

Keeping the Statute Book up-to-date—A personal view

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Introduction

Since legislation incorporates the norms by which society operates, its availability in an up-to-date, accessible and coherent form is crucial for the orderly and effective functioning of society and in particular for the rule of law. From the perspective both of the state and its citizens, it is vital that up-to-date versions of legislation relevant to an issue that concerns them are capable of being identified and accessed. If legislation is not readily and immediately accessible, finding it will prove to be a task that is beyond not only lay people but also competent and experienced lawyers.

Ideally, legislation should be published in a manner that will facilitate its being identified and located by members of the public. Ensuring this outcome should be relatively straight forward. Unfortunately, this is by no means always the case, as I shall try to show in this paper.

An initial problem faced by someone searching for the relevant legislation on a particular topic is that it is not necessarily to be found in one Act. In many cases, the relevant provisions are scattered among a number of statutes and statutory rules¹ and, quite probably, judicial decisions.

In most common law countries, the practice has been to publish statutes and statutory rules in annual volumes. Normally, each volume will consist of public general Acts arranged in the order of enactment, with any private Acts being included separately at the end of the volume. The volumes are not updated or revised, although in some common law countries it has been the practice to issue annual publications containing annotations setting out amendments to earlier statutes. Statutes that are repealed, become spent or otherwise lose their force are not excised. Unless there is a mechanism for revising and republishing amended statutes,² users of those statutes are faced with considerable difficulty in finding out what legislative provisions are relevant to them. Moreover, having found what may appear to be the provisions that concern them, they cannot rest on their laurels. They still have to check to see whether, and to what extent, those provisions have been affected by subsequent legislation.

If legislation is not kept up-to-date, the task of researching it is unnecessarily difficult and mentally demanding, and requires much time, resources and enthusiasm. The problem is alleviated in those jurisdictions where indexes and annotations of statutes are maintained. And in recent years, the publication in most common law jurisdictions of electronic versions of statutes and statutory rules also makes it easier to access legislation.³

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¹ Statutory rules usually take the form of regulations, rules, bylaws or ministerial orders. In the United Kingdom and Ireland, they are called statutory instruments. Other terms used to describe this form of legislation are 'subordinate legislation', 'subsidiary legislation' and 'delegated legislation'.

² Along the lines of the British *Statutes Revised* or *Statutes in Force*.

³ By means of word and phrase searches of the text.

Some historical developments

The position in the United Kingdom

The state of the English Statute Book attracted criticism as early as 1551. In that year King Edward VI, then only 14 years of age and a very precocious youth, wrote as follows:⁴

“I have shewed my opinion heretofore what statutes I think most necessary to be enacted this session. Nevertheless, I would wish that beside them hereafter, when time shall serve, 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; which thing shall much help to advance the profit of the Commonwealth.”

In a speech from the throne in 1609, King James I spoke of—

“divers cross and cuffling statutes, and some so penned that they may be taken in divers, yea, contrary senses”... “and therefore would I wish both these statutes and reports, as well in the Parliament as common law, to be once maturely reviewed and reconciled; and that not only all contrarieties should be scraped out of our bookes, but even that such penal statutes as were made but for the use of the time (from breach whereof no man can be free) which do not now agree with the condition of this our time, might likewise be left out of our bookes, which under a tyrannous or avaricious king could not be endured.”

In 1616, Sir Francis Bacon, then Attorney-general to King James I, submitted to the King a proposition “touching the compiling and amendment of the laws of England”. He proposed that the work to be done should consist of two parts. One would comprise a digest or compilation of the common laws. The other would reform and recompile the statutes. Among the reforms he envisaged was the reduction “of statutes *heaped one upon another to one clear and uniform law*”.⁵ But despite his efforts, nothing seems to have come of them. After the restoration of the monarchy in 1660, the topic was raised again, but nothing came of it. It was another 130 years before the topic resurfaced. In 1796, two reports, presented by the committees of the House of Commons, drew attention to the unsatisfactory state of the Statute Book. This led to an improvement in the classification of statutes, and to the distinction now recognised by us between public general Acts, local and personal Acts and private Acts. However, in 1800, the UK Parliament passed resolutions that led to the appointment of the First Commission on Public Records. It was under the authority of this Commission that the edition of the statutes known as the “Statutes of the Realm” was prepared. A further attempt at reform was made in 1833 with the appointment of a royal commission to codify the criminal law and to ascertain how far it might be expedient to consolidate the other branches of the law then existing in England. However, the project was over ambitious and so yielded only limited success.

Since then the situation has improved appreciably, in that commercial publishers, such as Butterworths, produce very accurate edited versions of the Statute Book. Halsbury’s Statutes provide the equivalent of a continuously revised Statute Book (though not for Scotland or Ireland). An official electronic statute law database is now available, which contains the Scottish statutes as well as those of the United Kingdom as a whole. This is accessible by members of the

⁴ Discourse on the Reformation of Abuses.

⁵ Which is symptomatic of non-textual amendments.

general public and allows them not only to find out the current law is but also to find out what the law was on a given date.

Some of the statutes in the United Kingdom Statute Book go back as far as the 13th century. The fact that many of the older ones are written in an archaic style of English make them hard to understand. Even if consolidators are able to give meaning to those statutes, they are still faced with the difficulty of translating them into modern English. Moreover, United Kingdom statutes are now overlain with large tracts of European Union law, which frequently qualifies what on the face of them might otherwise be seen to be intelligible statutes.⁶

The position in Australia

Victoria

The need to keep the Statute Book up-to-date was recognised in Australia early on. Although, the colony of Victoria was established only in 1835, a full consolidation of the colony's Statute Book was undertaken as early as 1865. Further consolidations of Victorian legislation took place in 1890, 1915, 1928 and 1958. This has meant that the Victorian Statute Book has remained in reasonable shape from the outset.

