

Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 21 December 2016

10.30 am

Watch the meeting

Members present: Lord Lang of Monkton (Chairman); Lord Beith; Lord Brennan; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord MacLennan of Rogart; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 7

Heard in Public

Questions 102 - 112

Witnesses

[I](#): Sir David Bean, Chairman, the Law Commission; Professor David Ormerod, Law Commissioner for Criminal Law and Evidence.

Examination of witnesses

Sir David Bean and Professor David Ormerod.

Q102 **The Chairman:** I welcome Professor David Bean and Professor Ormerod on behalf of the Law Commission. Thank you for your written evidence to us, which met a lot of your criteria as per your founding statute, in that it is clear, lucid and accessible and covers the subject well. Nevertheless, we should like to ask you a few oral questions. I shall kick off. You will have seen—I know you have been reading the evidence and following the Committee’s progress—that we quote the Office of the Parliamentary Counsel definition of what should be good law: “necessary, clear, coherent, effective and accessible”. It varies slightly from your definition but yours was put in statute so you are stuck with it.

Apart from the need for consolidation, what factors cause legislation to fall short of these criteria and what do you think can be done to tackle such factors? Sir David.

Sir David Bean: Some of the criteria you have mentioned are to do with substance. Our work includes work on law reform. We hope we draft legislation that is fair but that is not really a drafting point; it is a content point. As to being modern and accessible, it should be contained in one place—consolidation is part of that—available free of charge on an accurate website and, so far as possible, capable of being understood by a non-specialist. Not all statute law will be easily readable but, as far as possible, it should be intelligible without the aid of lawyers.

One of the adjectives you used was “cost-effective”. Legislation should be sufficiently clear to avoid money being wasted on pointless litigation or appeals that would never have happened if the drafting had been better in the first place. I am sure you will, in due course, ask Professor Ormerod about our sentencing code proposals. Part of that is brought about by hundreds of cases every year being brought on rather technical points where a judge has imposed a sentence that is simply illegal because the legislation is so diffuse and complicated. We try to be cost-effective in that sense.

Professor David Ormerod: It is about the investment of time. It is clear that the legislation is trying to serve several purposes. Clearly, the policy must be robust and the representation of that policy in the legislative formula must be faithful. You have to look beyond that, however, to the ultimate user of the legislation. The litigant, the citizen, the trader, the businessman or whoever it may be must have the capacity to understand that legislation. The advantage of the Law Commission approach is to ensure that the legislation has that degree of clarity because we have the time and the resource to devote beyond the policy to the form in which the legislation appears.

The Chairman: One has to remember that a lot of the Government’s legislative programme is developed and delivered under enormous pressures—political and other—which makes it rather more difficult. Nevertheless, we still want to identify ways of improving it. You operate

in rather calmer waters but under different pressures, and I think you have quite a lot to teach us. We shall see what we can draw out of you in the next 45 minutes.

Q103 **Lord Beith:** In your written evidence, you refer to the four projects that you thought illustrated ways of making good or better law, including those for firearms, the process for getting married—rather a diverse collection. Are there many lessons from this that ought to be applied to the normal making of law, as opposed to your process of reviewing and remaking it?

Sir David Bean: The single lesson from our working methods is, perhaps, “Consult, consult, consult”. We consult widely, not just lawyers but people involved on the ground, and we try to develop a consensus. Some government legislation is obviously not like that but the sort of stuff that we do, which is non-partisan, is greatly helped by consulting people who know about what is happening and trying to develop a consensus. For example, we have a project on mental capacity and deprivation of liberty safeguards where we are consulting not just lawyers but healthcare professionals about what is happening on the ground.

There is one on what we call event fees or transfer fees—not in the football sense—where residential property, perhaps in a retirement home, is subject to clauses in the lease that require sums to be paid if there is a transfer of ownership. We consult developers, managing agents, residents of retirement homes and so forth. Perhaps David has something to add on firearms.

