



BRIEFING PAPER

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Sentencing (Pre-
consolidation
Amendments) Bill [HL]
2019-21

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Summary

The [Sentencing \(Pre-consolidation Amendments\) Bill \[HL\] 2019-21](#) (the “Pre-consolidation Bill”) was introduced in the House of Commons on 4 March 2020 and is due to be considered in [Second Reading Committee](#) on 17 March 2020. [Explanatory Notes](#) have been published.

The Law Commission sentencing code project

The Government in 2014 asked the [Law Commission](#) to consolidate the law relating to sentencing. This was prompted by concerns that the complexity of the current law contributes to a disproportionate number of errors and unlawful sentences being imposed, resulting in delays and an unnecessary number of appeals. This complexity also makes it difficult for the public to understand the law which affects public confidence in sentencing.

The Law Commission consulted on the issues and in November 2018 published a [report](#) and two draft bills, a Pre-consolidation Amendment Bill and a Sentencing Code Bill and recommended their enactment. A [short summary](#) of the report is available. The Government [accepted](#) the Law Commission’s principal recommendations.

The sentencing code would consolidate all the existing legislation governing sentencing procedure. It has been designed by the Law Commission to make the law on sentencing procedure comprehensible and accessible. The code will not change the substance of the law, such as by changing maximum sentences; it will re-enact the law already in force in a more logical framework. A consolidation bill containing the sentencing code, the [Sentencing Bill \[HL\] 2019-21](#), was introduced to the House of Lords on 5 March 2020.

The code would introduce a new approach to dealing with amendments to sentencing law. The Law Commission have called this approach the “clean sweep”. This will remove historic layers of legislation. All offenders convicted after the code comes into force will be sentenced according to the most up to date law with some limited exceptions. These exceptions will protect the fundamental rights of an offender not to be subject to retroactive punishment.

The code has received widespread support, including from legal practitioners, judges and academics.

In the future it is intended that all changes to the law on sentencing procedure will be made by amending the sentencing code itself. It is hoped this will bring clarity to the law.

The Bill

Before the sentencing code can be enacted as a [consolidation bill](#) there is a need for “paving provisions” to be passed in another bill, the Pre-consolidation Bill, which has two main elements:

- It would remove historic layers of legislation and give effect to the “clean sweep”; and
- It would make changes to the existing law of sentencing procedure to enable the consolidation in the code to take place.

The Pre-consolidation Bill is a Law Commission Bill and so is subject to a [special procedure](#).

The majority of the Pre-consolidation Bill extends to England and Wales only. Annex A of the [Explanatory Notes](#) sets out the exceptions.

1. Background

1.1 The Law Commission's project

[The Law Commission](#) is the statutory independent body created by the *Law Commissions Act 1965* to keep the law of England and Wales under review and to recommend reform where it is needed.

The Law Commission was asked by the Government in 2014 to undertake a [project](#) to consolidate the existing law relating to sentencing procedure into a single statute.

Problems with the current law

The Law Commission gathered evidence on the problems with the current law of sentencing procedure. It noted that the law is incredibly complex and difficult to understand even for experienced judges and lawyers. It said that the law on sentencing has no structure and cannot be found in a single place.¹

When the Law Commission undertook the task of compiling all of the current law of sentencing it found that it was more than 1300 pages long. Even this figure did not include the historic sentencing regimes courts must apply when sentencing for offences committed a number of years ago.

The Law Commission also identified problems with the way in which sentencing legislation is amended. There has been, they said, no discernible standard approach. Sentencing legislation is heavily and frequently amended. Sometimes changes are made by amending previous enactments, sometimes they are introduced in their own enactments. New provisions are frequently not brought into force for long periods of time or are not brought into force at all. The way in which amendments are brought into force is also inconsistent. This often makes it difficult and time consuming to find out if a particular provision applies to a particular case.

