SYMPOSIUM ON LEGISLATION

CURRENT PROBLEMS IN THE LEGISLATIVE PROCESS

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In an earlier article,[1] I dealt briefly with the Parliamentary process, the kinds of bills, the initiation and preparation of legislation, the language of statutes, and the qualifications and training required for draftsmen.

The purpose of this article is to discuss some problems of the legislative process today.

First, however, because of references in this article to Parliamentary Counsel, it is necessary to mention the changes that have taken place in the office described in the earlier article as the Law Drafting Office.

THE PARLIAMENTARY COUNSEL OFFICE

At the end of 1973 the Law Drafting Office shook off the last remnant of its colonial origin by changing its name. It is now called the Parliamentary Counsel Office. The change had to be made by statute.[2] The head of the bill drafting department of the Office is now called the Chief Parliamentary Counsel. The present holder of that office, Mr W. Iles, also holds the office of Compiler of Statutes, as head of the compilation department. The new nomenclature is in line with that used in the United Kingdom and Australia. It should benefit the Office by giving it a better status in the eyes of the legal profession, and it is to be hoped that it will help recruitment by attracting to the Office able young lawyers with the required qualities.

Vacancies in the Office caused by recent retirements have been filled, and there are at present eight Parliamentary Counsel (including the Chief Parliamentary Counsel) together with two others, both former Heads of the Office (Mr J. G. Hamilton and Mr J. P. McVeagh), who have come back in the last few years to help with the heavy workload. However, there is no doubt that the Office will need at least two more draftsmen in the near future.

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1 D. A. S. Ward, "The Preparation of Acts of Parliament" (1968) 1 Otago Law Review 294.

2 The Statutes Drafting and Compilation Amendment Act 1973.

EARLY SESSIONS

In the past few years there has been much talk about the desirability of an early start to the Parliamentary session. This article is not concerned with the question whether policy or other considerations may make an early start desirable. What does need attention is the question whether an early start means a better and calmer consideration of legislation over a longer period. Many people outside Parliament think it does. The following extract from a letter to a Wellington newspaper is typical:[3]

> Legislation is always rushed through the House at the end of the term by means of all-night sittings, during which many M.P.s are bemused by lack of sleep and are scarely aware what is being passed. An earlier start would end this undesirable practice, and enable legislation to be considered in a less frantic atmosphere.

Let us look at the experience of the past six years, in five of which Parliament met early in the year.[4]

In 1970 the session began on 12 March (when the Queen was present to open Parliament) and ended on 3 December. There were four adjournments totalling 76 days. The House sat on 110 days, which is 30 days more than the average for the years 1950-69. The hours sat after midnight totalled more than 69, whereas during the previous 20 years a total of 30 hours after midnight had been exceeded only on five occasions. The total number of public acts passed was 153; and of these 115 had their third readings in the last month of the session—in fact 111 (including 69 which had been introduced as part of the Statutes Amendment Bill[5]) had their third readings in the last eight days.

In 1971 the session began on 25 February and ended on 17 December. There were three adjournments totalling 104 days. The first adjournment was for 74 days, between 25 March and 8 June. The House sat on 111 days, including more than 10 hours after midnight. Public acts passed totalled 157; and of these 103 (including 60 which were introduced as part of the Statutes Amendment Bill) had their third readings in the last month of the session.

In 1973 the session began on 14 February and ended on 23 November. There were two adjournments totalling 97 days (the first being for 80 days between 16 March and 5 June). The House sat on 111 days, including three and a half hours after midnight. Public acts passed totalled 123; and of these 94 (including 55 which were introduced as part of the Statutes Amendment Bill) had their third readings in the last month of the session.

In 1974 the session began on 4 February and ended on 8 November. There were two adjournments totalling 72 days (the first being for 59 days between 29 March and 28 May). The House sat on 118 days (a record for the years from 1950), including a total of nearly

3 J. Thompson, *The Dominion*, 25 May 1976.

4 1970, 1971, 1973, 1974, 1975. See Schedule of Business, Session 1975, Comparative Table.

