

Fiscal Studies (1994) vol. 15, no. 3, pp. 129–39

Legislation for Business: Is It Fit for Public Consumption?

MALCOLM GAMMIE¹

I. ‘HALF-BAKED’ BILLS

‘We are convinced that a central problem of the legislative process is that far too many bills are introduced into Parliament in a state that is recognised — even, we suspect, by Ministers — to be less than perfect.’² In short, ‘... bills are too often introduced to Parliament “half-baked” and with a lot of the detail insufficiently thought out ...’³

I would not mind were Parliament a competent cook, able to complete a process started by government. Were that so, our elected representatives would enhance the democratic process by the part they played in turning out the final product. But the heat of parliamentary debate is rarely sufficient: what enters Parliament half-baked usually emerges half-baked, or worse.

‘The weight and extent of the criticisms received is perhaps the most notable feature of our enquiry.’⁴ Criticism of legislation is as old as legislation itself. King Edward the Sixth wished that ‘the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that

¹ Malcolm Gammie is a tax partner with Linklaters & Paines. He was President of the Institute of Taxation in 1993–94 and is Chairman of the Executive Committee of the Institute for Fiscal Studies.

On 6 June 1994, the Institute of Taxation, the Institute for Fiscal Studies and the Hansard Society for Parliamentary Government brought together a number of people to discuss reform of the legislative process. The report of the Hansard Society Commission on the Legislative Process (1993), *Making the Law*, provided the context for discussion. This article is a personal reflection on some of the issues discussed. The author is grateful to the conference speakers and discussants for their valuable comments on a draft of this article. The author remains entirely responsible for its length and content.

² *Making the Law*, para. 116.

³ *Making the Law*, para. 57.

⁴ *Making the Law*, para. 54.

men might better understand them'.⁵ But 'half-baked' does not just refer to a failure to achieve simplicity or clarity in legislation; it refers to the failure of legislation to achieve its purpose of converting the aims and objectives of government policy into practical rules to regulate our lives in a sophisticated society.

What disturbs me is not the failure, but that Members of Parliament apparently tolerate it. Even before the Hansard Society Commission, many have criticised the process. Our legislators stand accused of failing in their central role — to produce laws that achieve their purpose and are intelligible. That should stir a response but, as yet, I see no concerted attempt to change matters; neither do I hear anyone defend the way things are done, or argue that the criticism is without foundation. Do those who represent us lack the will to do things properly and well — something that should pervade our efforts in every field?

II. THE ROLE OF CONSULTATION

We elect a government to set an agenda and the direction. Our institutional processes should enable the government to take informed and achievable decisions and to translate those decisions into practical and intelligible law that people understand and respect. 'Consultation' is part of achieving that result.

The Hansard Society Commission was 'convinced that proper consultation should play a central part in the preparation of bills ...'.⁶ Few people disagree: indeed, a substantial consultative process already exists. The Commission records that consultative documents increased from 11 in 1976 to a peak of 288 in 1988, falling marginally to 232 in 1991.⁷ However, this significantly understates the amount of consultation that occurs. In the field with which I am familiar — the tax field — the Revenue Departments and the Institute of Taxation consult regularly, and this may be on more than 100 separate items during a year.

Most consultation does not, however, involve any formal document: 'consultation' takes many forms with varying degrees of formality. For this reason, the Hansard Society Commission concludes — in my view, correctly — that we should not try to place consultation into a precise pattern or defined steps. We need government to conduct consultation on agreed principles — 'best consultation practice' — set out in guidelines.⁸ The Department of Trade and Industry has taken a first step with guidelines issued under its deregulation initiative.⁹

⁵ See Renton Committee (1975, para. 2.8).

⁶ *Making the Law*, para. 123.

⁷ *Making the Law*, Appendix 8.

⁸ *Making the Law*, paras. 150–2.

⁹ Department of Trade and Industry, 1994a, Ch. 5: 'A guide to good regulation'.

But here is the conundrum: despite the explosive growth in consultation, dissatisfaction with the legislative end-product is as strong as ever. This is perhaps because, as the Commission records, ‘the overwhelming impression from the evidence is that many of those most directly affected are deeply dissatisfied with the extent, nature, timing and conduct of consultation on bills as at present practised’.¹⁰ Effective consultation for both government and consultees is not a matter of finding consensus; it is an attitude of mind: a willingness to listen, a chance to persuade, to change minds or to create respect for alternative views.

