) The value added tax provisions of the Finance Bill 1972 (Cmnd 4929, March 1972)

(c) The corporation tax provisions of the Finance Bill 1972 (Cmnd 4955, April 1972)

(d) The provisions of the Furnished Lettings (Rent Allowances) Bill 1972 (Cmnd 5183, December 1972)

The last of these is a textual memorandum containing nothing but the text of the relevant provisions of the Housing Finance Act 1972 and the corresponding Scottish Act as proposed to be amended by the Bill. It is thus in a somewhat different category of explanatory material, with which we deal elsewhere. In only two Bills, therefore, has the Select Committee's recommendation been adopted; and only one of them, the Finance Bill 1972 was long and complicated. We consider that detailed explanations of the provisions of lengthy and complex Bills are useful, that the practice adopted with the Finance Act 1972 of issuing separate publications dealing with separable subjects covered by one Bill is commendable where appropriate, and *we recommend* that such explanatory material should be provided more frequently in the form of White Papers.

15.12 Throughout the several stages of legislation there is a constant exchange of information between the sponsoring department and the various interests affected by the Bill about its purpose and the detailed implications of the text. In Parliament itself the intention of the legislation will be explained by Ministers in broad terms at Second Reading, and in detail during the committee stages. Frequently there is also correspondence between Ministers and Members. If the Parliamentary timetable allows, ample opportunity is thus given to Members of either House and to individuals and interests affected by the Bill not only to suggest amendments on points of substance but also to raise questions about any textual obscurity or doubt.

15.13 It may sometimes be useful, in the case of amending Bills drafted on the textual amendment principle, to present the Bill to Parliament with a White Paper showing how the existing legislation would look if the proposals being considered by Parliament were enacted. We deal with textual memoranda in paragraphs 13.12 and 13.13.

AFTER ROYAL ASSENT

15.14 The explanatory material we have been describing from paragraph 15.6 onwards is primarily for the benefit of the legislators to assist them in their understanding of Bills submitted to them for enactment. Although such material is also of help to members of the public and organisations who have an interest in a particular Bill, its main value is that it helps Parliament to focus on the substantive issues that should be debated, and thus to ensure that the text of the statute gives effect accurately as possible to the legislative intention of Parliament. This purpose is fulfilled once the Bill has been enacted. Accordingly explanatory, financial and manpower memoranda are not printed with the Act after Royal Assent.

15.15 As soon as a Bill has finally passed through its Parliamentary stages Government departments can turn their attention to publicising and administering its provisions. In many cases, it is essential to the enforcement of a new law on a particular date that those affected should be given prior information and advice about its effect. Generally however any action taken by departments to publicise and explain the effects of a new law is taken after enactment. This may take a variety of forms. In the case of new taxes, for example, leaflets and public notices are prepared and distributed to business firms and made available to members of the public. Public advertisements may also be used; and visits may be made by officials to traders who are likely to be affected.

15.16 Such material does not purport to give authoritative advice on the legal interpretation of the provisions referred to, or about the legislative intent of Parliament.

Those to whom departmental circulars and other similar documents on new Acts are addressed are well aware of the limitations of such papers. But they are nevertheless widely relied upon as practical guides to what may be highly complicated and technical Acts: and they are of considerable value to those who must understand and administer the provisions of new legislation. (The third part of Appendix D lists the documents prepared by Government departments after the Local Government Act 1972 received the Royal Assent).

15.17 The practice of Government departments with regard to post-legislative explanatory material is well established and appears to serve its purpose adequately.

Chapter XVI

HOW COMPUTERS WOULD HELP

16.1 We have received written evidence on the application of computer technology to the legislative process from the Society for Computers and Law Ltd; and oral evidence from Mr S J Skelly, Director of Jurimetrics in the Department of Justice of Canada, where such application has reached an advanced stage, and from Professor Reed Dickerson. In addition, much material on the subject, published and unpublished, has been studied by a working group of four members of our Committee.

16.2 Since we were appointed the Statute Law Committee has set up a Sub-Committee with the following terms of reference:

> "To investigate and advise the Statute Law Committee from time to time about ways in which computer technology can be used to assist the process of drafting and publishing Acts and statutory instruments and indices and other aids to their use, and (so far as lies within the province of the Statute Law Committee) the system of handling Bills in their passage through Parliament".

We welcome the decision to set up such a body, and indeed we regard it as urgently necessary.

16.3 Having regard to our terms of reference, our main concern has naturally been with the use of computer technology as an aid to the draftsman, especially when engaged upon consolidation or upon any other Bill which requires the study of a mass of previous legislation. It has, however, proved impossible for us to consider this aspect in isolation since (as will appear) the effective use of the computer as a drafting aid inevitably raises questions as to:

(a) its cost-effectiveness, whether used by the draftsman only or by others as well;

(b) its use in the printing process; and

(c) the material that should be stored in the computer, and the arrangements for getting it there in the first instance and for its subsequent updating.

Whilst such questions will clearly be the subject of detailed study by the Statute Law Committee, the evidence we have received suggests certain conclusions about them which we record.

CONCEPTS AND TERMINOLOGY

16.4 A simple conceptual picture of the computer, and an explanation of some possibly unfamiliar terms, may be helpful as an introduction to this chapter.

16.5

Input Medium	—	Processing Unit	—	Output Medium

The computer may be compared to the human mind. In the diagram above, the box on

the left represents the *input medium* or source of information. In relation to the human mind, this could be a book, a picture, a television screen, or any source of information detectable by one of the senses. In the case of the computer, it could be information stored in a punched card, a magnetic tape, or any other *machine readable* form - that is to say, any form the computer can work with. While a computer can "read" a magnetic tape of information, it cannot strictly speaking read a book containing the same information. *Optical character recognition systems*, which scan the printed page and produce a machine-readable version, have been developed, but at present the conversion of printed matter into a machine-readable form normally involves its being typed manually, through a typewriter terminal, into the computer, which records it on the magnetic tape or other input medium. Either method calls for careful proof-reading in order to ensure the accuracy of the transcription.

16.6 The centre box in the diagram represents the *processing unit* - the human mind or the central processing unit of the computer. The major difference between the human mind and the computer central processing unit is that the computer can only do what it is told to do: it has no ability to think or reason or learn from experience, but can only follow a predetermined set of rules known as *computer programs or software*. This is the vital element that turns the computer machinery - known as *hardware* - into something that can perform a task. Since the computer cannot think, computer programs have to anticipate every possible situation that may arise, and are therefore complicated.

16.7 The right-hand box represents the *output medium*. In human terms, the output may be, for instance, written, spoken or drawn. In the case of a computer the output may be displayed on a *visual display unit* resembling a television screen, printed, or delivered in a machine-readable form.

APPLICATIONS

16.8 Once the texts of Acts of Parliament have been recorded in machine-readable form, they can be put to use through the computer in one or more of several ways.

Information retrieval

General description

16.9 The computer's capacity for locating information by recognising words is of prime importance to the draftsman. To enable it to do this, it is necessary to set up, using computer programs, a *concordance*, or list of all the words found in the text, linked to a *master file* containing the location references (statute, section number, sentence number, position of word in the sentence) for each word, except very common words such as "and", "but", "the". There are existing computer programs providing a concordance and linked master file which can be used on simple instructions given by an operator. Given suitable instructions (typically, through a keyboard resembling that of a typewriter), the computer can then almost instantaneously locate and print out, or display on a visual display unit, all the places at which particular words or phrases occur in the text. The instructions can be quite detailed: the searcher can specify that he wants one particular word within so many words of another word, that these must be in a particular order, or that various alternative words are acceptable; that all words with a particular root are required; and so on. Such a rapid and accurate means of searching existing statute law has advantages particularly in connection with the drafting of repeals, amendments, and consolidations.

16.10 An example, from Canada, arose out of the replacement of the Exchequer Court of Canada by the Federal Court. By feeding the words "Exchequer Court" into the computer it was possible to find, almost instantaneously, all the places where those words appeared in the Statutes and where amendments were therefore required. The alternative would have been for the draftsman to read all the Statutes or rely on his memory.

Updating

16.11 It is clear that for the computer to be entirely effective as a tool for searching

statute law, at least all the statute law currently in force must be available to it in a form that it can "read". To achieve this it is necessary not only for the texts of existing Acts to be stored in machine-readable form but also for the text of each new enactment to be added, as soon as may be, to the computer store and, where the new enactment has any effects on existing Acts, for the computer records of those Acts to be updated accordingly. For the last part of this operation two basic alternatives were considered by the Canadians. The first was a fully-automated system "where the computer takes the old Act, reads the amending Act, and merges them together in the appropriate way". It was concluded that the computer programming involved would be very complicated, and that it would still be necessary, as a separate, semi-automated, operation, to alter source references and add notes on sections indirectly affected by amendments. For the present, the second alternative was therefore chosen: this is a semi-automated system in which "the information is fed in by an operator who tells the computer where the amendment is to go". There are, no doubt, other possible systems: we understand, for instance, that the updating of the computer record of *Statutes in Force* for printing purposes (see paragraph 16.20) is to be brought about by giving the computer specific instructions, but fed into it in the form of a "correcting tape" and not manually by an operator.

16.12 It is important to appreciate that in Canada the Federal Statutes are normally amended textually by the re-enactment of whole sections or other units of text. It appears that with present technology and experience it would be very difficult to set up a fully-automated system to handle textual amendment by the deletion and replacement of individual words or phrases, and virtually impossible for a fully-automated system to handle amendments effected otherwise than textually.

Current and historical files

16.13 The updating of the texts of statutes in computer store also involves a choice between maintaining a *current file* and maintaining a *historical file*. A current file reflects the state of the law at the date of the latest enactment; repealed provisions, and textually amended provisions in their previous form, are discarded. A historical file retains the old law as well as the new, but takes account of the effects and dates of repeals and amendments and enables the law to be searched as at any date, after the commencement of the file, selected by the searcher. To maintain a historical file would be rather more complex in terms of legal analysis, systems analysis and design, and computer programming (though we understand that there would now be no great technical difficulty), and it would require more computer storage than a current file. It would therefore be more expensive, and has been rejected for the present in Canada, on the ground of cost and limited utility.

The initial text

16.14 The choice between a current and a historical file also has a bearing on the selection of the text to be recorded in the first instance. In Canada, the original computer database was the text of the 1970 revised edition of the Federal Statutes (which was concurrently printed, from the same magnetic tapes, by computer-assisted photocomposition: see paragraph 16.19). This would, of course, have precluded the maintenance of a historical file from any date earlier than 1970. Here, we recommend that the text of *Statutes in Force* should be used (see paragraph 16.26(5)).

A drafting tool

16.15 The methods of information retrieval we have described require the user to possess a terminal - at present either a typewriter terminal or a visual display unit. While in time we may expect draftsmen to have their own terminals, this would not happen quickly and will involve considerable expense. It is worth pointing out therefore that draftsmen can and should in any event be equipped with an essential drafting tool in the form of fully-updated printed material. Obviously the most important printed

material for a draftsman is the text of the statutes, followed perhaps by the text of statutory instruments and local and private Acts. We return to this theme below (paragraph 16.21).

16.16 To the draftsman (especially one who is prepared to acquire, even imperfectly, the skills of a typist) the computer can offer a number of aids. Where a suitable system has been set up, he can by using a keyboard:

put new material on to an input medium, for use by the computer (this can be done by a copy typist);

call up for inspection any material already stored in the computer;

take material out of store, so that it can be worked on without affecting what is in the permanent store;

alter the material to be worked while it is displayed on a screen;

when the text has been finally got right, instruct the computer to take the revised version into its store;

print out any desired passages from the store, and alter the positions of words, sentences, and paragraphs.

One draftsman said, after experimenting with keyboard and visual display facilities, "this seems an extremely effective way of doing what I myself have always done with pencil and rubber".

16.17 The same draftsman was impressed by the possibilities such a system offered for consolidation. He has described the process as follows—

> "The draftsman would first decide the enactments to be included in the consolidation, using the search and retrieval facilities... He would then bring all the enactments into working store. This enables him to play about with them without affecting what is in the permanent store. He could then study the enactments using the visual display unit, and very simply delete the parts that were obviously unnecessary. He would be left with the bare bones of a consolidation Bill. Having devised a structure for the Bill, he would then get the material into the right order (a simple process). Where, as is usual in the United Kingdom, amending Acts had been drafted referentially rather than textually, the consolidator's most difficult task would then begin. This is the conflation into one text of each original enactment together with enactments amending it. When ready, he could get a printout of the whole Bill, and of Tables of Derivation and Destination. Obviously, the more the enactments to be consolidated have been amended textually rather than referentially, the easier the task of consolidation will be".

It needs to be emphasised, however, that while the computer can help in assembling and physically manipulating the material to be consolidated it cannot solve any of the basic intellectual problems inherent in the process of consolidation. Whether the Acts to be consolidated have been amended textually or referentially, there may be difficult decisions to be made as to the scope and arrangement of the consolidation Act, as to the extent to which comparable provisions can be united into a single provision, as to how obscurities are to be resolved, as to whether the Acts to be consolidated contain ambiguities which must be incorporated in the consolidation Act, and as to what amendments, if any, are necessary to pave the way for consolidation: the list may well not be complete. These difficulties require reasoned analysis and decision by the intellectual effort of the draftsman. The computer cannot solve them. In Canada, where (as mentioned in paragraph 16.12) Federal Statutes are normally amended textually by the re-enactment of whole sections or other units of text, pure "consolidation" appears to involve little more than the re-printing of statutes as amended. Even so, the computer

programming required for a fully-automated process of "consolidation" would be very complicated, and therefore at this stage a partly-automated system, involving the intervention of an operator, has been adopted.

An analytical aid

16.18 We would mention, as an interesting idea but one of which any practical application may still be a long way off, the LEGOL project being pursued by Mr R Stamper at the London School of Economics with support from the Science Research Council. The aim is to develop a formal "language", expressed in mathematical and other symbols, into which legislation could be translated (or in which it could be formulated in the first instance), that would enable a computer both to test the logic of the legislative rules and to apply it directly to the facts of a case. The legal department of the Commission of the European Communities is understood to be interested in this project because the use of a linguistically neutral formalism might be valuable in expressing law that affects several nations, and in checking that the logic of the law is the same in each "natural" language. This would facilitate harmonisation. It seems possible that LEGOL might also be valuable in finding, for Anglo-Scottish legislation, neutral terms which would do equally well for both the English legal systems and the Scottish.

Printing

16.19 As well as providing "print-outs", of low typographical quality, for the purposes discussed in paragraphs 16.9 onwards, the computer can be used to assist in the production of printed matter of a quality comparable to that achieved by conventional "hot-metal" typesetting. The process carried out in Canada was described to us by Mr Skelly in the following terms:

> "The first stage is that the computer takes the tape, reads it through and locates certain basic codes which it expands into printing codes. This material is then passed to the second stage where the computer builds full page width lines . . . The next step is for it to prepare a page. It takes the material in the lines, puts them together, works out where the page has to end and builds its pages. Finally it is fed to the photocomposition device which reads the magnetic tape, generates character images, and flashes them onto photographic paper or film, in the form of made-up pages (camera reading copy). Plates are then made and run on an offset printing press".

16.20 In this country the new revised edition *Statutes in Force* is in fact being printed by a computer-assisted process. If the same process were also used for printing Bills, and if the draftsmen's offices and HMSO were equipped with the necessary computer terminals, we understand that the draftsman could hand in the computer-typeset Bill to the appropriate Public Bill Office. As the Bill went through its Parliamentary stages it would be reprinted with amendments by computer typesetting. When it had received Royal Assent, HMSO would add it to the database, or computer store, of statutes, and it would be printed for publication. (We have discussed in paragraphs 16.11 to 16.13 the question of updating existing enactments in the computer store that are affected by new legislation.)

16.21 It is important that on the passing of an Act not only should its text be added to the database of statutes but that any amendments made by it in existing legislation should also be entered in the database. This would ensure that users with terminals, when using them to search for and retrieve information, would have the necessary updated text. It is also important however that users of the statute book (whether with or without terminals) should be able to receive the printed text of the new Act, and updated printed versions of other enactments amended by the new Act, as early as possible.

THE PRESENT SITUATION

16.22 The public general Acts in force were estimated in 1968 to contain 20 million words or 100 million characters. The annual gross increase has been variously estimated

at between 500,000 and 800,000 words; we have found no estimate of the annual loss through repeals. In terms of computer storage these are not enormous quantities. Existing disc packs can each store 100 million characters, and later versions will hold 200 million characters. The Greater London Council is planning a computer system which will be able to retrieve information from 14 of these disc units, holding a total of 2,800 million characters. The statute book if stored in a current file (see paragraph 16.13) would therefore use only a fraction of the capacity of the GLC system, and could be comfortably housed in a single one of the new disc packs with plenty of room for expansion.

16.23 The proportion of legislation in computer storage is at present relatively small, but it is steadily growing. *Statutes in Force* is, as mentioned in paragraph 16.20, being computer typeset. This can easily provide as a by-product the text of the statutes included in that publication in a machine-readable form suitable for information retrieval. The text of the first instalment of *Statutes in Force* has in fact been stored by IBM in a database the retrieval of information from which was demonstrated to Members and Officers of both Houses at the House of Commons during December 1973. The Acts relating to atomic energy (from the Atomic Energy Act 1946 onwards) have also been stored in a database by the Research Group of the United Kingdom Atomic Energy Authority ("The Status Project"). Apart from these initiatives nothing has been done to provide an information retrieval system for statutory material.

16.24 No regular use has so far been made of computers in the preparation of public Bills, or in the Parliamentary processes leading to their enactment. A computer is, however, at present being used by the Parliamentary Counsel Office in the preparation of three public Bills. The apparatus employed creates machine-readable text, prints it out and duplicates it, and allows manipulation of the text, monitored by a visual display unit. The experiment has not yet been completed, and with no assessment of its results available to us our conclusions in paragraph 16.26 about the usefulness of computer systems to the draftsman can only be tentative.

16.25 HMSO, conscious that their present printing capacity is not large enough to meet the expected continuing growth of Parliamentary printing beyond the next three years, have plans for the substitution of computerised composition for hot-metal typesetting throughout the whole range of Parliamentary printing. They have already developed computer composition programs which would be adapted to a wide range of Parliamentary requirements. Moreover, they have appointed a team of four technical staff with computer experience to prepare a systems analysis of the problems. There is as yet no commitment to a computer-based system of printing, but there is a firm, if general, agreement between HMSO and Parliamentary officials on the desirability of its introduction, subject to the approval by the two Houses of any necessary alteration in format or procedure. We are satisfied that HMSO have the willingness and expertise to convert their printing to such a system (which will need to be fully discussed with their industrial staff) and are aware of the immense advantages of such a system both for the processing of Bills throughout Parliament and for the retrieval of information (statutory and non-statutory).

CONCLUSIONS

16.26 In the light of the evidence we have received and the material studied by our working group, we have reached the following conclusions, and *we recommend* accordingly.

(1) Computer typesetting would speed up the printing of public Bills at all stages, ie while they are being drafted, during their passage through Parliament, and at their final enactment. In particular it would make it easier and quicker for the printer to produce marshalled lists of amendments, and to incorporate those which were accepted in successive reprints. It would also lead to greater

accuracy. Finally, it would make for the ready incorporation of the enacted texts into a comprehensive database of statute law.

(2) We think that the recording of the complete text of the statute book by computer and the institution of a system of information retrieval would provide a valuable tool for all those who are responsible for the making of laws. Such a system of retrieval would help Parliamentary draftsmen:

(a) to search areas of existing relevant legislation;

(b) to find all occurrences of one word, eg "felony";

(c) to achieve completeness in eg repeals;

(d) to achieve consistency of drafting language both within a Bill and between a Bill and previous legislation.

Further, if the computerised typesetting of Bills were adopted at the drafting stage the draftsmen might make use of the computer as a mechanical aid to drafting as well as for research (see paragraphs 16.16 and 16.17). In these ways the computer might contribute to accuracy and speed, remove some of the drudgery from the draftsman's task, and leave him with more time to concentrate upon the central intellectual problems of good drafting.

(3) Such a system of retrieval would also be useful to Members and Officers of both Houses of Parliament concerned with the preparation and the amendment of Bills.

(4) A system of retrieval would (especially if the database included subordinate legislation) be valuable to all those whose duties may require them to search the statute book: Government departments, local and statutory authorities and the legal professions generally. In particular, we would mention the duty of the Government to inform Parliament of the impact of European Community legislation upon the statute book, which on occasion may be a heavy task and require as a preliminary the utmost speed and accuracy in searching the statute book.

(5) To provide a system of information retrieval for these purposes it would of course be necessary for a text of the statutes in a machine-readable form to be prepared, and a concordance and master file set up as described in paragraph 16.9. There would also have to be arrangements for updating this material (paragraph 16.11). We have considered various alternatives based on the text of the third edition of *Statutes Revised* and subsequent annual volumes, but have rejected them as unrealistic. In practical terms, the text used would need to be that of *Statutes in Force*, which is already being prepared in a machine-readable form for printing purposes and is expected to be completed within five years and to achieve a high degree of accuracy.