New South Wales

Initially, the situation was not so good in New South Wales. The first New South Wales statute was passed in 1824. However, by 1893, the condition of the Statute Book had deteriorated to the extent that there were calls for reform. Between 1824 and 1893, except for two or three topics, no consolidation was attempted. Furthermore, amendments, partial repeals, re-enactments, implied repeals, repeals of Acts in the formula "so much of the said Act as is inconsistent with the present Act is hereby repealed," adoptions of Acts with provisions quite inapplicable to New South Wales, and various other methods of legislation, had been piled one upon the other, and had brought the Statute law into a condition of confusion and entanglement.⁷ This gave endless trouble to the judiciary and was a daily source of irritation and expense to all classes of the community. The position was only alleviated by the occasional publication of collections of New South Wales statutes.⁸

This led to a clearing of the Statute Book of the very large number of Acts that, for various reasons, had ceased to have any effect. By using a carefully drawn saving clause, no fewer than 602 Acts were repealed by the *Revision Act of 1898*. A further 122 Acts were repealed by similar legislation passed in 1902. Subsequently, a Royal Commissioner was appointed to make proposals for the consolidation of the New South Wales Statute Book. The Commissioner reported to the State legislature in 1902. One of the aims of the consolidation was to bring the language and arrangement of Acts as far as possible into conformity with the clearer and simpler methods of modern drafting. Preambles were to be omitted, long and involved clauses cut up, inaccuracies removed, and inconsistencies reconciled, and generally all the enactments on any

⁶ A similar situation exists in Ireland.

⁷ A sure sign that the non-textual method had been used to amend statutes.

⁸ See the report of the Royal Commissioner, Charles Heydon, on Statute Law Consolidation, which was published by the New South Wales Legislative Assembly on 22 July 1902. Some official volumes of "statutes of practical utility" were prepared during the period between 1900 and 1914. In all, some 14 volumes were published concurrently with the annual volumes of 'Acts as passed'.

particular branch of the law arranged in as concise, clear and orderly a manner as possible, in one consolidating statute.⁹ However, no amendments “which partook of the character of legislation ought to be ventured upon, and that all amendments, however, carefully limited to the bare necessity of the consolidation, should be noted and pointed out for the information of Parliament in the memorandum which was to accompany each bill.”¹⁰ According to the Commissioner, it would have been far easier, would have saved much time and an infinity of trouble, and would have avoided a great deal of risk, to repeat the clauses of the Act practically as they stood with their inaccuracies and inconsistencies. This in fact was the approach adopted in Victoria. However, in New South Wales, it was from the outset that a more thorough consolidation, with its great accompanying reduction in the bulk of the Statute Book, was desirable. In the event, this was accomplished.

It should be noted that the New South Wales legal profession considered the consolidation to be an inconvenience!¹¹ Members of the profession were apparently content with a confused jumble of Acts with which they had become familiar and which they had carefully noted up with decided cases. However, every consolidation will cause this kind of inconvenience. According to the Commissioner, the preparation of a new edition of the statutes, with all the consolidations and a good index would go a long way to remove the difficulty, which in a short time would entirely disappear.

Not long afterwards, the New South Wales legislature enacted the *Amendments Incorporation Act 1906*. That Act specifically (and I would argue significantly) for the first time authorised the reprinting of New South Wales Acts with the textual amendments that had been made to them by other Acts. This Act remained in force until it was replaced by the *Reprints Act 1972*.¹² Since, 1906 non-textual amendments to New South Wales statutes have been extremely rare, being confined to savings and transitional provisions and some referential amendments of a global nature. But now even savings and transitional provisions that are consequent on the enactment of amending Acts are drafted as textual amendments to the relevant principal Act.

A full consolidation of the New South Wales Statute Book was carried out in 1937.¹³ In 1957, a further full consolidation was undertaken.¹⁴ Although the volumes comprising this consolidation were prepared under the auspices of the Law Book Company, they were published with official approval. Some interest was shown in undertaking a further revision in 1977, but in the event, it was decided to enhance the official reprints system rather than having a static set of bound volumes that would soon become out-of-date.

Queensland

In Queensland, a continuous interest had been shown in keeping the Queensland Statute Book in a clear and orderly state. Sir Samuel Griffiths¹⁵ apparently did valuable work in the way of

⁹ Which all sounds very modern!

¹⁰ *Ibid*, pp. 4 and 5.

¹¹ Also see comments of Sir Courtenay Ilbert, *Mechanics of Law Making*, 1901, p. 40 regarding the resistance to change of Government officials.

¹² This was originally called the *Acts Reprinting Act 1972*.

¹³ These were known colloquially as “the Green Statutes”.

¹⁴ And these were known colloquially as “the Red Statutes”.

¹⁵ Who was to become the first Chief Justice of Australia after Australia became a federation on 1 January 1901.

codifying and consolidating the Statute Book. In 1908, the Queensland legislature passed the *Statute Law Revision Act*, which authorised the publication of Acts as amended by any subsequent enactments. That Act made it clear that it was not necessary to reprint the amending Act.

South Australia

The position in South Australia was that, until the 1920s, that State's amending legislation consisted of a hotchpotch of textual and non-textual amendments. A major consolidation of South Australian statutes took place in 1936, by which time the use of the textual amendment method had become the norm. The South Australian legislature passed an *Acts Republication Act* in 1934. As one would expect from the title, this authorised the publication of amended Acts. A further full consolidation of the South Australian Statute Book was undertaken in 1976. Since all legislation is now kept on an electronic database, it is now the practice in that State to publish amended Acts to coincide with the commencement of the relevant amendments.