Professor David Ormerod: Yes, just to give an example and put flesh on those bones, the extensive stakeholder engagement begins even before a project is taken on. So when we are contemplating whether a project is suitable for the commission, we would already engage with as wide a range of stakeholders as possible to understand from them the nature of the problem, so that we can ensure that the solution is carefully targeted and tailored to meet it. Throughout the process, it is not simply the case that we then produce our own report, going away into an ivory tower and coming back. Far from it—we are engaged throughout with the stakeholders. It is an iterative process and quite dynamic, whereby we engage them in reviewing drafts and refining the policy. So when we produce the legislation, not only are we confident that the policy is robust in terms of research, we know it will meet the needs of the ultimate consumers in the firearms context, whether they are the police officers who have to apply this on the ground or firearms enthusiasts in possession of particular items and so on. There is that continued engagement and involvement.

To give an example in relation to the mental capacity project mentioned by the Chairman, I think the team attended 83 different consultation events across England and Wales during the four-month consultation period. There were 583 consultation responses, not only from healthcare professionals and care home providers but from family members who

were responsible for the care of people with learning disabilities and so on, so it really is across the board.

Lord Macgregor of Pulham Market: I would like to compliment you on your evidence to us. One question that kept coming up in my mind—I do not quite know whether I have the answer to it—is how you make a distinction between what I might describe as more technical or less politically controversial legislation, where one is undertaking all this consultation that you have just described, and other legislation that either derives from a manifesto or is much more driven by political considerations.

Sir David Bean: That is perhaps a matter for you rather than for us. We do two sorts of work. Our programme, which is drawn up once every three years, is where we suggest subjects. It has to be approved by the Lord Chancellor, but we will not undertake a project unless a department has indicated that there is a serious intention to take forward reform. The other sort of work is references from departments to us. Again, the department indicates to us that there is a serious intention to take forward reform. We would not be asked to take on a project, and would not agree to do so, if it were party political. A good working rule to my mind is that if there would be a Division at Second Reading in the House of Commons then we should not go anywhere near it, but quite a lot of legislation is not in that category and that is where we can make ourselves useful.

Professor David Ormerod: I would like to add that the devil is always in the detail. Something that is potentially very controversial—sentencing or firearms, for example—does not necessarily fall outside our remit, provided that what we are doing does not make significant policy change that has a party-political dimension. For example, we have 34 pieces of legislation on firearms spread across 100-odd years. We need to be able to identify the pressing problems of a technical nature, rather than of a policy-driven nature, so that we can seal the loopholes that are being exploited by criminals and make sure that the legislation is future-proofed against developing technology and so on. Those things are all perfectly capable of being achieved by the commission without trespassing into the political arena.

Lord Brennan: Part of your statutory duty involves the consolidation and codification of the law, yet at some stage in the report you have given us you mentioned that there have been only two significant consolidation Bills in the last 10 years. Is the volume and intensity of legislation getting to the pitch where it makes consolidation impractical, legislatively or financially? If not, what can be done about it?

Sir David Bean: In my view, consolidation remains a desirable activity. The old style of consolidation was exemplified, if I may show you my copy, by the Companies Act 1985, which I bought from HMSO for £19 at the time it came out—say £50 in today's money. What you got for your money following Parliament's efforts in consolidation was a document like this. Then, as soon as further amendments started being made, that

document rapidly became useless. Now we have moved on to the age of the internet and a free-access website, legislation.gov.uk. If you consolidate an area of law now and future-proof it in the way that we are likely to propose for the sentencing code, you do not have to do the consolidation again and you can amend the statutory code that you have created while still having the legislation in one place and available to the public free of charge. So the usefulness of consolidation has actually increased since the days when it was fashionable.

It is very striking that in the years up to 2006 there were 200-plus consolidation Acts in 40 years and since then there have been two. It would be a great pity if it were consigned to history. We are under a statutory duty to promote it. I will hand over to David so he can tell you why the proposed sentencing procedure code will be more useful than a traditional consolidation.