(6) We think that much of the value of an information retrieval system would be lost if updating did not take place very quickly after new legislation had been enacted. If it did not, the results of a computer search would normally need to be confirmed by conventional research in order to establish that there had been no relevant repeals, amendments, or new provisions since the last updating. The annual cumulative supplement to *Statutes in Force* sets out all the amendments affecting each Act as at the end of the year, but cannot in the nature of things be published until more than a year has elapsed since the date of the earliest amendment it contains. Moreover the supplement is at present typeset by the conventional hot-metal process and therefore could not become part of the database for an electronic information retrieval system. The searcher relying solely on such a system would thus have at his disposal only the latest revised edition of each statute, and subsequent amendments would

not be brought to his notice. That would not be well suited to the needs of the Parliamentary draftsmen. It might therefore be helpful to introduce a system of continual computer-assisted editing: each time anything occurred that affected the text of an Act published in *Statutes in Force*, the editors would record the appropriate corrections through a computer terminal, thus updating the database so that the information retrieval system would provide searchers with completely up-to-date answers. This constant updating should also make it possible for a new revised edition of any Act to be produced for *Statutes in Force* with less expense and effort.

(7) The system adopted for *Statutes in Force* requires that every newly-enacted Act shall be reprinted as soon as possible in the format of *Statutes in Force*. If computer type-setting were used for printing Queen's Printer's copies of Acts, so that they were already on magnetic tape, a great deal of work, cost and time should be saved. If in addition the format of *Statutes in Force* could be adopted for Queen's Printer's copies, there should be still further savings.

(8) A historical file (see paragraph 16.13) appears to us to have significant advantages over a current file, and we suggest that the system should include one (possibly commencing at 1 June 1972, the effective date of the first instalment of *Statutes in Force*) unless this proved to be prohibitively difficult and costly. We understand that the methods hitherto contemplated for the production of *Statutes in Force* might not allow the compilation of a historical file, and that any decision to include one in the system should therefore be taken before any of the material in *Statutes in Force* is revised. A compromise that might be worth considering is the "freezing" of the computer text at intervals as a permanent historical record of what it had been at a particular time or on a particular occasion. We understand that such a "frozen" text could be stored compendiously and at little expense, though it would be of limited value as it would serve only those persons who were concerned with the text as at the dates at which it was frozen, and intervening periods would have to be searched by traditional methods.

(9) We hope in any event that the production of *Statutes in Force* may be completed by 1980 so as to provide an up-to-date computer-linked system. Such a system would we think benefit the draftsmen in the ways we have described above.

(10) The inclusion in the database of subordinate legislation and, eventually, of case-law would seem to make a retrieval system more valuable not only to the draftsman, Government departments, and some legislators but also to the legal profession and other non-Government users. Optical character recognition devices (see paragraph 16.5) may have a part to play in converting these materials into machine-readable form without manual transcription.

(11) More extensive use of the textual amendment system of amending Acts of Parliament should reduce the amount of editorial work required in the production of *Statutes in Force*, and assist in ensuring accuracy, avoiding delay, and reducing costs.

Chapter XVII

FISCAL LEGISLATION

17.1 We devote a separate chapter to this subject because it has some peculiar features and some of the heaviest criticism has been directed to it. There is fiscal legislation every year, much of it prepared in great secrecy and under severe pressure of time, and it directly affects most people. This legislation is complicated and elaborate, because of the often intricate propositions it has to express, and the variety of circumstances and

conditions in which it falls to be applied and the refined distinctions that it embodies in order to attempt to cater expressly for them. Consequently, despite some fairly recent consolidations, the body of tax statutes as a whole is voluminous, and complex in structure as well as in concept and expression.

17.2 The problems we discuss in this chapter are not new. They have been considered in the past by other bodies, notably in the reports of the Royal Commission on the Taxation of Profits and Income (1952-1955)(*) and of the Departmental Committee on Income Tax Codification (1927-1936).(**) We refer to these two bodies - to whose reports, as will be seen, we are indebted for much of our own analysis - as the Royal Commission and the Codification Committee respectively.

THE LEGISLATIVE SCHEME

Perfect fiscal equity

17.3 One reason for the complexity of the ideas and rules to which our tax statutes have to give expression is the tradition of seeking "perfect fiscal equity" - scrupulously fair tax treatment involving minute differentiation between individual situations. As the Royal Commission put it:

> "The social and industrial structure of the United Kingdom is intricate. It comprehends a great variety of forms. A master tax, such as income tax has come to be, which has to be applied with fairness to all that variety of forms, must reflect to a large extent the intricacy and complication of the underlying structure ... Secondly, the high rate of tax brings certain consequences ... There is pressure for allowances, alleviations and qualifications wherever a special case can be asserted or a distinction claimed ... Moreover, the methods and process of Parliamentary legislation, particularly, perhaps, as applied to the annual Finance Act, themselves assist in the multiplication of special provisions ... Perhaps the most formidable single obstacle [to simplification] is the fact that hitherto the tendency both of Parliament and of the Inland Revenue Department has been in the opposite direction. Scrupulous regard has been paid to even small differences in individual situation: and, while it is comparatively easy to advance from a simple system to a more refined one by introducing qualifications and differentials, it is very much more difficult to retire from a refined system to a simpler one and, by so doing, to ignore distinctions which hitherto have been recognised and allowed for".(*)

Having started their inquiry "with an ardent desire to leave the structure and the conceptions of the tax simpler than we found them", the Royal Commission confessed to having had "only small success in the result" and to having been "led ... on occasions to reject a seemingly attractive simplification".(**)

17.4 The Codification Committee had earlier reached a similar conclusion: "The impossibility of producing a simple code of income tax law must be obvious ... The countless complications of modern life must inevitably be reflected in the complexity of the code which has to cope with them".(*)

Anti-avoidance measures

17.5 The other main reason for the need to give legislative expression to complex ideas and rules is the treatment of tax avoidance. This expression was defined by the Royal Commission as follows:

> "By tax avoidance ... is understood some act by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. Thus the situation which he brings about is one in which he is legally in the right, except so far as some special rule may be introduced that puts him in the wrong".(*)

The Royal Commission denied the existence of, and the desirability of introducing, a "general principle that a man owes a duty not to alter the disposition of his affairs so as to reduce his existing liability to tax or, alternatively, for the purpose of or for the main purpose or partly for the purpose of bringing this about".(**) They concluded that the proper principle was that "the tax avoidance that should be struck at is to be found in those situations in which a man, without being in law the owner of income, yet has in substance the power to enjoy it or to control the disposition of it in his own interest".(***)

17.6 In considering "the kind of measures that the tax system should adopt to correct avoidance", the Royal Commission found that

> "The choice seems to lie between the enactment of some general provision which nullifies or controls the effect of transactions that violate the suggested principle, and the enactment of specific provisions which identify with precision the kind of transaction that is to be struck at and prescribe with corresponding precision the consequences that are to follow for the purposes of tax assessment".(*)

They noted that United Kingdom legislation had in the main followed the second course, whilst in other countries "the usual course is to approach the problem on the lines of some general declaration of principle governing tax avoidance ... and to leave the application of the principle and the consequential tax adjustments to the decision of a special tribunal, subject in most cases to some appeal to a Court of Law".(**) They also noted, however, a tendency in recent years to frame anti-avoidance provisions in United Kingdom legislation "in very general terms, so that they were capable of being applied to a much wider range of transactions than those against which the legislation was really directed".(***) This tendency they found disturbing:(****) their basic recommendation was that there should be no departure "from the present system of detailed legislative control of the various forms of tax avoidance that are thought to be obnoxious".(*****)

A matter of policy

17.7 It has often been urged that there should be a system of "general fiscal equity" (in which it would be accepted that a few people might be overcharged to tax, balanced by a few people undercharged) rather than "perfect fiscal equity", with or without the enactment of a general anti-avoidance provision whereby any transaction the paramount object of which was the avoidance of tax should have no fiscal advantages. We think, however, that decisions of this nature lie in the field of policy, and that our terms of reference confine us to examining what might be done, assuming that fiscal legislation will continue to have to express complex ideas and rules, to achieve greater clarity and simplicity in its expression and structure.

EXPRESSION

17.8 The Codification Committee declared that "to expect from us a codification of the law of income tax which the layman could easily read and understand was a vain hope, which only the uninstructed could cherish ... Income tax legislation must, by its very nature, be abstract and technical, and can never be easy reading. It is concerned with principles and methods of calculation which it is difficult to express in words without an appearance of complication".(*)

17.9 The Royal Commission, who considered that "without the assistance offered by judicial interpretation, the meaning and effect of the Income Tax Acts would have remained obscure indeed",(*) similarly concluded that the expression of the law on the subject of income tax in statutory form was never likely to be intelligible to the ordinary taxpayer, but thought that an effort should nevertheless be made to produce some greater simplicity of expression.(**) They were not satisfied that it was impossible to introduce greater clarity and concision into the drafting of income tax

legislation: "we remain under the impression that the possibilities of an improved technique are not exhausted and some advance could still be made in the way of clarity".(***)

17.10 We do not dissent from the Codification Committee's and the Royal Commission's view that the layman is never likely to be able easily to read and understand all fiscal legislation. We accept that over much of this field the legislative audience after enactment is to be regarded as consisting mainly of those - businessmen, lawyers, accountants, and members of the judiciary - who are professionally concerned with the subject, and that to a large extent the objective can only be the limited one of making fiscal legislation more readily intelligible to that audience, from members of which has come most of the evidence we have received on the subject (we examine below a number of specific suggestions that they have made). On the other hand many of the more complicated situations dealt with in the legislation are unlikely to occur in the affairs of the great majority of taxpayers, and we think it should be possible for the basic provisions affecting that majority to be framed in relatively simple terms, so as to be capable of being understood by them at any rate with the help of the explanatory material prepared for their guidance by the Inland Revenue.

Statements of principle

17.11 In a paragraph dealing with "the problem of expression" the Royal Commission recorded "a preference for clear statements of principle in a brief enactment over detailed attempts to cover by anticipation all imaginable evasions of it" as a line of advance towards greater clarity that had been suggested to them as worth exploring.(*) They did not, however, explicitly comment on the suggestion, nor indicate how it could be adopted without a policy decision (which they recommended against) to simplify the ideas and rules to which legislative expression must be given and to abandon the present system of detailed legislative control of tax avoidance. In the circumstances we record our view that in this field, as in others, the attempt to provide in legislation for every foreseeable circumstance can result in very complex provisions that are not easy for even an expert legislative audience to comprehend. Furthermore we consider that if Parliament were to state in broad terms in the Act what its intention was, any detailed provisions necessary for giving effect to that intention would be easier to understand, and we endorse the suggestion that the scope of a charge or relief should be stated clearly in general terms at the beginning of the section or group of sections dealing with it; *we recommend* accordingly.

Mathematical formulae

17.12 The Royal Commission accepted as one valid reason why income tax legislation was difficult and obscure the fact that "not infrequently its conceptions represent an attempt to dress what are really mathematical formulae in the vesture of English prose".(*) Several witnesses have suggested to us that obscurities arising from this source might be reduced if mathematical formulae were more often expressed as such. This is now an accepted drafting technique, and one of which, with certain reservations, we approve (see paragraph 11.20).

Meaning of words and phrases

17.13 Witnesses have complained to us about the lack of consistency in the use and definition of words and phrases in fiscal legislation. Of the examples cited to us, some appear to have been dictated by policy: if for instance, it is decided that "relatives" shall for the purpose of claiming reliefs from tax comprise a wider category of persons than the "relatives" who are to be treated as a single person in the context of certain company reconstructions, then, unless two different words can be used, different definitions of "relative" for the two purposes seem to be practically unavoidable (see Income and Corporation Taxes Act 1970, sections 23 and 253(4)). We have been presented with an analysis of provisions concerning groups of companies which

demonstrates the wide variety of criteria that determine, for different tax purposes, whether a company is a member of a "group": these distinctions also appear to be ones of substance resulting from policy decisions.

17.14 On the other hand, there are instances where the differences between definitions of the same expression appear to be purely verbal: the definition of "relative" in section 253(4) of the Act of 1970, cited above ("husband, wife, ancestor, lineal descendant, brother or sister"), seems to be no different in substance from the definition of "relative" in section 303(4) of that Act ("husband or wife, parent or remoter forbear, child or remoter issue or brother or sister"), and we see no obvious reason for their being differently expressed. The two definitions are derived from different annual Finance Acts (1954 and 1965) and occur in provisions dealing with different subjects (company reconstructions and close companies). The most likely explanation seems to be that the draftsman's instructions for the 1965 Act did not draw attention to the existing definition in the 1954 Act. We understand that on consolidation in 1970 a deliberate decision was taken not to engage in such tidying-up operations as standardising definitions, because of the risk of unintentionally changing the law and the particularly serious practical consequences any unintended change might have in the tax field. Though it seems unlikely that the difference would cause any inconvenience to users in the instance quoted above, there may well be cases where a purely verbal difference could be confusing. The possibility cannot be entirely discounted that to change the wording of established definitions, on consolidation, might arouse doubts on the part of practitioners whether a change in meaning was not intended; nor can the risk of an unintended change in meaning. But we think the balance of advantage is in favour of standardisation.

17.15 It has also been represented to us that expressions used in fiscal legislation the precise meanings of which are important are not always, but ought to be, defined; examples given were "management" and "error or mistake". Another criticism made to us concerns the artificiality of requiring references to one expression to be read as including references to other expressions where the latter embody concepts that are alien to it in commercial and accountancy terminology and even in the ordinary meaning of our language. The example given was section 467(2)(a) of the Income and Corporation Taxes Act 1970: "References [in section 461] to profits include references to income, reserves or other assets". We do not accept the witness's suggestion that this example demonstrates the draftsman's ignorance of commercial and accountancy terms. The device seems to us to be a legitimate one, adopted in this instance in order to avoid further complicating the wording of section 461, though it may be that some other expression, more apt than "profits" to carry all four meanings without artificiality, could have been used.

17.16 It has been suggested to us that it would be helpful, both to the draftsman as an aid to consistency and to the legislative audience, if definitions of expressions used in fiscal legislation were standardised (and collected together either in a new Interpretation Act(*) or in a separate part of a new Taxes Act). Whilst in general we think that the use of definitions is a matter for the draftsman's judgment (paragraph 11.15), it does seem to us that there is room for some rationalisation in the fiscal field. Where no difference in meaning is intended, we think every effort should be made to avoid variations in wording when drafting definitions in new fiscal legislation,(**) and to standardise the wording of existing definitions when consolidation provides an opportunity for this to be done. Where different meanings are intended, and an expression is accordingly defined in substantially different terms, for different tax-purposes, any degree of standardisation would involve considerations of policy. We consider, however, that even where no standardisation of the underlying concepts would be acceptable greater clarity might be achieved by purely drafting means, such as the use, where practicable, of different expressions (rather than the same expression differently defined) or the

addition of qualifying adjectives or phrases, or other distinguishing words; and *we so recommend.*

Precision

17.17 We have mentioned in paragraph 17.6 above that the Royal Commission were "disturbed by the criticism that much of the anti-avoidance legislation is obscurely worded and drawn more widely that its purpose requires".(*) Complaints to the same effect have been made to us. Without conducting an investigation of the substance of current fiscal statutes and the proclaimed or presumed intentions underlying particular provisions, which we consider to be outside the scope of our inquiry, we cannot comment on the justice of these complaints.

Brevity

17.18 We note with some sympathy the view put forward to us that "skilfully compressed wording" in fiscal legislation could be difficult to understand, and that it would generally be preferable to sacrifice such elegant economy of expression in order to achieve greater clarity, even at the cost of increased length. This was coupled with a plea that there should be no increase, but rather a reduction, in the length of sentences, and that if there was any existing convention that each sentence should be numbered as a section or subsection it should be abandoned. We do not think that fiscal legislation is in a special category in these respects. We discuss these topics in general terms in Chapter XI.

Consultation

17.19 Various suggestions, differing in detail, have been made to us to the effect that drafts of fiscal Bills, or at least of those parts of them that were not of necessity subject to Budget secrecy, should be published before introduction into Parliament, so as to enable the professional accountancy bodies, and others, to draw attention to drafting points and to situations and circumstances that might have been overlooked. Such publication might, it was suggested, either be general or take the form of a reference to some advisory body, or both. We think that some such procedure (the possibility of which we discuss more generally in Chapter XVIII) might well be particularly useful if applied to fiscal legislation, though particularly difficult because of the intense pressure on the time and resources available and the requirements of Budget secrecy.

17.20 It has been suggested to us that the more detailed provisions of a Finance Bill might be detached from the main budgetary provisions and given more leisured scrutiny at another point in the Parliamentary year, possibly by a Select Committee empowered to hear expert evidence. In recent years parts of Finance Bills have been taken in Standing Committee. The Select Committee on Procedure, in their Second Report for 1970-71, recommended that Standing Order No. 40 of the House of Commons should be amended to enable a Bill to be committed in part to a Standing Committee and in part to a Select Committee.(*) It was, however, envisaged that the two committees would meet simultaneously and that the Bill would be considered as a whole on report. The recommendation was not confined to Finance Bills, but the view was expressed, in support of the recommendation, that the necessary distinction between questions of principle and questions of detail had been successfully drawn in proceedings on the Finance Bill in three sessions. The Government accepted in principle that "suitable" Bills or parts of Bills might in future be committed to Select Committees, but "in view of the additional time that would be required under such a procedure, such Bills would perhaps need to be exclusively of the less urgent kind".(**) We do not think that a further new procedure involving reference of parts of the annual Finance Bill to a Select Committee is either practicable or desirable. It would not be right to deprive an adequate representation of Members of the chance to vote on the detailed provisions.

Correction

17.21 It has been suggested to us that there is a need for some procedure that would enable defects of expression to be rectified, and other uncontroversial amendments of

fiscal statutes to be made, without making demands on Parliamentary time. The kind of machinery proposed was a statutory committee of revenue law experts, which would consider what amendments of this nature were desirable and formulate them in consultation with the Inland Revenue and Parliamentary Counsel; the amendments would be scheduled to the annual Finance Bill and should not be subject to debate. We find this suggestion attractive. The Joint Committee procedure we recommend in paragraph 18.38, for the rectification of defective statutes in general might not be constitutionally appropriate for fiscal statutes, but we think that it might be practicable to secure immunity from debate for the statutory committee's proposed amendments if they were certified by the Chairman of Ways and Means as not substantially altering the effect of the statutes to be amended. *We recommend* accordingly.

STRUCTURE

17.22 The Codification Committee held that "the fact that this branch of legislation cannot avoid being technical and complicated is no excuse for perpetuating its present confused and illogical shape. Rather the contrary. For the more difficult and elaborate the subject, the more important are precision and orderliness in its presentation".(*) Two major consolidations of fiscal legislation have taken place since that Committee reported, but a high degree of structural complexity remains.

Schedules

17.23 Witnesses have complained to us that too great a proportion of fiscal legislation is contained in Schedules, and have suggested that all provisions affecting taxes payable and reliefs granted should be contained in sections, and only ancillary and supplementary matter in Schedules. A similar view was taken by the Codification Committee. In describing the plan of their draft Bill,(*) they said that "it will be observed that the whole untidy apparatus of schedules and rules has been swept away and all the provisions on each topic have been gathered together ... and embodied in articulate clauses in the Bill.... Eight Schedules deal with a variety of special matters (... mostly of an administrative character) with which it was thought better not to encumber the main text of the Bill".(**) As we have indicated in Chapters X and XI, we believe that, in general, the inclusion in Schedules of detailed provisions of a permanent kind (provided that their existence is adequately signalled in an enacting section or sections) can be a valuable means of shortening and simplifying the body of an Act. We do not think that fiscal legislation is a special case in this respect.

Amendments

17.24 We have already recommended (paragraph 13.20) that where amendment of existing legislation is required the system of textual amendment should be applied as generously as possible. It has been proposed to us in evidence that in the sphere of fiscal legislation that system of amendment should be employed to the exclusion of all other systems. A necessary prerequisite of putting such a proposal into effect would be a comprehensive and up-to-date consolidation of the various branches of revenue law. All changes of the law, whether by way of addition, omission or modification, would then take the form of textual amendment. The law would thus be in a state of "perpetual consolidation". As to the proposal itself, we were informed by First Parliamentary Counsel that it "involves decisions which the draftsman, left to himself, cannot take" and that the present practice is to employ textual amendment in amending the Income Tax Acts "wherever it produces a convenient result".

17.25 We recognise that there will be many circumstances in which the amendment of fiscal legislation by the textual amendment method will not be practicable. For instance, it may not be practicable to find a suitable place in the text of any existing enactment for the insertion of a quantity of new matter. But the volume, frequency and intricacy of fiscal legislation make it, in our view, particularly desirable that changes in this body of statute law should, wherever practicable, be affected by textual amendment rather than

by enacting new provisions that the reader must conflate with those of existing enactments in order to ascertain their combined effect.