Tasmania

In Tasmania, the *Amendments Incorporation Act 1906* authorised the publication of amended Acts. However, even before 1906, some Acts were reprinted, but they were a compilation of principal Acts and amending Acts, with no attempt being made to incorporate the amendments. Since 1906, reprinted Acts incorporating amendments to them have been published periodically by the Government Printer. As with the other States, a reprinted Act has evidentiary value but is not conclusive as to the actual state of the law in question.

Western Australia

In Western Australia, the earliest Act authorising the reprinting and publication of amended Acts was the *Statutes Compilation Act 1905*.¹⁶ Later, in 1923 the *Amendments Incorporation Act 1923* was passed. The Minister moving the second reading described the bill as a measure that “will make for the automatic consolidation of statutes.”¹⁷ Section 2 (1) of the Act provided that:

When any Act has...been amended...then in every reprint of the Act by the Government Printer the Act shall be printed as so amended, under the supervision of the Clerk of the Parliaments.

The 1923 Act did not repeal the 1905 Act, but instead co-existed with it. The two Acts appear to provide different means of achieving the same end. However, the Minister who moved the second reading of the 1923 Act saw a distinction, saying “...but there is also a great difference between the Act he has quoted [*Statutes Compilation Act 1905*] and the Bill before the House. The latter is merely for reprints, while the former refers to any consolidation.”

¹⁶ Section 2 of that Act provided:

From and after the passing of this Act, whenever both Houses of the Parliament shall, by resolution, direct the compilation, with its amendments, of any Act in force in the State, it shall be the duty of the Attorney General...to prepare a compilation embodying all the provisions of such Act and the amendments thereof, omitting all those portions of the text of such Act which have been repealed or altered by subsequent Acts, and inserting in the proper places all words or sections substituted for or added to the text of the original Act by such subsequent Acts....

Section 3 required a compilation to be tabled before both Houses of Parliament.

¹⁷ Western Australia Parliamentary Debates, 1923, p. 627.

The 1923 Act was repealed by the *Amendments Incorporation Act 1938*, while the *Statutes Compilation Act 1905* remained in place until repeal by the *Reprints Act 1984*, which is the Western Australian Act that currently authorises the publication of amended statutes.

However, it seems that Acts as amended were being reprinted in a consolidated form even before the passing of the 1905 Act. In moving the second reading of the Bill that led to that Act, the Minister commented that:

In this State, we have adopted a procedure which will be found in the Justices Act, the Criminal Code, the Electoral Act, and a number of more recent statutes. The Government Printer, in printing subsequent copies of any statute that has been amended, is entitled to embody the amendments.¹⁸

Australian Commonwealth

The Commonwealth of Australia was established on 1 January 1901. One of the earliest amending Acts enacted by the Commonwealth Parliament was the *Commonwealth Franchise Act 1902*. This was a non-textual amendment. The following year saw the first use of the textual amendment method.¹⁹ In 1904, The *Defence Act 1904* (an amending Act) required that all amendments of the *Defence Act 1903* be incorporated in any future reprints of the principal Act. This provision was a pre-cursor to the *Amendments Incorporation Act 1905*, which applied the same principle to all Acts and also required reprinted Acts to include notes.

In 1913, the Commonwealth published a reprint of all Commonwealth Acts in force on 1 January 1912, except Appropriation and Supply Acts. The publication included an index of all the Acts, and a table showing Acts enacted under the various provisions of the Australian Constitution. The *Statute Law Revision Act 1934* was the first general revision of Commonwealth statutes. The Act “tidied up” the Commonwealth Statute Book in preparation for a general reprint of Commonwealth Acts.

In 1936, the Commonwealth published a reprint of all Commonwealth Acts in force “as at 1 January 1936”. The reprint was in 4 volumes, with the 4th volume being an index. The first three volumes contained 2,959 pages. Further volumes containing reprints of amended Commonwealth Acts were published in 1952 and 1974. In 1958, the Commonwealth published a reprint of all regulations in force as at 31 December 1956.²⁰ Since then, amended Commonwealth has adopted the ‘rolling reprint’ approach, which involves reprinting Acts when they are amended and providing loose-leaf binders in which to store them.²¹

The position in New Zealand

New Zealand departed from the English form of statutes at a very early date.²² One major departure was the inclusion of an “Analysis” (in effect a table of contents). It was many years before this useful practice was adopted in Australia. The textual method of amendment was

¹⁸ Western Australia Parliamentary Debates, 1905, p.146.

¹⁹ The *Electoral Divisions Act 1903* textually amended section 19 of the *Commonwealth Electoral Act 1902*.

²⁰ There had not been a reprint of Regulations for almost 30 years.

²¹ This is similar to the approach previously adopted in Victoria and subsequently in most other Australian States and Territories.

²² See Walter Iles ‘Legislative Drafting Practices in New Zealand’, *Statute Law Review*, 1992, pp. 16-30.

adopted at an earlier date, although non-textual ‘stand-alone’ amending Acts were enacted on rare occasions.²³

In 1908, a full revision of New Zealand statutes was undertaken. Consequently, it is almost unheard of to have to look for a New Zealand statute enacted earlier than that year. The first general reprint of the Public Acts was undertaken in 1931. A further general reprint of Public Acts began in 1957. The reprints were authorised by the *Statutes Drafting and Compilation Act 1920* (which is still in force in 2005). Reprinted versions of statutory regulations have been published under the authority of the *Regulations Act 1936*.