Professor David Ormerod: In response to your question, sentencing is a good example in that it is an area in which there is almost perennial amendment. However, that does not diminish the need for consolidation; in fact it could be argued to enhance that need. Officials have been very candid in telling us that they can no longer accurately and confidently predict the impact of further legislative change, given that the sentencing landscape is so confused, spread across hundreds of statutes—I do not need to tell some members of the Committee precisely how confused. So clearing the landscape and having a single statute in which all the provisions relating to sentencing procedure appear will make it easier in future for valuable policy changes to be identified and assessed for their impact.

In the sentencing code project, we started by identifying all the existing law, which runs to some 1,300 pages of primary legislative provision. Even if we simply republished that, it would be impenetrable to most users, and that can of course include litigants in person, defendants and lay magistrates. The intention is to redraft all that in a single statute, using clear language wherever possible and other drafting techniques to make it as accessible and clear as possible.

In addition, we have already published a report demonstrating that it is possible to remove the difficulty with transitional provisions. Something that is a systemic failure with the sentencing legislation is that you end up with parallel regimes of sentencing law. If you are looking at a historic sex offender, for example, you would have to identify what the date of the offence was and which particular version of the sentencing legislation was in force at that time. We have identified the opportunity to sweep all that away so that, from the date of commencement of the sentencing code, anyone sentenced under that code would be dealt with under the procedures of that code—subject to the very important caveat that no one can be given a graver penalty than that which would have been available at the date of the commission of their offence. That avoids judges having to look back across various parallel regimes.

Having achieved that, the challenge is to maintain that code as the single source of primary legislation, and obviously that lies in the power of the Palace here. We are not going to restrict your autonomy or sovereignty in making any future legislative change in relation to sentencing, but we need to encourage a culture whereby future sentencing legislative changes are by the code—they are insertions, amendments, repeals to the code—and we hope that can be achieved

The best that we can do, of course, is to try to engender a culture of that. It might be possible for the House authorities to do more than that by producing rules that will encourage parliamentarians in the future to adopt precisely that approach.

The Chairman: Your answers so far are very clear, concise and lucid, but the acoustics in this room are not very good, despite the microphones. Could you both speak a little louder and directly into the microphones, if you can?

Q104 **Lord Hunt of Wirral:** Apart from your work on sentencing, why did you decide not to have any specific consolidation project currently?

Sir David Bean: Our funding is very limited. It has been sharply reduced since 2010 and continues to be reduced. What we can do within our core funding is very limited. Consolidation is an expensive business because Parliamentary Counsel, as you will know, are a scarce and expensive resource. If we were to undertake a new consolidation or codification project, it would almost certainly have to be funded by the department making the request. You have had a good deal of evidence, for example, about immigration law; both the primary statutes and immigration rules are in a terrible state, as witnesses have told you. There are two jobs to be done. One is the streamlining of the rules and the other is the consolidation of the primary statutes. For either of those, we would need funding from the Home Office to be able to do it because it is a big task—but a very worthwhile one, I think.

Professor David Ormerod: I think that there is a lack of appetite for consolidation, which is disappointing because the gains that can be achieved by consolidation should not be underestimated. To go back to sentencing, there has been an independent survey that suggests that around 30% of appeals in the Court of Appeal Criminal Division on sentencing involve an unlawful sentence. That is because of a mistake by the judge as to the powers available in relation to the sentencing determination. The cost of that is astronomical. So even if you consolidate—and you can do more than that; a kind of “consolidation plus” and additional streamlining is possible within a consolidation project—it can have an enormous cost savings, and not only in litigation.

To switch to another example, if you look at some of the work we are doing around planning law in Wales and take an area where the law is fragmented across many pieces of legislation, you can draw it together in a single statute and make it accessible. That might promote investment in the context of planning law, whereby there may be greater impetus for

development in a particular region because the planning law is clear and the implications are identifiable. So there are savings to be made and political advantages to be had by having clear, consolidated legislation.

- Q105 **Lord Brennan:** Lord Hunt has put forward a point which I feel, as he does, is very important. Is it possible, without you having to commit yourself to it, to consider in each of your three-year programmes a couple of consolidation projects that are in the public interest in the context which Professor Ormerod has just described? Have you determined the budgetary cost and, if it is feasible, the cost benefit to be derived from it? If the Government say no, you have offered it; if they say yes, you can do it.