5 The Statutes Amendment Bill consists of minor and non-controversial amendments to a collection of unrelated Acts, with not more than two amending clauses for each Act. It is dealt with as one Bill by the Statutes Revision Committee of the House and by the House itself until it has reached the Committee of the Whole House, where each set of clauses is "peeled off" and becomes a separate Amendment Bill for the purposes of Third Reading.

42 hours after midnight. Public acts passed totalled 149; and of these 93 (including 56 introduced as part of the Statutes Amendment Bill) had their third readings in the last month of the session.[6]

The 1975 session began on 25 March and ended on 10 October. There were two adjournments totalling 34 days. The House sat on 97 days, including a total of 29½ hours after midnight. Public acts passed totalled 140; and of these 110 were assented to by the Governor-General in the last month of the session. In fact 88 (including 58 introduced as part of the Statutes Amendment Bill) were assented to in the last week.[7] The records for past year show that assent follows forthwith (at the latest within a few days) after the third reading.

In these figures we find certain common features. In each of the above-mentioned years:

(1) After relatively brief sittings, Parliament adjourned more than once during the session, for periods totalling from 34 (in the election year of 1975) to 104 days. In three of the years (1971, 1973, and 1974) the first adjournment was so lengthy that the House did not meet again until about the traditional date at the end of May or early in June.

(2) The total number of days on which the House actually sat (97 to 118) did not vary significantly. Moreover, that total did not exceed by as much as one might have expected the average for the years 1950 to 1969, which was 80 sitting days.

(3) Sittings until midnight or later (instead of the normal 10.30 p.m.) were not avoided, and in 1970 the hours sat after midnight (69 hours 50 minutes) far exceeded the highest total for the previous 20 years (42 hours 54 minutes in 1958, the year of the "Black Budget").

(4) The number of public acts passed did not vary greatly. The lowest figure (123) was in the first year of a new government.

(5) About two-thirds of the public acts were passed in the last month of the session.

Two questions arise. Why were the adjournments necessary, and why were two-thirds of the acts passed in the last month? These two questions are connected.

The adjournments were necessary to allow select committees, with the authority of the House, to get on with their work of dealing with legislation, petitions, and other matters. A select committee may not, unless the House otherwise directs, sit during the sitting of the House or on any day on which the House is not sitting.[8] The House rarely grants its consent for a committee to sit while the House is sitting. This is for the obvious reason that members on both sides want to be in the House itself for debates on other matters. This means that, for practical purposes, committee sittings are limited to Tuesday and

6 Further details about the years in question, including the dates of First and Second Readings, Committals, Reports, Third Readings, and Royal Assent, and which Bills went to Select Committees, are in the Schedules of Public Bills in the Journals of the House of Representatives for those years.

7 Dates of assent taken from 1975 Statutes. The Journals of the House for 1975 were not available when this article was written.

8 Standing Orders of the House of Representatives, S.O. 351.

Wednesday mornings, because the House sits on Tuesday, Wednesday and Thursday afternoons and evenings and on Friday mornings, and the party caucuses meet on Thursday mornings. Most members leave for their homes and electorates on Friday afternoons, and return to Wellington on Tuesday mornings. Therefore the usual meeting time for all committees is Wednesday morning.

A substantial number of public bills are referred to select committees in each year: for example, 52 out of 100 were so referred in 1973. Many are major or controversial bills that attract a large number of submissions, and much time is needed to hear and examine the witnesses and study the evidence before the committee can deliberate on the bill. Then more time must be allowed for the drafting of amendments that the committee may decide to make; and these in turn must be considered by the committee. In addition to the public bills, all local bills are referred to the Local Bills Committee (which has power under Standing Orders to sit during any recess or adjournment)[9] after the first reading or, if received during a recess, after examination by the Clerk of the House.[10] All private bills are referred to a committee after second reading.[11]

For these reasons, the earlier the session starts, the more adjournments are necessary. It must also be remembered that most members of Parliament are members of more than one committee. The advantage of an adjournment for a substantial period is that meetings of different committees can be held on different days, so that the members can attend each of their committees. It is not good that witnesses should have to appear before a depleted committee because half the members are attending another committee meeting.