The position in Ireland

Although no general revision of the Statute Book has yet taken place in Ireland, as mentioned elsewhere, some major statutes have been consolidated in recent years and, since the millennium, it has become the practice to use the textual method for amending statutes. It is believed that a revision of pre-1922²⁴ statutes is currently underway.

The position in Jersey

A full scale consolidation of statutes has just been completed in Jersey. This should now make it relatively easy for the Jersey Statute Book to be kept up-to-date even if statutes are extensively amended in the future.

The position in Canada

As early as the middle of the 19th century, what were then Canadian colonies recognised the need to completely update their legislation so that it would be in a form accessible to members of the public. The procedure developed for the purpose was called a ‘statute revision’. In its ordinary sense, the term “revision” means the correction and rewriting of a text that is for any reason found to be unsatisfactory. Revision in this sense is quite different from the term “consolidation”, which is defined and described elsewhere in this paper. In the Canadian context, the term “statute revision” has come to mean a combination of consolidation; rewriting whenever necessary; and rearranging the various statutes and their respective contents. In undertaking the revision of a statute, the revisers are usually empowered to modify the existing text, but only so long as they do not alter the substance of the law. Apart from correcting editing, grammatical, and typographical errors, the language of a statute may be altered in order “to preserve a uniform mode of expression” as long as the substance is not changed. Changes to reconcile “seemingly inconsistent enactments” are also allowed. If the different official language versions of a statute are incompatible, changes can be made to reconcile them. More recently, action has been taken to standardise the wording of frequently used provisions and to shortening long sections and subsections by splitting them into shorter and more readable provisions. Efforts have also been made to eradicate archaic expressions (including most Latinisms).

At the federal level, several general revisions of the statutes of Canada have been made since Canada was established in 1867. The first was in 1886, less than 20 years after federation. Further revisions of federal statutes were undertaken in 1906, 1927, 1952, 1970 and 1985. In

²³ E.g. *The Fisheries Amendment Act 1963*.

²⁴ 1922 was the year in which Ireland gained its independence from the United Kingdom.

each case, a statute revision commission was appointed under the authority of an Act of Parliament. The commission's brief was to examine, consolidate and revise all public general statutes. The revised statutes were then published in a series of volumes under the title 'Revised Statutes of Canada' with the addition of the year of publication. One way in which a statute revision in Canada significantly differs from a reprinted statute published in the various Australian jurisdictions is that the Acts authorising a revision of Canadian statutes provided that, after the revision was completed and the revised statutes had been deposited in the office of the Clerk of the Parliaments, they were to be brought into force by proclamation of the Governor General. The authorising Acts also provided that, on the coming into force of the revised statutes, the pre-revision versions of the statutes were to be repealed.

After the 1970 revision, a decision was taken to replace the system of appointing an ad hoc commission for each revision by establishing a permanent statute revision commission whose members and staff would be employees of the federal Department of Justice. However, those employees were required to be experienced in drafting and editing legislation. One of the principal reasons for appointing a permanent commission was to make it possible to undertake revisions of statutes on a continuing basis with a view to shortening the intervals between the years in which revised statutes were published.

As early as 1970, a computer database of all federal legislation was established and the Act establishing the 1974 Statute Revision Commission provided not only for the continuing revision of both statutes and regulations but also for the possibility for the institution of a loose-leaf system of continuous consolidation of statutes. The change to a system of continuous revision meant that it was no longer possible to repeal and replace the whole Statute Book at once. The current practice is for the federal Minister for Justice to lay drafts of revised statutes before the appropriate parliamentary committee for examination and approval. After the committee has approved the revised statutes, the Minister then introduces a Bill to bring them into force.

In the early years of the Canadian federation, the Canadian provinces were rather more assiduous than federal Canada in keeping their statutes up-to-date. The system for revision adopted at the provincial level is similar to that used at the federal level. Thus, Ontario has undertaken a number of general revisions entitled "Revised Statutes of Ontario", the first one being in 1877. In Quebec, the first revision was undertaken in 1888 and others have been undertaken at regular intervals since then. Similarly, the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan have all undertaken revisions of their statutes at regular intervals since the establishment of the Canadian federation.

Why the Statute Book may not be up-to-date, accessible and coherent

A principal cause of the difficulty encountered by users of statutes and statutory rules in finding the law on a particular topic that concerns them is that often the relevant provisions are to be found not in one self-contained statute, but in a number of provisions scattered among a number of separate annual volumes. Often some of these provisions will deal with matters other than the one with which the user is concerned.

As anyone who is familiar with the Statute Book of any common law jurisdiction will be aware, the bulk of legislation amends existing legislation and it seems to me that a major source of the problem lies in the method by which statutes and statutory rules are amended. In essence, two

methods are available for amending legislation. One method is the non-textual or indirect method. The other is the textual or direct method.²⁵

A non-textual amendment does not alter the text of the old law but consists of a discursive statement or narrative of the effect of the amendment on the old law. Because the text of the law that is to be amended remains unaltered, the amendment operates indirectly. With this technique, the amending law does not merge with the Act being amended. Nor does it lose its separate identity in the Statute Book. As Thornton²⁶ points out, use of the method involves legislating referentially. The ultimate effect is a cumulative one as statute is piled on statute, with the result that comprehension becomes more and more difficult.

An example of a non-textual amendment is to be found in section 1 (4) of the *Infanticide Act 1949* (Ire), which states as follows:

Section 60 of the *Offences Against the Person Act 1861* shall have effect as if the reference therein to the murder of any child included a reference to infanticide.

Another example is to be found in section 37 of the *Town and County Planning Act 1968* (UK), which non-textually amends section 149 of the *Town and County Planning Act 1962*, section 37 (3) provides as follows:

For a person to be treated under section 149 (1) or (3) of the principal Act (definitions for the purposes of blight notices 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.