Sir David Bean: My colleagues and I certainly feel that we should not lose sight of our mission in the 1965 Act to give some priority to codification, consolidation, streamlining and simplification. Reform will continue to be an important part of what we do but it should not be 100% of what we do. We will not be permitted or funded to do consolidations unless we can rekindle the interest in them in Westminster and Whitehall—and I hope very much that we can. If, for example, we were able to take on immigration in the next year or two, that would be a very big project. Three years down the line, I am sure there will be something else that is a good candidate. But I would be very disappointed if the next 10 years had as little consolidation or codification as the last 10 years.

I do not know whether this Committee is aware of it, but the Welsh Government are very keen on consolidation and codification. Professor Ormerod has mentioned our work on a planning code for Wales. The aim is that the Welsh would like to have, instead of the planning law encyclopaedia, which is seven or eight ring binders, a planning code for Wales which would be a single, quite slim document. Last week, the Counsel General for Wales published a statement on behalf of Welsh Ministers expressing their enthusiasm for codification. We hope in future to move on from planning to other statutory topics in Wales. Perhaps Cardiff will be setting an example for Westminster to follow.

- Q106 **Baroness Taylor of Bolton:** You make a very strong case for consolidation and for more work in these fields. You will be aware that Parliamentary Counsel gave evidence last week; they quoted the website that you mentioned earlier, Sir David: legislation.gov.uk. Their suggestion was that, because current texts can be updated very frequently, there is perhaps less need for consolidation. But the picture that I am getting is that, before you can get to the stage of having less need and updating things online, you have to—to borrow the phrase used earlier—“clear the legislative landscape” and the confusion that exists there. Do we have to get rid of the backlog before we can get to the position that Parliamentary Counsel were talking about of updating online?

Sir David Bean: Broadly, yes. I disagree with the suggestion that consolidation is now less useful or less necessary, as I said earlier.

Reading the evidence of the Leader of the House of Commons and Parliamentary Counsel, I understand that there have been some unfortunate experiences in the past. The example that they gave was a massive education consolidation in 1996 in the last years of the Major Government, and then a change of Government in 1997 with the Education Act 1996 turned upside down, which was bad timing. But I do not think that that should deter us from doing consolidations now. It is right, as Elizabeth Gardiner said to you, that it involves a lot of resource—but, as we have been saying, there are benefits from it as well.

Q107 Lord Morgan: We heard some disturbing evidence from the Senior President of Tribunals about immigration law and I want to ask about that. We were told that there had been eight immigration Acts in 12 years, three EU directives and some 30 statutory instruments. Does the Law Commission feel that some kind order or consolidation would be appropriate in this area—and, if not, why not?

Sir David Bean: Very much so. I have the immigration law handbook here. It is not an official publication but all the judges and practitioners in the field use it. It has no commentary; it is just the basic texts. It is 2,000 pages long. Part 1 is the primary statutes. Excluding odd sections of the Senior Courts Act and matters like that, the specific immigration statutes are about 14 in number, going back to the Immigration Act 1971. There is no way that you could know what to look for on legislation.gov.uk since the primary statutes are in 14 different places. Then, after the procedural rules and practice directions, there are the Immigration Rules, which run to 648 pages in this book—not in a very large font, by the way. I agree with my colleague Lord Justice Ryder that this is a very pressing problem. The Court of Appeal and the Supreme Court have complained again and again about the complexity of the Immigration Rules. In this morning's *Times* there is a law report of a decision of the Supreme Court last week in which Lord Carnwath said there was an urgent need for a streamlining of the Immigration Rules, and that has been said many times before. So I would see that as a real priority.

Of course we will not be asked, nor should we be, to consider great questions of public policy—say, on whether immigration controls in this country are too lax or severe—as those are matters for the politicians, but behind that there is real value in some technical work to try to bring this within bounds. One of my judicial colleagues, who knows far more about immigration law than I ever have or ever will, considers that the Immigration Rules could be reduced by 200 or 300 pages without great difficulty.