17.26 We think that too restrictive a view tends to be taken at present of the extent to which it is practicable to amend fiscal legislation by the textual amendment method. Here is a particular instance of non-textual amendment to which our attention has been drawn. Section 188(1)(d) of the Taxes Act of 1970 reads as follows:

> "188.—(1) Tax shall not be charged by virtue of section 187 above in respect of the following payments, that is to say:—
>
> (d) a benefit paid in pursuance of any such scheme or fund as is described in subsections (1) and (2) of section 221 of this Act (exemptions from charge to tax under the said section 220) or in section 24(1) of the Finance Act 1970".

The effect of this provision was altered by section 73 of the Finance Act 1972 as follows:

> "73. The exclusion, by virtue of section 188(1)(d) of the Taxes Act, of certain benefits from the charge to tax under section 187 of that Act (payments on retirement or removal from office or employment) shall not apply to any compensation paid for loss of office or employment or for loss or diminution of emoluments unless the loss or diminution is due to ill-health; but this section shall not be taken to apply to any payment properly regarded as a benefit earned by past service".

17.27 It was represented to us on the one hand that this was inconvenient for the user, who is obliged to conflate the Acts of 1970 and 1972, and on the other that the draftsman was right to use this method because a textual amendment would probably have been "cumbersome and difficult to understand". We suggest that the alteration could have been fairly satisfactorily made by textual amendment in either of two ways. The first would have been to after the text of section 188(1)(d) of the 1970 Act, the amending section 73 (of the 1972 Act) taking some such form as this:

> "73. Section 188(1)(d) of the Taxes Act is amended by adding at the end the words ', except a benefit consisting of compensation paid for loss of office or employment, or for loss or diminution of emoluments, where the loss or diminution is not due to ill-health and the payment is not properly regarded as a benefit earned by past service' ".

It may be that the words in section 73 after the semicolon are almost declaratory, and we would accept that that possible flavour of the proposition is not carried over into this textual version.

17.28 The second textual method would have been to draw the amendment in substantially the same form as that in which it was in fact enacted, but insert it into the text of section 188 of the 1970 Act as a new subsection. Section 73 of the 1972 Act would then have read like this:

> "73. Section 188 of the Taxes Act is amended by inserting after subsection (1) the following subsection:
>
> '(1A) The exclusion, by virtue of subsection (I)(d) of this section, of certain benefits from the charge to tax under section 187 above shall not apply to any compensation paid for loss of office or employment or for loss or diminution of emoluments unless the loss or diminution is due to ill-health; but this subsection shall not be taken to apply to any payment properly regarded as a benefit earned by past service" '.

We believe this amendment has precisely the same effect as section 73 of the Finance Act 1972, though in practice it would probably be supplemented by a textual amendment of section 188(1)(d) of the 1970 Act, inserting a forward reference to the new subsection (1A). However, the proposition in section 188(1)(d) as actually amended or as textually amended in either of the two ways we have suggested, remains a chain of no less than four negatives each qualifying what has gone before.

17.29 A third theoretically possible method of textual amendment, which might have produced a more satisfactory result than either of those so far suggested, would have been to re-cast the whole of section 188(1)(d) in a form which both effected the amendment and got rid of the negatives; but Parliamentary considerations no doubt inhibited the draftsman from considering extensive recapitulation of this kind.

17.30 We recognise that textual amendments may not be particularly helpful to the user of the statutes if he is left to note them up for himself, and that if they were more liberally used a frequent reprint service would become even more of a practical necessity. Such a service is in fact already provided, for the Acts concerning income tax, corporation tax, and capital gains tax, by the Inland Revenue's annual compilation *The Taxes Acts*. The whole of this compilation is re-issued each year, and we think that in the tax field at any rate this method may be preferable to any loose-leaf or similar system, as the retention of earlier issues by the user can provide him with a convenient means of ascertaining the law in force in past years, which in practice often has to be applied.

Consolidation

17.31 A large body of fiscal legislation was consolidated a few years ago broadly as follows: the principal administrative provisions for income tax, corporation tax, and capital gains tax in the Taxes Management Act 1970; the principal provisions relating to capital allowances in the Capital Allowances Act 1968; other provisions relating to income tax and corporation tax (including income tax and corporation tax exemptions as extended to the capital gains tax but excluding other capital gains tax provisions which extend to the computation of corporation tax on chargeable gains) in the Income and Corporation Taxes Act 1970. It will be observed that the consolidation of provisions relating to the three taxes was not complete: provisions relating to liability to capital gains tax (and to corporation tax on chargeable gains) were not consolidated, and are still to be found in Part III of the Finance Act 1965 as amended. Various transitional provisions also require reference to be made to the earlier legislation (some of which is not reproduced in *The Taxes Acts*).(*)

17.32 We do not subscribe to the view that fiscal statutes could be kept in a state of "perpetual consolidation" by the use of textual amendment. As we have said in paragraph 17.25, we recognise that there will be many circumstances in which the amendment of fiscal legislation by the textual amendment method will not be practicable. Even where amendments of the law are effected by textual amendment of a consolidation Act, a point must inevitably be reached when the original structure of the Act cannot conveniently accommodate new matter. It is therefore clear that fresh consolidations must from time to time become a necessity. We note that the Royal Commission recommended that there should be a regular consolidation every 10 years,(*) and we do not consider that a more liberal use of textual amendment would necessarily enable that interval to be lengthened. Nevertheless, it remains in our view a matter for regret that the integrity of the consolidations mentioned in paragraph 17.31 has not been preserved, as far as possible, by casting subsequent legislation on the subjects with which they deal in the form of textual amendments to them wherever it would have been practicable to do so.

Codification

17.33 The Codification Committee produced, as Volume 2 of their report,(*) a draft Bill to codify income tax law as it stood at 31 January 1936; that is to say, to re-state in

statutory form not only the relevant statutory provisions but also the judicial decisions by which they had been interpreted. The Bill was never introduced into Parliament and the outbreak of war in 1939 put an end to further consideration of it. In 1955 the Royal Commission concluded that the task of codification had by then become even more formidable; they were not satisfied that a full codification of income tax law was either feasible or, if feasible, valuable enough to justify the labour involved, for no codifying statute would be short or easy to read or to understand.(**) Codification of fiscal law is not a subject on which any evidence has been submitted to us or on which we feel able to offer any informed opinion. We make no recommendation, and merely record that we see no reason to dissent from the Royal Commission's views.

Chapter XVIII

PARLIAMENTARY PROCEDURE AND SCRUTINY OF DRAFTING

18.1 Our terms of reference require us to consider any consequential implications for Parliamentary procedure that may arise from our recommendations for achieving greater simplicity and clarity in our statute law. In looking at consequential changes in procedure we have also reached some other conclusions, not necessarily consequential on our earlier recommendations, which would in our view facilitate the enactment of simpler and clearer statutes.

BILLS AMENDING EXISTING ENACTMENTS

Short titles

18.2 Several proposals for changes in procedure have been put to us by witnesses on the ground that they would assist in the preparation of more intelligible legislation when amendments to existing Acts are being considered. For example, the Statute Law Society suggested that there should be changes in the practice relating to the choice of short titles for amending Bills which would assist in

> "steering the Bill into its appropriate niche in the existing body of statute law and supplement the work of the draftsman in implementing the one Act, one subject principle".

The Society have particularly in mind the case of composite Bills amending several principal Acts, the short titles of which are usually not very helpful in this respect. They contend that titles should not be chosen

> "at random, inconsistently or unsystematically but should be selected by a designated person or body charged with this task and according to prescribed rules"'.

At present the short title of an amending Bill is chosen by the promoter, having regard to the general terms and purposes of the Bill. Although we think that in some cases the short title of a Bill can be misleading, we do not feel that it is practicable for such titles to be chosen by another body as envisaged by the Statute Law Society, and we have already (in paragraph 14.7) expressed our view that the idea of consolidating the statute book on a "one Act, one subject" principle is fallacious in theory and incapable of being put into practice.

Separate amending Bills

18.3 Another suggestion put to us by the Statute Law Society to facilitate the arrangement of the statute book on a "one Act, one subject" basis is that where several principal Acts are to be amended together, there should be a separate amending Bill for each principal Act and a suspension of Standing Orders (as happens in the Australian Federal Parliament) to permit the related Bills to be dealt with together. We believe that this practice would involve complications which would not be justified, even supposing Parliament were to agree to the procedure. Furthermore, as we have already said, we do

not support the proposal to re-arrange the statute book on a one Act one subject basis. We do accept that the practice of introducing amendments to several different codes in one amending measure (such as a Miscellaneous Provisions Bill) does cause difficulties for practitioners. These difficulties should however largely disappear with the new edition of *Statutes in Force*..

BILLS AFFECTING SCOTLAND

Procedure to save time on separate parallel Bills

18.4 As we have urged in paragraph 12.8, there should be a separate parallel Bill for Scotland in all cases where legislation in common with England and Wales is required but a combined Bill cannot be drafted in straightforward terms for both countries. We pointed out in paragraph 12.9 that the enactment of separate Acts applying equally to England and Wales and to Scotland need not take up as much Parliamentary time as would be required under existing procedures. The adoption of a procedure on the following lines would, we think, help to save time. In both Houses the debate on second reading and third reading, if any, would be taken on the English Bill, and the Scottish Bill would be given formal readings. For the committee stages in the Commons, each Bill would be taken in its appropriate committee. In the Lords the English Bill would be referred to a committee of the whole House, and the Scottish Bill would be taken by the committee whose appointment we recommend in paragraph 18.7. The advantages of this system would be that both English and Scottish legislators would be considering "clean" Bills and that the Scottish Bill would be committed to a Scottish committee. From the Government's point of view this procedure would use very little more Parliamentary time than a single Anglo-Scottish Bill. Although the second and third readings would theoretically be of the English Bill, speakers who wished could refer to the Scottish Bill. If the Bills were altered in their separate committees in such a way that they could no longer be regarded as parallel Bills, then they would have to go through the existing procedures for the rest of their stages. *We recommend* that further consideration should be given to this proposal.

Separate re-enactment of provisions applying only to Scotland

18.5 We mentioned in paragraph 12.10 the possibility that there may on occasion be such urgency and shortage of Parliamentary time that it is necessary to instruct the draftsmen to prepare an Anglo-Scottish Bill which turns out to require an unacceptable degree of alteration to make it suitable for Scotland. For such Acts there is a procedure which provides for the re-enactment in Scotland-only form of those provisions which apply to Scotland. This is done as if the re-enactment were a consolidation, so that the shortened procedure applicable to consolidation is available. This produces an Act which is acceptable to Scottish practitioners having to consider the legislation after the re-enactment is published. It does not, however, assist practitioners who need to consider the Scottish aspect before re-enactment; nor does it assist Parliament during the Bill stage of the original Act. A recent example of the use of this procedure is the Land Compensation (Scotland) Act 1973, re-enacted from the Land Compensation Act 1973. *We recommend* that this procedure should be adopted whenever a United Kingdom Act requires substantial adaptation to make it workable in Scotland, subject to our preference for the speedier procedure described in the following paragraph.

18.6 We would prefer, instead of the procedure outlined in the previous paragraph, one that would not have the disadvantage of a delay between the enactment of the Anglo-Scottish Act and the re-enactment of its Scottish provisions. We have noted a suggestion made to the Kilbrandon Commission on the Constitution by the Scottish Law Commission(*) for a procedure which would reduce the time-lag before the appearance of a Scottish re-enactment. Briefly, this would permit the appropriate Minister, after Royal Assent, to lay before both Houses of Parliament a provisional measure setting forth the effect of the United Kingdom Act in Scotland. The measure

would be referred to a Joint Committee of both Houses, consisting of five Members of the House of Lords, including at least one Scottish Lord of Appeal, and five Members of the House of Commons representing Scottish constituencies, with a quorum of four. The Joint Committee would examine each provisional measure with the assistance of the Scottish Parliamentary Draftsman, and if satisfied that it accurately reproduced the Scottish contents of the original United Kingdom Act would report that fact to both Houses. Unless either House, within, say, ten Parliamentary days of receiving such a report, otherwise resolved, the measure would be presented for Royal Assent as if it were a Bill passed by both Houses. On receiving the Royal Assent, the measure would become an Act of Parliament and those parts of the original United Kingdom Act superseded by the provisional measure when enacted would automatically expire. We prefer this as a speedier alternative to the arrangement described in paragraph 18.5, and *we recommend* that this proposal, or something similar, should be adopted.

Scottish legislation in the House of Lords

18.7 *We recommend* that the House of Lords should appoint a committee to which Scotland-only Bills could be committed at the committee stage. We think that this would make for better and more detailed discussion of these Bills than is practicable on the floor of the House, and this in turn would help to achieve greater simplicity and clarity in Scottish Bills. The House of Lords, which is widely regarded as a revising chamber, would also benefit from having amongst its members a minister who is a Scottish lawyer, as was the case in 1969 when the Lord Advocate was created a Life Peer. Scottish Peers felt that this enabled them to improve the content and clarity of amendments dealt with in the House of Lords. *We recommend* that as a standard constitutional practice there should be a Scottish lawyer, whether or not a Law Officer, included in the ministerial team in the House of Lords.

TERRITORIAL EXTENT

18.8 Shortly after we were appointed, the Lord President of the Council drew our attention to a Question he was asked in the House of Commons on 21 May 1973 by Mr Donald Stewart, Member of Parliament for the Western Isles, about the indication given in the titles of Government Bills as to their territorial extent. Mr Stewart asked if the Lord President would make it a general drafting practice to make clear in the titles of Government Bills to what country they referred. We have considerable sympathy with Mr Stewart and with others in Scotland, and in Northern Ireland, who wish to know fairly quickly when looking at an Act whether any of it applies to the law with which they happen to be concerned. There are two distinct problems here, one relating to the long title and one to the short title.

In the long title of the Bill

18.9 So far as the long title is concerned, the rule of the House of Commons is that the scope of a Bill is limited to a particular part of the United Kingdom if, but only if, such a limitation is written into the long title. The rule applies even if the limitation is only implicit, as when the title is framed by reference to an Act which does not extend to the whole of the United Kingdom. Because of this rule, the committee on the Bill cannot entertain an amendment to extend the Bill beyond the part of the United Kingdom to which it is limited. The rule can however be abrogated if the House agrees to an instruction to the committee, and the House will usually not object to such an instruction. The implications of references in the long title to particular legislation may however easily be overlooked.

18.10 The rule may sometimes work in favour of the Government in that it may prevent the moving of amendments to extend the Bill; but it is just as likely to inconvenience Ministers if they find that they wish to extend the Bill by amendments in committee. The draftsman will naturally be careful not to expose the Government to the risk of this inconvenience, even though it would be easy to get the House to agree to the necessary

instruction. If therefore he suspects that the Bill may need to be extended by amendments in committee, he will avoid importing into the long title any territorial limits which might necessitate an instruction. We do not think that any discouragement should be placed in the way of the draftsman from expressing the territorial limits of Bills clearly in their long titles, and we *therefore recommend* that this rule of the House of Commons be abolished.

In the short title of the Bill

18.11 The problem of identifying the territorial extent of statutes in their short titles, which we think it is more probable Mr Stewart had in mind when he asked his Question, though not a procedural point, might also be dealt with here. There is no difficulty of course about identifying Acts which apply solely to Scotland. With a few exceptions these are already plainly distinguished by the use of the expression "Scotland" in their short titles, as in the Crofters (Scotland) Act 1955. The same practice applies with Acts relating only to Northern Ireland. The trouble arises with Acts applying only to England and Wales, which carry no distinguishing expression in their short titles. We do not think there is any practical reason why they should not do so, and just as it is helpful for English readers to see at a glance from the short title of a "Scotland only" Act that they need read no further (nor indeed get a copy of the Act), so Scottish and Northern Irish readers would be helped by corresponding guidance in the short titles of Acts affecting only the law of England and Wales. *We therefore recommend* accordingly.

18.12 Where the law of only one law district is *excluded* from the application of an Act it is more difficult to show the extent in the short title without clumsiness, but no one has suggested that this should be attempted, and we make no recommendation on this point.

18.13 To some extent the Editorial Board of *Statutes in Force* have met this problem by printing the initial letters "UK", "EW", "S" and "NI" at the bottom right hand corner of the title page of each Act printed in that edition.

The letters are intended to be primarily a guide for purchasers, but they are no doubt of assistance to users. A similar practice might be found useful if applied to Bills in Parliament and to Acts as printed by the Queen's Printer, and *we recommend* that an experiment be made on those lines.

In the body of the Bill

18.14 Finally, there is the question of territorial extent clauses within the Bill itself. An extent clause is needed only in order to negative the normal presumption that an Act of the Parliament of the United Kingdom (or a particular provision of such an Act) extends to the whole of the United Kingdom. It is not needed, and with one exception is not used, in order to indicate that an Act does extend to a particular part of the United Kingdom. The exception is that for some years it has been usual to include in a Bill which is to extend to Northern Ireland an express provision declaring that it does so extend. The reason for this was the existence of the separate legislature in Northern Ireland. It has been suggested to us that a similar practice should be adopted with regard to Scotland, so that the practitioners and the public there can find in each Act an express statement that the Act, or any particular provision of the Act, does or does not extend to Scotland.We think this proposal could usefully be considered, though we doubt if it could or should be adopted as an invariable rule. There is much to be said for including a clearly-stated extent clause whatever the present rule may be and *we recommend* that such a clause should ordinarily be included in Bills. Where in any Act the extent of a particular section is different from the extent of the Act as a whole, this should be indicated in a side note to the section. The effect of these proposals would be to assist users of the legislation in England, Wales and Scotland. No procedural questions would be involved unless it were decided to promote the extent clause from the end of the Bill to the beginning, and this proposition we now consider.

THE POSITION IN BILLS OF COMMON-FORM CLAUSES

18.15 We have received evidence from a number of users of the statutes that it would be convenient to have certain general provisions placed at the beginning of the Act rather than at the end where they are at present usually to be found. These common-form provisions deal with extent and commencement, short title and citation and interpretation. It is argued that logically the proper place for them in an Act is at the beginning, because the reader cannot fully understand it until he has learned which expressions have special definitions. In a Bill they are rightly placed at the end, since it is wrong to consider how particular expressions are to be defined, which clauses should or should not extend to Scotland, or when different provisions of the Bill should come into force before deciding what expressions are to be used, what clauses are to stand part of the Bill, and what those clauses are to say. This antagonism between the logical and the procedural arrangement might be reconciled if these clauses were placed at the beginning of a Bill but postponed until the Bill had been gone through in committee. The postponement would have to be formally moved and there would be a risk of a division at the very beginning of a controversial Bill on a minor point of procedure before the principles of the Bill had been expounded to Parliament. The Parliamentary draftsmen have therefore normally adhered to the practice of placing common-form clauses at the end of Bills, and this is where most regular users of the statutes have long been accustomed to look for them.

18.16 There are disadvantages in changing the present practice of placing common-form sections at the end of the statute. From the point of view of the user it is a switch from one convention to another which cannot affect existing Acts. The user would therefore be faced with two different modes of arrangement, and we do not suppose that he would welcome this or that it would make it easier for him to understand the Acts he needed to consult. It might also tend to discourage the valuable drafting practice by which the main provisions of the legislation are formulated early in the Act. Although the reader certainly needs to grasp the meaning of the definitions and terms used in the statute before he can fully understand it, he is more likely first to require a general statement of the policy which the statute is putting into effect. The process of understanding is then refined by reference to the detailed provisions contained in later sections, in the common-form sections and in the Schedules.

18.17 Recent experience in Northern Ireland has helped us to reach a view on the question whether common-form sections should be promoted to the beginning of Acts. During the period of Direct Rule, when Orders in Council replaced Acts of the Stormont Parliament, the Northern Ireland draftsmen adopted the practice of inserting the short title and interpretation provisions at the beginning of the Order. This is the usual practice with Statutory Instruments, and the draftsmen considered that this was a more logical arrangement. The change-over from Orders in Council to Measures of the Northern Ireland Assembly which took place in 1974 gave the draftsmen an opportunity of reviewing the practice. They concluded that although there was a great deal to be said in favour of promoting the common-form clauses to the beginning of Measures, any benefits which might result would be outweighed by the disadvantage that the practice would be out of step with Westminster legislation. Current Northern Ireland law would have included Measures where common-form provisions appeared at the beginning and Westminster statutes where they appeared at the end. This would not have been a satisfactory arrangement, and so they went back to the practice of placing the extent, commencement and other common-form provisions at the end of their Measures. In considering the same point in relation to Westminster legislation we too have reached the conclusion that the existing practice should not be disturbed. We do not believe it makes very much difference to the ease with which Acts can be read whether the

common-form provisions are placed at the beginning or the end of the statute; but since the latter practice is so well established a change now might cause more confusion than would be justified by the possible advantages of a more logical arrangement.