The perceived advantage of a non-textual amendment is that it should make sense when standing alone, although that is clearly not the case with the example taken from the *Infanticide Act 1949*. The user should be able to ascertain the effect of the amendment, a matter of convenience that is claimed to be important from a legislator's perspective. One advantage that non-textual amendments can have is that of effecting, in one measure, the blanket amendment of a number of different provisions.

Non-textual amendments are often used to make global changes. For example, on a change of currency, it is necessary to convert all statutory references from the old currency to the new currency. When Ireland changed to decimal currency in 1970, this was achieved by section 9 (1) of the *Decimal Currency Act 1970* (Ire) which provided a general formula for amending existing references to outmoded shillings and pence. Likewise, the *Euro Changeover (Amounts) Act 2001* (Ire) achieved the same purpose, when the euro replaced the Irish pound.²⁷

A consequence of over-reliance on the method of non-textual amendment is that a set of cross-references, interpretations and qualifications develops which adds to the complexity and lack of intelligibility of the Statute Book - it becomes exceedingly difficult to collect the text of legislation on a particular topic in a single instrument. For this reason, the current view is that

²⁵ In this paper, I use the term non-textual method and textual method rather than indirect method and direct method, but they more or less amount to the same thing.

²⁶ G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, at 405.

²⁷ Arguably, the same result could have been achieved by legislation that was drafted in the form of textual amendments.

textual amendments are to be preferred for their relative simplicity.²⁸ For instance, section 1 (4) of the *Infanticide Act 1949* (Ire) would have been as effective had it directly amended the text of section 60 of the *Offences Against the Person Act 1861*. A textual amendment in that case could have said:

Section 60 of the *Offences Against the Person Act 1861* is amended by inserting “or infanticide” after “murder of any child”.

This would have been a tidier method of amendment and would have facilitated the subsequent consolidation of the 1861 Act. As it now stands, section 60 has to be read as if the words ‘or infanticide’ are to be implied into the section but they do not form part of its text. Thus, the Statute Books of those jurisdictions where non-textual amendments are used are a curious mixture of textual and non textual amendments. Thornton’s observations on this are apposite:

The traditional ... style, therefore, produced a pottage comprising direct amendments, indirect amendments and provisions incorporating both techniques. The effect, at least to one not nurtured from his early years on English statutes, is confusing, particularly so as it rests on a stream of consistently invidious and inevitably inconsistent decisions as to which amendments should properly be effected by one method, which by the other, and which of both.²⁹

On the other hand, a textual amendment is one that amends an existing enactment or statutory rule by repealing words or provisions; by substituting new words or provisions for existing ones; or by inserting into the enactment or rule additional words or provisions. When this method is used, the problem faced by the legislator or user is that the change made to the law is not immediately intelligible. In order to understand the amendment and what it does, it is necessary for the legislator or user to read the text of the amended enactment or rule with the amendment incorporated into it. In some jurisdictions, parliamentary counsel include in their amending Bills a note showing what a provision will look like when the amendment is incorporated.³⁰

However, in most jurisdictions a comprehensive explanatory note is provided so that the legislator or user can immediately see what the existing law is; what the amendment does to that law; and what effect the amendment has on the existing law. In some cases, in order to provide a complete explanation of the amendment, the explanation has to be longer than the amendment. In most legislative drafting offices, these notes are prepared by the parliamentary counsel responsible for drafting the relevant Bill.³¹ But even in cases where explanatory notes are prepared by government officials, the final responsibility for their contents should remain with parliamentary counsel who drafted the Bill.

In my view, the advantages of the textual amendment method greatly outweigh the non-textual method. Thornton has listed a number of them.³² These are as follows:

²⁸ G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, p. 407; Miers and Page, *Legislation* (2nd ed.), 1990, pp. 195-196.

²⁹ G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, pp. 406-407.

³⁰ In the United Kingdom, this device has been adopted on some occasions by means of what are known as Keeling Schedules. A Keeling Schedule shows, in a Schedule to the relevant Bill, how the law will look once it is amended. It also makes it clear in the text of the Bill itself how the law is being amended. See paragraphs 13.21 and 13.22 of the Renton Report.

³¹ However, in the United Kingdom and Ireland, explanatory notes are usually prepared by government officials.

³² G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, p. 407.

- The [textual] method produces law that is simpler and easier to understand, provided that the reprints, revisions or consolidations are produced frequently.
- The [textual] method reduces the proliferation of statutes.
- To some extent, [the textual method] makes consolidation a running exercise thus facilitating the production of consolidated reprints or revisions without the need for specific legislation.
- By encouraging the integration of new and modified provisions with the old, [the textual method] encourages a view of the law on a particular subject as a whole rather than as a series of interwoven but separate parts.
- By directly integrating the new provisions with the old, [the textual method] reduces the potential for repeal by implication.
- [The textual method] facilitates annotation.
- Not least, [textual] amendments are easier to draft.

I would add two further advantages. Because textual amendments are relatively easy to incorporate into the relevant principal enactment or statutory rule, the resources involved in keeping the law up-to-date are much reduced. This is because the incorporations can be made by skilled clerical staff, whereas the services of experienced, specialist lawyers are required in order to prepare consolidations of laws that are a mixture of non-textual and textual amendments. Moreover, if a principal statute or statutory rule is amended only by textual amendments, it becomes unnecessary to include provisions such as the following:³³

This Act and the *National Treasury Management Agency Act 1990* shall be construed together as one and may be cited as the *National Treasury Management Agency Acts 1990 and 2000*.