Another practical reason for adjournments is the difficulty of producing enough legislation early in the year to keep the House engaged. Between the end of one session and the beginning of another the departmental officers concerned with legislation and its administration, and the Parliamentary Counsel, are busy. The departments have to settle details of necessary regulations, perfect administrative machinery, and do all the other things that are necessary to make new legislation work. A limited number of officers in each department are qualified and available to make the required decisions. At the same time, these officers are involved in the formulation of policy for legislation for the coming session, and in advising Ministers. The result of all this activity is that the Parliamentary Counsel Office usually has to wait longer than is desirable for instructions on the details of legislation that has been approved by the government in principle for drafting and introduction. Also, it takes time for bills that have been drafted to be considered by the departments.

The Parliamentary Counsel are similarly involved. At the end of a session their first task is to check the text and approve the printing of all the Acts passed. They have urgent regulations to draft, and must start on consolidations, and at the same time start drafting policy bills that are required for introduction early in the coming session.

9 Ibid., 265.
10 Ibid., 265, 266.
11 Ibid., 296.

These things have already been dealt with in some detail in an earlier article.[12]

It might be thought that adjournments would take some of the pressure off the draftsmen and give them more time to draft more bills for introduction when the House meets again. But any such relief is limited. Most draftsmen have bills before committees, and have to attend the committee meetings during the hearing of the evidence and while the committees are deliberating. The draftsman of a major or controversial bill that has attracted many separate submissions finds himself sitting on most days of the week in a committee. In recent years some bills have led to more than 200 submissions and have engaged the attention of committees for months on end. Finally the draftsman has to draft amendments to give effect to the committee's decisions, and attend all the committee's deliberations on his bill.

Enough has been said about the necessity for adjournments in an early-starting session to make it clear why two-thirds of the public bills in the sessons we have been looking at were passed in the last month. Bills that have been referred to committees can take a long time to come back to the House, and by then the House is spending a good deal of its time on the financial debate and in consideration of the estimates. Bills that are not referred to committees tend to be dealt with later in the year because of the adjournments. However, the comparatively large number of third readings at the end of a session can give a misleading impression. Most of them have been on the Order Paper for some time and have had a thorough airing in the second reading and committee stage, in addition to careful consideration outside the House in the case of bills that have been to select committees. Many come from the Statutes Amendment Bill, which is necessarily brought in late in the session.

However, all these facts (which are supported by my own experience as a draftsman up until March 1974) show that an early start does not result in a more even flow of bills into the House, or better drafting, or an easier passage through the House, or an avoidance of rush towards the end of a session. In my opinion, the legislative programme is better handled if Parliament meets at the traditional time of the year.

It should be added that in recent years there has been a steady increase in the practice of introducing some major policy bills and consolidations at the end of a session, and authorising select committees to deal with them in the ensuing recess. This is a good practice, leading to better consideration of the bills in the committees and a flow of reported bills onto the Order Paper early the next session. But those results are achieved only if the recess is long enough, and if the committees sit early enough and often enough during the recess, so that the bills are ready to report back at the beginning of the next session. If that is done, the advantages outweigh the disadvantage of keeping some of the draftsmen away from the drafting of new bills while the committees sit.

12 Supra, n. 1.

Law Reform

New Zealand now has five law reform committees and a Law Reform Council.[13] Practising lawyers predominate on the committees, but membership includes university professors and legal officers of the Justice Department and, in the case of the Criminal Law Reform Committee, a representative of the legal section of the Police. In addition, each committee has as one of its members an experienced legislative draftsman. The committees report to the Minister of Justice.

The Law Reform Council was established in 1975 and replaces the former Law Revision Commission. It consists of the Minister of Justice as Chairman, the chairmen of the five law reform committees, the Secretary for Justice, and the Chief Parliamentary Counsel. The Council meets annually. Its main function is to act as a forum for an exchange of ideas on law reform generally, the discussion of problems encountered, and a general survey of the work of the committees.

In this field there is the problem that many more recommendations have been made by the committees than have been implemented by legislation. As at 1 March 1976, out of 81 reports made since June 1967, 33 proposals had been enacted. It is reasonable to assume that most of the recommendations made are acceptable to the Government, with or without modifications. The problem is really one of Parliamentary time and drafting time.