PROPOSALS TO LIMIT DEBATE ON CLAUSES IN THE COMMONS

18.18 Many of our witnesses have expressed a preference in favour of shorter sections, and we have therefore considered whether the present rule that in committee each clause can be debated on a motion that it shall stand part of a Bill has an adverse effect on the intelligibility of our legislation by disposing the draftsman to frame clauses which are longer than they should be, thereby helping to reduce the opportunities for debate and the time taken on the Bill. The present rule is subject to the qualification that the chairman of the committee has a discretion to prevent discussion on clause stand part if the principle of the clause and any matters arising thereon have already been adequately discussed during debate on amendments to the clause. If the rule were to be altered so that a clause automatically stood in the Bill unless a specific amendment had been put down to remove it, would this lead to an improvement in drafting?

18.19 One of the objectives in the drafting of a Government Bill is to limit the opportunities for lengthy debate when there is intense political opposition to a measure, euphemistically described as "close scrutiny of Government legislation". If the present rule were to be altered in the manner suggested in paragraph 18.18, it is to be expected that in a situation of "close scrutiny" amendments would be put down to leave out nearly every clause. It would therefore be necessary for the chairman to have a discretion not to call such amendments if the principle of the clause had already been sufficiently debated or if the content of the clause did not warrant discussion. The selection of amendments to leave out a clause could not be decided on in advance of the debate on the amendments to the clause itself, and one would be back to the present situation with the difference that there would be no debate unless the amendment was selected. We doubt therefore whether the suggested amendment of the rule would make any practical difference. Whichever form the rule takes, a decision to chop up a long Bill into a given number of clauses will have precisely the same effect.

18.20 We do not believe that the present rule is so harmful to good drafting practice as it might appear to be, or that a change in the rule would of itself make it easier to draft shorter clauses. It is clear to us from a review of recently enacted legislation that there is in any event now a tendency in favour of shorter clauses, and it has presumably been possible to draft Bills in this way within the constraints imposed by the existing rules and procedure. We do not therefore consider that any change is required in the present rules and practice relating to debates on "clause stand part". We have noted that the Select Committee on Procedure of the House of Commons have considered proposals to limit debate on clauses when Bills are in committee and have rejected them.(*)

SOME MINOR PROPOSALS

18.21 First Parliamentary Counsel has drawn our attention to certain constraints imposed by Parliamentary practice which may be a hindrance to the draftsman in the preparation of legislation, and has proposed a number of changes. His proposals are only indirectly relevant to the subject of our inquiry; but, to the extent that any changes in practice would reduce the load on the draftsman after a Bill is introduced and give him more time to concentrate on essentials, we are glad to give them our support.

Italics to show financial provisions

18.22 The first suggestion is that the practice, with Bills introduced in the Commons, of printing in italics provisions relating to financial expenditure should be discontinued. When these Bills are reprinted, the italics are dropped and the text has to be rechecked, with consequent slight risk of introducing printing errors. The practice serves little or no purpose since there is already an account of the financial effects of such Bills in the

Financial Memorandum. Moreover, the italics are not a reliable guide to passages which need to be confirmed by a money resolution before they are debated in committee. First Parliamentary Counsel has suggested that there should be no italics in Government Bills as introduced in the Commons. We agree with this proposal and *we so recommend*.

Form of amendments to Bills

18.23 The form of amendments to Bills differs in the House of Commons for committee and report stages. The form in the House of Lords differs from both. It would save time and trouble for those concerned with legislation if practice were made uniform in both Houses. We agree that there is a strong case for harmonising the lay-out of amendments for both Houses and consider that the method used in the House of Lords has advantages over that used in the House of Commons. *We recommend* that there should be consultation between the two Houses with a view to submitting agreed proposals on this subject.

Numbering of new Clauses

18.24 When a Bill has new clauses added to it the resultant renumbering of clauses and internal cross-references can be time-consuming and is a possible source of error. First Parliamentary Counsel has suggested that new clauses should be given temporary numbers (for example 7A, 7B, Schedule 2A) which would make it unnecessary to renumber and would allow everyone to continue to refer, throughout the passage of the Bill, to the original clauses by their original numbers. The Bill could be renumbered in correct sequence when the proof Royal Assent copy was being prepared. This is an attractive suggestion, but it would not be practicable in present circumstances because of the further risk of error which a complete renumbering of clauses would entail at the Royal Assent proof stage, and the delay that would occur before the general publication of an Act to allow renumbering to take place. However, as progress is made with the use of computers in the processing of Bills through both Houses, no doubt ways will be found of speeding up the task of renumbering so that it will be possible to do this much more quickly and accurately before Royal Assent. *We recommend* that the possibility of carrying out the entire renumbering process at this stage should be looked at again when the application of computer techniques to the preparation of legislation has been developed to a greater extent.

Abolition of Consolidated Fund and Appropriation Acts

18.25 Annual Consolidated Fund and Appropriation Acts are at present needed to give effect to Supply Resolutions of the House of Commons. First Parliamentary Counsel has suggested to us that there would be a significant reduction in the annual flow of legislation reaching the statute book if these constantly recurring enactments were to be abolished. In recent years there have been three short Consolidated Fund Acts and one 50-page Appropriation Act annually. We agree that it is undesirable to place the ephemeral details of the Government's annual expenditure on the statute book if this can be avoided, and *we recommend* that some other method should be devised to give effect to Supply Resolutions. We have noted that the Select Committee on Procedure of the House of Commons did not favour a proposal to dispense with these Acts when they reported on financial procedure in 1965-66.(*) We hope that the Select Committee might be prepared to review their decision in the light of the considerations which have led us to make the recommendation in this paragraph. It would of course be necessary to provide the Commons with an alternative means of seeking redress of grievances before the granting of supply.

SCRUTINY OF DRAFTING

18.26 There is at present no formal machinery for the scrutiny of Bills during their passage through Parliament to examine their form and drafting rather than the substance of

the policy to which they are to give effect. Various suggestions have been put to us that there should be some such scrutiny. In approaching these proposals we have kept in mind that they could involve extra work for the Parliamentary draftsmen, whose resources are already fully extended, and that scrutiny would take up time which would not be recovered at other stages. Nevertheless, we have come to the conclusion that it should be possible to devise means which would permit the scrutiny of Bills for drafting to take place without imposing undue strain on the existing legislative process, and we make certain recommendations to this end in subsequent paragraphs.

Scrutiny before presentation

18.27 Several witnesses have suggested that the scrutiny of the drafting of Bills should take place before they are presented to Parliament. Proposals we have considered are that this scrutiny should be carried out by standing or *ad hoc* committees of experts qualified to make a contribution, by the Law Commissions and by the Cabinet itself. (Such pre-presentation scrutiny is to be distinguished from the proposals to make use of pre-legislation committees recommended by the Select Committee on Procedure of the House of Commons in their Second Report for 1970-71(*) and accepted in principle by the then Government in November 1971). We find it difficult to reach a firm view on these suggestions, partly because our terms of reference do not permit us to examine the processes of Government that take place before a Bill is presented to Parliament. We assume that any Government wishing to make its proposed legislation as intelligible as the subject permits will have regard to the importance of good drafting. The Government have a collective responsibility for this, and Ministers in charge of particular Bills are personally responsible for the drafting of their Bills and answerable to Parliament if they do not reach acceptable standards.

18.28 It has been suggested that the Law Commissions should be asked to advise on the drafting of Bills before they are presented to Parliament (and indeed after presentation). Although the Commissions assist in some of the pre-Parliamentary preparation of legislation by producing reports and draft law reform Bills, by drafting consolidation, statute law revision and statute law repeals Bills, and by advising Ministers on particular legal points arising in connection with departmental Bills, they are independent bodies and should not be expected to take any general responsibility for advising on the drafting of departmental Bills before they are presented to Parliament.

18.29 In his evidence to us, the Chief National Insurance Commissioner suggested that a standing conference should be appointed to keep social security law (which is entirely statutory) continuously under review in order to identify provisions which did not work well and to propose possible improvements. One of the functions of this standing conference would be to assist in the preparation of social security legislation with the object of ensuring that Bills were arranged in a clear, logical order. This suggestion led us to consider whether similar standing committees might have a contribution to make to the drafting of complex legislation in other fields. We have concluded that it must be left to Government departments themselves to decide what advice they should seek before presentation from advisory bodies on the drafting, as distinct from the substance of Bills.

Scrutiny during passage through both Houses

18.30 Some witnesses have suggested to us that each Bill should pass through a stage in the Parliamentary process during which it would be scrutinised by a committee concerned solely or primarily with the form in which the Bill is drafted. Lord Simon of Glaisdale expressed the following view on the subject:

> "With regard to Parliamentary review of drafting, it seems to me to be only intermittently performed. There is a natural concentration on policy, even at committee stage. Moreover, Parliamentary time tends to be exhausted and

> Parliamentary energies to flag before Schedules are considered; and these often contain provisions of considerable importance couched in a particularly baffling form. Such a function is best performed by a Select Committee or a Joint Select Committee".

A similar suggestion is also made by the Statute Law Society and by the accountancy bodies who were

> "strongly of the opinion that discussion of proposed legislation by Select Committees was likely to improve not only the substance of legislation but also its technical quality".

A variant on the proposal for scrutiny by a Parliamentary Select Committee favoured by some other witnesses would be scrutiny by the Law Commissions, possibly working in association with experts on the subjects from outside the Government service. The Society of Public Teachers of Law considered that:

> "a carefully integrated contemporaneous or parallel vetting process need not delay or obstruct parliamentary progress on a Bill".

18.31 Our witnesses recognised that the proposal for a separate stage in Parliament to scrutinise the drafting of Bills would create additional work for the officials and draftsmen. Indeed, Lord Simon of Glaisdale recommended that his proposed Select Committee should:

> "where appropriate, work in parallel with a committee of officials, and should in any event have a standing counsel".

Not only would there be extra work for the officials, and the Ministers, handling the Bill, there would be an additional burden on Parliament itself. Lord Simon of Glaisdale suggested that one way of mitigating the load on Parliament and at the same time speeding the passage of legislation would be to substitute a "scrutiny of drafting" stage for one of the existing stages. His proposal was that the scrutiny of drafting stage should replace the report stage in the second House. In his view this would postpone the consideration of drafting points until the latest possible stage before the third reading of the Bill in the second House. Lord Simon argued that one of the functions of the report stage is in any event to allow drafting improvements to be introduced. The other functions could be provided for by permitting amendments on third reading in the House of Commons (as is already permissible in the Lords) to give effect to undertakings given in committee.

18.32 Not all witnesses agreed with the view that there should be a separate stage during the passage of a Bill through Parliament devoted to the scrutiny of drafting, however desirable this might be. The Society of Parliamentary Agents pointed out that:

> "Any public Bill which does not complete all its stages by the end of the Session must fail. While this continues to be the practice of Parliament, it is doubted whether the time could be spared to enable a panel or a committee of experts to consider the drafting of a Bill, particularly if it were a contentious one. Furthermore, it is a common-place that drafting in committee nearly always produces disastrous consequences. It is submitted, with all respect, that a panel or committee of experts, be they never so distinguished, would not in the circumstances be more likely to produce a workmanlike result than the original draftsman".

First Parliamentary Counsel in his evidence to us was naturally very much concerned with the burden of additional work which a scrutiny committee would impose upon the draftsman, to the possible detriment of other necessary work. He cautioned that when ideas were put forward:

"which in themselves are no doubt well worth consideration but make assumptions as to resources and time available ... there may be something else better that you could do with the resources".

18.33 Having weighed the arguments on both sides, we do not think that there is any practical scope for introducing a new scrutiny stage during the Parliamentary process. This would in our opinion impose undue strain on a Parliamentary machine which is already under great pressure, and would also add to the labours of the draftsmen who have more than enough to do as it is to keep pace with the legislative programme.

Intervals between stages of Bills

18.34 On some occasions there is too little time between the various stages of a Bill to permit Members of Parliament, Peers and those whom they consult to give adequate consideration to the drafting of the proposed legislation and the framing of amendments. This problem is especially acute between the end of the committee stage and the start of the report stage, especially on Bills of substantial length and complexity. No doubt the Parliamentary draftsmen also find themselves at a disadvantage when there is insufficient time between stages. *We therefore recommend* that, unless there is a need for special urgency, there should always be at least—

(a) two week-ends between the first publication of a Bill and the debate on second reading in the first House;

(b) fourteen days between second reading and the start of the committee stage;

(c) on all Bills of considerable length or complexity, fourteen days between the publication of the Bill as amended in committee or standing committee and the start of the report stage.

Scrutiny after the Parliamentary process

18.35 Some Acts reach the statute book in defective form, and it would often be a simple matter to remove blemishes if expeditious procedures were available for doing so. There are two situations to consider. First, there are occasions when obvious examples of inaccurate drafting come to light just before a Bill receives the Royal Assent. Secondly, there are Bills which could well be rearranged and tidied up after Parliament has finished with them so that they are more fit to go out into the world and be of help to those who must use them. We have the following proposals for dealing with these two situations.

18.36 There is usually very little time to spare for the correction of inaccuracies after a Bill has passed through both Houses and before Royal Assent, so any correcting action would need to be most expeditious. *We recommend* that a procedure should be available by which the Speaker and the Lord Chancellor would certify, on application by the sponsor of a Bill, that amendments which came within a narrowly defined category (of which obvious inaccuracies in drafting would be one) would, if incorporated in the Bill, constitute improvements of a drafting nature. The proposed amendments would be printed on the Order Paper with the requisite certificate, and Parliament would be given the opportunity to accept or reject them, taken together and not individually, without debate.

18.37 The scrutiny of Bills which had passed through the Parliamentary process with a view to improving arrangement and drafting could be undertaken in less haste, though the need for expedition here also would be paramount. Where there was some lapse of time between the passage of the Bill and Royal Assent this type of scrutiny could well take place before Royal Assent. In most cases, however, it would take place after Royal Assent, and the procedure would then be similar to the consideration of Consolidation Bills by the Joint Select Committee on such Bills. The task of rearrangement and redrafting would of course need to be undertaken by the draftsman of the Bill and we realise that this would impose a burden on the Parliamentary draftsmen. We put the

proposal to First Parliamentary Counsel and his estimate was that the time it would take a draftsman to deal with a medium-sized Bill of about 50 pages would be three weeks. A Bill of 150 pages would take six weeks to knock into shape. Even though it would not be necessary to subject all Bills to this revision, there would be a tendency at the end of each Session, when many Bills are ready for Royal Assent, for them to be bunched together, and this would further delay the despatch of the work.

18.38 Despite these difficulties, which we have not underestimated, *we recommend* that a procedure should be available whereby Bills, or Acts as the case may be, which are found to be obscure or otherwise defective in point of form could be rewritten (in whole or in part) in clearer language and re-enacted without using much Parliamentary time. We think that a procedure on the lines of that applicable to Consolidation Bills would be appropriate. Thus a Bill "to re-enact with formal improvements [section ... of] the [...] Act" would be introduced in the House of Lords and automatically be referred to a Joint Committee, who would report, either that they were satisfied that the Bill contained only formal improvements or that they were not so satisfied. If the Joint Committee reported favourably, the Bill would then enjoy the expedited procedure which is now available to Consolidation Bills. It might even be possible for the Joint Select Committee on Consolidation Bills to take on this task in addition to their other work if their order of reference were extended.

General scrutiny of legislation for drafting

18.39 Even if the two procedures which we recommend above were made available, we believe that there should also be a general and continuing oversight of legislation with the aim of achieving long-term improvement in standards of drafting, and in the arrangement of the statute book. We considered whether responsibility for this should be given to a Joint Select Committee of both Houses, but decided that it would hardly be possible for such a committee to undertake the detailed and continuing supervision which would be required. In any case, some of the tasks which we should like to see carried out are presently being performed by the Statute Law Committee (see paragraphs 5.1 to 5.4), which exercises a very healthy, expert and well-informed (though little publicised) oversight of public and private Bill legislation generally.

18.40 *We recommend* that the Lord Chancellor should arrange for the Statute Law Committee to keep the structure and language of the statutes under continuous review. *We further recommend* that the Committee should review the carrying into effect of those recommendations in our Report, which are accepted, in particular our recommendation in paragraph 13.20 with respect to the use of textual amendment.

18.41 We believe that Parliament should be kept regularly informed of the Statute Law Committee's progress. That Committee does not publish reports on the activities for which it is responsible. We think that it should now do so, but that the intervals between such reports should be sufficient to enable it to review trends and tendencies in drafting practice over a fairly broad space of time. *We therefore recommend* that the Committee should publish reports from time to time, but not less often than every three years, and that these reports should be laid before Parliament. The publication of such reports would give Parliament the opportunity and the incentive to question the Government about the technical quality of their legislation.

CONCLUSION

18.42 Parliamentary procedure and practice do have a bearing on the form and style of our legislation, and it is right that this should be so in view of the part which Parliament plays in the making of laws. When we approached our task we were pre-disposed to recommend any changes which might conduce to the simplicity and clarity of the statute law as it reaches the user; and we would not have hesitated to recommend that alterations should be made had we thought they were needed. As will be evident, however, we have not tracked down many procedures which require to be changed.

There are sound reasons for the procedures of Parliament and our view is that these should not be altered unless it can clearly be demonstrated that it would be beneficial to do so. Apart from the recommendations we have made for the Parliamentary scrutiny of drafting to which we attach great importance, and some minor recommendations, we have come to the conclusion that no other changes of substance in procedure would improve the clarity and simplicity of legislation. The way in which procedures may be used can however sometimes cause trouble, and when the drafting of Bills becomes defective because of the application of a procedural rule, however innocently this may have happened, the Government (and indeed Parliament itself) have a clear responsibility to set matters right.

Chapter XIX

INTERPRETATION OF STATUTES

THE RELATIONSHIP BETWEEN INTERPRETATION AND DRAFTING

19.1 In 1969 the Law Commissions published a joint study of the rules applied by the courts when dealing with the interpretation of statutory provisions.(*) In paragraph 5 of this study the Commissions stated that "there is an interaction between the form of a communication and the rules by which it is to be interpreted. If defects in drafting complicate the rules of interpretation, it is also true that unsatisfactory rules of interpretation may lead the draftsman to an over-refinement in drafting at the cost of the general intelligibility of the law". We fully agree with this statement; and the same theme was touched on by certain of our witnesses in discussion with us. Lord Simon of Glaisdale suggested that "a robust and not too technical an approach to construction" was necessary if statutes were to be drafted in popular language. Lord Denning roundly said: "It is because the judges have not felt it right to fill in the gaps and have been giving a literal interpretation for many years that the draftsman has felt he has to try and think of every conceivable thing and put it in as far as he can so that even the person unwilling to understand will follow it. I think the rules of interpretation which the judges have applied have been one of the primary causes why draftsmen have felt that they must have a system of over-detail, over-long sentences, and obscurity". But he also thought that if Parliament initiated the change, the judges might follow it up: "if the draftsman could make Acts simpler, the judges would alter their approach to them ... It could be done by breaking up the form of the statutes, by making them simpler, sticking more to the principles, and not going into so much detail".

19.2 If the draftsmen are to be encouraged to cut down upon detail and elaboration and to use simple formulae in the operative words of Bills, they must have some confidence that when the Bills become Acts they will receive from the courts a beneficial construction (see Maxwell on *Interpretation of Statutes*, 12th edition, page 92). We see no reason why the courts should not respond in the way indicated by Lord Denning. The courts should, in our view, approach legislation determined, above all, to give effect to the intention of Parliament. We see promising signs that this consideration is already uppermost in the minds of the members of the highest tribunal of this country. "If I thought that Parliament's intention ... could not be carried out, or even would be less effectively implemented, unless a particular (even though unnatural) construction were placed on the words it has used, I would endeavour to adopt that construction". So said Lord Wilberforce in a recent appeal (*Nimmo v Alexander Cowan & Sons Ltd.* [1968] A.C. 107 at 130). While there might not be complete agreement with the proposition that an unnatural construction may be placed upon words simply to secure a higher degree of effectiveness in the implementing of Parliament's intention, yet the passage well illustrates the modern attitude towards construction of a remedial statute. In the same case, Lord Guest (at p. 122) indicated that, where there was doubt, the construction to be preferred was that which would best achieve the result to be attained.

If this is to be the judicial approach it follows that the Parliamentary intention must be

made sufficiently clear and this can, in our view, best be done by the adoption of the "general principle" approach in the drafting of statutes as we have recommended in Chapter X (paragraph 10.13).

