

Lecture to the Conference of the Statute Law Society

15 November 2013

**Is there still a case for codifying the criminal law, and, if there is, what might a modern Code of Evidence look like?**

**Ian Dennis**

**Emeritus Professor of Law and Director of the Centre for Criminal Law, UCL**

Introduction

I should start by clarifying my somewhat mysterious title. It asks a question about the criminal law, and answers it by reference to the law of evidence. This apparent disjunction is deliberate, as I shall now explain. Codification of the criminal law is a subject that has been on the agenda of law reformers for decades. It was a flagship project for the Law Commission for forty years, until the Commission regrettably abandoned it in 2008. It has attracted distinguished judicial support, and there is a substantial literature advocating the enactment of a criminal code for England and Wales.

Nearly all the scholarly and professional attention has been devoted to codification of the substantive criminal law. By this I mean the general principles of criminal liability and the main criminal offences for which a person can be prosecuted, convicted and punished. But the codification enterprise is potentially much wider than this. When the Law Commission reported on its project in 1989 it envisaged a code in four parts: Part I would contain general principles of liability, Part II specific offences, Part III would deal with evidence and procedure, and Part IV with the disposal of offenders. Similarly, the Government's 2001 White Paper, *Criminal Justice: The Way Ahead*, also envisaged a code with the same four Parts. However, as I have just indicated, it is Parts I and II that take up the great bulk of the discourse on codification. As regards Part IV, virtually no attention has been paid to this. I suspect the reason is that law reformers regard sentencing of offenders as a hopeless case. Sentencing legislation is a notorious minefield, with numerous traps for unwary judges and counsel. Some of you will remember the praiseworthy attempt to consolidate sentencing law in 2000. That consolidation lasted a matter of months before it was substantially amended, and the minefield has been growing ever since.

Part III however is a more promising case. In an article in the *Criminal Law Review* some years ago Professor John Spencer argued persuasively the case for a code of criminal procedure. The cause was taken up by Lord Justice Auld in his review of the criminal courts in 2001, and a conference in Cambridge a year or two later discussed how to take this forward. We have still to see a full draft of such a code, but there has been one significant development in this direction. This was the introduction of the Criminal Procedure Rules in 2005. The statement of the 'overriding objective' of the Rules begins with the proposition that they are a 'new code'. Now of course it is true that the

Rules are not primary legislation but we can at least say that the concept and language of codification has achieved a degree of official recognition and implementation in this context.

Spencer's argument referred to codification of the law of criminal evidence, but did not address it in any detail. Lord Justice Auld also favoured a code of evidence, but thought that its preparation would need to be preceded by a comprehensive review of the law. His own analysis of a number of evidential rules and practices led him to make a series of specific recommendations founded on a broad aim of moving away from technical rules of admissibility towards trusting judicial and lay fact-finders to give relevant evidence the weight it deserves. Some of those recommendations informed the radical recasting of two major areas of the law of criminal evidence that took place in the Criminal Justice Act 2003. The law on hearsay and bad character evidence underwent substantial reform. This included abolition of the previous common law and its replacement by new statutory regimes of admissibility. In the case of hearsay this regime has been judicially described as a 'crafted code', and the case law shows that the courts have treated both regimes as in effect mini-codes making a fresh start on the law.

It is now ten years since the passing of this Act. It seems to me that this anniversary is an appropriate time to revisit the question of codification, in particular codification of the law of criminal evidence. I want to focus on criminal evidence partly because it has been somewhat neglected in the debates on codifying the criminal law, and partly because I believe that codification of criminal evidence would now be the easiest part of a comprehensive code to achieve. If it could be achieved, it could pave the way for codification of the other parts.

I propose to tackle the subject in the following way. First, I will revisit the general arguments in favour of codifying the criminal law, to consider their potential application to criminal evidence. Secondly, I will look at the objections to codification and the difficulties alleged to be associated with the exercise. My argument will be that there is still a good case for codifying the criminal law, and that if the codification project is to be revived, it should start with the law of criminal evidence. This is because the objections and difficulties associated with codification have little weight in this context, provided we are clear about what the code should and should not include. The preparation of an evidence code should not in my view prove unduly difficult. In the final section of the lecture I will consider the structure and contents of such a code, where I will draw on recent experience in Australia and New Zealand.