Q108 Lord Judge: You touched on the issue of funding. How many cuts have you had in the last three to six years?

Sir David Bean: Our core funding from the Ministry of Justice was £4 million in 2010. It was reduced to £3 million, in round figures, by 2015, and there was an indication at the beginning of this year that we were to be put on a trajectory from £3 million to £2 million by 2020. I hope that

decision might be modified. It is right to say that that is not our only source of income, otherwise, frankly, we would almost have gone out of business. We can receive references from any government department or the Welsh Ministers and usually, when asked to do a reference, we will say, "Yes, we'll do it but you'll have to pay for it". We can charge for that extra work. Treasury rules are that we cannot make a profit on references but our basic infrastructure, as it were, and a small number of programme projects can be paid for from core funding. It would be very unfortunate if the commission became entirely dependent on reference income because that would mean we had no choice in the projects that we took on. We would become—to think of my and your old profession, Lord Judge—like a barrister waiting for the next brief. It would be very difficult to maintain a coherent programme as an independent body.

Lord Pannick: You have powerfully explained the urgent need for action on immigration law—to streamline, as you put it. Has the Law Commission put this point to the Home Office and, if so, what reply have you received?

Sir David Bean: We have put the point to the Home Office, and some discussions are going between our staff and theirs. That is all I am in a position to say at this stage, but I hope the discussions will bear fruit. Anything that your Committee can do or say in that regard would be most welcome.

The Chairman: We are running rather short of time. I am going to have to ask for questions and concise answers, if I may.

Q109 **Lord MacLennan of Rogart:** The Senior President of the Tribunals said that immigration policy is separately provided in guidance and that one could access that through the Home Office website, but he described it as rather dense and unconsolidated. Does the commission have views about the relationship between primary and secondary legislation, and between legislation and guidance? What steps should you take to consolidate secondary legislation or guidance alongside primary legislation?

Sir David Bean: In the highly contentious area of immigration, I think it would be above our pay grade, and probably beyond what parliamentary process could easily accommodate, to try to alter the balance between primary statutes, the Immigration Rules and guidance. The Immigration Rules are not subject to paragraph-by-paragraph debate and amendment as primary statutes are, which makes them easier for the Home Office to change. Substantial change to primary statutes, on the other hand, would obviously involve a big government programme Bill with a great deal of time for debate. In more technical areas one could perhaps alter the balance without creating too many waves, but on immigration it is not a matter for us to say, "Well, you should have more in the Acts or in the rules". I quite appreciate what you say in principle but one must be practical. If we were to do work on the primary statutes, it would have to be consolidation rather than major reform.

Q110 **Lord Hunt of Wirral:** In your evidence, you have stressed that you

highly value the involvement of stakeholders in your law reform projects. How do you best achieve such involvement?

Sir David Bean: Going back to what I said earlier, it is a question of consult, consult, consult. We try to identify people who actually know about the subject. I think David mentioned what is being done in firearms law as an example. Our staff have meetings with stakeholders, and sometimes we organise symposia. Another of David's team's projects—of some interest in this building, perhaps—is on misconduct in public office, another interesting area of criminal law. We held a symposium at which a number of people, mainly lawyers, made suggestions, some of which I thought were very useful, some less so. It was a very helpful discussion, and there will be more on other subjects in the course of the year.

Q111 Lord Norton of Louth: To follow up on that, you have already referred to the value of the legislation.gov.uk website and how you are exploiting it. In your evidence, at paragraph 1.47, you also mention that you are in discussion with the National Archives about utilising the site for greater engagement. Could you expand a little on that?

Professor David Ormerod: In relation to the sentencing project in particular, there are two dimensions to that. We are due to produce a draft of the entire code in the summer of 2017 and we have spoken to the National Archives about the possibility of it hosting it on its website, making it clear that it is not current legislation. That will be an open public consultation for six months and we will be encouraging practitioners and judges to test it to destruction and see whether the new legislation works. That will obviously be a strong card when it comes to consolidation; not only will parliamentary counsel be able to validate to this House that it is a faithful representation of the present law, we will also be able to demonstrate that it works in practice.