19.3 Because of this interaction between drafting and interpretation (and in particular the influence the latter has on the former) we think it right to consider in the context of our own terms of reference the proposals which the Law Commissions put forward for the enactment of certain statutory rules of interpretation. This we do in paragraphs 19.12 to 19.31 of this chapter. Also in this chapter we consider whether the interests of clarity and simplicity might be furthered by—

(*a*) a modernisation of the Interpretation Act 1889, which enacts certain general conventions for the interpretation of statutes (paragraphs 19.4 to 19.11);

(*b*) the enactment of a presumption against retrospective effect (paragraph 19.32);

(*c*) the more frequent use in individual statutes of preambles or other provisions declaring the main purpose of the statute in question or particular provisions of it, and the giving of "controlling" force to such provisions (paragraph 19.33); and

(*d*) the enactment of special rules for the interpretation of European Community Treaty provisions and instruments which have legal effect in this country without further enactment, and of United Kingdom legislation implementing Community Treaty provisions and instruments which do not have such effect (paragraphs 19.35 to 19.39).

A NEW INTERPRETATION ACT?

19.4 A general Interpretation Act can help to shorten and simplify particular Acts of Parliament, to clarify their effects by enacting rules of construction, and to standardise common-form provisions. The Interpretation Act at present in force is of 1889, and we consider in the following paragraphs whether it now needs to be replaced, bearing in mind that, although it has stood the test of time, it is a long time since it was enacted. The Act has been amended and supplemented by subsequent enactments, some of which were retrospective.

19.5 Leaving aside for the moment the question of enacting the new provisions proposed by the Law Commissions in 1969 and the new provision about retrospection that we recommend in paragraph 19.32, there is a strong case for the re-enactment of the Act of 1889 in up to date terms.

19.6 The case for doing so is substantially the case for any consolidation. Various provisions of the Act have been amended or superseded by subsequent enactments, and others have become obsolete with the passage of time. In the address to which we have already referred(*) Sir William Graham-Harrison said in 1935 that the time had undoubtedly arrived for a new Interpretation Act. Some 40 years later, it might be thought to be overdue. Out of 20 institutions comprised in the "Official definitions" (section 12) something over half have disappeared as such. Almost all the "Judicial definitions" (section 13) are obsolete or irrelevant. The Poor Law (section 16) is no longer with us. Most of the "Geographical and colonial definitions" (sections 18 and 18A) should have been blown away by the wind of change. On the other hand a fair number of expressions have been defined generally by enactments passed since 1889. A list of such enactments (which may, however, not be comprehensive) is given in the *Index to the Statutes* under "ACT OF PARLIAMENT 2(*b*)".

19.7 A former First Parliamentary Counsel, Sir John Rowlatt,(*) thought that there should only be one Interpretation Act: the public should not have to look in more than one place (outside the enactment which they are considering) for general provisions affecting the construction of that enactment. This was an argument against any new Interpretation Act; but, by now, with so many general definitions outside the Act of

1889, it almost turns into an argument at least for consolidation. The problem of applying the provisions of a new Interpretation Act to existing enactments is complex but not insuperable. The choice would be between a new Interpretation Act which applied both to existing and to future enactments and a new Interpretation Act which applied to future Acts only, leaving the Act of 1889 and other statutory definitions in force in relation to previous enactments. Whichever alternative were chosen, if all subsequent definitions of general application were fed into the new Interpretation Act by way of amendment, preferably textual, and if a suitable system of annotating and reprinting the new Act were adopted, the user of the statute book would find his task considerably simplified.

19.8 So much for the definitions in the Act of 1889 (and elsewhere). The remaining provisions of the Act, mainly designed to shorten subsequent legislation, are as good as new. Those mainly relied on are section 1 (masculine includes feminine; singular includes plural and vice-versa); section 11(1) (non-reviver of repealed enactments by repeal of the repealing enactment); section 19 (person); section 20 (writing); section 26 (service by post); section 32 (statutory powers and duties); section 36 (commencement) and section 38 (general savings on repeals). This is not to say that all these provisions are perfect. In particular section 32(3) (power to revoke and amend subordinate legislation) does not apply to all subordinate legislation and has to be regularly supplemented by special provision in Acts conferring power to make orders: and section 38(1) is ambiguous and possibly defective. There are other provisions which are repeated from Act to Act and might usefully be eliminated by inclusion in a new Interpretation Act - notably the incantation that "References in this Act to any other enactment are references to that enactment as amended by any subsequent enactment", which is probably unnecessary but cannot safely be omitted because it has been said so often.

19.9 The Interpretation Act (Northern Ireland) 1954 is more comprehensive than the Act of 1889. It runs to 51 sections compared with 43. Some of the additional material is peculiar to the context of legislation by the Parliament of Northern Ireland (for example section 11(3)). Some of it states expressly rules of construction or presumptions which apply to Acts of the Parliament of the United Kingdom but rest on the common law and are not enacted as such (eg non-application to the Crown,(*) enactments to be construed as always speaking). Such provisions do not shorten or simplify the language of the Acts to which they apply - they merely clarify their effects. However, the Northern Ireland Act also contains a number of common-form provisions not included in the Act of 1889, eg section 18, tenure of holders of offices; section 21, power to make rules of court; section 22, powers of appellate courts; and section 23, inquiries and investigations. These enactments have no doubt done much to shorten particular Acts of the Parliament of Northern Ireland - at the cost, as Mr. William Leitch observed in 1965,(**) of concealing some of the substance from the reader of individual Acts. He claimed that without the Act of 1954 "the annual volumes of the Northern Ireland Statutes would, upon a conservative estimate, be approximately one-third larger than they are". We should not expect any such spectacular results from similar extensions of the Act of 1889 in the field of United Kingdom legislation, but the possibility of enacting some such common-form provisions in a new Act could usefully be considered.

19.10 Finally, the Northern Ireland Act also contains some general provisions which would have useful, though not dramatic, effects on the statutes of the Parliament of the United Kingdom if enacted here. One of these replaces the incantation described at the end of paragraph 19.8. Another eliminates the repetition of words such as "of this Act", "of this section", and "of this Schedule". A third deals with the computation of periods of time, and so eliminates such ponderous expressions as "the period of 30 days beginning with [the passing of this Act]" which are necessary but no doubt contribute something to the general dislike of statutory language. The enactment of general provisions of all

these kinds in an Interpretation Act would have three advantages. They reduce (however little) the volume of subsequent enactments. They eliminate some mystery. And not least they reduce inconsistencies between different Acts. As matters stand the incantations described in paragraph 19.8 vary from Act to Act. The reasons for this may be valid, but are not apparent to the public. Different techniques of internal references abound - eg "section 4 of this Act", "section 4 below", "the next following (or succeeding) section". Different methods are used to make it clear whether a period includes or excludes the first or last day, and the need to do so is sometimes overlooked. Every provision which is standardised in an Interpretation Act plays a valuable part in facilitating the task of the draftsman and easing the burden on the reader.

19.11 In the light of all these considerations we believe that the case for a new Interpretation Act is extremely strong. The initiative for the preparation of such an Act lies with the Law Commissions, though as they have pointed out "The revision of the Act [of 1889] is a task which of its nature closely involves the Parliamentary draftsmen and is dependent on their available manpower".(*) Subject to that, *we recommend* that the preparation of a new Interpretation Act should be put in hand.

THE LAW COMMISSIONS' PROPOSALS

19.12 We readily accept the Law Commissions' statement of the constitutional position of the judiciary:

> "Under our constitutional arrangements it is the function of an independent judiciary to interpret the law and no proposals which we make can or should undermine the freedom which this function requires".(*)

The Commissions nevertheless concluded that a limited degree of statutory intervention was required in this field,(**) and formulated a set of draft clauses, printed as Appendix A to their report. We consider these below, subject to a similar caveat.

Draft clause 1

19.13 *Draft clause 1(1)* would provide as follows:

> "In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say-",

and there follow five paragraphs which we now consider separately.

19.14

> "(*a*) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act".

Judges have told us that they agree with this, and that to some extent it represents current practice (except as regards side-notes). First Parliamentary Counsel, supported by officials of Government departments concerned with the preparation of legislation and, independently, by the Law Society, takes the opposite view, at any rate as regards punctuation and side-notes. They fear that paragraph *(a)* might lead to punctuation being regarded as part of the text and so alterable only by amendment; that the words "the Act as printed by authority" would include successive revised editions where side-notes may have been changed as a matter of editing; that it would be dangerous to alter the degree of significance to be attached to side-notes originally drafted on the assumption that they would not carry much interpretive weight; and that for the future draftsmen might be induced by this paragraph to produce longer and generally less helpful side-notes. Nevertheless we agree with the Law Commissions' proposal: see paragraph 19.21 below.

19.15

"(*b*) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed".

The main objection advanced against this paragraph is that it cannot be assumed that a report or other *travaux preparatoires* will tell you what Parliament had in mind when discussing and passing the Act (if paragraph *(b)* were enacted, the issue before a court might well be the extent to which the Act was intended to depart from the report); it could also be difficult to decide in every case what was a "relevant report", since the paragraph would seem to admit references to any report that could be shown to be relevant, no matter how long before the passing of the Act concerned it was made. Judicial witnesses, however, were generally in favour of this paragraph, and regarded the present law as to the status of these reports as unsatisfactory. We do not agree with this proposal: see paragraph 19.23 below.

19.16

"(*c*) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time".

Objections by witnesses to this paragraph include the lack of any time limit for "relevant" material; the frequent inclusion in treaties, in order to resolve international differences of policy, of deliberate ambiguities which the draftsman of the Act may have been instructed to resolve in a certain way; and the difficulty in which litigants and their advisers would be placed by the words "whether or not the United Kingdom were bound by it at that time". Lord Denning, however, approved of paragraph (c), regarding it as consistent with the present practice of the Court of Appeal and indeed as "inescapable". We accordingly agree with the Law Commissions' proposal: see paragraph 19.22 below.

19.17

"(*d*) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time".

This has been objected to on the grounds that an Act resulting from a White Paper often diverges from it both in outline and in detail, for the aims of the White Paper may have been different from the aims of Parliament in passing the legislation; that there would in any event be a temptation to couch White Papers in terms designed to provide the courts with overriding principles by reference to which ensuing legislation was to be interpreted; that if a document such as a White Paper was to be published shortly before or at the same time as the introduction of a Bill, the need to ensure that the one was as precise as the other in legal (as distinct from political) effect would increase the burden on the draftsman and the Government department concerned; and that since paragraph *(d)* would be retrospective, it again raised the question whether documents, such as White Papers, written under one set of rules should in future be looked at under different rules. The judicial views put forward to us on paragraph *(d)* range from an unqualified welcome to the conclusion - expressed with "regret" - that from a practical and professional point of view it is too wide. We do not agree with this proposal: see paragraph 19.23 below.

19.18

"(*e*) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section".

It has been suggested to us that paragraph *(e)* is unnecessary, since it goes without saying that any Act can declare a particular document to be relevant for the purpose of interpreting the Act, and undesirable because by serving as a reminder of that fact it might encourage the moving of amendments writing documents - including even *Hansard* - into the Act. It was rightly suggested that clause 1(3), to which we refer below, could not override a specific provision in a particular Act which declared a report of proceedings in Parliament to be relevant to the construction of the Act. A further difficulty to which our attention has been drawn is that if an Act declared under paragraph *(e)* that one document falling within paragraphs *(b)* to *(d)* was relevant the relevance of other documents falling within those paragraphs might by implication be called in question. We think paragraph *(e)* may be superfluous, but that Parliament should exercise its existing power with restraint: see paragraphs 19.23, 19.24 and 19.26 below.

19.19 *Draft clause 1(2)* would provide that:

> "The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances".

Witnesses who are critical of the draft clauses have commented that clause 1(2) is an acknowledgement that much of the material admitted by clause 1(1) would be of doubtful value, or little weight: "much research and labour may have been spent to little purpose". We agree, however, with this proposal: see paragraph 19.25 below.

19.20 *Draft clause 1(3)* seeks to exclude *Hansard*, in the following terms:

> "Nothing in this section shall be construed as authorising the consideration of reports of proceedings in Parliament for any purpose for which they could not be considered apart from this section".

We have already (in paragraph 19.18) noted that this provision would not override the kind of provision contemplated by draft clause 1(1)(e) (documents declared by the Act to be relevant). Our witnesses have been almost unanimous in saying that reports of Parliamentary debates should not be admissible, though Lord Simon of Glaisdale's view on this was a qualified one, which he has since expressed in the following terms in his speech in *Dockers' Labour Club and Institute Ltd. v. Race Relations Board* [1974] 3 W.L.R. 533:

> "It would be one thing to cite debates in Parliament to help to ascertain the general objective of an Act and the general limitations on such objective - this would be using the debates to identify the 'mischief' which the Act seeks to remedy ... It would be quite another thing to have recourse to reports of debates to see whether any understanding was expressed as to the meaning of the statutory language as related to particular situations not statutorily identified. It might be yet a third thing if any such understanding so expressed contradicted the meaning of the statutory language".

We have discussed in Chapter X (paragraph 10.7) Lord Simon's suggestion for mitigating the effect of the exclusion of Parliamentary debates for the second of the purposes he mentions in this passage. We agree in principle with the Law Commissions' draft clause 1(3): see paragraph 19.26 below.

Conclusions on draft clause 1

19.21 We recognise the force of the objections mentioned in paragraph 19.14, but consider that the balance is nevertheless in favour of admitting the "indications" mentioned in draft clause 1(1)(a). We do not recommend any departure from the existing practice whereby punctuation and side-notes are not amendable in Parliament,

and we assume that in applying the new principle judges would have regard to that practice.

19.22

> "There is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."(*)

Moreover, where there is cogent extrinsic evidence of a connection between an international treaty and an Act under interpretation, a court may look at the treaty in elucidating the Act, even though the Act does not mention the treaty. On the other hand, where it is the clear intention of Parliament to enact a law which is in any respect inconsistent with the provisions of a treaty to which Her Majesty's Government in the United Kingdom is a party, the courts will give effect to that intention.(**) We agree with the current judicial attitudes, which attach high importance, in the construction of legislation, to the terms of treaties which may be relevant to that legislation. In spite of the objections noted in paragraph 19.16, we think that clause 1(1)(*c*), with clause 2(b), provides a useful restatement of those judicial attitudes. See, however, paragraph 19.39 below.

19.23 We appreciate that there is a difference of judicial opinion as to the extent to which such materials as are referred to in clause 1(1)(*b*) and (*d*) are at present admissible as aids to interpretation.(*) We think, however, that the unrestricted admission of such materials would place too great a burden on litigants and their advisers, and indeed on the courts, and would create even greater difficulties for lawyers trying to advise their clients before a specific controversy had arisen. It would certainly do nothing to make statutes more immediately intelligible to the lay public, and it might greatly lengthen court proceedings. From the draftsman's point of view it seems at least possible that the desire for greater precision in order to avoid any possible ambiguity arising from comparison with these extensive materials would produce more rather than less complicated provisions. We consider, therefore, that it would be preferable to leave it to Parliament, if it saw fit, to declare in the Act that specified material outside the Act (and not admitted by clause 1(1)(c)) should be admissible for the purpose of interpreting it. But since it is in any case possible for Parliament to do this, we doubt the value of clause 1(1)(e).

19.24 Although in Chapter XV we make certain recommendations about the publication of specially prepared explanatory materials, we think that in general such materials should not be declared to be admissible for the purpose of judicial interpretation. To do so would be to create what Professor Reed Dickerson has called a "split-level statute", of which only the primary level would have been fully debated in Parliament, and would, as a distinguished member of the judiciary put it, be asking the courts "to ride two horses, to construe technical draftsman's language and layman's language".

19.25 We think that draft clause 1(2) is a helpful clarification and should be included.

19.26 We strongly support the principle of draft clause 1(3), and favour its enactment if the rest of the clause is to include anything whatever which could put that principle in the slightest doubt. Our misgivings about the unrestricted admission of pre-legislative materials (paragraph 19.23) apply *a fortiori* to the admission of the records of Parliamentary proceedings on the Bill; though we recognise that it would be possible for Parliament to declare these to be admissible (whether or not draft clause 1(1)(e) were enacted), we would strongly urge that this should never be done.

Draft clause 2

19.27 *Draft clause 2* turns from aids to interpretation to principles of interpretation, and would provide as follows:

"The following shall be included among the principles to be applied in the interpretation of Acts, namely

(*a*) that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not; and

(*b*) that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not".

Clause 2(a) has been criticised on the ground that the rule expressed may not be the right one, in that it might be the general legislative purpose of the Act that should be favoured rather than the purpose "underlying the provision in question". Doubt has been expressed as to whether this principle should in any event be elevated at the expense of others such as the liberty of the subject (in the context of criminal proceedings) and the need for clear words to make a man part with his money (in taxing statutes). On the other hand it has been suggested that clause 2(*a*) "is little more than a re-phrasing of the old "mischief rule", which is probably ... evolving in the desired direction without the need for statutory intervention". Clause 2(*a*) was, however, welcomed, at any rate in principle, by more than one of our judicial witnesses. Clause 2(*b*) has not attracted explicit comment from witnesses, although there were several passing references to it.

Conclusions on draft clause 2

19.28 Clause 2(*a*) is, as we understand it, in part a codification of modern practice in the application by the courts of the so-called "mischief rule" of statutory interpretation. We agree with the emphasis placed on the positive "general legislative purpose", which is an expression well chosen to apply to all types of legislation. Clause 2(*b*), in combination with clause 1(1)(*c*), provides a useful restatement of the substance of recent judicial pronouncements (see paragraph 19.22). We are in favour of enacting draft clause 2 as a whole.

Draft clauses 3 and 4

19.29 *Draft clause 3* would apply clauses 1 and 2 to subordinate legislation and so is outside our terms of reference. We therefore express no opinion on it.

19.30 *Draft clause 4* would raise a presumption that breaches of statutory duties imposed by future Acts were intended to be actionable. This we think involves considerations of substantive law which are outside our terms of reference, and so on this too we express no opinion.

General conclusion on Law Commissions' proposals

19.31 We believe that acceptance of the Law Commissions' proposals to the extent indicated in paragraphs 19.21 to 19.28, and subject to a further point we make in paragraph 19.39 about European Community instruments, would enable statutes to be drafted more clearly and simply. We accordingly *recommend* the early enactment of a suitably modified version of the Commissions' draft clauses. These might usefully form part of the comprehensive revised Interpretation Act we recommend in paragraph 19.11.

OTHER PROPOSALS

Retrospective legislation

19.32 The difficulties that may be encountered by the courts in determining whether legislation has retrospective effect lead us to *recommend* that the following principle should be given statutory effect:

"In the absence of any express indication to the contrary, a construction that would exclude retrospective effect is to be preferred to one that would not".

As with the Law Commissions' proposals (see paragraph 19.31), this could usefully form part of a comprehensively revised Interpretation Act.

"Controlling" provisions

19.33 We have discussed in paragraphs 11.6 to 11.8 the use of statements of purpose as an aid to the understanding of statutes. It has been suggested to us not only that Acts should contain preambles or other provisions declaring the main purpose of the Act, or its "guiding principles", but that these should govern the construction of the more specific and detailed provisions of the Act in all cases (and not only where there is doubt about the meaning of the latter), and should prevail over them where there is a conflict. In particular, it has been suggested that preambles could with advantage be used for this purpose. The present rules as to the use of preambles in the interpretation of statutes are, as we understand the matter, these:

(1) In cases where the effect of a substantive provision in an Act is clear from the terms of the Act itself, then recourse may not be had to the preamble for the purpose of interpreting the provision.

(2) Where the effect of a provision is not clear from the terms of the Act itself, recourse may be had to the preamble to ascertain the intentions of Parliament.

We are not convinced that an alteration of these rules so as to enable a preamble to control an enactment which is in itself clear and precise would be productive of any advantage. On the contrary, it might lead to confusion.

Disregard of prior case law

19.34 At present the draftsman has to bear in mind the common law and the interpretation placed by the courts on earlier statutes. It was suggested to us that in appropriate cases there should be put in the statute an indication that former case law was no longer to have any authoritative effect, thus giving the draftsman a freer hand and leaving the courts free to approach interpretation in a new way having regard only to the spirit of the Act. Whilst this had a favourable reception from one judicial witness, another expressed doubts about its practicality. We think the suggestion is an interesting one but that it has such far-reaching implications for the doctrine of precedent as to be outside the proper scope of our inquiry.

THE EUROPEAN INFLUENCE

19.35 Part of the law applicable in the United Kingdom now comes, directly or indirectly, from the European Communities, through the Treaties themselves and subordinate instruments made under the Treaties by the Community institutions. A Community *regulation* is "directly applicable in all Member States"(*) without any intervention by any national law-making agency (though it does not necessarily have direct effect for individuals in the sense of creating rights and obligations enforceable within the national legal system, as for instance where it is merely a regulation enabling further regulations to be made). A *directive* (which is "binding, as to the result achieved, upon each Member State to which it is directed, while leaving to national authorities the choice of form and methods"),(*) and a *decision* ("binding in its entirety upon those to whom it is addressed"), may call for the enactment of national implementing legislation, but may, it seems, have direct effect for individuals even without such legislation, as may articles of the Treaties themselves.(**)

19.36 Section 2(1) of the European Communities Act 1972 provides as follows:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be

enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies".