Tidying up the Statute Book

So how should the responsible authorities keep their Statute Books accessible and coherent? A number of approaches can be adopted. One is to enact statute law revision legislation that clears the Statute Book of deadwood. Such legislation repeals those statutes that have become obsolete and have no practical value. The usual practice is expressly to provide that the revision does not affect any existing rules or principles. But, statute law revision is only a partial solution as old statutes that are still in operation are left untouched. Moreover, the physical state of the Statute Book remains intact. The old statutes that have been repealed, and therefore no longer form part of the law, remain in the official volumes of statutes. The user still has to check whether a particular provision is in force or not.

Another approach is the periodic re-publication of statutes in their revised form, incorporating the amended text and purged of repealed and spent provisions. As already mentioned, this kind of approach is adopted in the Australian Commonwealth and its States and Territories. Each of those jurisdictions has special legislation that facilitates the periodic reprinting of statutes and statutory

³³ I have found that it is not unusual for these collective citations not to be kept up-to-date.

rules.³⁴ The process involves publishing a statute in a single updated text that takes account of all amendments that have been made to it since it was first enacted.

A reprinted Act is thus simply a means of providing an up-to-date accessible and coherent version of existing legislation. Although the process is an administrative one, the publisher³⁵ is usually allowed to make certain styles changes, such as changing numbers or dates from words to figures or changing long-form cross references to short-form ones. This method not only ensures that accessible and coherent statutes and statutory rules are available to users, but it also obviates the need to take up the time of the legislature, which is at best a scarce resource. Although a reprinted statute or statutory rule does not of itself normally have the force of law, it is *prima facie* evidence of the law contained in the provision to which it relates.

In Australia,³⁶ New Zealand and Hong Kong, electronic versions of statutes are now normally publicly available within hours after the amendments have taken effect. Also in Australia, pamphlet copies of updated versions of statutes and statutory rules are also published on a periodic basis. The Hong Kong Department of Justice, which produces consolidated versions of Hong Kong statutes and statutory rules in a loose leaf system, publishes replacement pages for legislation shortly after it has been amended. In Canada, the Department of Justice publishes electronic versions of updated versions of federal statutes and regulations.³⁷ Up-to-date electronic versions of statutes and statutory rules of Canadian provinces are similarly available.³⁸

However, the effectiveness of the reprint or compilation system as used in Australia and other Commonwealth countries is closely tied to the use of the textual method of amendment. If the public is to have access to up-to-date, accessible and coherent revised versions of amended statutes and statutory rules, it is essential that the amendments should be effected *only* by the textual method. As the Renton Report makes clear,³⁹ to the extent that there is a conflict between the needs of the legislator and the statute user, the needs of the user should prevail. The report goes on to say:

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

³⁴ The *Amendments Incorporation Act 1905* requires the Australian Government Printer to publish reprinted updated versions of amended statutes and statutory rules. However, this work is now undertaken in the Office of Legislative Drafting and Publications in Canberra. In New South Wales, the *Reprints Act 1972* authorises the Parliamentary Counsel to issue updated versions of statutes and statutory rules. Similar legislation operates in Queensland (the *Reprints Act 1992*); in South Australia (the *Legislation Revision and Publication Act 2002*) in Tasmania (the *Legislation Publication Act 1996*); in Victoria (section 21A of the *Interpretation of Legislation Act 1984*); and in Western Australia (the *Reprints Act 1984*). In New Zealand, compilations of amended statutes are prepared under the *Statutes Drafting and Compilation Act 1920*. In Hong Kong, section 99 of the *Interpretation and General Clauses Ordinance* authorises the Government Printer to print copies of Ordinances with all amendments made by amending Ordinances. Such copies are treated as authentic copies of the amended Ordinances.

³⁵ The official designated to be the publisher will normally be the Government (or Queen's) Printer, the Attorney General or the Parliamentary Counsel.

³⁶ Both at the federal and state levels. For example, for compilations of Australian Commonwealth Acts, see <http://www.comlaw.gov.au/ComLaw/legislation> and for consolidated versions of New South Wales statutes and statutory rules, see www.legislation.nsw.gov.au.

³⁷ E.g. see <http://laws.justice.gc.ca/>.

³⁸ E.g., see <http://www.e-laws.gov.on.ca/DBLaws/Statutes/> for the legislation of Ontario and <http://www.qp.gov.bc.ca/statreg/default.htm> for the legislation of British Columbia.

³⁹ *The Preparation of Legislation*, 1975, Report of a committee appointed by the Lord President of the Council and chaired by (then) Sir David Renton. See paragraph 13.17 of the report.

legislation often adds to the burdens of the user, particularly when the consolidation of heavily amended legislation is held up for one reason or another.

I could not agree more!

So why has use of the non-textual method been so prevalent in past amending statutes? The following extract from Sir Courtenay Ilbert's work *The Mechanics of Law Making* seems to provide the answer:⁴⁰

In the first place, it [i.e. an Act that textually amends another Act] is absolutely unintelligible without the text of the enactments which it is proposed to amend, and even if these objections can be removed by means of an explanatory memorandum, a bill thus drawn is, as any one who has watched attempts to frame parliamentary amendments will readily understand, extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in committee. For these reasons, this technical method of amendment is hardly ever adopted in England except in the case of non-contentious measures.

In these circumstances, the ordinary mode of amending an Act is to state in the amending bill the effect of the amendment proposed to be made. This is the commonest mode, and for English parliamentary purposes is 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. And in some cases, where the amendment virtually overrides a large portion of the existing enactment, it is practically the only possible method.