### The arguments in favour of codification

Let me begin with a word about definitions. What do I mean by 'codification'? I was a member of the team of academic lawyers which assisted the Law Commission on their codification project in the 1980s. Our conception of codification, which the Law Commission accepted, was the task of setting out the criminal law in a "single, coherent, consistent, unified and comprehensive piece of legislation". We took the view that this was a different exercise from consolidation. Consolidation, broadly speaking, involves bringing together in one statute provisions relating to the same subject-matter that are to be found in a variety of other statutes. The provisions will be restated rather than reformed. Codification may adopt a guiding principle of restatement of existing law, as the draft criminal code did, but the task of making the law coherent and consistent may necessitate a certain amount of reform. Now of course one could say more about this distinction between codification and consolidation, but that is not necessary for my purpose today. I am happy to proceed on the

basis that a code of criminal law should in principle aspire to the qualities I have outlined. I will return later in this lecture to consider how far they can be realised in a code of criminal evidence.

Looking back at the codification project one can see three kinds of arguments used in support of a criminal code. I will not elaborate these in detail; I think it is enough for present purposes to set out a fairly brief summary. First, there are the constitutional arguments. These are partly focused on the legality of the criminal law. They claim that the law should be reasonably clear, accessible and known in advance, so that citizens may regulate their conduct accordingly. This claim is founded on the values attached to the liberty and autonomy of citizens in a democratic society which require fair warning to be given of prohibited conduct. The argument goes accordingly that a code would enable citizens to find the law more easily and to understand it better than if they had to search through the mass of statutory and common law sources that we presently have. A related claim concerns the legitimacy of the criminal law. A code advances legitimacy by ensuring that the criminal law's various and competing aims of social defence, promotion of individual liberty and autonomy, and due process of law, are debated and resolved through the democratic process. Contemporary Parliamentary approval, in other words, enhances the legitimacy of the criminal law. This argument is particularly apposite to common law rules, but can apply also where criminal law is contained in old statutes which have not received Parliamentary consideration for many years.

Second, there are arguments of principle for a code. These relate to the moral quality of the law. They claim that the process of codification enables us to maximise the fairness of the criminal law and to ensure that it adheres to the ethical standards that we wish to respect. As Professor Wechsler, the principal draftsman of the American Law Institute's Model Penal Code, put it, a Code demonstrates that "...when so much is at stake for the community and the individual, care has been taken to make law as rational and just as law can be". These claims are now reinforced by the incorporation of the European Convention on Human Rights into English law. A new draft criminal code could and should take account of relevant human rights jurisprudence. It would inform the ethical standards which the code should respect, and we would expect it to form part of the law to be restated in the code.

Third, there are arguments relating to efficiency in the administration of criminal justice. These emphasise the need for the criminal law to be accessible, clear and reasonably certain. Such claims are the same as some of the constitutional arguments, but the rationale is different. We are concerned here with the instrumental benefits of codification for decision-making in criminal justice. The argument is in essence that a code will make the jobs of those working in criminal justice easier. Judges, lawyers, magistrates, police officers, and other criminal justice players, will all be able to find and use the criminal law more quickly and efficiently. Since many of these people will not be trained lawyers, or may not have much experience of administering and enforcing the criminal law (for example, part-time judges), a code offers the great advantage of a common authoritative starting-point, drafted in a clear and consistent style.

It seems to me that collectively these arguments continue to present a compelling case for a criminal code. However, it is the case that the arguments were largely directed, as I have said, to a code setting out the substantive criminal law of liability. Now it may be, as the Law Commission commented when it abandoned the project in 2008, that for various reasons it would be more difficult to achieve codification of the substantive law now than in 1989. One can concede this point

without weakening the force of the case in principle for codification. I turn, therefore, to consider how far the arguments in favour of a code apply to a code dealing with the law of criminal evidence. In answering this question it is helpful to begin by thinking about the audience for such a code, and the function of the code. We need to ask who the code is for, and what is it for? The answers to these questions begin with the proposition that a code of criminal evidence, like a code of criminal procedure, will be concerned with the process of enforcing the criminal law. Most of it is likely to be dealing with the law which governs the process of adducing and using evidence at contested trials. In other words, it will be setting out rules dealing with the adjudication of criminal liability. Fairly obviously the main users of rules of adjudication will be the courts and the lawyers for the prosecution and the defence. If that is right, the main arguments in play will be concerned with matters of principle and efficiency. Given that the first element of the overriding objective of dealing with cases justly is delivering accurate outcomes (convicting the guilty and acquitting the innocent), we would be asking whether a code of criminal evidence would enable the process of adjudication to proceed more fairly and efficiently in this function. From this perspective the strength of the arguments in favour of codification will depend on the comparison we make with the current state of the law of criminal evidence, and I will return to this shortly.

