

The Law Commission

(LAW COM. No. 44)

LAW COMMISSION'S SECOND PROGRAMME ON CONSOLIDATION AND STATUTE LAW REVISION

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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THE LAW COMMISSION

Second Programme on Consolidation and Statute Law Revision

NOTE BY THE COMMISSIONERS

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

1. On 22nd February 1971 we were formally requested by the Lord Chancellor to prepare a programme of consolidation and statute law revision pursuant to section 3(1)(d) of the Law Commissions Act 1965.

2. This is our second programme on this subject. In the first programme¹ we defined "consolidation" as meaning the process of combining the legislative provisions on a single topic into one coherent enactment, a process which renders the statute law more easily accessible, and "statute law revision" as meaning the pruning of dead-wood from the statute book, another process which makes the statute law easier to ascertain. We explained that the two processes were complementary to each other and to the wider process of law reform. As mentioned below, there have been developments of technique in both processes, but the object remains the same, namely to make the law easier to find and understand.

3. In preparing the new programme we have, of course, drawn on the experience gained from our efforts to carry out the first one. That programme contained seven major topics for consolidation. Two of these, Income Tax² and the Rent Acts³, have been completed. The consolidation of another, Road Traffic, having been started⁴ but interrupted by a stream of current legislation, has been resumed and at the date of submission of the programme the Bill which virtually completes it is about to be introduced. A fourth was Estate Duty. The preparation of a Consolidation Bill is well advanced but there is a need for amending legislation first in relation to administration and collection, and we are considering this now with the Board of Inland Revenue. A fifth topic was Stamp Duty. There is now considerable pressure for the abolition of these duties or at least for their complete overhaul. If we propose a consolidation and the Government then yields to this pressure, the consolidation would have only a short expectation of life; we have therefore decided not to proceed with this topic, and it does not appear in our second programme. In the case of two other subjects, Local Government and Public Health, the implementation of the Redcliffe-Maud Report would have supplanted much of the consolidations, and accordingly work on the former was suspended and work on the latter was postponed. In other words in our first five years we succeeded in completing only two out of the seven major topics in the first consolidation programme. Moreover only two of the ten additional topics listed there have been completed. Despite the success with Income Tax and Rents, this suggests that a different approach is needed, a conclusion

¹ Law Com. No. 2 (17th November 1965).

² The Capital Allowances Act 1968; the Income and Corporation Taxes Act 1970; the Taxes Management Act 1970.

³ The Rent Act 1965.

⁴ The Road Traffic Regulation Act 1967.

which is reinforced by the fact that since the publication of the programme we have produced a considerable number of consolidation Bills, which we did not mention in it or inherit at the inception of the Law Commission. Ten of these have reached the statute book and thirteen others are passing through Parliament or are in the course of being drafted.

4. We have had some success with our statute law revision programme, although it has taken time to achieve it. The first essay in this field, the Statute Law (Repeals) Act 1969, introduced a new concept, the repeal of enactments which were no longer of practical utility. It succeeded in repealing 188 Acts in whole or in part, but one of the clauses of the Bill for that Act and some of the proposed repeals did not commend themselves to the Joint Committee on Consolidation Bills. A subsequent Bill in this series, the Wild Creatures and Forest Laws Bill, which repeals in whole or in part some 64 Acts relating to forests and the forest laws, has had to go forward as a law reform Bill for reasons explained below. Among other things, the Bill proposed to abolish the prerogative right to royal fish, but the House of Lords voted to retain the right. A third Bill, the Statute Law (Repeals) Bill, has now been introduced on the lines of the 1969 Act and proposes the repeal of 88 whole Acts and parts of 85 other Acts.