Section 2(4) of the Act of 1972 provides *inter alia* that:

"any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section".

19.37 Section 3(1) of the Act of 1972 provides as follows:

"For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court,(*) be for determination as such in accordance with the principles laid down by and any relevant decisions of the European Court)".

19.38 Where a Treaty provision or a Community instrument has legal effect in the United Kingdom without further enactment, we believe that the effect of the provisions we have quoted will be to secure that it is interpreted in accordance with the principles of interpretation which would be followed by the European Court. As Lord Denning said in *H P Bulmer Ltd* v *J. Bollinger SA*:(*)

"It is apparent that in very many cases the English courts will interpret the Treaty themselves. They will not refer the question to the European court at Luxembourg. What then are the principles of interpretation to be applied? Beyond doubt the English courts must follow the same principles as the European court. Otherwise there would be differences between the countries of the Nine. That would never do. All the courts of all nine countries should interpret the Treaty in the same way. They should all apply the same principles. It is enjoined on the English courts by section 3 of the European Community Act 1972, which I have read.

What a task is thus set before us. The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the judges hold that they have no power to fill the gap. To do so would be a 'naked usurpation of the legislative function': see *Magor and St. Mellons Rural District Council* v *Newport Borough Council* [1952] AC 189, 191. The gap must remain open until Parliament finds time to fill it.

How different is this Treaty? It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way. That appears from the decision of the Hamburg court in *In re Tax on Imported Lemons* [1968] CMLR 1.

Likewise the Regulations and directives. They are enacted by the Council sitting in Brussels for everyone to obey. They are quite unlike our statutory

instruments. They have to give the reasons on which they are based: article 190. So they start off with pages of preambles, "whereas" and "whereas" and "whereas". These show the purpose and intent of the Regulations and directives. Then follow the provisions which are to be obeyed. Here again words and phrases are used without defining their import. Such as "personal conduct" in the Directive 64/221, article 3 (EEC) which was considered by Pennycuick V-C in *Van Duyn* v *Home Office* [1974] 1 WLR 1107. In case of difficulty, recourse is had to the preambles. These are useful to show the purpose and intent behind it all. But much is left to the judges. The enactments give only an outline plan. The details are to be filled in by the judges.

Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European court in the *Da Costa* case [1963] CMLR 224, 237, they must deduce "from the wording and the spirit of the Treaty the meaning of the community rules". They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight: see *Sociale Verzekeringsbank* v *Van der Vecht* [1968] CMLR 151. They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European court acts".

19.39 Where, however, a Treaty provision or a Community instrument does not have legal effect in the United Kingdom without further enactment but requires to be implemented by United Kingdom legislation, questions may arise as to the manner in which that legislation is to be interpreted. To assist the courts in resolving such questions we make two recommendations. First, *we recommend* that any United Kingdom legislation intended to implement a Treaty provision or a Community instrument should contain a clear statement that it is so intended. Secondly, *we recommend* that it should be made clear that in such a case the courts may, in construing the United Kingdom legislation, take into account the relevant provisions of the Treaty or other instrument to which that legislation is intended to give effect. This would involve enacting the Law Commissions' draft clause 1(1)(*c*) in a somewhat wider form than that in which it is at present cast.

GENERAL CONCLUSIONS

19.40 We do not consider that any question of using the courts to fill in gaps should logically arise from the simpler drafting which we are recommending. The problems will be those of limiting and defining the application of the broad general rules stated in the Act. We do not for a moment suppose that the courts of the United Kingdom would approach legislation drafted in the way we recommend in the spirit of attempting "to pull the language to pieces and make nonsense of it".(*) On the contrary we are sure that they would apply the principle contained in draft clause 2(*a*) of the Law Commissions' clauses (to which we have already referred in paragraph 19.27) that a construction which would promote the general legislative purpose is to be preferred to one which would not.

19.41 We conclude that interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present would present no great problems provided that the underlying purpose and the general principles of the legislation were adequately and concisely formulated. The real problem is one of confidence. Would Parliament be prepared to trust the courts? We refer again to the evidence given to us by Lord Emslie and Lord Wheatley:

"It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This, with respect to them (the Parliamentarians), is wholly unfounded".

Chapter XX

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

20.1 In Chapter I of the Report we discuss the scope of our task and the way we set about it. In Chapters II to V, as a background to our enquiry, we give a brief account of the present machinery for the preparation and publication of legislation, and of its historical development; and in Chapters VI and VII we analyse the problems as we see them and discuss the factors to be taken into account in suggesting remedies. We now summarise briefly the main conclusions reached in the remainder of the Report. Recommendations involving some change in the existing system, whether of law or practice or only of emphasis, are indicated by an asterisk.

20.2 The Government promotes and drafts virtually all the legislation that Parliament enacts. There is therefore a joint responsibility for the condition of our statute law as well as for the volume and scope of the annual output. We stress this because it has an important bearing on our principal conclusions and recommendations, which are as follows:

Chapter VIII—The draftsman's present difficulties

*(1) Consideration should be given to the setting up of a training course in legislative drafting (para 8.16).

*(2) Advice on draft Bills should be sought from specialists in the relevant branches of law (para 8.17).

(3) There should be no large-scale transfer of drafting work away from the Government draftsmen (para 8.18).

*(4) The Law Commission's drafting strength should be restored and indeed further increased at the earliest possible moment (para 8.19).

*(5) At present, the Government draftsmen should assist with only such Private Members' Bills as are likely to reach the statute book; when there are more draftsmen, support should become more generous (para 8.21).

*(6) All available methods should be used to recruit and train more draftsmen as a matter of high priority (para 8.22).

Chapter IX—British and European approaches to legislation

(7) The European legislative tradition has been to express the law in general principles; in this country the tradition has been to specify in detail the application of the law in particular circumstances (para 9.14).

Chapter X—Conflicts

*(8) In principle the interests of the ultimate users should always have priority over those of the legislators; a Bill should be regarded primarily as a future Act (para 10.3).

*(9) More use might be made of examples (in Schedules) showing how a Bill is intended to work in particular situations (para 10.7).

(10) Demands for immediate certainty of legal effect encourage elaboration (para 10.9).

(11) To enact law in the form of general principles alone may, but does not necessarily, simplify its application to particular cases (paras 10.10, 10.11).

(12) Where a Bill has a substantial political or administrative content the demand for immediate certainty of legal effect must be expected to continue: there may however be more scope in private law for legislating by statement of general principle alone (para 10.12).

*(13) The use of statements of principle should be encouraged; where detailed guidance is called for in addition, it should be given in Schedules (para 10.13).

Chapter XI—Drafting techniques

(14) The draftsman should not be forced to sacrifice certainty for simplicity (para 11.5).

*(15) Statements of purpose:

(a) should be used when they are the most convenient method of clarifying the scope and effect of legislation;

(b) when so used, should be contained in clauses and not in preambles (para 11.8).

*(16) There should be no general rule about drafting in short sentences, but there should be as few subordinate phrases as possible before the subject of a legislative sentence or between the subject and its verb (para 11.10).

*(17) There should be no rule or convention precluding the use of a full stop in the middle of a subsection (or of a section without subsections) (para 11.11).

*(18) Long un- "paragraphed" sentences should be avoided (para 11.12).

*(19) A statute should be arranged to suit the convenience of its ultimate users (para 11.13).

*(20) The number and kind of definitions included in a statute must in general be left to the draftsman's judgment, but the definition of an expression by reference to another statute which is obscure or obsolescent should be avoided (paras 11.15-11.16).

*(21) Except in very short Acts, definitions occurring in the body of the Act should always be indexed (para 11.17).

*(22) Ways should be explored of indicating that an expression used in an Act is defined in the Act (para 11.18).

*(23) Internal cross-references should take the form of precise references to numbered provisions, and in big Acts may with advantage include a parenthetical description of the subject matter of the provision referred to (para 11.19).

(24) The increased use of fractions and other simple mathematical formulae is welcomed (para 11.20).

*(25) Provisions implementing European Community obligations should be so printed as to be easily recognisable (para 11.21).

*(26) Other conventions may be preferable for distinguishing passages of other kinds, and the Statute Law Committee should consider what visual aids could be helpful for these purposes (para 11.21).

*(27) The type in which Schedules are printed is inconveniently small and a larger one should be used (para 11.22).

*(28) Schedules of amendments should normally be in tabular form (para 11.23).

*(29) Queen's Printer's copies and *Public General Acts and Measures* should be printed with shoulder notes on each page showing section and, where applicable, Part and Chapter numbers (para 11.24).

*(30) General principles should be set out in the body of a statute, detailed provisions of a permanent kind in Schedules, and details liable to frequent modification in statutory instruments (para 11.25).

*(31) Legislation by reference:

(a) is unobjectionable when it is used to apply to some matter a code originally passed for the purpose of being applied from time to time to that kind of matter;

(b) should not be used where the situation to be dealt with is created or circumscribed by an earlier enactment the relevant provisions of which can simply and shortly be incorporated in the new Act;

(c) is often objectionable when it is used to apply to a new set of circumstances law originally passed for dealing with another set of circumstances;

(d) raises special considerations (discussed in Chapter XIII) when it modifies an existing enactment (paras 11.28-11.31).

Chapter XII—Anglo-Scottish legislation

*(32) Great Britain departments sponsoring Anglo-Scottish Bills should issue instructions to both English and Scottish draftsmen in time to allow adequate consultation between them; the draftsmen should plan the Bill from the start in consultation with each other (para 12.7).

*(33) The draftsmen should be free to produce corresponding but separate provisions (para 12.7).

*(34) Where a minor variant as between England and Scotland occurs within a clause, the technique of using a Scottish substitution or other adaptation should be avoided and the English and Scottish versions should be set out separately (para 12.7).

*(35) Wherever a combined Bill cannot be drafted for both countries without complicated adaptation, legislation enacted in the form of two parallel but separate Acts should be the standard choice (para 12.8).

*(36) Advice should be sought systematically from the English and Scottish draftsmen before any choice is made in favour of a combined Bill, and proper weight should be given to their advice where it is against that choice (para 12.8).

*(37) Consideration should be given to adopting a new procedure (described in para 18.4) for the enactment of separate parallel Acts (para 12.9).

*(38) Where urgency and shortage of Parliamentary time have precluded the introduction of parallel Bills but the combined Act requires an unacceptable degree of alteration to make it suitable for Scotland, a procedure such as is described in paragraph 18.5 should be adopted to permit the speedy re-enactment of a Scottish version (para 12.10).

Chapter XIII—Amending existing legislation

*(39) The needs of the eventual user of the statutes must be given priority over those of the legislator when proposals for amending existing legislation are being framed (para 13.17).

(40) Whilst non-textual amendment often adds to the burdens of the user, a Standing Order requiring all amendments to be drafted textually would not be in his interests, would not be workable, and is not recommended (paras 13.17-13.18).

*(41) The present practice of amending legislation textually wherever convenience permits should be applied as generously as possible (paras 13.20, 13.24).

*(42) Encouragement should be given to the quick reprinting of loose copies of Acts as amended (para 13.20).

*(43) The Keeling Schedule is not capable of wide application, but where one is included in a Bill material proposed to be omitted from an existing enactment should be printed in distinguishing type in the Schedule (para 13.22).

(44) There is a close link between the pace of consolidation and the rate at which textual amendment can have a beneficial effect on the clarity and simplicity of legislation (para 13.23).

*(45) Where a Keeling Schedule or a textual memorandum can assist Members of Parliament or others in understanding textual amendments, such a Schedule or memorandum should be provided whenever it is reasonably practicable to do so (para 13.24).

Chapter XIV—Consolidation

(46) Consolidation is desirable both for the direct benefits it brings and to provide a base for the use of the textual method of amendment (para 14.5).

(47) It would not be practicable to consolidate the whole statute book within a limited number of years, nor to do so on the principle of "one Act, one subject", nor to maintain each such "principal" Act in a state of perpetual consolidation by the exclusive use of textual amendment; moreover Acts framed in this way would not necessarily be clearer or simpler for the user (paras 14.7-14.10).

*(48) The possibility should continue to be explored of recruiting and training for consolidation work lawyers with the necessary aptitudes even though they have not had the full training of Parliamentary draftsmen (para 14.18).

*(49) The Joint Committee on Consolidation Bills should sit in two divisions whenever the flow of such Bills exceeds the Committee's capacity for dealing with them in the usual way (para 14.23).

*(50) Where powers are conferred to amend Acts by Order in Council in order to facilitate consolidation, the exercise of the powers should be made subject to affirmative resolution, and no such resolution should be taken in the Commons until the relevant order had been reported by the Joint Committee on Statutory Instruments (para 14.25).

*(51) Consolidation can easily be upset by policy decisions involving major amendments of the existing law, or even by the prospect of such decisions: in order to lessen this risk, it may be prudent in many cases to select a relatively narrow field of legislation for any one consolidating measure (paras 14.28-14.32).

(52) Responsibility for consolidation should remain with the Law Commissions (para 14.33).

*(53) Whilst a pragmatic approach seems inevitable, and the present pace need not hamper the further introduction of textual amendment, the pace of consolidation should be accelerated (paras 14.34-14.36).

Chapter XV—Explanatory material

(54) The question whether any, and if so what kind of external explanatory material should be provided is best considered separately for each statute, as at present (para 15.2).

*(55) The practice of publishing Green or White Papers in advance of legislation should be extended (para 15.5).

*(56) Explanatory memoranda should, as recommended by the Select Committee on Procedure, provide more information about the Bill (para 15.7).

*(57) The practice should be developed of making available for Committee stage debates in both Houses notes on clauses and similar additional explanatory material (para 15.10).

*(58) A trial should be made, initially with uncontroversial Bills, of printing the explanatory notes opposite the clauses to which they relate (para 15.10).

*(59) White Papers giving detailed explanations of lengthy and complex Bills should be provided more frequently (para 15.11).

(60) The practice of Government departments with regard to post-legislative explanatory material is well developed and appears to serve its purpose adequately (para 15.17).

Chapter XVI—How computers would help

*(61) Computer assisted typesetting would produce greater speed and accuracy in the printing of public Bills at all stages; if adopted at the drafting stage, would enable draftsmen to make use of the computer as a mechanical aid to drafting; and would facilitate the incorporation of the enacted texts into a comprehensive data base of statute law (para 16.26(1) and (2)).

*(62) An information retrieval system giving access to such a data base would be useful to draftsmen and others involved in the preparation of legislation (para 16.26(2) and (3)).

*(63) It would also be useful to others whose duties may require them to search the statute book, particularly in connection with the impact upon it of European Community legislation (para 16.26(4)).

*(64) The text initially recorded in the data base should be that of *Statutes in Force* (para 16.26(5)).

*(65) It should be updated immediately upon the enactment of any new legislation; a system of continued computer-assisted editing of *Statutes in Force* would both facilitate this and make it possible for a new revised edition of any Act to be produced for *Statutes in Force* with less expense and effort, particularly if computer typesetting were used for Queen's Printer's copies of Acts and if these were produced in the same format as *Statutes in Force* (para 16.26(6) and (7)).

*(66) The information retrieval system should include a historical file unless this proved to be prohibitively difficult and costly (para 16.26(8)).

*(67) The completion of *Statutes in Force* by 1980 would enable a computer-linked system, of benefit to the draftsmen, to be set up by the same date (para 16.26(9)).

*(68) The eventual inclusion of subordinate legislation and case law would increase the value of the system to both Government and other users (para 16.26(10)).

*(69) More extensive use of textual amendment should reduce the amount of editorial work required in the production of *Statutes in Force*, and assist in ensuring accuracy, avoiding delay, and reducing costs (para 16.26(11)).

Chapter XVII—Fiscal legislation

(70) The principal reasons for the complexity of fiscal legislation are the tradition of careful differentiation between individual situations and the enactment of specific anti-avoidance provisions aimed at particular kinds of transactions (paras 17.3-17.6).

(71) A change to broader taxing and anti-avoidance rules would involve policy decisions which are outside our terms of reference (para 17.7).

(72) Given the complexity of the underlying legislative scheme the scope for simplifying its statutory expression is limited (para 17.10).

*(73) The basic provisions affecting the majority of taxpayers should nevertheless be framed in relatively simple terms (para 17.10).

*(74) Detailed provisions should be made easier to understand by broad statements of intention (para 17.11).

*(75) The scope of a charge or relief should be stated clearly in general terms at the beginning of the section or group of sections dealing with it (para 17.11).

(76) Mathematical formulae should continue to be used (but should not become elaborate) (para 17.12).

*(77) Definitions should be standardised where no difference in meaning is intended (paras 17.14, 17.16).

*(78) Expressions should not be artificially defined to include alien concepts (para 17.15).

*(79) Where a difference in meaning is intended, different expressions should where practicable be used rather than the same expression differently defined (para 17.16).

*(80) Subject to the requirements of Budget secrecy and the availability of time and resources, consideration should be given to some form of pre-legislative outside consultation on fiscal legislation (para 17.19).

(81) Finance Bills should not be committed in part to a Select Committee (para 17.20).

*(82) Consideration should be given to a procedure enabling corrections and uncontroversial amendments, certified by the Chairman of Ways and Means, to be made to fiscal statutes without debate (para 17.21).

(83) As with legislation on other subjects, the relegation of detailed provisions of a permanent kind to Schedules can help to shorten and simplify the body of an Act (para 17.23).

*(84) Changes in fiscal legislation should wherever practicable be made by directly altering the text of existing enactments, and a less restrictive view should be taken of what amendments it is practicable to effect textually (paras 17.25-17.29).

(85) The necessary system of frequent reprints is already available in *The Taxes Acts* (para 17.30).

(86) A more liberal use of textual amendment would not necessarily enable consolidation to take place less frequently than at the ten-year intervals recommended by the Royal Commission (para 17.32).

Chapter XVIII—Parliamentary procedure and scrutiny of drafting

(87) No change is called for in the practice relating to the choice of short titles for Bills so far as their subject matter is concerned (para 18.2).

(88) The time and effort involved in introducing a separate amending Bill for each Act, where several Acts are to be amended at once, would not be justified. Any difficulties caused to practitioners by combining such amendments in a single Bill should disappear with the completion of *Statutes in Force* (para 18.3).

*(89) There should be a separate, parallel Bill for Scotland wherever a combined Bill cannot be drafted in straightforward terms for both countries.

Consideration should be given to adopting a new procedure (which we describe) for the passage of such parallel Bills through both Houses (para 18.4).

*(90) Where urgency and shortage of Parliamentary time have precluded the introduction of parallel Bills but the United Kingdom Act resulting from a combined Bill requires substantial adaptation to make it workable in Scotland, the provisions which apply to Scotland should be re-enacted, in Scotland-only form, by the shortened procedure applicable to consolidation or preferably by a new procedure enabling the re-enactment to be presented for Royal Assent, as if passed by both Houses, after being reported by a special Joint Committee and not resolved against by either House (paras 18.5-18.6).

*(91) The House of Lords should appoint a committee to which Scotland-only Bills could be committed at the Committee stage (para 18.7).

*(92) As a standard constitutional practice there should be a Scottish lawyer, whether or not a Law Officer, in the ministerial team in the House of Lords (para 18.7).

*(93) The rule of the House of Commons that the scope of a Bill is limited to a particular part of the United Kingdom if, but only if, such a limitation is written into the long title should be abolished (para 18.10).

*(94) Where an Act affects only the law of England and Wales this should be indicated in the short title (para 18.11).

*(95) As an experiment, the practice adopted by the editors of *Statutes in Force* of printing on the title page of each Act the initial letters of the parts of the United Kingdom to which it applies should be extended to Bills and to Queen's Printer's copies of Acts (para 18.13).

*(96) A clearly stated extent clause should ordinarily be included in Bills, and where the extent of a particular clause is different from that of the Bill as a whole this should be indicated in a side note to that clause (para 18.14).

(97) Common form provisions should continue to be grouped together at the end of the statute (para 18.17).

(98) No change is required in the present rules and practice relating to debates on "clause stand part" (para 18.20).

*(99) Provisions relating to financial expenditure should not be printed in italics in Government Bills as introduced in the Commons (para 18.22).

*(100) There should be consultation between the two Houses with a view to submitting agreed proposals for harmonising the form of amendments to Bills (para 18.23).

*(101) The possibility of deferring the re-numbering of clauses until the Royal Assent proof stage should be looked at again when the application of computer techniques to the preparation of legislation has been developed to a greater extent (para 18.24).

*(102) Appropriation and Consolidated Fund Acts which give effect to Supply Resolutions should be abolished, and the Resolutions themselves should be regarded as sufficient authority for the appropriation and spending of grants; but some other means must be found to allow the Commons to pursue the redress of grievances before the granting of the supply (para 18.25).

(103) It should be left to Government departments to decide what advice on the drafting of their Bills they should seek from advisory bodies before presentation (para 18.29).