Every year a government has a crowded legislative programme to give effect to its policies. Priorities have to be set, and many ministerial proposals for legislation are held over. While the public will generally complain that there is too much legislation, as individual members of groups with particular interests they are constantly demanding more to promote those interests. There seems to be no way of avoiding more and more legislation in the modern welfare state with its planning and regulation of so many fields of activity. This constant pressure for more laws leaves little room for law reform proposals that are not pressed for and do not appear to be urgent. Pressure from the New Zealand Law Society might help.

For the same reasons, little time is available for the drafting of law reform bills. The draftsmen are fully occupied in coping with the government's programme.

The ideal solution is for the government to be persuaded to give priority in its annual legislative programme to a specified number of law reform bills. This means that it would be for the Minister of Justice to persuade his colleagues on the Cabinet Committee on Legislation that law reform must to some extent take a place in the queue ahead of other proposals pressed for by departments and supported in many cases by outside groups; and it would be no easy task. But unless it is done law reform will fall further behind. Even the Justice Department, which does its best to promote law reform, finds itself having to ask for priorities for a number of other proposals.

13 The Contracts and Commercial Law Reform Committee; the Criminal Law Reform Committee; the Property Law and Equity Reform Committee; the Public and Administrative Law Reform Committee; and the Torts and General Law Reform Committee. The Criminal Law Reform Committee was set up in 1971, and the others in 1966. For a reasonably up-to-date list of the members of each committee and of the Law Reform Council, see the *New Zealand Law Register* (1976), 312, 313.

The Minister would be helped greatly if, wherever possible, the reports of the committees had draft bills attached to them. Where that has been done, the committees have had more success in seeing their reports implemented. This can be done only where the bill is drafted by the draftsman-member of the committee, because only he has the training and experience required to produce a satisfactory and acceptable bill. It has also been my experience that the involvement of committee members in considering and criticising a draft bill to be attached to their report has had a beneficial effect on the report itself. Nothing clarifies one's thinking more than having to express an idea in precise words.

There are obvious difficulties for the draftsman-member of a committee in producing a draft bill for the committee's report. If he is still a full-time member of the Parliamentary Counsel Office he is already hard pressed in coping with the government's legislative programme, and it is difficult to find the time to do more bills. Simple and straightforward amendments to the law do not present much trouble; but many legislative proposals require the more or less undivided attention of the draftsman over quite a long period.

From time to time the suggestion is made that the solution to the problem is to appoint more draftsmen to the Parliamentary Counsel Office. If governments are prepared to make the salaries and conditions of service good enough to persuade young lawyers of the first quality to give up the more glamorous attractions of the bar and make a career of legislative drafting, Parliament and law reform will benefit in the long term.[14] But the appointment of new recruits does not for some time ease the burden of the experienced draftsmen and give them more time for law reform. The new appointees have to be trained and supervised for several years, and only the experienced draftsmen can do the training.

Private Members' Public Bills

The Hospitals Amendment Act 1975 highlights another problem, which may recur unless a satisfactory procedure is adopted to deal with private members' public bills. Section 2 of that Act provides as follows:

> 2. *Therapeutic abortions to be carried out only in institutions under the control of a Hospital Board or in approved licensed hospital* — The principal Act is hereby amended by inserting, after section 140, the following section:
> "140A. (1) Nothing in section 182 (2) of the Crimes Act 1961 (which relates to the causing of the death of a child in good faith for the preservation of the life of the mother) shall apply unless the operation is performed in an institution under the control of a Hospital Board under this Act or in any licensed hospital that may be approved for the purpose by the Director-General of Health upon his being satisfied that it maintains or uses adequate and independent counselling services and also procedures to ensure that all operations authorised are within the law and that the facilities for operation and after-care are satisfactory:
> "Provided that nothing in this section shall apply in any case where by reason of the urgency of the case the life of the mother is likely to be prejudiced by the time occupied in conveying her to such an institution or licensed hospital.

14 As to the qualities required, see the article cited in note 1 supra.

> "(2) Whenever any therapeutic abortion, or other operation that could lead to or effect an abortion or subsequent unnatural miscarriage, is performed, a record of that operation and the reason for it, but without the patient's name, shall be made and forwarded within 1 month to the Director-General of Health."