5. Clearly there are lessons to be learnt about consolidation and statute law revision, both in the framing of programmes and the way in which they are to be implemented. We believe that it may be helpful to set out in this note some of the more important difficulties which we have met. But before we do so we must stress the nature of the operation on which we are engaged, namely the production of legislation which has to pass through Parliament. In general, if a Bill is introduced to deal with any topic, the whole of that topic becomes debatable in proceedings on the Bill, and under our system this is capable of occupying a great deal of parliamentary time. The risk of this happening could easily kill the process of consolidation and statute law revision. It is for this reason that the practice grew up during the last century and is still observed today whereby both Houses abstain from making amendments of substance to consolidation and statute law revision Bills provided that members are satisfied that the Bills do not change the law. The function of scrutinising such Bills in order to determine whether they make any changes in the law has been delegated to a joint committee of both Houses known as the Joint Committee on Consolidation Bills. Developments in the techniques of consolidation, which enable minor amendments of the law to be made in pursuance of proposals in a memorandum under the Consolidation of Enactments (Procedure) Act 1949, and more far-reaching amendments to be made in pursuance of proposals made by the Law Commissions, have led to an extension of the Joint Committee's jurisdiction. They now have the function of examining the proposals, with power to reject or alter them. Once approved by the Joint Committee a 1949 Act consolidation may not be amended by either House, except for the purpose of reproducing the law in areas not covered by the Memorandum. But Law Commission proposals for amendment may be re-examined by either House, which may exercise the like powers as the Joint Committee, although in other respects the Bill will be treated as a pure consolidation Bill. The Joint Committee has had a similar extension of its jurisdiction over statute law revision Bills which is dealt with in more detail below.

CONSOLIDATION

6. It follows from what is said in paragraph 5 above that the draftsman of a consolidation Bill has to ensure that, except as regards changes recommended in a memorandum under the 1949 Act or in Law Commission proposals, he reproduces the existing law accurately even though he perpetuates, as he must, all its imperfections and doubts. This is a process which requires great care and a fair amount of training and experience, not only to secure that the draftsman reproduces the law accurately, but also to enable him to identify those points of doubt to which the Joint Committee's attention should be drawn and those points on which changes should be proposed. It is also a very lengthy process. It has been calculated that it would have taken one draftsman $2\frac{1}{2}$ years to produce the Income and Corporation Taxes Act and the Taxes Management Act of 1970 and nearly six months to produce the Town and Country Planning Bill which, it is hoped, will be introduced shortly. This does not mean that the whole job could be completed in $2\frac{1}{2}$ years in one case or six months in the other. The draftsman has to await the reactions of the experts in the departments concerned with the Bill, who for their part have to spend a comparable amount of time in going through the Bill. A consolidation of the size of the Town and Country Planning Bill (300 clauses and 26 Schedules) would probably take fifteen to eighteen months to prepare. But this does not conclude the draftsman's labours. After introduction the Bill has to be explained to and piloted through the Joint Committee, who have to be satisfied that the conditions mentioned in paragraph 5 above have been fulfilled. There have been occasions when they have not been satisfied about this.

7. It is obvious from what has been said that the production of consolidation Bills consumes a lot of manpower both among draftsmen and in the departments. The Law Commission has available to it the services of five draftsmen of whom four are actually attached to the Commission. The time of some of these is necessarily taken up with drafting law reform Bills and now codification Bills and with other activities of the Law Commission. The drafting strength left for consolidation tasks is therefore limited. We are exploring the possibility of experimenting in the farming out of consolidations to practising or academic lawyers, but the practical difficulties are formidable. Any outside lawyer would have to be trained first and this would itself take a draftsman off doing consolidations or other Law Commission work.

8. But this is not all. The draftsman needs the co-operation of the department concerned. Without it a satisfactory consolidation is rarely possible. But it cannot be given if the experts concerned happen to be engaged on more urgent tasks than consolidation. Here, then, is another potential impediment.

9. Yet another factor which may limit the progress of consolidation is the capacity of the Joint Committee to handle the Bills coming before it. The eminent members of the Committee have many other commitments with the result that it may not be able to meet as frequently as would suit the needs of the consolidators. One of our Bills, the Bill for the Statute Law (Repeals) Act 1969, lost its quorum on four occasions. This is in no sense a criticism of the Joint Committee. We mention it only to show the sort of problems which we have to contend with.