I should say though that a focus on arguments of principle and efficiency does not mean that constitutional arguments have no purchase in this context. If citizens have a right to due notice of prohibited conduct it ought to follow that they should also have due notice of their rights if they are caught up in the criminal process. The point of due notice is to enable citizens to regulate their conduct and plan their lives; this seems equally applicable whether we are talking about a citizen in their home or on the street, or in a police station or in a criminal court. Accordingly we might reasonably expect a code of criminal evidence to set out clearly a person's rights in the criminal process. Let us take as examples the presumption of innocence and the privilege against self-incrimination; these are matters which concern not only police, lawyers and courts in the enforcement of the criminal law, but also express fundamental rights of all citizens. Indeed, in many countries, these rights have constitutional status.

My conclusion therefore is that all three kinds of argument are applicable to the case for codifying the law of criminal evidence. The strength of the arguments depends, as I have just said, on a comparison between the current state of the law and what we could expect a code to offer. The current law of criminal evidence is contained in a mixed mass of sources: common law, statutes, rules of court, Codes of Practice and Guidelines. I do not wish to suggest that all of these are candidates for inclusion in primary legislation. To that extent the idea of codification as aspiring to a single comprehensive statute will require some modification. I will come back later to the relationship between primary legislation and what we might call 'soft law'; for the moment my focus is on the existing statutes and the common law.

For many years the law of criminal evidence was very largely common law. It was founded principally on the rulings of trial judges from the seventeenth century onwards; consistent judicial practice resulted in those rulings hardening into rules of law. Parliament began to intervene in the nineteenth century on a piecemeal basis, its main concern being the old common law rules of competency of witnesses. Even with these occasional statutory interventions it was still possible to say as recently as 30 years ago that codifying the law would be mainly a task of trying to turn a mass of common law into statutory form. However, the law of criminal evidence has been transformed in

the last 30 years. The process began with the reforms made by the Police and Criminal Evidence Act 1984 (PACE), and continued with the Criminal Justice Act 1988, the Criminal Justice and Public Order Act 1994, the Youth Justice and Criminal Evidence Act 1999, the Criminal Justice Act 2003, and the Coroners and Justice Act 2009. Collectively these Acts have turned a subject that was largely common law into one that is primarily statute-based.

In my view it would not be unduly difficult to consolidate all the relevant provisions from those Acts in one new statute. The provisions deal with discrete topics, and the drafting styles do not differ significantly. There are therefore no issues of overlap or inconsistency. This consolidation would almost certainly account for more than half the law of criminal evidence. The remaining statutory provisions dealing with general principles of evidence are not extensive. They date mostly from the nineteenth century, and, while the statutory language needs updating, the principles themselves are reasonably well settled. When we turn to the common law much the same could be said. Take for example the general rules governing the questioning of witnesses. There are some uncertainties about the scope of a couple of the common law exceptions to the finality rule, but broadly speaking, the rules are clear and well settled. They would not be unduly difficult to restate in statutory form. Another example is the common law rules of legal professional privilege. Again these should not present major problems for the codifier; the basic rule of privilege is already contained in section 10 of PACE. I note though that expert evidence is one area where the common law is widely felt to be unsatisfactory. It is said that the law fails adequately to ensure the reliability of expert evidence. The Law Commission recently produced a full report on the subject, presenting a well-argued case for reform by tightening the criteria for admissibility. A policy decision would be required as to this recommendation, but it may be the only really significant one for the purpose of codification. If I am right, we can say that on this basis codification of the law of criminal evidence is not only desirable in principle but looks to be a feasible objective in practice. I turn therefore to the arguments against codification.