The Bill was not drafted in the Parliamentary Counsel Office. It was introduced by a private member.[15] It was not adopted by the government as a Government Bill, but was allowed to proceed on a free non-party vote of members. Members voted according to their consciences and the Bill was duly passed. It soon led to litigation and its drafting was severely criticised by the Supreme Court.

This article is not concerned with the merits of the proposition that the promoter of the Bill apparently intended to enact, as displayed by the sidenote to the amending section. What must concern us is that the new section is badly drafted and ambiguous. Amongst other things it apparently leaves untouched section 183 of the Crimes Act, under which prosecutions for abortion are taken. It is fair to suppose that many members of Parliament misunderstood the effect of the clause when they voted. They were voting on what they thought it meant. The new Minister of Health says that the amendment does not express the intention of Parliament. On that ground, he recently introduced a Health Amendment Bill containing different provisions, which would have replaced the 1975 Act; but, again on a free vote, the new Bill was deferred for twelve months, leaving the 1975 Act in force.

It is most undesirable that badly drafted and ambiguous legislation should find its way on to the statute book, particularly on a subject that is controversial and of great importance to the community. In recent years the number of private members' bills introduced has increased. What happened in 1975 can happen again. Where there is a bill on a matter of moral and social concern, on which public opinion is divided, a government may decide not to take sides, because of political overtones. If that happens, the existing procedures are not adequate.

There are three things that can happen to a private members' public bill. First, it may be ruled out of order as involving an appropriation of public money and therefore requiring a message from the Governor-General recommending the House to make provision accordingly. Secondly, the government may, with the consent of the member in charge of the bill, adopt it as a Government Bill.[16] Thirdly, as happened in the case of the Hospitals Amendment Bill, it may be allowed to proceed; and if it is passed it then becomes a public act.

If the government adopts the bill as its own there is no problem. Past practice has been for the bill to be referred to the government departments concerned for reports, and also to the Parliamentary Counsel Office for any necessary redrafting, with the result that the government usually produces another bill.

Some procedure is needed to ensure that no private member's bill that is to be allowed to proceed without adoption by the government is allowed to go to a second reading until it is properly drafted. For this purpose it should be a function of the Parliamentary Counsel

15 Under Standing Order 210.
16 Ibid., 73.

Office to report on the bill in much the same way as, under the Statutes Drafting and Compilation Act 1920, it has to report on a local bill. For the same purpose, every government department concerned with the bill's subject-matter should also be required to report. Only in this way can a bill be properly tested for its effect on the existing statute law and case law. This could best be done by referring the bill, after its first reading, to a scrutiny committee consisting of members of both sides of the House, including the member in charge of the bill. The committee would consider the reports from the departments and Parliamentary Counsel. Its function would be limited to ascertaining the intention behind the bill and ensuring, in the light of the reports, that it is so drafted as to give effect to that intention and operate effectively against the background of the existing law. The committee would report back to the House, with an explanation of the intention of the bill and of any drafting amendments that have been made. The House would then be in a position to consider the bill on its merits, and would still be able to refer it to a select committee for consideration and the hearing of evidence if such a course were thought desirable.

Readers may be led to suggest that it might be better for a member to have the right in the first instance to have his bill drafted by Parliamentary Counsel. I would strongly oppose this suggestion. In the first place, the Parliamentary Counsel Office is overworked and understaffed, and the drafting of government bills must have priority and should not be interrupted. Secondly, it is one thing for a draftsman to draft a government bill with departmental experts on the subject available for discussion and to back up his own research, but quite another to be expected to produce, by himself, a private member's bill that may be complex and technical. Lastly, the draftsman may well be faced with drafting a government bill on a given subject, and an entirely different bill on the same subject for a private member, and both at the same time; or two or more conflicting private members' bills on one subject. All in all, the Office would be placed in an impossible situation. It could very well, however, carry out the reporting function suggested above.