III. GENUINE CONSULTATION

Mr Justice Webster describes the essence of consultation as ‘... the communication of a genuine invitation to give advice and a genuine consideration of that advice ...’.¹¹ The crucial word is ‘genuine’: government must conduct consultation in a manner that convinces consultees that it is not paying lip-service to the process, that it has not made up its mind, that it has considered seriously consultees’ views, that the process can achieve a constructive result.

This involves the government explaining the purpose and background of consultation and what it is seeking to achieve; it must offer the opportunity for consultees to disagree and to propose alternatives. Ministers will always consider that there are some matters on which they have a political mandate; on many matters, however, the government should be willing to consult, not just on how something should be done, but on whether it should be done at all.

In any case, if the scope and nature of a review, or the basis on which the government is conducting it, are unclear, consultees will merely oppose what they fear will emerge, rather than consider constructively what might be done. The more controversial the subject and the greater the vested interests involved, the truer this is. We will have no satisfactory debate about VAT on books or children’s clothing, or changing the taxation of dividends, unless we elevate such issues above the ‘threat’ of change that is bandied about in the newspapers. Representative bodies and commentators have a responsibility to respond constructively. But government must create the environment for sensible debate.

And when the consultation is over, government should respond to consultees, telling them what decisions it has reached, how and why it reached them and

¹⁰ *Making the Law*, para. 113.

¹¹ *R. v. Secretary of State for Social Services ex parte Association of Metropolitan Authorities* [1986] 1 All E R 164 at p. 167. The Hansard Society Commission adopts this definition in *Making the Law*, para. 126.

why it rejected alternative proposals.¹² The Cabinet Office summary of responses to the Open Government White Paper is a step in this direction.¹³

IV. AN OPEN PROCESS

These aspects of consultation are important but more is needed to ensure a successful outcome. Ministers cannot be experts on all matters on which they consult. They bring a perspective to the decision-making process, based on their experience and political judgement. Their decisions, however, depend upon the quality of the advice they receive.

Asking people's views is an essential component in the process but government must test the status and validity of the views expressed. The quality of advice depends upon the quality of its assessment and the way it is presented. The quality of the assessment depends upon research and the information that is available to government. The reputation of the Institute for Fiscal Studies is no happy accident: it is founded upon the quality of its research.

I share the view of the Chief Economist of the Bank of England, Mervyn King: openness in the giving of advice increases credibility and accountability. The publication of the Bank of England's *Inflation Report* discloses the research basis for the Bank's views on monetary policy. The advice the Bank gives on that subject is clear, now that the Chancellor publishes the minutes of his monthly monetary meetings with the Governor. King (1994) notes that

[t]here is one further important consequence of openness and transparency — greater public *accountability* of the Bank.... There will not be any doubt about the advice tendered by the Bank.... One consequence of greater public accountability has been the spur to improved performance within the Bank. The publication of our analysis and advice is a great incentive to getting it right. I am one of those who believe that the strongest incentive to provide good economic advice is the prospect of having to defend that advice in public.

What works for economic advice can work for other forms of advice; openness can raise standards. Publication ensures that we see when advice, and the information on which it is based, are correct; it allows us to correct what is wrong. In the end, we should respect good advice openly given and backed by proper information and research; our respect for those who give the advice and for the decisions that Ministers base on it should increase.

One function Ministers must fulfil is to make judgements between conflicting views, and Civil Servants may have to defend Ministers' decisions, whatever the advice. Accordingly, government may not always be ready to bare its soul to the world. Nevertheless, while the information upon which Ministers base their

¹² See *Making the Law*, para. 131.

¹³ Cabinet Office (OPSS), 1994.

decisions remains undisclosed, the doubt will linger whether the final decision was correctly based; so long as we do not know what report Ministers receive of consultations, consultees will harbour the suspicion that their views were inadequately understood or presented.

The discipline that openness imposes applies equally to consultees. The Association of First Division Civil Servants 'was critical of the nature and quality of some of the responses that departments received when they sought to consult outside bodies'.¹⁴ In an open process, we can recognise ill-informed or partisan views for what they are. Of course, vested interests may openly seek support through a public lobby. Such lobbies frequently shed little light on a subject and may reflect government's failure to create the environment for sensible debate and to explain the issues. But special pleading often operates to best effect behind closed doors.