#### The arguments against codification

The Law Commission's 1989 report reviewed a number of arguments and difficulties that commentators had raised against codification of the criminal law. The Commission did not find any of them persuasive. There does not seem much point in rehearsing them all again now, since they are set out in full in the report. As the Commission said, a number of them seemed to demonstrate several misconceptions about the nature and interpretation of an English criminal code. For example, it is not the case, as one commentator complained, that practitioners would have to learn to interpret a code like continental lawyers. A new technique would not be required. A code would be a normal English statute, interpreted according to established principles of statutory construction. English lawyers have become well used to dealing with lengthy new statutes and with mini-codes in relation to various matters of criminal law, and they have not encountered any special difficulty.

Similarly it is not the case that codification would reduce the role of the courts in determining matters of criminal process. The courts will still need to interpret the codified law and apply it to differing circumstances. The experience of the new regimes for hearsay and bad character evidence in the Criminal Justice Act 2003 shows that there will still be plenty of work for the courts to do in implementing a code of criminal evidence.

There are three other potential issues with a code of criminal evidence that I need to address. The first is the objection that a code would have the effect of making the law immutable, and freezing it at a particular stage of its development. There would be a risk of ossification of the law and perpetuation of error. In its report the Commission thought there was some force in this view, and I would be prepared to concede that there could be a risk that the proper development of the law could be inhibited. However, in my view the risk is largely theoretical. This is for two reasons. First, as I have already suggested, the code, like any other statute, will require interpretation from time to time, and I see no reason why the courts should not continue to use their familiar techniques to adapt and apply the statutory language as appropriate to the case in hand. After all, one can fairly expect the courts to regard the code as a new starting-point, not as the end of the road. Second, I anticipate that there would be a standing body to monitor the application of the code and, if necessary, to recommend amendments of its provisions. There are already a number of bodies in existence which could undertake this task: the Law Commission is one, the Criminal Justice Council, and the Criminal Procedure Rules Committee, are others. I see no reason why the code could not be updated as and when required using the expertise of these bodies.

The second issue concerns the content of the code. At this point I return to the question of whether it would be desirable or even possible for a code of criminal evidence to be a single comprehensive statute. This is an important question and it requires a nuanced answer. One of the problems facing a codifier is how far one can or should take statutory provisions out of a thematic context. For example, if we are drafting a code of substantive criminal offences, should we try to take all the road traffic offences out of the Road Traffic Act and re-enact them in the code? Similarly should we include all the licensing offences from the Licensing Act? What about offences concerned with health and safety, or food safety, or the environment, and so on? The code team took the view that there were severe practical difficulties in trying to codify offences which formed part of a complex scheme of statutory regulation of a particular activity. Such schemes often have multiple elements involving special statutory agencies, jurisdictional provisions, special duties and powers, and particular procedural and evidential rules, all in addition to the specific offences. Some of this statutory context might have to go with the offences to make them intelligible, but to take all the context would unbalance the code and make it impossibly large. Equally, it would not make much sense to split the regulatory scheme between the code and the thematic statute. This would not suit the convenience of those concerned with the implementation and enforcement of the regulatory schemes. Accordingly we advised the Law Commission that users of the code would be better served by leaving such regulatory schemes intact in their own mini-codes. I believe this was the right advice, and I would apply the reasoning to rules of evidence as well as to substantive offences. So, for example, if a statute creates a regulatory offence and then provides for a reverse burden of proof in relation to a special defence to that offence, that evidential rule should remain in its statutory context.

What this suggests is that a code of criminal evidence should aim to state the *general* rules of the law. These are evidential rules which apply across offences in the same way as general principles of criminal liability, such as the rules of complicity or defences. Evidential rules which apply only in respect of particular offences should not normally be included. As I have just argued, the principle of user-convenience will usually indicate that evidential rules specific to a particular offence, such as a reverse burden or a curtailment of the privilege against self-incrimination, should remain in their existing statutory contexts.