The Textual Amendment System

A major problem in the United Kingdom, which has led to much discussion in recent years, is the considerable disarray of their statute book. In 1968 the Council of the Statute Law Society[17] appointed a committee under the chairmanship of Sir Desmond Heap, to examine the ways in which the system of framing, enacting and publishing statutes of the United Kingdom Parliament failed to meet the requirements of the user. That committee published in 1970 a report called "Statute Law Deficiencies" (generally known as the Heap Report). The report was highly critical of the state of the statute law. Its conclusions can be summarised by saying that the procedures for making and promulgating statute law should be governed by the needs of the user, and that the user's basic requirements of accessibility and intelligibility were not being met.

17 The Statute Law Society is an association of statute users whose principal aim is to secure improvements in the system by which laws are expressed, produced, and published.

In 1970 the Society appointed another committee to propose solutions to the deficiencies found by the Heap committee. This second committee was chaired by Lord Stow Hill. Its first report, known as the Stow Hill Report, was published in 1972.[18] Its solution was that so far as possible all statute law on one subject should be gathered into one act. For this purpose there should be set in train a "crash programme" of continual consolidation which so far as practicable would ensure that all or virtually all statute law is contained in consolidation statutes within a reasonably short period of years. Then, wherever possible, what the report calls the "referential" system of amendment should be replaced by the textual amendment system. All bills using the textual amendment system should be accompanied by explanatory memoranda so that members of Parliament and other readers would understand the effect of each amendment.

A draft of the Stow Hill Report was put before the Select Committee on Procedure of the House of Commons. That Committee recommended, among other things, that the government should appoint a committee, including members and officers of both Houses, to review the form, drafting, and amendment of legislation and the practice in the preparation of legislation for presentation to Parliament.[19] The government duly appointed a Committee on the Preparation of Legislation (the Renton Committee) which invited the Statute Law Society to submit to it a comprehensive memorandum containing the Society's views on the deficiencies of the statute law, their causes, and their remedies. The Society's committee, under its new Chairman, Mr H. H. Marshall, did this, and the memorandum has since been published.[20] The memorandum contains a more detailed treatment of the deficiencies found by the Heap Committee, diagnoses their underlying causes, and proposes a number of remedies in addition to those in the Stow Hill Report. However, the main recommendations were still the "crash programme" of consolidation and the adoption of the textual amendment system.

The Renton Report was published in May 1975.[21] Pursuant to its terms of reference, namely to review the form in which public bills are drafted with a view to achieving greater simplicity and clarity in statute law, the committee makes a number of recommendations. In this article we need to consider only the question of the textual amendment system. In the minds of the members of the Stow Hill Committee, a pre-requisite to its adoption was a "crash programme" of consolidation. The Renton Committee, because of the difficulty of recruiting and training enough draftsmen and finding enough Parliamentary time to do the job, described this proposal as being "in the realm of fantasy",[22] thereby rousing the ire of Mr F. A. R. Bennion, a former Parliamentary draftsman and vice-chairman of the Stow Hill Committee.[23]

18 *Statute Law: The Key to Clarity* (1972, published on behalf of the Statute Law Society by Sweet & Maxwell Ltd.).
19 Second Report of the Select Committee on Procedure, Session 1970-71, H.C. 538, paras. 67, 68, 70 (28).
20 *Statute Law: A Radical Simplification* (1974, published on behalf of the Statute Law Society by Sweet & Maxwell Ltd.).
21 *The Preparation of Legislation* (1975; Cmnd. 6053).
22 Ibid., para. 7.21.
23 F. A. R. Bennion, "The Renton Report" (1975) 125 New L.J. 660.

So far as the textual amendment system is concerned, the Renton Report seems to show all the elements of a compromise. It said that in principle the interests of the ultimate users should always have priority over those of the legislators, and that the present practice of amending legislation textually wherever convenience permits should be applied as generously as possible.[24] The fact is, of course, that it is the draftsman who decides when convenience permits, and that decision governs the extent to which the practice is applied. Textual amendment has not been common in the United Kingdom in the past. It has been used more in recent years, partly, we are told, because of the Law Commission's suggestion that the draftsmen should take account of the requirements of the proposed new edition of the statutes under the name of "Statutes in Force".