V. TIME AND RESOURCES

'At the heart of the problem is the inherent conflict between the need, for the assumed public good and for political impact, to get a bill on the statute book without unwanted delay ... and the need to "get it right"'.¹⁵ In short, time is a problem. It takes time to prepare the policy and identify the desired approach. The details then have to be filled in. At every stage, however, there is a trade-off between discussion and action. Time is limited because political horizons are short; we only give a government five years in which to set an agenda and the direction. The horizons of particular Ministers may be shorter still, as they anticipate moving between departments.

Nevertheless, a sure way for consultation to fail is to set an unrealistic timetable. Consultees will oppose change where they have no confidence that a sensible outcome is possible in the time allowed. Such exercises merely waste time and resources. At its heart, however, time, or lack of it, is a function of the task in hand, the number of other tasks to which you have committed yourself and the resources that you can deploy. Frequently the real problem is not time alone, but the failure by government correctly to balance these elements. Government takes on more than it can deliver satisfactorily with the resources that it is prepared to commit in the time allowed.

VI. COMPLEXITY OF LEGISLATION

The availability, or lack, of trained draftsmen should place a constraint on legislative output but it seems not to. Parliamentary Counsel 'have to work under pressures and constraints which make it very difficult for them, with the best will

¹⁴ *Making the Law*, para. 110 and Appendix 1, 'Selected written evidence, M5'.

¹⁵ *Making the Law*, para. 117.

in the world, to produce simple and clear legislation. They are inadequately staffed and are often given gigantic tasks to perform in a race against time'.¹⁶ What the Renton Committee noted in 1975 is true in 1994.

Parliamentary Counsel are more than just draftsmen; they are Counsel who advise government whether its policy stands up to objective scrutiny and is attainable. I believe that they fulfil this wider role too late in the day. Their contribution should come earlier, as government formulates its proposals. However, lack of resources makes it impossible for Counsel to involve themselves at that earlier stage.

Complexity of legislation is not just a matter of drafting style; fundamentally, it stems from the policy that the draftsman must convert into legislation. This is true in many areas; in taxation matters I have previously noted:¹⁷

There are many reasons for complexity, but at the heart of the matter, complexity stems from the policy that underlies the tax system. You can tinker with the detail but you can never tackle the fundamental complexity of the tax system without looking closely at the underlying policy. The complexity of the tax system stems from what you are trying to tax, and how you set about doing so. If you try to tax something that is difficult to tax, the system will become increasingly complex as year after year you try to defend the integrity of the system.

Income tax illustrates this: '... income is, in the last analysis, a subjective concept whose size depends on the judgement of the accountants who compile it and the particular purposes for which the measure will be used ... Income, in short, is a necessary concept but one which cannot be given the precision or objectivity that some of its uses might require'.¹⁸ 'Income' in the context of taxation requires precision and objectivity. It is the search for precision and objectivity that is the source of our difficulties with the tax and its avoidance.

VII. DRAFTING STYLE

Given the policy of income tax, I agree with Gladstone that '[t]o bring the construction of these laws [of income tax] within the reach of [persons who have not received a legal education] was no doubt extremely desirable, but far from easy ...'.¹⁹ But the late Presiding Special Commissioner, Hubert Monroe, was right to add a plea to Gladstone's statement: '... that it would be some advance if laws of this kind were intelligible to those who *have* received a legal

¹⁶ Renton Committee, 1975, para. 6.21.

¹⁷ Text of an address by the author as President of the Institute of Taxation at Trinity College, Cambridge on 26 March 1994.

¹⁸ Professor John Kay's address at University College, Cardiff, 1984.

¹⁹ *Hansard*, 27 May 1853, col. 722.

education'.²⁰ Practitioners may have difficulty understanding such laws but Butterworths Tax Handbooks and competing publications at least allow them access to current tax legislation. The Hansard Society Commission wishes to see easier access to all current legislation through a statute law data base. The Lord Chancellor's Department has made progress with plans for a modernised process of publication of updated statute law but progress must be maintained.

Organising legislation, however, is just a first step: beyond that, there *are* things that we can do with the layout of legislation — and not just tax legislation — to provide a better route map through the legislative jungle. I would expect Members of Parliament to welcome and encourage such changes as aiding their own role. My particular criticism of recent tax legislation is its 'holistic' approach: you cannot understand one section until you can understand them all. Imagine reading a book where your understanding of each chapter depended upon your having read and understood all its chapters; I do not think that the book would become a best seller. Mastering such legislation is a costly intellectual effort — costly mainly for the clients of professional firms.