10. Some topics cannot be satisfactorily consolidated without being amended. Consolidation with amendment, however, takes up a great deal of valuable parliamentary time. Various techniques have been used to overcome this difficulty. One is that adopted for the Local Government Act 1933 and the Highways Act 1959; both consolidated the existing law with considerable amendments, which were scrutinised by an expert committee, the Bills subsequently being treated in Parliament as consolidation Bills. This is a very time consuming process, not only for the draftsman and the department, but also for the members of the expert committee. We have already mentioned two other techniques—consolidation under the Consolidation of Enactments (Procedure) Act 1949, and consolidation with amendments recommended by the Law Commissions. The amendments which can be effected under the 1949 Act are of a comparatively trivial nature. There is no formal limit to the scope of the amendments which the Law Commissions may recommend, but in practice they must be of a non-contentious nature or they will not be acceptable to Parliament. It follows that amendments to produce satisfactory consolidations of some topics have to be left to current legislation. The Finance Act 1969 contained, in Schedule 20, a large number of amendments designed to facilitate the consolidation of the Income and Corporation Taxes Acts and the Friendly Societies Bill now going through Parliament is partially designed to facilitate a consolidation of the Friendly Societies Acts. But this method involves joining the queue for parliamentary time with the result that, as has happened more than once, the amending Bill which would facilitate the final consolidation is held up for long periods.

11. It sometimes happens that the law on some subject is in need of restatement in one Act instead of several, but is in such a state that even substantial amendment will fail to produce a satisfactory consolidation. In that case nothing short of radical revision will do and this too, since it will not qualify as consolidation, will take up parliamentary time. An example is to be found in the disreputable legislative tangle constituted by the two dozen or so Acts about burials, most of which date from the nineteenth century. We are now considering whether or not there should be a revision of these Acts as part of our law reform functions since consolidation, even with amendments, would not produce a satisfactory statement of the law. In other cases consolidation alone will fail to achieve a satisfactory statement of the law, because the statute law has been the subject of much judicial interpretation or because it only forms part of the corpus of the relevant branch of the law. This is likely to be true of the provisions of the Judicature Act about practice and procedure (which are referred to in Section I of the consolidation programme) and also of the law of landlord and tenant, which is divided between common and statute law and which we are in the course of codifying. Codification is another process which is capable of taking up valuable parliamentary time.

12. From time to time obstacles of a different kind impede consolidation. New legislation and even the possibility of new legislation are examples. As mentioned above work was started on a local government consolidation, but abandoned because of the Redcliffe-Maud Report and work was also started on an urgently needed consolidation of the Children and Young Persons Acts, but stopped because of projected changes in the law which

eventually became the Children and Young Persons Act 1969. Then again some topics in need of consolidation never seem to be free of current legislation and it becomes very difficult to time the drafting and introduction of consolidation Bills. Road Traffic is one example of this, the latest consolidation Bill in the series having been postponed more than once. And, of course, consolidations in any branch of revenue law must be co-ordinated with Finance Bills. Any such consolidation Bill must be introduced at a time when no Finance Bill is before Parliament or at any rate at such a time that, when it is considered by the Joint Committee, no amendment of its contents can be made by a current Finance Bill; and it must be passed before the next Finance Bill is introduced, whether it is a spring or autumn Finance Bill.