Regrettably, this view subordinates the needs of statute users and the long-term coherence of the Statute Book to the short-term needs of parliamentarians. And, as Ilbert concedes, there are other ways of communicating the effect of proposed amendments to parliamentarians. He also expresses with approval the approach adopted in the Indian legislature. Having stated that ideally amendments should be made by repealing and replacing the whole of the section or part affected, he goes on to say:

... the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to bills in Parliament, or like errata or addenda in books; that is to say, in the form of directions to strike out particular words or sentences from an enactment, and to add others. This is the form frequently adopted by the Indian legislatures. It enables a clerk to note up, almost mechanically, the alterations in the statute law, by simple striking out or writing in the necessary words.

Thanks to this method of amendment, the Legislative Department of the Government of India is able to issue periodically revised editions of the most important Indian Acts, which embody the amendments up to date, and thus, for many purposes, take the place of repealing and consolidating Acts. But for purposes of practical administration such reprints are of great convenience.

One cannot help getting the impression from this that a system that was good enough (and even desirable) for India was not appropriate for the United Kingdom! In my view, the approach adopted in India (probably as a result of the influence of the British jurist, Sir James Stephen)

⁴⁰ At p. 129.

was the right one.⁴¹ The adoption of a similar approach in Australia, Canada and New Zealand has certainly helped to ensure that each jurisdiction in those countries has a Statute Book that is up-to-date, accessible and coherent.⁴²

Although the Renton Report favours the textual method of amendment, it nevertheless concludes that its adoption will never eliminate the need for consolidation, if only because 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. However, I have to disagree with this conclusion. Even on the rare occasion when non-textual amendments are necessary,⁴³ this should only be regarded as a stopgap measure. I believe it should always be possible⁴⁴ to convert those amendments to textual ones shortly after the enactment containing them.

A third method for alleviating the problem is to enact consolidating legislation.⁴⁵ A consolidating Act is one that re-enacts all the relevant provisions on a particular subject in one statute, making, at most, only minor amendments to the existing law.⁴⁶ Many Parliaments in common law countries have special parliamentary procedures to expedite the enactment of such legislation. For example, in Ireland several Acts have been passed using such procedures.⁴⁷ The *Taxes Consolidation Act 1997* (Ire) exemplifies the benefits associated with consolidation. It consolidated the law on income tax, capital gains tax and corporation tax and, in the process, reduced its bulk. Provisions that were formerly contained in 40 separate statutes are now found in a single Act, with over 2000 different sections being reduced to 1104 sections and 50 schedules being condensed to 32.⁴⁸ The consolidated Act was drafted and structured with users (principally taxation officers, taxpayers, tax practitioners and accountants) in mind. There is no doubt that the Act's more coherent format eases the task of finding the relevant Irish law on taxation. However, despite the Act having been quite extensively amended since 1997 and those amendments having been made textually, no up-to-date version of the Act is currently available.

⁴¹ Stephen served (1869–72) as the legal member of the Viceroy's Council in India, preparing a draft codification (later adopted) of the law relating to contracts, crime, and evidence. He later drafted a codification of English criminal law, but the United Kingdom Parliament never enacted it.

⁴² Likewise in Hong Kong, where the Law Drafting Division of the Department of Justice maintains up-to-date sets of loose-leaf reprinted statutes and statutory rules.

⁴³ Such as was the case with the *Reunification Ordinance* enacted by the Hong Kong Provisional Legislative Council during the early hours of the morning of 1 July 1997 in consequence of the resumption of the sovereignty of Hong Kong by the People's Republic of China. However, the various non-textual referential amendments were later converted to textual ones by means of a systematic program of amending legislation.

⁴⁴ E.g. by means of a Statute Law (Miscellaneous Provisions) Bill.

⁴⁵ See Lord Simon of Glaisdale and Webb, *Consolidation and Statute Law Reform*, 1975, PL 285.

⁴⁶ Sir Courtenay Ilbert, *The Mechanics of Law Making*, 1901, pp. 36 and 37, described consolidation in the following terms:

“By consolidation I mean the combination into a single statute of several statutes or parts of statutes dealing with the same subject. Consolidation deals with statute law alone as interpreted and explained by judicial decisions. In consolidating statute law, you have to consider and reproduce, unless you determine to alter, the effect of judicial decisions. You also have to consider the reciprocal bearing of the statute law and of the rules of common law on which it is based, which it presupposes and which it may or may not vary.”

⁴⁷ E.g. See the *Fisheries (Consolidation) Act 1959*, the *Income Tax Act 1967*, the *Social Welfare (Consolidation) Act 1981*, the *Social Welfare (Consolidation) Act 1993*, the *Taxes Consolidation Act 1997* and the *Stamp Duties Consolidation Act 1999*.

⁴⁸ Hennessy and Moore, *Taxes Consolidation Act 1997: the Busy Practitioner's Guide*, 1997, p. 3.

A fourth method is to carry out statute revisions as is the practice in all Canadian jurisdictions. A revision will normally go further than a consolidation. In the Canadian parlance, “statute revision” has come to mean a combination of consolidation, rewriting where necessary and rearranging the order in which provisions appear. As is with the case with a pure consolidation or a reprint, the only modifications that are permitted are ones that do not change the substance of the statute or regulation under revision.

A fifth method is a codifying statute, which enacts in one statute all the relevant provisions on a topic, often making major changes to the existing law.⁴⁹ Common law jurisdictions have tended to be hostile to codification. But there are exceptions. Queensland, Tasmania and the Northern Territory of Australia have all codified their respective criminal laws, as has New Zealand. And in Ireland, the *Succession Act 1965* can be cited as an example of a codifying measure. These measures help to reduce the bulk and cumbersome nature of the Statute Book, but they are of limited assistance. Due to the time and effort involved in their drafting and preparation and competing demands on the parliamentary agenda such legislation tends to be infrequent.