A further exclusion from a code concerns what I referred to earlier as 'soft law'. I would include under this heading forms of delegated legislation such as rules of court and codes of practice issued under statutory authority. It seems to me that the style and detail of much of this material means that it is not appropriate for a code of primary legislation. The PACE Codes of Practice, for example, with their combination of rules, instructions, notes of guidance and explanatory material, would look very odd in a statute, even in a Schedule. They could be left as they are, although that would not rule out publishing them as an annex to the code. A similar strategy could be adopted for the Criminal Procedure Rules, which have a number of rules dealing with evidential matters. I would expect to see the practice continue of incorporating Practice Directions into the Criminal Procedure Rules. That leaves a certain amount of other material such as Guidelines issued by the Attorney-General or the Director of Public Prosecutions, and judicial Protocols, such as the Protocol on Disclosure. There is a good case for rationalising and consolidating such material, as Lord Justice Gross recognised in his recent review of the law on disclosure. In the evidential context witness anonymity orders provide an example of a topic where multiple sets of guidelines could usefully be amalgamated.

The third issue which presents potential difficulty for the codifier is restatement of the common law. Our experience with the draft criminal code was instructive. One problem with the common law of general principles of criminal liability is that the common law sometimes presents a fuzzy target where the law is obscure or unclear. The law may also be a moving target as well, depending on how often it has to be refined or explained to meet the exigencies of the latest case. In this sense a statutory draft of the common law will always be playing catch-up. A further problem is that the common law may well be viewed by some as defective in terms of policy or principle. These commentators may want the law to be reformed not restated.

The result of these different problems is that the draft we produced of common law rules on general principles of liability tended to attract two kinds of criticism. One group of critics, led by no less a figure than Glanville Williams, complained that we had failed to capture the proper common law rules, particularly in relation to causation. In their view, by failing to state the rules accurately, we had inadvertently reformed them for the worse. On the other hand some critics complained that in so far as we had succeeded in stating the common law rules accurately we had merely succeeded in perpetuating bad law that ought to be reformed. With hindsight this was undoubtedly one of the obstacles to taking forward the 1989 draft code. However, the extent of the restatement difficulty depends on how far one regards the common law in question as obscure and/or controversial. It has to be said that there was a substantial amount of obscurity and controversy surrounding several areas of the common law on general principles of liability. I'm not sure whether the position has got better or worse since 1989. The courts have done some valuable work on criminal defences, and in clarifying the meaning of recklessness, for example, but the law on intoxication has proved very difficult to state in an intelligible statutory form, and the thought of trying to codify the current law on joint enterprise is the stuff of nightmares.

Would the common law of criminal evidence present a comparable degree of difficulty? I think the answer to this must be No. If we take the law on expert evidence as an illustration the rules of admissibility and the duties of an expert witness are reasonably clear. There is certainly controversy whether the common law applies a sufficiently searching test of reliability to expert evidence, especially where the evidence involves a new scientific technique or theory. As I said earlier, a policy decision is required as to whether the Law Commission's proposal for a new statutory test of

sufficient reliability should be enacted. If it isn't presumably the common law could be restated, warts and all, and the courts would then be left to do the best they could with it. This brings me to the last part of the lecture. Having outlined what would *not* be included in a code of criminal evidence I will now discuss what should be included.

### The contents of an evidence code

There are several models of modern evidence codes to be found in other common law jurisdictions. I don't have time to deal with them fully, so I will say a few words about three that have been operating successfully for some years. The American Federal Rules of Evidence govern proceedings in the Federal courts of the United States, and they have provided a model for some of the State codes of evidence. However, the Federal rules are only a partial code. They omit some important common law topics, such as legal professional privilege, and they also do not cover a number of evidential matters which are the subject of constitutional guarantees. So they do not deal with the privilege against self-incrimination, or the right to confrontation of witnesses, or the 'fruit of the poisoned tree' doctrine of the Fourth Amendment. A further problem is that in several areas they have a rather old-fashioned look. They were drafted in the mid-1970s, and they tend to reflect the unreformed common law of the time. This means that admissibility of evidence is often determined according to whether the evidence fits into one of the old category-based exceptions to an exclusionary rule, whereas much of the reform in England in the last 30 years has been in the direction of more flexible discretionary standards for admission. For these various reasons I conclude that a codifier of the English law of criminal evidence will not derive much help from the Federal rules.