13. The difficulties which we have mentioned so far affect the process of consolidation itself. Some of them, particularly that of manpower and that created by supervening legislation, also affect the planning of the consolidation programme. The first stage in this operation is to identify those topics which are most in need of consolidation, and here a more intangible difficulty arises. It is impossible to foretell at any given moment what will be on the statute book in the future. A proposal for consolidation which may seem urgent now may become unnecessary later on because a Bill may be introduced re-writing the subject matter. On the other hand, a topic which does not need consolidation now may need it urgently in the not too distant future because a Bill is introduced extensively amending it without re-writing it. These problems and those mentioned earlier in the note have, of course, influenced us in preparing the attached programme. We have felt it necessary to set them out in some detail in order to explain both why the programme does not cover all topics which might be thought candidates for consolidation and why the entries relating to particular topics in the programme are framed as guidelines rather than as detailed specifications. Despite these limitations, however, we are of the opinion that the programme will serve a useful purpose. It is not, and cannot be, either exhaustive or immutable; but it does indicate certain major areas where in our view consolidation is urgently required. We have divided the programme into two parts. The items mentioned in Section I are those to which, other things being equal, we will give priority because of their appeal to a wide readership; those in Section II are no less in need of consolidation, but their public is more limited. We suggest in some cases that the whole of a particular topic needs consolidation, in others that it is better to use the splitting technique, as we did in the case of Income Tax and Road Traffic. Its use will often enable progress to be made when a consolidation of the whole subject would require substantial amendment first over part of the field. This is particularly true of a subject such as merchant shipping.

14. The programme only comprises major topics. There are many smaller topics in need of consolidation, for instance Costs in Criminal Cases, Clean Air, Prisons, and Tribunals and Inquiries. Juries would be another strong candidate, but a consolidation would be premature before the implementation of those provisions of the Morris Report⁵ which have not yet been acted

⁵ *Report of the Departmental Committee on Jury Service (1965)*; Cmnd. 2627.

upon. Medium and small consolidation Bills are drafted not only by the Law Commission's draftsmen, but also by members of the Office of the Parliamentary Counsel with time to spare from current legislation, and this year such Bills form the bulk of the current consolidations. The decision to prepare them is normally taken on the basis of reports on consolidation prospects from the draftsmen of current Bills, who may be expected to be familiar with the subject matter. These reports have been made now for over three years and a very good picture is being built up of consolidation needs on different topics, small and large, important and unimportant. In addition we occasionally undertake consolidations at the request of government departments or on the suggestion of outside bodies or individuals.

STATUTE LAW REVISION

15. The older type of statute law revision Bill proposed the repeal of enactments which had ceased to be in force or had become unnecessary. A slightly more modern type proposed to "revise the statute law by repealing obsolete, spent, unnecessary or superseded enactments". The preparation of both kinds of Bill involved a tremendous amount of care and consultation with a view to providing evidence for the Joint Committee that the repeals effected no change in the law. The process inevitably took a very long time and still left a number of provisions of doubtful utility on the statute book. It was to deal with these that we have had recourse to a new type of Bill which proposes the repeal of enactments which are no longer of practical utility. But the amount of care and consultation needed, and the time taken for the preparation of the Bill, remain undiminished because the Joint Committee requires to be satisfied that the enactments proposed for repeal are not of practical utility, the onus of proof being on the proponents of the Bill. That this is no light onus is shown by the fact that the Bill for the Statute Law (Repeals) Act 1969 occupied six days of the Joint Committee's time and the Committee required the attendance not only of the draftsmen, but also of eight other witnesses (including leading members of the Chancery Bar) to give evidence on the repeals in their respective fields of specialisation. The time taken up by all involved in the operation reached formidable proportions and it is clear that no quick results can be expected in the future. Nevertheless we are pressing on with a systematic search of the statute book with a view to recommending the repeal of all enactments which can be shown to serve no useful purpose. The search is partly done in chronological order and partly by subject matter.

16. Not all statute law revision is being done by Statute Law Revision or Statute Law (Repeals) Bills. Some is included in current legislation, as it was in the Theft Act 1968 and is in the Courts Bill. This practice is being encouraged by the Joint Committee. An innovation is the Wild Creatures and Forest Laws Bill, which implements our Second Report on Statute Law Revision⁶ and is proceeding as a law reform Bill because in order to found the repeals it was necessary to include a provision abolishing the forest law itself and the royal prerogative right to wild creatures. The use of a law

⁶ Law Com. No. 28.

reform Bill to promote statute law revision is still something in the nature of an experiment, but it may prove to be a useful way of making progress in the removal of the dead or decaying wood from the statute book.