When the new sentencing code is enacted, as we hope it will be, it will be hosted on the National Archives website in the usual way as a legislation.gov.uk title. We hope, however, that there will be additional functionality. In addition to being able to reveal or hide the Explanatory Notes, the schedules and so on, there will also be the opportunity to add material that has not made its way into the Bill—for example, a table. One of the most common causes of unlawful sentences being passed is judges making errors in the combinations of sentences that might be permissible. We envisage a table in the form of an old-fashioned mileage chart, with all the penalties available on both axes, and you can simply look at whether you can pass a suspended sentence and a community order and it will tell you. That will avoid vast numbers of unlawful sentences and bring huge savings in terms of appeal time. That kind of functionality can be hosted on the website, along, perhaps, with things such as a table showing all the historical maxima for the most commonly prosecuted offences, which have changed significantly over time. Historical sex cases are obviously an issue. The maximum sentence for indecent assault changed from two years to five years to 10 years and so on. Having the dates on which those occurred available as a chart, with access through the legislation.gov.uk website, would be very valuable. It

is about providing that additional accessibility once we have already produced clarity in the legislation. That is not to suggest that simply publishing on a website diminishes the need for clarity in the legislation itself.

Lord Morgan: Will the attempt to redraft the sentencing code remain accessible for future scholars?

Professor David Ormerod: We hope that the sentencing code, if enacted, will then be the only source of legislation on sentencing indefinitely. Future legislative change would be brought about by amendment to that code. This has happened in other jurisdictions where there has been a sentencing code for 20 or 30 years. Parliaments in those jurisdictions have simply amended that code so that judges, practitioners and members of the public know that it is the single source of primary law on sentencing.

Lord Pannick: Your evidence at paragraph 1.26 describes your model for law reform. How does that affect the need for pre-legislative scrutiny in Parliament?

Sir David Bean: It is more a matter for you than for us, but where we have had rounds of consultation and stakeholders have sent us comments that we record, we hope that reduces the need for pre-legislative scrutiny here. Our working methods sometimes include the publication of a draft Bill and sometimes the draft Bill is left until later. But where a draft Bill is published with the report, that is all in the public domain and people have a chance to look at that. Nothing will prevent last-minute suggestions, however many times we have consulted, but we hope we can relieve you of some of the burden by consulting on the draft text. I should say also that, whether or not we do a draft Bill alongside the report, our in-house parliamentary counsel are very much involved in the discussions that lead to the report. Where we are working up a proposal that involves a critical phrase in legislation, sometimes parliamentary counsel says to us, "What you are thinking of suggesting cannot be put into words". We then try to improve on it.

Q112 **Lord MacGregor of Pulham Market:** I think you have almost answered the question I wanted to ask. I tried to come back to you earlier on core funding. I must say I was astonished by the figure you quoted in your report; I thought it must be a misprint but obviously it is not. What would be the cost/benefit analysis of doing that to the text you have on immigration laws and reducing it very considerably?

Sir David Bean: That is a very good question and not an easy one to answer. Suppose, for example, the cost of streamlining the Immigration Rules and consolidating the primary statutes was £1 million. Think about how much it costs the taxpayer when a case goes up through the First-tier Tribunal and the Upper Tribunal and gets to the Court of Appeal, with the Home Office lawyers obviously being paid for by the taxpayer and the lawyers for the appellants possibly also being paid for by the taxpayer. It is a test case so others may be held up behind it, incurring more costs

and so on. How many of those do you need to get to £1 million? That is simply in paying for the process. You then hope that once the code is in force, fewer such pointless cases will founder on technicalities. That is part of the rationale for our sentencing code as well.

Professor David Ormerod: There are also the non-monetised or not immediately monetised benefits. Going back to the planning law example, yes, you might avoid litigation costs, but if you can then enhance the likelihood of investment in or development of a particular industry, that may have much more significant benefits.

The Chairman: Thank you very much. There we must draw to a close an extremely interesting and useful session. On top of your very valuable written evidence, you have given us a lot of further food for thought. Thank you very much, Sir David and Professor Ormerod.