These problems with the current law lead to significant rates of error and causes delay. The Law Commission referred to an analysis conducted in 2012 which demonstrated that the complexity of the legislation is resulting in an extraordinary number of sentences that have been wrongfully passed. 36% of 262 cases sampled involved unlawful sentences which the court should not have made.²

The Law Commission noted the potentially serious results of these errors:

It could mean that a minimum sentence is not passed on an offender to whom it applies, or that an offender is subject to a lengthy prison sentence which is not available for their offence.³

¹ Law Commission, [The Sentencing Code: Summary of the Report](#)

² Law Commission, [The Sentencing Code: Summary of the Report](#)

³ Law Commission, [The Sentencing Code: Summary of the Report](#), p3

Errors also have economic consequences, resulting in delay caused by additional hearings to correct errors and unnecessarily lengthy hearings due to the difficulty of interpreting and applying the law.

Aims

The sentencing code project aims to ensure that the law relating to sentencing procedure is readily comprehensible and operates within a clear framework, to increase public confidence in the criminal justice system and to ensure that the system, in relation to sentencing procedure, operates as efficiently as possible.

Consultation

The Law Commission undertook consultation and engaged with stakeholders. It published papers on specific issues and invited comment on the draft sentencing code:

- [Issues Paper 1 – Transition](#), 1 July 2015 considered policy questions around transition from the current law to the new sentencing code (also known as the “clean sweep”)
- [Sentencing law in England and Wales: Legislation currently in force](#), 9 October 2015, set out the current legislation and asked consultees whether any had been missed and whether the scope of the exercise had been correctly defined
- [The Sentencing Code Volume 1: Consultation Paper](#), 27 July 2017, the ‘main’ consultation paper, sought views on the draft code
- [The Sentencing Code: Disposals relating to children and young persons](#), 23 March 2018, sought views in relation to certain provisions related to the sentencing of children and young persons.

Reports on specific issues were published following consultation:

- [A New Sentencing Code for England and Wales: Transition—Final Report and Recommendations](#), May 2016
- [Sentencing Law in England and Wales: Legislation Currently in Force—Interim Report](#), 7 October 2016

1.2 The Law Commission’s report and draft legislation

In November 2018 the Law Commission published a report on the conclusions of the project together with a draft Sentencing Pre-Consolidation Amendments Bill and a draft Sentencing Code Bill.

- [The Sentencing Code Volume I: Report](#)⁴
- [The Sentencing Code Volume II: Draft Legislation](#)⁵

The Law Commission has published summaries of its report:

⁴ HC 1724, Law Com No 382, 22 November 2018

⁵ HC 1725, Law Com No 382, 22 November 2018

- A short executive summary: [The Sentencing Code: Summary of the Report](#)
- A more detailed summary [The Sentencing Code: A Report Summary](#)

The Government gave its [interim response](#) to the Law Commission on 21 May 2019 accepting the recommendation to enact the draft Sentencing Code Bill and draft Sentencing (Pre-consolidation Amendments) Bill.⁶

The sentencing code

The sentencing code drafted by the Law Commission brings together all of the law of sentencing procedure in one statute with a clear and logical structure. The code also updates terminology used in the law, streamlines the law to provide additional consistency and clarity and corrects errors and omissions. This, the Law Commission says, will make the law more accessible for the public, the judiciary and practitioners. The code will be a much shorter document than the law it replaces.

The code will not make changes to maximum sentences or introduce new minimum sentences. It will not restrict the discretion judges have when sentencing or replace sentencing guidelines produced by the [Sentencing Council](#).

It is expected that future changes to the code will be made by amending the sentencing code itself rather than by adding sentencing procedure into other separate laws.

The “clean sweep”

The Law Commission has proposed a novel approach to dealing with changes to the law: the “clean sweep”.⁷ The current approach to the amendment of sentencing procedure legislation is to create multiple “layers” of legislation. Provisions are repealed but are partially ‘saved’ for certain historical cases. This complexity leads to errors.

The clean sweep will remove the need for the courts to look back to historical layers of legislation when conducting sentencing exercises. Courts will apply the law in the new sentencing code for all offenders from the date the code is brought into force regardless of when their offence was committed. This will be subject to certain important exceptions so as to respect the rights of offenders concerning retroactivity.