(Signed) LESLIE SCARMAN, *Chairman.*

CLAUD BICKNELL.

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NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

23 February 1971.

LAW COMMISSION'S SECOND PROGRAMME ON
CONSOLIDATION AND STATUTE LAW REVISION

PART A. CONSOLIDATION

I. Consolidations Deserving Priority

Children and Young Persons

1. At the time of our first consolidation report a consolidation had already been begun of the enactments relating to the care of children and children in trouble. It was already urgent as a glance at the four main Acts on the subject matter, those of 1933, 1948, 1958 and 1963, will show. It had to be abandoned, however, because of the prospect of further legislation. This has now materialised in the shape of the Children and Young Persons Act 1969, and the consolidation deserves a high priority. The existing Acts, however, will not be easy to consolidate and if a satisfactory consolidation cannot be achieved by Law Commission recommendations, an amending Bill may be necessary first.

The consolidation of two smaller topics in this field would be desirable when the major consolidation is undertaken. One is adoption, comprising four Acts of 1958, 1960, 1964 and 1968, but this should await the report of the Houghton Committee. The other is the employment of children, comprising the Employment of Women, Children and Young Persons Act 1920 and Part II of each of the Children and Young Persons Acts of 1933 and 1963.

Company law

2. The last consolidation was in 1948, since when major changes have been effected by the Companies Act 1967 and less extensive changes by other legislation, e.g. the Companies (Floating Charges) (Scotland) Act 1961. Two further operations may materialise. The Scottish Law Commission in their report on the 1961 Act⁷ have recommended the revision and extension of that Act, and the Queen's speech of 2nd July 1970 stated the Government's intention of carrying out a review of company law in general. If the report and the review result in further amendments, the need for consolidation will be pressing.

Courts, practice and procedure

3. The Acts on this topic, with the exception of the County Courts Act which was last consolidated in 1959, constitute something of a legislative jungle which ought to be cleared, and the passage of the Courts Bill will make the need for consolidation even more urgent. It is probably not profitable to re-enact some provisions of the Supreme Court of Judicature (Consolidation) Act 1925, particularly those about jurisdiction and procedure, because they are in the nature of transitional provisions on a body of unwritten law. The need in their case may rather be for codification. On the other hand consolidation of some of the other provisions is highly desirable. This is essentially a case where the splitting technique will be useful.

⁷ Cmnd. 4336.

Housing Acts

4. A great deal of legislation has been enacted since this topic was last consolidated in the Housing Act 1957 and the Housing (Financial Provisions) Act 1958, and the law on the subject is now in a confusing state. In the area covered by the 1957 Act, the most important new provisions are contained in the Housing Acts of 1961, 1964 and 1969; each of those Acts also made major changes in the financial field, as did the Housing Subsidies Act 1967.

In the Queen's speech the Government announced their intention to re-fashion housing subsidies and the new legislation to achieve this might make consolidation of the financial provisions unnecessary. It would certainly make it premature. But consolidation of the other provisions of the Housing Acts ought to be attempted in due course and need not necessarily await the new legislation, particularly as a convenient approach to the whole subject might be to split it on the pattern of the 1957 and 1958 Acts.

Local Government

5. The Local Government Acts were in our first programme of consolidation and statute law revision. The Local Government Act 1933 has been amended again and again and is in great need of consolidation. This was started, but was suspended on the publication of the Redcliffe-Maud report.⁸ The Government have now published two documents⁹ setting out their proposals for local government reform in England and Wales respectively and have announced their intention of introducing legislation to implement them during the 1971-72 session of Parliament. When the legislation is passed, resumption of the consolidation will deserve a high priority, though it may conceivably have to wait for the implementation of the Government's forthcoming proposals on local government finance.