More promising models are to be found in Australia and New Zealand. Let me take Australia first. The model here is the so-called uniform legislation on evidence. This was first enacted as the Evidence Act 1995 in the Commonwealth and New South Wales jurisdictions. The two versions have a few differences of detail, but in terms of structure and basic principles the Acts are identical. Other versions of the Evidence Act have since been enacted in Tasmania in 2001 and Victoria in 2008. The hope is that in due course the remaining Australian states will also adopt it. The Evidence Act does not describe itself as a code, but it has several of the characteristics we would expect to find in a code: it is unified, consistent and systematic. The Act is based on the work of the Australian Law Reform Commission in the 1980s, which produced a series of research papers, followed by an Interim Report in 1985 and a Final Report in 1987. The Act runs to 198 sections, plus two short Schedules and a Dictionary, which comprises an extended set of definitions. The main body of the Act is divided into five Chapters. These are headed Formal Matters, Adducing Evidence (which is broadly the law relating to witnesses and documentary evidence), Admissibility of Evidence, Proof (which covers such matters as the standard of proof, judicial notice, proof of foreign law, corroboration, and judicial warnings and directions), and a final set of Miscellaneous provisions. This Act is more comprehensive in its reach than the American Federal Rules, but it still omits a number of topics that would be candidates for inclusion in an English code. These include special measures directions for vulnerable witnesses, restrictions on the use of sexual history evidence of complainants, the burden of proof (surprisingly), and presumptions.

Naturally the Evidence Act has generated a fair amount of case law. Several of its provisions have received consideration by the High Court of Australia. In one of the early cases on the Act,

*Papakosmas v R*, the High Court rejected the argument that the Act should be read by reference to the previous common law and interpreted as making changes only where indicated expressly or by necessary implication. The court made it clear in effect that it was not business as usual. The Act was said to have made substantial changes to the law of evidence. The language should be given its natural and ordinary meaning, and, according to Justice McHugh, reference to pre-existing common law concepts will often be unhelpful. It seems to me that in England the Court of Appeal has taken a similar approach to the interpretation of the new mini-codes for hearsay and bad character evidence. Both statutory regimes have been treated as making a new start, and the court has resisted attempts to reintroduce elements of the common law where Parliament had clearly intended them no longer to have effect. Of course this is not to say that all the content of the common law on hearsay and character evidence has necessarily changed. But the source of the law has certainly changed, and the Court of Appeal has made it clear that the new source will be interpreted without preconceptions or assumptions as to the continuance of the previous law.

It should be noted that the Australian Evidence Act applies also in civil proceedings. It is not restricted to criminal proceedings. So far I have discussed an English evidence code solely in relation to evidence in criminal proceedings. This is consistent with the case I have made for an evidence code as part of a wide-ranging code of criminal law. I think this is the right approach, not least because large parts of an English code of criminal evidence could have no application in the civil context. Moreover, some evidential rules differ considerably as between civil and criminal proceedings: hearsay is a good example. This is not to say that there is now a complete divergence between evidence in criminal and civil proceedings. Obviously there are some topics where the law is applicable to both types of proceedings: expert evidence and legal professional privilege are two of the main examples. There is certainly a good argument that the basic rules for experts and legal privilege should not differ according to the nature of the proceedings, and so it would be for discussion whether provisions on those topics in a criminal evidence code should be made applicable in civil proceedings also. There is a longstanding precedent for this in sections of the Criminal Procedure Act 1865.

The New Zealand law is contained in the Evidence Act 2006. This is slightly longer than the Australian equivalent, running to 216 sections and two small Schedules of amendments and repeals. It has some similarity in terms of organisation of the material. So there is a Part 1 containing preliminary provisions; a Part 2 dealing with admissibility rules, privilege and confidentiality, and a Part 3 covering trial process, which includes all the law on witnesses and documentary evidence, as well as corroboration and judicial warnings and directions. Part 4, however, diverges from the Australian Act to deal with evidence from overseas or to be used overseas; much of this Part contains special provision about the relationship between New Zealand and Australian proceedings. Part 5 is a group of miscellaneous provisions. Standard evidential topics not included in the Act are the burden and standard of proof, and presumptions. One particularly interesting feature of the Act is section 6, which contains a statement of the purpose of the Act. This statement is comparable to the statement of the overriding objective of the English Criminal Procedure Rules, to which I referred earlier. The New Zealand provision adds that one of the purposes of the Act is to enhance access to the law of evidence, a principal aim of codification.