(104) There is no practical scope for a new stage of scrutiny of drafting during the Parliamentary process (para 18.33).

*(105) Unless there is special urgency there should always be at least:

(a) two week-ends between the first publication of a Bill and the debate on second reading in the first House;

(b) fourteen days between second reading and the start of the committee stage;

(c) on all Bills of considerable length or complexity, 14 days between publication of the Bill as amended in committee and the start of the report stage (para 18.34).

*(106) There should be a procedure for incorporating improvements (including the correction of obvious inaccuracies), certified by the Speaker and the Lord Chancellor to be of a drafting nature, after the passing of a Bill by both Houses and before Royal Assent (para 18.36).

*(107) There should be a procedure, similar to that for consolidation Bills, for the re-enactment of statutes, in whole or in part, with drafting improvements (para 18.38).

*(108) The Lord Chancellor should arrange for the Statute Law Committee to keep the structure and language of the statutes under continuous review (para 18.40).

*(109) The Statute Law Committee should also:

(a) review the carrying into effect of those of our recommendations that are accepted, in particular our recommendation with respect to textual amendment;

(b) publish reports (to be laid before Parliament) from time to time, but not less often than every three years (paras 18.40, 18.41).

*(110) In the main the procedures of Parliament do not in themselves have a detrimental effect on the clarity and simplicity of legislation, but where the drafting of Bills becomes defective because of the application of a procedural rule the Government (and Parliament) have a clear responsibility to set matters right (para 18.42).

Chapter XIX—Interpretation of Statutes

(111) Interpretation influences drafting (paras 19.1-19.2).

*(112) The preparation of a comprehensive new Interpretation Act should be put in hand (para 19.11).

*(113) The following matters should be made generally admissible by statute for the interpretation of Acts of Parliament, as recommended by the Law Commissions:

(a) all indications provided by the Act as printed by authority (para 19.21); and

(b) relevant international agreements and European Community instruments (paras 19.22, 19.39).

They should be given no more weight than is appropriate in the circumstances (para 19.25).

(114) The following should not be made so admissible:

(a) reports of Royal Commissions and similar bodies; and

(b) White Papers and similar documents (para 19.23).

(115) Although Parliament may in any Act declare specified material outside the Act to be admissible for interpreting it, specially prepared explanatory materials should not in general be so declared (para 19.24).

*(116) It should be enacted that those constructions are to be preferred which:

(a) would promote the general legislative purpose (para 19.28);

(b) are consistent with international obligations (para 19.28);

(c) exclude retrospective effect (para 19.32).

*(117) The provisions recommended in sub-paragraphs (113) and (116) above might usefully form part of the comprehensive new Interpretation Act recommended in sub-paragraph (112) (paras 19.31, 19.32).

(118) The rules as to the use of preambles in the interpretation of statutes should not be altered (so as to enable a preamble to control an enactment which is in itself clear and precise) (para 19.33).

(119) The European Communities Act 1972 secures the interpretation in accordance with European Court principles of European Community Treaty provisions and Community instruments that have legal effect in the United Kingdom without further enactment (para 19.38).

*(120) To assist our courts in interpreting United Kingdom legislation intended to implement other European Community Treaty provisions and Community instruments:

(a) such legislation should contain a clear statement that it is so intended; and

(b) relevant Community instruments should be made generally admissible by statute for the interpretation of such legislation; (para 19.39; see also sub-paragraph (113) above).

(121) Interpretation of Acts drafted in a less elaborate style need present no great problems: the real problem is whether Parliament would have sufficient confidence in the courts (para 19.41).

David Renton (Chairman)
Atholl
Bacon
Samuel Cooke
Basil Engholm
J A R Finlay
John Gibson
Peter Henderson
Noel Hutton
Kenneth Mackenzie
Patrick Macrory
S J Mosley
Ivor Richard
Ewan Stewart

A M Macpherson (Secretary)
Robert Cumming (Assistant Secretary) 19 March 1975

1. Note by the Duke of Atholl, Sir John Gibson and Lord Stewart

1. We are in complete agreement with what has been said in Chapter XII of the Report about legislating for two different legal systems in one Act. We think it necessary, however, that we should make an additional point which is highly relevant to ensuring that Scottish statute law is kept free of the strains and distortions referred to by the late Lord Cooper, and recently by Lord Hunter, and generally to maintaining the objectives of clarity and simplicity in that law.

2. It seems likely that some part of the Westminster Parliament's legislative function may eventually be devolved to a Scottish legislature, and we are concerned lest it be thought, if this happens, that the points made by the Committee in Chapter XII will then be less relevant to Westminster law-making than they are at present. This, however, would not be the right view. In the fields of the "retained" subjects departments in Whitehall will continue to promote legislation applying to Scotland as well as to England; and the Scottish element of such legislation, whether it be in a separate Scottish Act or combined with the English element in a single Act, will, as now be part of the law of Scotland. The need in the Westminster machine to have adequate Scottish legal advice at all levels and the participation of Scottish Parliamentary draftsmen (in both cases with the improvements suggested in Chapter XII) will therefore remain. If there is a failure in any new organisation to meet that need and take full account of the Scottish dimension, Westminster additions to the Scottish statute book will continue to give dissatisfaction to judges and practitioners from time to time; and if less than the present standard of legal service is provided, it is all too likely that the quality of such additions will revert to the low level exhibited in the period prior to 1871.

Atholl,
John Gibson,
Ewan Stewart.

2. Note by Sir Basil Engholm, Mr Peter Henderson, Mr Kenneth Mackenzie and Sir Patrick Macrory

1. There is one matter on which some of us wish to make a recommendation additional to those embodied in the Report which we have signed with our colleagues.

2. In paragraph 15.10 of Chapter XV the Committee have recommended that, as an experiment, explanatory notes should be printed on the pages of a Bill opposite the clauses to which they refer, and have suggested that this experiment should be tried with a number of non-controversial Bills, with the purpose of helping users of the Bill to a better understanding of it. These explanatory notes, like explanatory memoranda, would disappear when the Bill became law. In the opinion of those who have signed this Additional Note, users of the Act should also have the opportunity of seeing whether such explanatory notes would be of assistance to them.

3. The main argument against such a step is that this would create, in Professor Reed Dickerson's words, "a split-level statute" and that the lay explanation of the legal language would be less reliable, and could be argumentative. Notes on the clauses of a Bill are always prepared for the assistance of Ministers, and, as the Report points out, these have, on occasion, been made available to Parliament. Such notes need to be, and are, accurate. Moreover, such explanatory notes could, if it were thought desirable, be certified by the Lord Chancellor as being non-argumentative explanations of the sections to which they refer. For these reasons the undersigned do not consider this argument to be conclusive against trying such an experiment.

4. *We therefore recommend* that the experiment with the Bills should be extended to the Acts which they become. This would mean that where, during the trial period, Bills

include explanatory notes, these should, suitably amended to reflect any changes as a result of the Bill becoming an Act, be printed on the pages of the Act opposite the sections to which they refer. We emphasise that we have in mind an experiment only; that we suggest that the notes should be included only in the Queen's Printer's copy of the Act, not in the bound volumes of the statutes (which are already big enough); and that they should be introduced by a statement, similar to the statement printed at the beginning of explanatory notes to statutory instruments, to the effect that the notes do not form part of the Act.

Basil Engholm
Peter Henderson
Kenneth Mackenzie,
Patrick Macrory.

3. Note by Sir Samuel Cooke and Sir Noel Hutton

In paragraph 15.10 the Committee recommend that a trial should be made, initially with uncontroversial Bills, of printing explanatory notes opposite to the clauses to which they refer. A similar suggestion was considered but not commended by the Select Committee on Procedure in paragraph 63 of their Second Report for 1970-71. The Select Committee's reason for advising against the suggestion was that it would be difficult to exclude argumentative matter from the explanatory notes. We, the undersigned, are in agreement with the Select Committee's conclusion for the reason which they gave. We are therefore not in agreement with the final recommendation in paragraph 15.10 of the Report of our own Committee. As for the further suggestion, favoured by some of our number, that explanatory notes be printed with an Act opposite the sections to which they refer, we think it would open the way to much uncertainty in the construction of Acts of Parliament. It could also give rise to serious editing and publishing problems.

Samuel Cooke
Noel Hutton

APPENDIX A

LIST OF WITNESSES

	Written Evidence	*Oral Evidence*
THE JUDICIARY		
The Rt Hon Viscount Dilhorne	*	
The Rt Hon Lord Gardiner	*	*
The Rt Hon Widgery, OBE TD, Lord Chief Justice of England		
The Rt Hon Lord Simon of Glaisdale	*	*
The Rt Hon Lord Kilbrandon		
The Rt Hon Lord Edmund-Davies	*	
The Rt Hon Lord Emslie, Lord President of the Court of Session	*	*
The Rt Hon Lord Denning, Master of the Rolls		*
The Rt Hon Sir Robert Lowry, Lord Chief Justice, Northern Ireland	*	
The Rt Hon Sir George Baker OBE, President of the Family Division	*	*
The Rt Hon Lord Wheatley, Lord Justice Clerk	*	*
The Rt Hon Lord Justice Russell	*	
The Rt Hon Lord Justice Orr	*	
The Rt Hon Lord Justice Scarman OBE		
The Hon Mr Justice Megarry	*	
Sir Robert Micklethwait, QC, Chief National Insurance Commissioner	*	
GOVERNMENT		
Council on Tribunals	*	
Sir Charles Davis CB	*	
Sir John Fiennes KCB QC		*
Foreign and Commonwealth Office	*	
Joint Committee on Consolidation Bills	*	
Sir Stanley Krusin CB		
Lord President of the Council	*	
Mr W A Leitch CB		
Mr S F Martin CBE	*	
Mr G I Mitchell CB QC	*	*
Sir Charles Sopwith	*	
Sir Anthony Stainton KCB	*	*
LEGAL BODIES		
Faculty Advocates	*	*
General Council of the Bar	*	
Holborn Law Society	*	
Law Commission	*	
Law Society	*	

Law Society of Scotland	*	*
Scottish Law Commission	*	
Society for Computers and Law	*	
Society of Parliamentary Agents	*	
Society of Public Teachers of Law	*	
Statute Law Society	*	*
OTHER REPRESENTATIVE BODIES		
Accountants' Joint Parliamentary Committee	*	
Confederation of British Industry		
Food Manufacturers Federation	*	
Institute of Taxation	*	
National Citizens' Advice Bureau Council	*	
National Farmers' Union	*	
Police Superintendents' Association of England and Wales	*	
Trades Union Congress	*	
INDIVIDUALS		
Mr F C S Bayliss		
Mr F A R Bennion	*	*
Mr R J Brien	*	
Professor Otto Kahn-Freund QC	*	*
Professor D Lasok	*	
The Rt Hon Lord Merthyr KBE TD	*	
Professor J D B Mitchell CBE	*	*
The Rt Hon Lord Molson	*	
Mr R W Perceval TD	*	*
Mr Ian Percival QC MP	*	*
Mr Peter Rees QC MP	*	
Mr C R Seaton, Secretary of the Industrial Relations Court	*	
Mr Paul Sieghart	*	
Mr Robert H F Smyth	*	
Professor B A Wortley OBE QC	*	
OVERSEAS		
Mr Felix R D Bandaranaike, Minister of Justice, Sri Lanka	*	
Professor Reed Dickerson, Indiana University		*
Professor Elmer A Driedger QC, University of Ottawa		*
Mr J P McVeagh CMG, Chief Parliamentary Counsel, Wellington	*	
Parliamentary Counsel, Canberra	*	
Mr S J Skelly, Director of Jurimetrics, Department of Justice, Ottawa		*

APPENDIX B

SOME JUDICIAL CRITICISMS OF DRAFTING

(CHAPTER VI, PARAGRAPH 6.4)

Statute	*Text*	*Cases*	*Nature of criticism*
1. Finance Act 1960, section 28(1) (now Income and Corporation Taxes Act 1970, section 460(1))	"28.—(1) Where— (a) in any such circumstances as are mentioned in the next following subsection, and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions: Provided that this section shall not apply to him if— (i) the transaction or transactions in securities were carried out, and (ii) any change in the nature of any activities carried on by a person, being	Greenberg v IRC [1972] AC 109, 145	"The meaning of 'carried out' in the body of this subsection must be 'effected' because the purpose of a transaction, bona fide or otherwise, could only be ascertained at its inception and could not await the conclusion of the transaction. But ... the ordinary and natural meaning of 'carried out' is 'implemented'. Moreover, the interpretation of 'carried out' must be considered in the context of the whole of section 28. The operation of 'dividend stripping' necessarily consists of a number of transactions, all leading to achieve the result of tax avoidance. This is shown by the reference to 'combined effect of two or more' transactions in the body of section 28(1). In these circumstances I am driven to the conclusion that the words 'carried out' have a different meaning in the body of section 28(1) from that which they have in the proviso. This, of course, is an unhappy conclusion to reach but draftsmen, like Homer, sometimes 'nod' and perhaps in the unnecessary complexity of section 28 this is not surprising. It appears to me that 'carried

Statute	*Text*	*Cases*	*Nature of criticism*
	a change necessary in order that the tax advantage should be obtainable, was effected, before the fifth day of April, nineteen hundred and sixty."		out' in the proviso must have this wider meaning of 'implemented'... If it did not have this wider meaning the purpose of the section would be very largely defeated. A transaction which had only entered its initial stage of an agreement prior to April 5, 1960, would be protected by the proviso although the tax advantage might not be obtained until some time after April 5, 1960." (per Lord Guest).
2. Limitation Act 1963, section 7(3)	"(3) In this Part of this Act any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say— (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action; (b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty; (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable."	Central Asbestos Co Ltd v Dodd [1973] AC518, 529, 531-534, 553	"Normally one expects to be able to find at least some clue to the general purpose and policy of an Act by reading it as a whole in light of the circumstances which existed when it was passed or of the mischief which it must have been intended to remedy. But here I can find none. The obscurity of the Act has been frequently and severely criticised... [As to section 7(3) I find it impossible, even after the able arguments which were submitted to us, to discover or even surmise what the draftsman can have had in mind when he drafted this subsection in this way. I have already pointed out that before a plaintiff can reasonably bring his action he must know four things: (1) the nature and extent of his injuries; (2) what the defendant did; (3) causation of the former by the latter; and (4) that what the defendant did was wrongful. These four elements are inextricably confused in (a), (b) and (c) in this subsection... Normally one assumes that when

Statute	*Text*	*Cases*	*Nature of criticism*
			the same word ['negligence'] is used twice or more in the same section it has the same meaning. But in such a welter of bad drafting as one finds here that would be a very unsafe assumption. * * * * * * * * * * * * * * On the whole matter the Act is so obscure that I do not think it possible to form a confident opinion." (per Lord Reid). "This Act has been before the courts on many occasions during its comparatively short life. I do not think there are many judges who have had to consider it who have not criticised the wholly unnecessary complexity and deplorable obscurity of its language. It seems as if it was formulated to disguise rather than reveal the meaning which it was intended to bear" (per Lord Salmon).
3. Finance Act 1965, section 15(9) (now Income and Corporation Taxes Act 1970, section 411(9)).	"(9) Nothing in this section shall be taken as precluding the deduction of expenses incurred in, or any claim for capital allowances in respect of the use of an asset for, the provision by any person of anything which it is his trade to provide, and which is provided by him in the ordinary course of that trade for payment or, with the object of advertising to the public generally, gratuitously."	Associated Newspaper Group Ltd v Fleming [1973] AC 628, 639, 642	"The appellants admit that but for subsection (9) they would have no case... On reading it my first impression was that it is obscure to the point of unintelligibility and that impression has been confirmed by the able and prolonged arguments which were submitted to us... I have suggested what may be a possible meaning, but if I am wrong about that I would not shrink from holding that the subsection is so obscure that no meaning can be given to it." (per Lord Reid). "... justly described by Lord Denning MR as being 'very obscure'..." (per Lord Morris of

Statute	*Text*	*Cases*	*Nature of criticism*
4. Immigration Act 1971, Sections 1(2), 2(3)(d), section 33(1), (2)	section 1 "(2)... indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under the provisions of this Act from the provisions relating to leave to enter or remain)." Section 2(3) "(d) ... references to a person being settled in the United Kingdom... are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain." Section 33 "(1) For purposes of this Act, except in so far as the context otherwise requires— * * * * * 'immigration laws' means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom... 'settled' shall be construed in accordance with section 2(3)(d) above... (2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident	R v Governor of Pentonville Prison ex p Azam [1974] AC 18, 59, 71, 72	Borth-y-Gest). "The machinery which has been used in order to effect the detention of the appellants is set out in a complicated series of provisions in the Act of 1971. I regret that in a matter which affects directly so many individuals so labyrinthine a path requires to be followed. I shall not attempt to trace its windings, for to do so would obscure the relatively compact points on which the appeals depend." (per Lord Wilberforce). "Whether or not an Act should be retrospective in its effect is a matter for the decision of Parliament alone... I feel bound, however, to express concern that the draftsmen of this Act should have chosen to achieve its retrospective effect through a labyrinth of verbiage which may well have been as perplexing to many of those who had to consider it in Parliament as it undoubtedly was to those whom it may have deprived of their constitutional rights... It would surely have been easier, far more satisfactory and fairer to have made this plain by express language in one of the main sections of the Act. It is impossible to ignore the danger that the unnecessarily circuitous and complicated fashion in which the power to act retrospectively was conferred (if it was conferred by the Act) may have concealed the very existence of that power." (per Lord

Statute	*Text*	*Cases*	*Nature of criticism*
	in the United Kingdom ... at a time when he is there in breach of the immigration laws."		Salmon).
5. Maintenance Agreements Act 1957, section 1(3)	"(3) Where an agreement to which this section applies is for the time being subsisting and the parties thereto are for the time being either both domiciled or both resident in England, and on an application by either party the High Court or, subject to the next following subsection, a magistrates' court is satisfied either— (a) that by reason of a change in the circumstances in the light of which any financial agreements contained in the agreement were made or, as the case may be, financial arrangements were omitted therefrom, the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements; or (b) that the agreement does not contain proper financial arrangements with respect to any child of the marriage, the court may by order make such alterations in the agreement by varying or revoking any financial arrangements contained therein or by inserting therein financial arrangements for the benefit of one of the parties to the agreement or of a child of the marriage as may appear to the court to be just having regard to all the circumstances or, as the case may be, as	Gorman v Gorman [1964] 1 WLR 1440, 1444 (CA)	"I have had occasion to say before... and I will repeat, that the language of section 1(3) is far from happily chosen, and for myself I do not find it altogether easy to construe." (per Willmer LJ).

Statute	*Text*	*Cases*	*Nature of criticism*
	may appear to the court to be just in all the circumstances in order to secure that the agreement contains proper financial arrangements with respect to any child of the marriage; and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration. Provided that this subsection shall not apply to an agreement made more than six months after the dissolution or annulment of the marriage."		
6. Land Compensation Act 1961, section 6(1)	"6.—(1) Subject to section 8 of this Act, no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if— (a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land; and (b) (where the circumstance are those described in one or more of paragraphs 2	Camrose (Viscount) v Basingstoke Corporation [1966] 1 WLR 1100, 1110 (CA)	"The drafting of this section appears to me calculated to postpone as long as possible comprehension of its purport." (per Russell LJ).