Proposals to simplify legislation deserve the attention of MPs and those who instruct Parliamentary Counsel.²¹ It may take time to tackle more fundamental causes of complexity but we can make progress by improving the organisation, language and layout of legislation. The draftsman should approach any piece of legislation as if he were telling a story, rather than making a jigsaw that users must painstakingly piece together. However, a draftsman can only tell a story if the government gives him a clear plot. I return, therefore, to the need for satisfactory consultation and advice: their value is readily apparent at the drafting stage; involving the draftsman earlier rather than later contributes to rather than detracts from the process.

VIII. THE LEGISLATIVE APPROACH

However, a more fundamental issue lurks behind how the draftsman approaches his task. In 1975, the Renton Committee (para. 19.41) concluded

... that interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present would present no great problems provided that the underlying purpose and the general principles of the legislation were adequately and concisely formulated. The real problem is one of confidence. Would Parliament be prepared to trust the courts?

The answer as yet appears to be that Parliamentarians do not trust the judges to give effect satisfactorily to clear statements of principle.

²⁰ Monroe, 1981, p. 23.

²¹ See Cutts (1993 and 1994).

It may be that Parliament has not always worked out the principle that does underlie particular legislation. We cannot, however, blame the draftsman for reflecting the legal traditions that have led us to seek legislative certainty through detailed provision. He must take account of what he knows to be the courts' interpretative approach to legislation. Should Parliament take the initiative in seeking a change in style? Or must the courts and the legal profession provide a lead in changing legal traditions and attitudes and interpretative approaches?

This chicken-and-egg situation may yet be resolved by the European cuckoo: as the influence of the European Union on our legislation grows, the different traditions of European law may force us to change our ways, to accept a greater use of statements of principle and to adopt a different interpretative approach. I do not underestimate the task involved in resolving the clash of English and European legal cultures — certainty versus the logical formulation of an idea. The latter may tell us the principle involved — or where the negotiation stopped — but may give us little idea of the answer to a particular problem. Attempts by the English draftsman to provide the answer in detailed legislation may merely perpetuate the cultural differences or be doomed to founder in the European Court.

However, at present we increasingly get the worst of all worlds: complex and detailed but unintelligible legislation, and no statement of principle to guide us. This produces the view that '... a code of practice will be more effective than freedom of information legislation in changing administrative culture ... The Code will be less legalistic and confrontational than a statutory approach where private rights are not at issue. Review and interpretation will be more flexible, with less scope for legal costs and delays'.²² This sentiment is reflected in the growth of unappealable discretion in areas of our tax law. The Special Committee of Tax Law Consultative Bodies rejects a 'flexible basis of law'²³ that relies on ministerial or departmental statement: 'Ministerial statement is not an acceptable way of "clarifying" unclear legislation ... It is also unacceptable to frame legislation in unclear or excessively wide terms on the basis that its scope and application will be subject to an interpretative statement by the Revenue Department concerned'.²⁴

The time and expense of resorting to law should suggest changing our approach to legislation and the legal system; the legal profession may need to respond to the accusation that the system is expensive and slow and lacks flexibility but these have never been good arguments for denying legal rights.

²² Cabinet Office (OPSS), 1994, p. 1.

²³ As suggested by the Financial Secretary, House of Commons Official Report, Standing Committee B, Finance Bill, Sixth Sitting, 30 June 1992, col. 446.

²⁴ Special Committee of Tax Law Consultative Bodies, 1993, Summary, p. iii.

Clear principles of law should provide flexibility, shape administrative culture and be the foundation of codes of practice.

IX. SECONDARY LEGISLATION

Legislation is not easier to draft because it is secondary rather than primary legislation. We cannot, therefore, circumvent the problems of primary legislation by relying more on secondary legislation. Secondary legislation can deal with the detail of legislation, but to do so it still requires the resources of skilled draftsmen and a satisfactory process.