Where exceptions to the clean sweep apply, the sentencing code will set out those historic provisions in the code itself, making clear to which cases they apply. It is expected that this will significantly reduce the risk of mistakes.

The “clean sweep” would be provided for by clause 1 of the Pre-consolidation Bill (see section 2.1 below).

⁶ [Written Statement: Interim Response to The Sentencing Code Volume 1: Report \(Law Com No 382\)](#), 22 May 2019, HCWS1581.

⁷ See [Issues Paper 1 – Transition](#), 1 July 2015

A consolidation bill and paving provisions

The sentencing code has been drafted as a consolidation bill. A [consolidation bill](#) restates the current law, bringing together into one piece of legislation the law on a particular topic from other Acts of Parliament. It does not change the effect of the existing law, although a consolidation bill may contain minor corrections and improvements.

There is a [special procedure](#) for this type of bill. The Law Commission has said the special procedure for consolidation bills is appropriate because a consolidation re-enacts law already in force, and therefore Parliament has already debated the substance of the provisions.

Before the sentencing code can be enacted as a consolidation bill there is a need for a small number of clauses to be passed in another bill. The Law Commission has described these clauses as paving provisions. They are contained in the Pre-consolidation Bill. Once the Sentencing Code Bill is enacted the Pre-consolidation Bill (having become an act) will largely be repealed, having served its core purpose.

Support for the code

The code has received widespread support, including from legal practitioners, judges and academics.⁸

Sir Brian Leveson, a senior judge, then President of the Queen's Bench Division and Head of Criminal Justice, said:

The need for a clear, logically structured statute governing sentencing procedure is long overdue. The Commission's Code is welcomed by judges and practitioners for the clarity it provides. It will bring confidence to the public generally that sentences handed down are accurate and lawful. It will, moreover, save vast amounts of time and money.⁹

Max Hill, Director of Public Prosecutions, said:

Parliament ensures our criminal legislation keeps pace with changes in criminal activity and behaviour. This is particularly evident when it comes to amending and revising the approach to sentencing in criminal cases.

This new proposal for a Sentencing Code Bill will enable all who are involved in criminal justice to read the relevant provisions clearly and, for the first time through the clean sweep mechanism, in one place. The Bill therefore marks a significant leap forward and is to be welcomed.¹⁰

The [Sentencing Council](#), which issues sentencing guidelines, said:

The Council strongly supports the Sentencing Code and is confident that it will achieve its aims of providing a sentencing procedure which is clear, accessible and coherent. The Council agrees that the Code will provide benefits for all users of the criminal justice system and for the wider public.¹¹

⁸ Gov.uk, press release, [Sentencing Code unveiled in Parliament](#), 5 March 2020

⁹ [New Sentencing Code to help prevent unlawful sentences being handed out](#), 22 November 2018

¹⁰ Ibid

¹¹ Law Commission, [The Sentencing Code: Summary of the Report](#)

2. The Bill

The [Pre-consolidation Bill](#) has been introduced as a Law Commission Bill. The Library briefing [The Law Commission and Law Commission Bill Procedures](#), October 2015, sets out the procedure for Law Commission Bills.

2.1 Clause 1 and Schedule 1

Clause 1 of the Bill would provide for the “clean sweep”. The purpose of the “clean sweep” is to remove the need to identify and apply historic versions of the law. One of the reasons for the complexity of sentencing law is the layering of changes to legislation over time. This means that different provisions apply to different offences and offenders depending on when the offence was committed.

The “clean sweep” approach would repeal historic provisions which are no longer needed. From the date the sentencing code comes into force, all offenders, with limited exceptions, will be sentenced by applying the law in the code, regardless of when the offence was committed. A detailed explanation of the technical operation of the clean sweep is set out at paragraphs 4.44 to 4.69 of the [Law Commission’s report](#).

The Bill sets out limited exceptions to the “clean sweep” to ensure that no offender is subject to a greater penalty than that available at the time of the offence or subject to a minimum or mandatory sentence that did not apply at the time of the offence. The exceptions will ensure that the “clean sweep” does not contravene an offender’s rights which protect against retroactive criminalisation and retroactive punishment.