One of the curious aspects of the Renton Report is that, although the committee received written or oral evidence from six overseas experts, including an informal discussion with the then Chief Parliamentary Counsel of New Zealand (Mr J. P. McVeagh), it does not seem to have explored the situation in the major Commonwealth countries (outside Britain), where the textual amendment system is the rule rather than the exception, to see whether it works well and gives satisfaction to the statute users as well as the legislators.

What is the situation here? What can New Zealand learn from the reports of these various committees? Is the textual method better than the non-textual? In this article it is intended to look at these questions against the background of the Stow Hill Report, in which the arguments for and against the two methods are brought into sharp focus. First, however, to clear away any misunderstanding, it must be pointed out that the report calls the non-textual method the "referential" method. This is misleading. Legislation by reference is the application or exclusion of other legislation, by reference to acts, parts, or section numbers, in respect of the subject-matter of a new provision. It should not be overdone, but it is often necessary to avoid a great deal of elaboration and repetition that would result in the new provision being much wordier than it needs to be. It is just as likely to be used in a textual amendment as in a separate substantive provision. What the Stow Hill Committee is really referring to is the "gloss" system of amendment. Under this system the draftsman writes a gloss on an existing text, in the form of a substantive provision that stands independently instead of being related textually to the existing legislation. The result is that the existing text is repealed or modified by implication, and it may be difficult to reconcile the existing and new texts so as to decide the extent of the repeal or modification.

The textual method is well known to New Zealand statute users. Words, paragraphs, subsections, or sections, and sometimes even parts of an act, are repealed and new ones substituted in their place; or new words, paragraphs, subsections, sections, or parts are inserted; and in either case the appropriate use of lettering enables the new pieces to be fitted into place. On the rare occasions when a more or less self-contained set of sections cannot be fitted in without doing violence to the structure of an act, the gloss system has to be used, but the amending act or the relevant part of it is still expressed to be part of the

24 *The Preparation of Legislation* (1975; Cmnd. 6053), paras. 13.17, 13.20, 13.24.

principal act; and if it is later amended the textual method can be used.[25]

The "simple illustration" of a textual amendment set out in Appendix C of the Stow Hill Report is far from good and certainly not simple. In fact it is clumsy, inelegant, and confusing in the way in which it amends a four line proviso to section 47 (1) of the Betting, Gaming and Lotteries Act 1963 (U.K.) by inserting in it a new eleven-line paragraph (a) and relettering the rest of the existing proviso as paragraph (b). In New Zealand the operation would not, I hope, be done that way. It would be done in one of three ways, namely by repealing the existing proviso and substituting a new one; or (for those who do not like provisos) by repealing the existing proviso and inserting a new subsection or subsections; or by repealing the existing proviso and inserting a new section 47A.

Appendix F of the Stow Hill Report sets out some very interesting extracts from the Second Report of the Select Committee on Procedure.[26] These include arguments against the textual system put forward by Sir John Fiennes, First Parliamentary Counsel (U.K.). He said that it tends to "a vicious degree of compression". He also said that when he first joined the Parliamentary Counsel Office the complaint was of too much textual amendment; and that it was then said, as the Stow Hill Committee now says for the opposite purpose, that they should take the trouble to tell people what they were doing. He took the Stow Hill Report's "simple illustration" (referred to above) and did a redraft to show how it might be done by "straightforward enactment" instead of by textual amendment. He said that a comparison of the drafts brought out a basic fallacy in the textual amendment theory, because the difficulty of deciding what effect the new provision had on section 47 (1) of the 1963 Act was in no way lessened by a direction that it was to be inserted in the Act.

The New Zealand statute user would no doubt concede the last point made by Sir John, but would reply that if there is difficulty in reconciling a new text with an existing one the argument cuts both ways, and that the gloss system is no better in this respect than the textual one. He, and I think most New Zealand draftsmen, would find Sir John's draft better expressed and easier to understand than the Stow Hill Committee's textual amendment; but the extraordinary thing is that neither Sir John nor the committee seems to have perceived that Sir John's draft of a direct and independent enactment would, with a minor drafting alteration in the reference to the principal Act, be a perfect example of a good textual amendment if it were inserted in the principal Act as a new section 47A. In any case, whichever way an amendment is drafted, if he can see a difficulty in reconciling the texts, the draftsman should reconsider his draft with a view to removing it.