It seems to me that the Australian and New Zealand Acts show that codification of the law of evidence is not just desirable in theory, but feasible in practice if there is political and professional

support. They demonstrate that an evidence code in a common law jurisdiction does not have to be a gigantic unwieldy piece of legislation. It can be drafted in the same way as a normal statute, and interpreted according to the normal principles of statutory construction. I am not necessarily advocating either Act as a template for an English Evidence Act, but they both provide useful illustrations of how an English Act might be structured and organised.

### Conclusion

This brings me to my conclusion. My title asks what a modern code of evidence might look like. I hope I have answered that question during the lecture by discussing the contents of an English code and pointing to the examples of the Australian and New Zealand Evidence Acts. I will finish with three final points about the preparation and enactment of an English Evidence Act. First of all, who is going to prepare it? The obvious body to do this is the Law Commission. The exercise would fall squarely within the scope of their statutory duties. They have a track record of valuable work on evidence issues, and potentially they have the resources to do it with the aid of consultants and an in-house Parliamentary draftsman. I would hope that the Commission and the Government might see the drafting of an Evidence code as the first step to reviving the project for codifying the criminal law as a whole.

Secondly, however, there might be fears about the length and organisation of an evidence code. Let me say something about this. As I mentioned earlier, I envisage that most of it would consist of a consolidation of existing provisions in modern statutes. It is difficult to be precise about the total number of these sections, since there would be debate as to exactly which provisions should go into the code. My best guess is that the total would be in the region of 130-140. There are maybe some additional 30 sections in other Acts which would be candidates for inclusion. How many sections would be needed for restatement of the common law requires another guess. On the basis of the Australian and New Zealand treatment of the relevant topics I would hazard an estimate of between 60 and 80. If my figures are anywhere near accurate we would be looking therefore at an Act of up to 250 sections. That sounds a lot, but more than half of it would essentially involve cutting and pasting from other statutes. I might add that it would be considerably shorter than the Criminal Justice Act 2003 which ran to 339 sections.

The organisation of the code would again be a matter for debate. How to divide up the law of evidence for purposes of exposition has always been a tricky issue. No two textbooks follow the same order of topics. There is a broad distinction, reflected in the Australian and New Zealand Acts, between rules of admissibility and rules of proof and trial process, although even then these organising categories have a degree of overlap, for example in relation to when, how and with what effect evidence can be adduced about a witness's previous statements. Other organising categories are possible. For example, privileges and immunities could form a coherent group of provisions. Other possibilities might arise according to how widely the code's remit extends. If the code were to include all police powers to obtain evidence from an accused person the relevant provisions would presumably constitute a distinct Part of the code. An argument in favour of inclusion is that such powers clearly engage human rights under the ECHR, and, if the powers are exceeded, there may be an issue whether evidence obtained in consequence should be excluded as a matter of law or discretion. However, it might be objected that such powers are more conveniently treated along

with other police investigative powers, such as stop and search, arrest, entry on to premises, and so on, as they currently are in PACE.

Thirdly there is the question of enactment. The code could not be taken through Parliament under the procedure for consolidation Bills. It would have to be a Government measure, and this is why it would be essential to obtain Government support for its preparation. How hard would it be to obtain Government support? I am not in a position to answer that question. What I would say is that there was a Home Office commitment a few years ago to the principle of codification of the criminal law. That may not mean very much 12 years on, but I can't see that anything significant has happened in the interim to justify withdrawing the commitment. Moreover, an evidence code ought not to be as politically sensitive as a code of substantive criminal law. This was undoubtedly a problem with the 1989 code, which contained a substantial amount of controversial law reform. I cannot see that an evidence code would generate a comparable difficulty. Most of it would be consolidation of existing legislation, and the restatement of common law would be mostly of settled principles of interest largely to lawyers. So there really should not be very much to frighten the horses.

Finally then, given our location, I hope I may be permitted to say that I commend this Bill to the House.

Ian Dennis

Emeritus Professor of Law and Director of the Centre for Criminal Law, UCL

Bentham House

Endsleigh Gardens

London WC1H 0EG

Email: [ian.dennis@ucl.ac.uk](mailto:ian.dennis@ucl.ac.uk)

Tel: 020 7679 1431