Subsection (4) would ensure that the “clean sweep” does not increase the maximum penalty for any offence. Subsection (5) would give effect to Schedule 1 to the Bill which lists exceptions to the “clean sweep”. Examples of the exceptions include:

- Offenders who committed offences at a time when the [victim surcharge](#) did not exist or was set at a lesser amount;
- Offenders who committed offences at a time when a driving disqualification was not available for all offences.

The [Explanatory Notes](#) (paragraphs 34 to 45) give details of all the other exceptions.

The Bill would give the Secretary of State powers to make regulations using the [affirmative procedure](#) to make further exceptions to the operation of the “clean sweep” should these become necessary.¹²

¹² For details see [Sentencing \(Pre-consolidation Amendments\) Bill Memorandum from the Ministry of Justice to the Delegated Powers and Regulatory Reform Committee, para 14](#)

The Law Commission explains that this clause is a technical one which, once enacted, will not need to be considered by users of the sentencing code.¹³

2.2 Clause 2 and Schedule 2

Clause 2 refers to Schedule 2 which would make amendments and modifications to existing sentencing legislation to facilitate the consolidation. The [Explanatory Notes](#) state that such changes are a standard measure which precedes consolidation bills.

The [Explanatory Notes](#) categorise the types of amendment that would be made by Schedule 2 as follows:

- a) clarifying the legislation or removing an element of ambiguity from it;
- b) remedying a missed consequential provision in earlier legislation;
- c) repealing or omitting provisions in existing legislation that are either spent or now considered unnecessary to repeat;
- d) simplifying, streamlining, or making more consistent sentencing procedure;
- e) ensuring consistency in re-sentencing or committal powers;
- f) ensuring consistency in relation to the powers of different courts to provide for when sentences or particular requirements of sentences are to take effect; and
- g) giving effect to the “clean sweep” in relation to future amendments.

The [Explanatory Notes](#) (paragraphs 50-101) give examples and further details of each of these types of amendment.

Details of the effect and purpose of the amendments are contained in the [Law Commission’s report](#), at Appendix 2.

Clause 2 would give the Secretary of State power to make regulations, using the [affirmative procedure](#), to facilitate the consolidation by making further pre-consolidation amendments to legislation.¹⁴ The power is limited to those changes that in the Secretary of State’s opinion facilitate or are desirable for the purposes of the consolidation. Once the consolidation occurs the power will no longer be able to be used.

2.3 Commencement

Most of the Bill would come into force immediately before the coming into force of the sentencing code.

¹³ [The Sentencing Code Volume I: Report](#), HC 1724, Law Com No 382, 22 November 2018, para 4.44

¹⁴ For details see [Sentencing \(Pre-consolidation Amendments\) Bill Memorandum from the Ministry of Justice to the Delegated Powers and Regulatory Reform Committee](#)

3. Debate in the Lords

3.1 Consideration of an earlier version of the bill

A version of the Bill was introduced in the last Parliament as the [Sentencing \(Pre-consolidation Amendments\) Bill \[HL\] 2017-19](#). It was introduced in the Lords on 22 May 2019, had Second Reading on [12 June 2019](#) and was considered by a Special Public Bill Committee on [23 July 2019](#). The Committee took [written and oral evidence](#). The Bill was lost at the end of the 2017-19 session, carried over to the 2019 session where Government amendments were tabled, and then lost at dissolution before reaching Third Reading.