Matrimonial Causes

6. The Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970 bring a much needed re-consolidation of this topic within reach. But this should await the passage of the Nullity of Marriage Bill and any Bills to implement our Report on Polygamous Marriages¹⁰ and our forthcoming proposals on the matrimonial jurisdiction of the English courts. The law as to marriage itself is now being examined by the Law Commission and the Registrar General, and their investigation is expected to lead to a re-casting of the Marriage Acts.

Public Health

7. This topic, also included in the first programme, is in great need of consolidation. It is, however, likely to be affected by the Government's proposals for local government reform and the greater part at least should await their implementation. On the other hand it might be possible to make a start on some aspects by using the splitting technique.

⁸ *Report of Royal Commission on Local Government in England 1966-69*; Cmnd. 4040.

⁹ *Local Government in England: Proposals for Reorganisation*; Cmnd. 4584. *The Reform of Local Government in Wales: Consultative Document*; 16 February 1971.

¹⁰ Law Com. No. 42.

II. OTHER CONSOLIDATIONS

Capital Gains Tax

8. The taxation of "long-term" capital gains was introduced by the Finance Act 1965 ; and the provisions of that Act relating to capital gains have been amended by every subsequent Finance Act, in some cases extensively. Certain enactments relating to the administration of this tax have been consolidated by the Taxes Management Act 1970, and the taxation of the capital gains of companies is now dealt with in the Income and Corporation Taxes Act 1970. A consolidation of the main body of enactments is undoubtedly desirable. However, the recent origin of the tax, and the Government's declared intention to undertake a general review of the tax laws, suggest that further amendments are probable in the next few years ; and for these reasons we think that it will not become practicable to embark upon a consolidation in the very near future. But for these considerations, this topic would have deserved a high priority in our programme.

Education

9. The Education Acts 1944 to 1970 are in need of consolidation, the 1944 Act having been frequently amended and added to by the later Acts. Some modernisation of this code may be required to produce a satisfactory consolidation and we are looking into the question whether this can be done by law Commission recommendations. If it cannot, it will be necessary to wait for an amending Bill.

Electricity

10. This subject comprises two topics, both of which need consolidation : (a) the Acts about the electricity industry, comprising the Electricity Acts 1947 to 1961 and two subsequent Acts ; and (b) the Electricity Supply Acts 1882 to 1936. The former would admittedly not command a large public ; the latter, however, would and a consolidation has been attempted, but may require an amending Bill first in order to produce a satisfactory result.

Highways

11. The Highways Act 1959 was itself a consolidation with amendments. A re-consolidation would be useful, although not as urgent as the consolidation of some other topics. We will have to consider whether to adopt the splitting technique. It would be possible to bring Parts VIII and IX of the 1959 Act (new streets and private streets) into a separate code or codes, but it may prove more convenient to keep them with the main body of highway provisions.

Merchant Shipping

12. The Merchant Shipping Acts and other legislation in this field need bringing together in one or more up-to-date statutes, but there is no doubt that some aspects of the subject need considerable modernisation first. The most profitable method of approach will undoubtedly be to use the splitting technique and tackle first those aspects which can be consolidated without amendments of substance. The most fruitful field in which to start is probably civil maritime law, including such topics as limitation of liability, division of loss, salvage, civil liability for oil pollution and lien for freight. In due course it will be important to start on the provisions relating to safety, but they first need modernisation in some respects.

PART B. STATUTE LAW REVISION

We intend to continue our review of the statute book with a view to recommending the repeal of all enactments which can be shown to serve no useful purpose. The review will be done partly in chronological order and partly by subject matter. Choice of subject matter will to some extent be influenced by the order in which topics are to be published in the new edition of the Statutes in Force. We work in close co-operation with the Editorial Director of this edition with a view to seeing that, so far as possible, priority is given to the repeal of obsolete enactments which would otherwise have to be reproduced in the new edition. He, for his part, is often able to draw attention to enactments which are ripe for repeal.

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