Statute	*Text*	*Cases*	*Nature of criticism*
	to 4 in the said first column) the area or areas referred to in that paragraph or those paragraphs had not been defined or designated as therein mentioned."		
7. Road Safety Act 1967, section 2(1)	"2.—(1) A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause— (a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion; Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence."	R v Sakhuja [1973] AC 153, 171, 197	"Notwithstanding its really remarkably loose draftsmanship, it is not intended, though unfortunately it has been too often understood, to provide for guilty motorists numerous ingenious escape routes based on narrow interpretations of the Act thought out by their legal advisers." (per Lord Hailsham LC). "I am, however, happy to say that, in my view, the true meaning of this not very felicitously worded statute does not lead to the result for which the appellant contends." (per Lord Salmon). ["person driving or attempting to drive"]
8. Theft Act 1968, section 16	"16.—(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years. (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where— (a) any debt or charge for which he makes himself liable or is or may become liable	R v Turner [1973] 3 WLR 352, 354, 357 (HL)	"This section was new and throughout the years that have passed since its enactment there has been acute controversy as to its meaning and effect. I am not surprised at that. At first sight it may look simple, but the more it is examined the greater are the difficulties in finding its proper construction. It is clear that it was intended to widen the scope of the existing law, but I cannot deduce from its terms or from anything else in the Act any clear indication of the extent of the change which

Statute	*Text*	*Cases*	*Nature of criticism*
	(including one not legally enforceable) is reduced or in whole or in part evaded or deferred; or (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement in the terms on which he is allowed to do so; or (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting. (3) For the purposes of this section 'deception' has the same meaning as in section 15 of this Act."		was intended... The first part [of subsection (2)] is drafted in an unusual way. Does it mean that in the cases set out in heads (a), (b) and (c) a pecuniary advantage is to be deemed to have been obtained, so that it is irrelevant to consider whether in fact any such advantage was obtained, and equally irrelevant to prove that nothing in the nature of pecuniary advantage was in fact obtained by the accused? I think that must be its meaning though I am at a loss to understand why that was not clearly stated... I would allow this appeal and restore the conviction of the respondent. I would add that it is extremely unfortunate that an important new criminal provision should be drafted in the form of section 16. It is possible that the section was amended at some stage during the passage of the Bill. But even so, I would hope that ways can be found of drafting such provisions in a form which does not require elaborate and ratified analysis to discover their meaning. Not every lawyer has the aptitude or the leisure for that task and few laymen could attempt it. No doubt any attempt to make such provisions readily intelligible would require them to be greatly expanded, but surely any disadvantage arising from that would be trifling in comparison with the advantage of making them intelligible to more than a minute proportion

Statute	*Text*	*Cases*	*Nature of criticism*
9. Leasehold Reform Act 1967, section 9(1), as amended by Housing Act 1969, section 82	"(1) Subject to subsection (2) below, the price payable for a house and premises on a conveyance under section 8 above shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller [(with the tenant and members of his family who reside in the house not buying or seeking to buy)], might be expected to realise on the following assumptions:— (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy but on the assumption that this Part of this Act conferred no right to acquire the freehold, and if the tenancy has not been extended under this Part of this Act, on the assumption that (subject to the landlord's right under section 17 below) it was to be so extended; (b) on the assumption that (subject to paragraph (a) above) the vendor was selling subject, in respect of rent charges and other rents to which section 11(2) below applies, to the same annual charge as the conveyance to the tenant is to be subject to, but the purchaser would otherwise be effectively exonerated until the termination of the tenancy from any liability or charge in respect of tenant's	Custins v Hearts of Oak Benefit Society (1969) 209 Estates Gazette 239, 241 (Lands Tribunal)	of Her Majesty's subjects to whom they are addressed." (per Lord Reid). "Presumably someone persuaded the majority of both Houses of Parliament that these provisions provided a reasonably clear basis of valuation. Alas, they underestimated the ingenuity of lawyers and surveyors... We cannot escape from the conclusion that if Parliament meant to exclude the sitting tenant it could and would have said so in clear terms." [These comments were on the section as originally enacted. The words shown opposite in square brackets were later added to the section, by the Act of 1969, so as to exclude the sitting tenant].

Statute	*Text*	*Cases*	*Nature of criticism*
	incumbrances; and (c) on the assumption that (subject to paragraphs (a) and (b) above) the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to section 10 below. [The reference in this subsection to members of the tenant's family shall be construed in accordance with section 7(7) of this Act.]"		
10. Landlord and Tenant Act 1954, section 24A(3) (added by Law of Property Act 1969, section 3(1))	"(3) In determining a rent under this section the court shall have regard to the rent payable under the terms of the tenancy, but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the tenancy were granted to the tenant by order of the court."	Regis Property v Lewis & Peat Ltd [1970] 3 WLR 361, 364	"... conceded on both sides to be a somewhat obscure subsection." (per Stamp J).
		English Exporters v Eldonwall Ltd [1973] 2 WLR 435, 444, 449, 451	"I share to the full the sentiments expressed by Stamp J as to the difficulties of construing section 24A(3). Indeed I would add my own comment that the term 'have regard' is almost of necessity bound to create difficulties. How much regard is to be had, and what weight is to be attached to the regard when it has been had? ... The section is indeed puzzling... Obvious though my reasons for regretting the length of this judgement must be, part of the responsibility may not unfairly be laid at the door of Parliament." (per Megarry J)."

APPENDIX C

CONSOLIDATION ACTS

PREPARED FOR THE LAW COMMISSIONS 1965-1974

(CHAPTER XIV)

1965	All consolidation Bills enacted in 1965 were in preparation before the setting up of the Law Commissions.
1966	Housing (Scotland) Act (c.49) (Scottish Law Commission) Mines (Working Facilities and Support) Act (c.4) Sea Fisheries Regulation Act (c.38)
1967	Advertisements (Hire-Purchase) Act (c.42) Air Corporations Act (c.33) Development of Inventions Act (c.32) Forestry Act (c.10) General Rate Act (c.9) Industrial Injuries and Diseases (Old Cases) Act (c.34) Legal Aid (Scotland) Act (c.43) (Scottish Law Commission) Plant Health Act (c.8) Police (Scotland) Act (c.77) (Scottish Law Commission) Road Traffic Regulation Act (c.76) Sea Fish (Conservation) Act (c.84) Sea Fisheries (Shellfish) Act (c.83) Teachers' Superannuation Act (c.12)
1968	Capital Allowances Act (c.3) Courts-Martial (Appeals) Act (c.20) Criminal Appeal Act (c.19) Criminal Appeal (Northern Ireland) Act (c.21) Export Guarantees Act (c.26) Firearms Act (c.27) Housing (Financial Provisions) (Scotland) Act (c.31) (Scottish Law Commission) New Towns (Scotland) Act (c.16) (Scottish Law Commission) Provisional Collection of Taxes Act (c.2) Rent Act (c.23)
1969	Customs Duties (Dumping and Subsidies) Act (c.16) Late Night Refreshment Houses Act (c.53) Trustee Savings Bank Act (c.50)
1970	Income and Corporation Taxes Act (c.10) Sea Fish Industry Act (c.11) Taxes Management Act (c.9)
1971	Attachment of Earnings Act (c.32) Coinage Act (c.24) Guardianship of Minors Act (c.3) Hydrocarbon Oil (Customs and Excise) Act (c.12) National Savings Bank Act (c.29) Prevention of Oil Pollution Act (c.60)

Rent (Scotland) Act (c.28) (Scottish Law Commission)
Town and Country Planning Act (c.78)
Tribunals and Inquiries Act (c.62)
Vehicles (Excise) Act (c.10)

1972 Betting and Gaming Duties Act (c.25)
Contracts of Employment Act (c.53)
Land Charges Act (c.61)
Local Employment Act (c.5)
National Debt Act (c.65)
Poisons Act (c.66)
Road Traffic Act (c.20)
Summer Time Act (c.6)
Town and Country Planning (Scotland) Act (c.52) (Scottish Law Commission)

1973 Costs in Criminal Cases Act (c.14)
Independent Broadcasting Authority Act (c.19)
Matrimonial Causes Act (c.18)
Powers of Criminal Courts Act (c.62)

1974 Legal Aid Act (c.4)
Slaughterhouses Act (c.3)
Juries Act (c.23)
Friendly Societies' Act (c.46)
Insurance Companies Act (c.49)
Solicitors' Act (c.47)

APPENDIX D

EXPLANATORY AIDS PROVIDED FOR THE LOCAL GOVERNMENT ACT 1972

(Chapter XV)

I. Before the introduction of the Bill

1. White Paper February 1971.
2. Press release on White Paper.
3. Circulars on new areas (see Note (a)).
4. Consultative documents provided for Local Authority Associations (see Note (b)).

II. During the passage of the Bill

1. (a) Introduction of Bill - general regional extracts.
   (b) Appointment of Lord Greenwood as Chairman of the Staff Commission designate.
   (c) Appointment of Secretary of the Staff Commission
   (d) Boundary Commission designates's proposals for non-metropolitan districts.
   (e) Appointment of some members of Staff Commission.
   (f) Endorsement of Staff Commission advice.
   (g) Circular 68/72 - Preparatory arrangements.
   (h) Appointment of other members of the Staff Commission.
2. Circulars on new areas and preparatory arrangements.
3. Documents published by the Local Government Boundary Commission (see Note (c)).
4. Consultative documents provided for Local Authority Associations.
5. Notes on clauses as well as maps and explanatory material on major amendments were made available to Members of the Commons Standing Committee and to Peers generally for Committee Stage debates.

III After Royal Assent

1. Press releases—
   (a) Appointment of Boundary Commissioners.
   (b) Appointment of Staff Commissioners.
   (c) Boundary Commission recommendations on the areas of new district councils.
   (d) Circular 121/172, explaining the 1972 Act.
   (e) Names for new Metropolitan Districts.
   (f) Agency arrangements.
   (g) Final decision on the areas of the new districts.
   (h) Names of Metropolitan Districts.
   (i) Status of authorities and civil dignitaries.
   (j) Memorandum on transfer of property.
   (k) Successor parishes.
   (l) Protection of staff.
2. Circulars by—
   (a) DOE.
   (b) Home Office

(c) DES.

(d) DHSS.

(e) Staff Commission (inc. Bulletins).

(f) Boundary Commission documents.

3. Consultative documents provided for Local Authority Associations.

4. National advertising campaign (see Note (d)).

5. Maps of new areas-priced documents available upon request from DOE.

Notes

(a) *Circulars* generally were directed at "affected interests". These were mainly local authorities, but might include others, such as, for example, professional groups.

(b) *Consultative documents* were usually formerly addressed to the Local Authority Associations, although they might also be sent to bodies representing other interests, eg local government staffs. The Associations normally made these papers available to all member local authorities.

(c) *Documents published by the Boundary Commission.* These were HMSO publications, and included draft proposals, of general public interest, regarding the new district patterns, and reports to the Secretary of State.

(d) A national *advertising campaign* to encourage voting in the first elections was undertaken in the Spring of 1973, and again in the Spring of 1974 to explain the new system at the time it came into operation. 1,500,000 free pamphlets explaining the new local government system were issued to the public via local authorities.

INDEX

References are to paragraph numbers

C

FOOTNOTES - Index

Para 1.1
(*) HC 538, paragraph 68.
(**) HC Deb., 656, cc 95-6.

Para 1.3
(*) Report from the Joint Committee on Delegated Legislation, 1971-72 (HL 184; HC 474); Second Report from the Joint Committee on Delegated Legislation, 1972-73 (HL 204; HC 468).

Para 2.3
(*) It will be apparent that there is not in the physical sense a single book containing all the statutes. In this report we use the expression "the statute book" to mean, according to context, the surviving body of enacted public law or the volumes published by authority in which it is for the time being set out.
(**) We were told that in July 1973 nearly 200 of the public general Acts in force were consolidation Acts.
(***) HL Deb., 349, c940.

Para 2.4
(*) The first Commons Bill in English was of 1414.
(**) Allen, *Law in the Making*, Seventh Edition, p.482.

Para 3.10
(*) This was authorised by a resolution of the House of Commons on 29 November 1971 pursuant to a recommendation in the Second report from the Select Committee on procedure, 1970-71 (HC 538), paragraphs 56 and 70(26).

Para 5.7
(*) A "printing clause" is a statutory provision for the reprinting of an Act with amendments or additions carried into place and repealed matter omitted. "Printing clauses" have been rare; those still in force occur in the Administration of Justice Act 1928 (section 20(5)), the House of Commons Disqualification Act 1957 (section 5(2), as extended by the Ministers of the Crown Act 1964 (section 5(2)), and the Land Compensation (Scotland) Act 1973 (section 81(2)). In all these instances the terms of the provision require the text of the reprint to be prepared and certified by the Clerk of the Parliaments.

Para 5.20
(*) Starting with the 1974 volumes, Tables of Destinations are also included.

Para 5.25
(*) The 1974 edition is in four volumes.

Para 5.32
(*) EEC Treaty, Article 191; EURATOM Treaty, Article 163.

Para 6.1
(*) An unofficial body of statute users whose aim is to press for improvements in the drafting and publication of statute laws.

Para 6.3
(*) Professor G S A Wheatcroft, *Estate Duty Relief for Spouses and Charities* [1973] *British Tax Review* p207, at p 242.

Para 6.15
(*) H H Marshall and N S Marsh, *Case Law, Codification and Statute Law Revision* (1965).

Para 7.9
(*) Ilbert, *Legislative Methods and Forms* (Oxford 1901), pp 241-2.

Para 8.16 (*) The course, which can lead to a Master's degree in law, is divided into lectures (on aspects of legislation other than drafting) and seminars (devoted to theoretical and practical instruction in legislative expression). The weekly exercises set for the seminars are progressively more difficult, moving from the analysis and re-casting of existing legislative provisions to original drafting on instructions, and students' drafts are all discussed and criticised by Professor Driedgar at the seminars. towards the end of the course students are required to re-write some of their earlier drafts in the light of experience gained during the course, and these re-drafts are discussed by the Professor with each student individually. There are written examinations on the material covered by the lectures, but students are graded on their seminar work according to the Professor's judgement of the quality of their work throughout the year and the progress they have made. In each year the course comprises from 4 to 6 Canadian students, the balance coming from other Commonwealth countries.

Para 8.18 (*) *Legislative Drafting in London and Washington* [1959] *Cambridge Law Journal*, p 49.

Para 9.5 (*) Legal Adviser to the House of Commons Select Committee on European Secondary Legislation.

Para 9.7 (*) Legal Adviser to the Select Committee of the House of Lords on the European Communities.
(**) Director of the Centre for European Legal Studies, University of Exeter.

Para 9.11 (*) Brinkhorst and Schermers, *Judicial Remedies in the European Communities*, p 22 (quoted by Sir Charles Sopwith).

Para 10.1 (*) Sir Noel Hutton, (1961) 24 *Modern Law Review*, p 21.

Para 10.5 (*) See Chapter VIII.

Para 10.7 (*) *Dockers' Labour Club and Institute Ltd. v Race Relations Board* [1974] 3 W.L.R. 533.

Para 10.9 (*) Sir Ernest Gowers, *The Complete Plain Words* (Penguin Books, 1968), pp 18-19.

Para 10.12 (*) The implications of both methods of drafting in fiscal legislation are discussed in Chapter XVII.

Para 11.1 (*) Cambridge University Press, 1916.

Para 11.3 (*) HC Deb, 867, cc 1545, 1551, 1573.

Para 11.11 (*) Although there was a period when the internal full stop was fairly common (there are, for instance, a number of occurrences in the Sale of Goods Act 1893), it now hardly occurs except where (as in section 236(9) of the Local Government Act 1972) it

precedes a new but unnumbered paragraph.

Para 11.14 (*) Practical Legislation (1902), pp 96-97.
(**) Driedger, *Composition of Legislation*, p 106; Dickerson, *Legislative drafting*, p56; Thornton, *Legislative Drafting*, pp 130-133.
(***) *Practical Legislation* (1902), pp 96-97.

Para 11.21 (*) HL, 1972-73, paragraph 116.

Para 11.25 (*) HC 538, 1970-71, Appendix C, paragraphs 11 and 12.

Para 11.26 (*) HL 204, HC 468

Para 11.28 (*) Printed in the *Journal* of that Society for 1935 at pages 9 to 45.

Para 11.30 (*) Law of Property Act 1925, section 110(2).
(**) Law of Property Act 1925, section 199(1).

Para 12.1 (*) At present on of the Parliamentary Counsel happens to be a member of the Scottish Bar as well as of the English Bar; but this is not a required qualification.
(**) *The Scottish Legal Tradition* (1949).
(***) Commission on the Constitution, Written Evidence, Vol 5, Scotland (HMSO, 1972), p 15.
(****) *The Scotsman*, 3 March 1975, p 5.

Para 12.6 (*) This rule is, however, by no means universally applicable and is perhaps irrelevant when comparing a Scottish provision with a corresponding English provision. Cf. dicta of Lord Reid in *Watson v. Fram and Winget*, 1960 SC(HL) 92 at 107, and of Denning and Parker L.JJ. in *R. v. Minister of Agriculture and Fisheries (ex parte Graham)*, [1955] 2 QB 140 at 162 and 168, and of Lord Reid in *Central Asbestos Co. v Dodd* [1973] AC518 at p 532C.

Para 13.6 (*) Ilbert, *Legislative Methods and Forms* (Oxford 1901), p 259.

Para 14.15 (*) *Report from the Select Committee on Acts of Parliament*, Minutes of Evidence, Q 1648, Q 1759, Q 1762.

Para 15.6 (*) Erskine May, 18th Edition, p 481.

Para 15.7 (*) HC 538 paragraph 22.
(**) HC Deb, 825, c650.

Para 15.8 (*) HL 204, HC 468.

Para 15.9 (*) HC Deb, 810, cc 1165-6.
(**) Report on Nullity of Marriage HC 164, 1970-71.
(***) HC 538, paragraph 63.

Para 15.11 (*) Ibid, paragraph 22.

Para 17.2	(*) Cmd 8761, 9105, 9474. (**) Cmd 5131, 5132.
Para 17.3	(*) Cmd 9474, paragraphs 1085, 1086, 1088. (**) Cmd 9474, paragraph 1088.
Para 17.4	(*) Cmd 5131, paragraph 23.
Para 17.5	(*) Cmd 9474, paragraph 1016. (**) Cmd 9474, paragraph 1017. (***) Cmd 9474, paragraph 1019.
Para 17.6	(*) Cmd 9474, paragraph 1020. (**) Cmd 9474, paragraphs 1021-1025. (***) Cmd 9474, paragraph 1028. (****) Cmd 9474, paragraph 1029(4). (*****) Cmd 9474, paragraph 1029(1).
Para 17.8	(*) Cmd 5131, paragraph 26.
Para 17.9	(*) Cmd 9474, paragraph 1087. (**) Cmd 9474, paragraph 1080. (***) Cmd 9474, paragraph 1089(5).
Para 17.11	(*) Cmd 9474, paragraph 1089(5).
Para 17.12	(*) Cmd 9474, paragraph 1089(5).
Para 17.16	(*) See Chapter XIX, paragraphs 19.4 to 19.11. (**) A computerised statute book might help; see Chapter XVI, paragraph 16.26(2).
Para 17.17	(*) Cmd 9474, paragraph 1029(4).
Para 17.20	(*) HC 538, paragraphs 29, 70(12). (**) HC Deb, 825, c 650.
Para 17.22	(*) Cmd 5131, paragraph 26.
Para 17.23	(*) Cmd 5132. (**) Cmd 5131, paragraphs 27-28.
Para 17.31	(*) See paragraph 17.30.
Para 17.32	(*) Cmd 9474, paragraph 1089(3).
Para 17.33	(*) Cmd 5132. (**) Cmd 9474, paragraph 1089(1).
Para 18.6	(*) Commission on the Constitution, Written Evidence, Vol 5, Scotland (HMSO, 1972), p 30, paragraph 9.
Para 18.20	(*) eg Sixth Report from the Select Committee on Procedure 1966-

Para 19.38 (*) [1974] 3 WLR 202, at p 215.

Para 19.40 (*) See the judgement of Denning L J (as he then was) in *Magor and St Mellons Rural District Council v Newport Borough Council* [1950] 2 A11 ER 1226, at p 1236.

67 (HC 539), paragraph 24.

Para 18.25 (*) HC 122, p ix, paragraph 14.

Para 18.27 (*) HC 538, paragraph 9.

Para 19.1 (*) *the Interpretation of statutes* (Law Com No 21) (Scot Law Com No 11).

Para 19.6 (*) See paragraph 11.28.

Para 19.7 (*) first Parliamentary Counsel 1953-56.

Para 19.9 (*) This presumption is not universal: in Scotland, at least in relation to some categories of legislation, there is no inherent unlikelihood that it is Parliament's intention to bind the Crown.
(**) 16 *Northern Ireland Legal Quarterly*, p 236. Mr Leitch was until recently First Parliamentary Draftsman at Stormont.

Para 19.11 (*) *The Interpretation of Statutes*, paragraph 82.

Para 19.12 (*) The *Interpretation of Statutes*, paragraph 79.
(**) Ibid, paragraph 81.

Para 19.22 (*) *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116.
(**) See *Ellerman Lines v Murray* [1931] AC 126, and Lord Denning's explanation of that case in *Corocraft Ltd v Pan American Airways Inc.* [1968] 3 WLR 1273, at p 1281.

Para 19.23 (*) See *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* as reported in *The Times*, 7 March 1975.

Para 19.35 (*) EEC Treaty, Article 189; EURATOM Treaty, Article 161. The terminology of the ECSC Treaty is not identical, but there are similar distinctions between the effects of different categories of instruments.
(**) *Van Gend en Loos v. Nederlandse Belastingadministratie* [1963] CMLR 105; *Grad v. Finanzamt Traunstein* [1971] CMLR 1; *SACE V Italian Ministry of Finance* [1971] CMLR 123; *Application des Gaz SA v Falks Veritas Ltd* [1974] 2 CMLR 75 (CA); *Van Duyn v Home Office* [1975] 1 CMLR 1.

Para 19.37 (*) The Court of Justice of the European Communities has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of Community institutions; national courts are enabled, and a final national court is required, to refer any such question to the Court of Justice in any case where the national court considers a decision on the question to be necessary to enable that court to give judgement: EEC Treaty, Article 177; *H P Bulmer Ltd. v J Bollinger SA* [1974] 3 WLR 202, [1974] 2 CMLR 91.