The Deregulation and Contracting Out Bill currently before Parliament empowers Ministers, as part of the government's deregulation initiative, to make orders amending or repealing primary legislation. I believe that such ministerial powers are undesirable. Nevertheless, the procedure that such orders will follow provides a blueprint for secondary legislation. The process has a number of elements: public consultation must precede the laying of such orders; the government must report the results of that consultation to Parliament and give justification for its proposals; Parliamentary Committees will examine the proposals and be empowered to take evidence; both Houses will vote on the orders.²⁵

Secondary legislation allows us to escape the restrictive timetable that Finance Bills must follow.²⁶ The procedure of the Deregulation Bill contains several elements that the Special Committee of Tax Law Consultative Bodies has proposed for the use of secondary legislation in the tax field, based on clear policy and principles in primary legislation.²⁷

X. CONCLUSION

'A central theme of our inquiry is that the legislative process must be seen as a whole. Although it is convenient to list separate stages in the process, these are interrelated and interactive ... One cannot say where the legislative process starts; it is a seamless robe.'²⁸ Consultation is relevant at all stages of the process, from policy formulation to implementation. But no amount of consultation on how we implement legislation can correct hasty legislation that is fundamentally deficient; better legislation cannot improve poor policy work.

²⁵ See the Deregulation and Contracting Out Bill, Ch. 1, Clauses 1–4 and Department of Trade and Industry (1994b, Annex A).

²⁶ Under the Provisional Collection of Taxes Act 1968, a Finance Bill introduced after the November Budget must receive the Royal Assent by the following 5 May.

²⁷ Special Committee of Tax Law Consultative Bodies, 1993, para. 6.4.

²⁸ *Making the Law*, para. 38.

Government must balance the tasks it launches with the time and resources that it is prepared to commit to them. It can improve how it consults, remembering that

... the purpose of consultation is to enable the government to make informed decisions. Consultation by itself is not enough to achieve this. The institutions ... available to Government must be such as: bring together a range of background, skills and experience; have the capacity and resources to undertake detailed statistical and analytical work; seek out satisfactorily the impact and implications of the proposals; [and] identify and listen to the different views on them.²⁹

The success of our institutions in achieving these ends remains shrouded in secrecy. The incentive for good advice is its openness to scrutiny.

Many believe that the way we make our law is unsatisfactory. A lack of concern for the accuracy of the law, and of respect for what it says or does or for the institutions that make it, are insidious influences to have at large. Institutions that fail to reform risk being swept aside. Without change, Parliament risks its role in the legislative process becoming increasingly irrelevant. The Hansard Society Commission recommended that '... the Government should make every effort to get bills in a form fit for enactment, without major alteration, before they are presented to Parliament; in the Government's review of the legislative process, this should be a first and overriding objective'.³⁰ This recognises that proper planning and attention to detail are vital. It also implicitly suggests that Parliament may have little part but to agree to what government proposes. The development of the European Union as a source of legislation only lends greater urgency to the need for Parliament to define its role in the modern legislative process.

REFERENCES

- Cabinet Office (OPSS) (1994), *Open Government: Summary of Consultation Comments and Government Response*, 29 March.
- Cutts, M. (1993), 'Unspeakable Acts? Clarifying the language and typography of an Act of Parliament', *Words at Work*, January.
- (1994), *Lucid Law*, final report on a project to rewrite an Act of Parliament in plain language, *Words at Work*, June.
- Department of Trade and Industry (1994a), *Thinking about Regulating*, January.
- (1994b), *The Deregulation and Contracting Out Bill: An Explanatory Guide*, January.
- Gammie, M. J. (1992), 'Fiscal legislation: evolution or revolution?', address to a conference on *Legislating for Business*, organised by the Institute of Advanced Legal Studies, 22 June.

²⁹ Gammie, 1992.

³⁰ *Making the Law*, para. 118.

Legislation for Business

- Hansard Society Commission on the Legislative Process (1993), *Making the Law*, Report of the Commission chaired by the Rt Hon. Lord Rippon of Hexham, PC, QC, February.
- King, M. A. (1994), 'Monetary policy in the UK', the Institute for Fiscal Studies Annual Lecture, delivered at the Chartered Accountants Hall, London, 1 June; published in this issue of *Fiscal Studies*.
- Monroe, H. (1981), 'Intolerable inquisition? Reflections on the law of tax', Hamlyn Lecture.
- Renton Committee (1975), *The Preparation of Legislation*, Report of a Committee appointed by the Lord President of the Council, chaired by the Rt Hon. Sir David Renton, Cmnd 6053, London: HMSO.
- Special Committee of Tax Law Consultative Bodies (1993), *Recommendations on the Development of Tax Legislation*, the Law Society, September.