Another objection to the textual method was that it takes longer. The answer is that sometimes it does, but sometimes it does not. It depends on the nature of the amendment. Probably it takes longer in most cases because the draftsman, after using all his skill in drafting

25 See, e.g., Part I of the Judicature Amendment Act 1972; and the draft Judicature Amendment Bill annexed to the Eighth Report of the Public and Administrative Law Reform Committee (September 1975).

26 Supra, n. 18, 47.

the bill, has then to turn himself into a sort of legal journalist and write an explanatory note so that the politicians and other readers of the bill will understand what it does. The note must be concise, leaving out minor matters that are not essential to an understanding of the draft; but it must not fail to mention anything of importance, and above all it must be absolutely clear. However, the argument about the extra time required to do an explanatory note is irrelevant in New Zealand, because the practice here is to attach such notes to all bills, not just to amendment bills. It is time well spent. Many a draftsman has found that the exercise of writing a simple and precise explanation of a perhaps complicated provision has made him reconsider his draft and simplify it. When this happens, we have better legislation.

As for the alleged "vicious degree of compression", it seems that this objection is based on a narrow view of the ways in which a textual amendment can be done. The textual method needs to be properly used and a choice made of the best way of going about the job so that the carpentry is not awkward. There are times when a patching job looks ugly; but in such cases there is generally the alternative of a clean excision and a neat replacement.

In assessing the relative merits of the textual method and the gloss method, we must remember that the state of our statute law is different from that of the United Kingdom. From the early years of our Parliament, New Zealand, as a general rule, avoided the common United Kingdom practice of piling up a series of separate acts on the same subject, often under identical titles and distinguishable only by the year of enactment. As far as possible we have one principal act for each main subject. Each later act on that subject is called an amendment act, and contains a direction that it is to form part of and be read together with the principal act. This practice facilitated the 1908 consolidation of the public acts and also the 1931 reprint, even though the use of the gloss system of amendment was quite common.

Secondly, consolidation of individual acts has been a fairly steady process, especially over the last 25 years. Also, most of our consolidations are consolidating and amending acts which rewrite the text and bring the substance into line with new developments and new policies in a changing society. Pure consolidations, that is, straight re-enactment of existing texts, are more common and more necessary in the United Kingdom because of the state of their statute book; and there they are made possible by a special procedure which allows minor and necessary amendments to be made to tidy up the text but does not require much Parliamentary time. They are seldom found satisfactory in New Zealand because the pace of social, economic, and technological change calls for a substantial rewriting.

Thirdly, there have been two general reprints of our public acts (in 1931 and 1957) since the 1908 consolidation; and last year the then Attorney-General announced that he had approved in principle the preparation of another general reprint within the next few years. Meanwhile, the reprinting of individual acts has gone on steadily since the 1957 reprint. Current reprints from 1958 to 1975 (inclusive) now total 102, in addition to those still current in the 1957 reprint. The great advantage of the continual reprinting of acts is that it makes the law readily accessible until time is available for the consolidation of the acts concerned.

All this work of consolidation and reprinting has been facilitated by the use, for many years, of the textual amendment system. When the time came for the 1957 reprint the statute book was in reasonably good shape so far as accessibility and intelligibility of the law are concerned; and it should be in better shape for the next reprint.

Credit must be given to the late Hon. H. G. R. Mason for insisting, when he was Attorney-General, that the gloss system of amendment was to be used only when the use of the textual system was impracticable. The draftsmen of the time felt many of the doubts and reservations now being expressed in the United Kingdom, but the transition was not too difficult because the textual system had already been used quite a lot. The major change was the insertion in principal acts of what may for convenience be called "A" sections.

I have no doubt that the use in New Zealand of the textual method has been beneficial to the ultimate users of the statutes. Moreover, because of the use of explanatory notes attached to bills, the method has been accepted by the politicians and others concerned with the reading and consideration of bills. Except for the fact that it takes up more of a draftsman's time because he has to draft the notes, one wonders what all the fuss is about in the United Kingdom.