If a country’s Statute Book is not systematically kept up-to-date on an ongoing basis, the task of revising it and making it accessible and coherent will be a monumental one. If the country’s laws have not been consistently amended by the textual method, it will mean that the reprint method will not work and they will have to be consolidated as part of a comprehensive program of consolidation. Such a program will involve a commitment of financial and human resources (through, for instance, the recruitment of additional legislative drafters) which historically Governments have been notoriously reluctant to approve. Moreover, it would require the allocation of time on the legislative agenda, at times when the Government might consider other proposals more desirable or politically important.

As part of the process, the manner in which legislation is published needs to be addressed. Legislative reform and statute law revision in itself does not reduce the actual physical bulk of the volumes of statutes that retain amended and repealed legislation. Statute users want to be provided with the up-to-date text of legislation, not to be presented with the opportunity to engage in a fascinating intellectual challenge of navigating backwards and forwards through volume after volume of statutes. The publication of legislation in its current, as well as its historical, form is crucial and to this end the production on regular basis of a revised Statute Book is desirable. The publication on a commercial basis of the loose-leaf consolidated statutes and statutory rules⁵⁰ would certainly help. And, with the advent of modern computer technology, it is now feasible (as indeed has been frequently demonstrated in Australia and Canada) to produce electronic versions of updated statutes and statutory rules within days of their being amended. And of course, electronic versions of legislation are much, much easier to search than hard copies are.

⁴⁹ Ilbert (ibid) pp. 36 and 37 has described codification in the following terms:

“By codification I mean the reduction into a systematic form of the whole of the law, statute law or common law. ... Codification deals both with common law and with statute law. ... In codifying common law, you have to incorporate rules which have already been reduced to statutory form.”

⁵⁰ E.g. like the reprinted laws of Hong Kong.

Reforming an out-of-date Statute Book: What needs to be done

On the assumption that a Statute Book has become out-of-date, inaccessible and jumbled, here are what I believe are the measures that need to be taken to rectify the situation so that an up-to-date, accessible and coherent Statute Book is available to both the organs of government and the citizens who are expected to comply with the law.

If the Statute Book of a country is not currently in an accessible and coherent form, it is necessary to put in place a systematic program of consolidation.⁵¹ If the existing Statute Book consists of legislation that is a hotchpotch of principal Acts, stand-alone amending Acts and non-textual amendments, it will be necessary to recruit a team of people experienced in drafting and editing legislation to systematically prepare consolidated versions of the existing statutes. As far as possible, this should be undertaken on the basis of one statute per topic. For example, there should be one statute dealing with companies; one statute dealing with road traffic; one statute dealing with animal welfare; one statute dealing with criminal law; and so on.

A single authority should be designated to oversee the program of consolidation. Its function should be to set targets and priorities and to check the appropriateness of draft consolidations. It should be empowered to ordain that particular legislation should be included in the program, irrespective of the wishes of government departments, some of whom are notoriously reluctant to promote consolidations of legislation for which they have administrative responsibility. In most Australian jurisdictions, the parliamentary counsel office has assumed or been accorded responsibility for this kind of function and this has proved successful. Because few people understand legislation as well as those who write it, arguably parliamentary counsel are the best placed people to fulfil this role.

As is the case with Canadian revisions and Australian reprints, the consolidation team should be authorised to make changes such as—

- removing obvious inconsistencies between different provisions,
- standardising the wording of frequently used provisions,
- shortening long sections and subsections by splitting them into shorter and more readable provisions,
- ensuring the consistent use of gender-neutral language,
- shortening long sections and subsections by splitting them into shorter and more readable provisions, and
- eradicating archaic expressions (including Latinisms).

In conjunction with the consolidation program, a firm decision needs to be taken to ensure that all amendments to statutes and statutory rules are made by the textual method. This should even extend to savings and transitional provisions contained in amending legislation. In the rare occasions where non-textual global referential amendments are required, they should be converted to textual amendments at the earliest opportunity.

Once the consolidation program is completed, the Statute Book will then be in a form that will allow statutes and statutory rules to be made available to the public in an updated, accessible and

⁵¹ I use the term ‘consolidation’ in the way used by Sir Courtenay Ilbert. *Ibid.*

coherent form immediately after they are amended. I envisage that special legislation authorising a designated authority to published updated statutes and statutory rules as and when appropriate. This legislation could be on the lines of the *Reprints Act 1972* (NSW), but it could equally be on the lines of Canadian legislation authorising the revision of statutes.⁵² Although, if the reprints method is adopted, the preparation would become a largely mechanical exercise that can be undertaken by competent clerical staff, I would again argue that the most competent people for overseeing the preparation of reprints of statutes or statutory rules are parliamentary counsel, on the grounds that no one knows their way round statutes and statutory rules better than those who were responsible for drafting them. If the reprint method is adopted, the reprinted statutes or statutory rules should include historical notes containing a table of amending statutes or statutory rules; and a list showing the provisions that were amended and the dates on which the amendments came into effect.

Last but not least, if a program along the lines is to be implemented it has to be properly funded. Unfortunately, there are few votes in undertaking a reform of the Statute Book. This is compounded by the difficulty in getting consolidation legislation through the legislature, even there are special rules to ease its way over the legislative hurdles. Nevertheless, the benefits of having an up-to-date, accessible and coherent Statute Book must surely be obvious. Apart from the removal of the frustration, the cost savings to both the state and the private citizen in both time and effort are surely immense. Moreover, no longer will the government official, lawyer or ordinary citizen have to hunt for the law scattered among umpteen different statutes and statutory rules that are often inconsistent with one another. The money would surely be money well spent!

⁵² E.g. The *Statute Revision Act*, Revised Statutes of British Columbia 1996, chapter 440.