Second Reading of the earlier version

Lord Keen, the Advocate-General for Scotland, emphasised that the sentencing code is concerned with sentencing procedure and not with sentencing policy. He noted that it was uncontroversial to say that the law governing sentencing procedure had grown incredibly complex and disparate and gave examples of errors made as a result.¹⁵

He set out the aims of the sentencing code as being to

... assist legal professionals in identifying and applying the law, thereby reducing the risk of error, appeals and delay in the sentencing process. The sentencing code will also enhance the transparency of the process for the general public.¹⁶

The Bill, the concept of the sentencing code and the approach of the 'clean sweep' were widely welcomed at Second Reading. Baroness Mallalieu for Labour described the code as essential and long overdue.¹⁷ Lord Judge said that at the time he retired as Lord Chief Justice it was already a matter of urgent necessity that there should be a sentencing code.¹⁸ Baroness Deech noted that the sentencing code

...has been universally welcomed by the Bar Council, the Director of Public Prosecutions and the Head of Criminal Justice.¹⁹

The Law Commission was recognised and thanked for its hard work in producing the report and draft bills.

Special Public Bill Committee

At this stage the Government tabled amendments which would add further exceptions to the clean sweep. Lord Keen explained that the amendments were mainly required to reflect the most recent changes to the law and to ensure that sentencing provisions relating to the armed services were included in the code. The amendments were agreed and are included in the current version of the Bill. Amendments to ensure that pre-consolidation amendments made by the Bill extended to Crown

¹⁵ HL Deb 12 June 2019 c14GC

¹⁶ HL Deb 12 June 2019 c14GC

¹⁷ HL Deb 12 June 2019 c17GC

¹⁸ HL Deb 12 June 2019 c21GC

¹⁹ HL Deb 12 June 2019 c25GC

dependencies and British Overseas Territories were also agreed, as were some further technical amendments.²⁰

Lord Judge explained the work of the committee which took [oral evidence](#) from Professor David Ormerod of the Law Commission and Lord Keen as Minister responsible for the Bill. The committee also received evidence from the Criminal Appeal Office, the Prison Reform Trust, Professor Andrew Ashworth and Professor Nicola Padfield. Lord Judge concluded that the adoption of the sentencing code is an imperative.²¹

He stated that members of the committee had been satisfied that the retrospectivity issue had been properly addressed in the “clean sweep” approach. He noted that the committee did not find a single observation in the evidence which suggested that there could be any doubt that the issue had been properly addressed.

He noted some concern expressed in the committee about the possible extent of the regulation making powers granted to the Secretary of State but said that, in his view, the powers, which are concerned exclusively with the consolidation of legislative provisions currently in force, are not open to potential misuse by the Secretary of State.

Lord Judge stated that it would be imperative that the code be used as a “living instrument” once in place such that when, in the future, sentencing provisions are introduced, amended or repealed, express provisions should be made in that primary legislation for the incorporation of new provisions into the sentencing code. Otherwise, he noted, the time spent on the code would have been wasted.

3.2 Sentencing (Pre-consolidation Amendments) Bill [HL] 2019-21

[Second reading](#) of the Bill took place on 11 February 2020. On 25 February 2020 the [Order of Commitment for the Bill was discharged](#) there having been no amendments tabled and no Member having indicated a wish to speak in committee.

Second Reading

Lord Keen said that a number of technical amendments had been made to the Bill since it was considered in the last Parliament. Some were those tabled by the Government ahead of the third reading of the earlier version of the bill, others were new.²²

Lord Judge expressed disappointment that the process of enacting the code had been slow. He repeated the enthusiastic support for the Bill of the committee that had considered the earlier version of the bill. He stated that the amendments suggested by the Government made good sense and improved the Bill. He said he had sought the advice of

²⁰ HL Deb 23 July 2019 c2

²¹ HL Deb 23 July 2019 c5

²² HL Deb 11 Feb 2020 c2235

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Professor David Ormerod (who led the Law Commission's sentencing code project) who had approved of the amendments.²³

Baroness Hallett, who was Vice-President of the Court of Appeal Criminal Division until last October, making her maiden speech, said the code had been greeted with acclaim by the informed legal community. She said she knew of no criminal lawyer or judge who objects to it.²⁴

Lord Falconer emphasised the need for the principle of the sentencing code to be abided by in future where amendments to sentencing law were made.²⁵

²³ HL Deb 11 Feb 2020 c2238

²⁴ HL Deb 11 Feb 2020 c2244

²⁵ HL Deb 11 Feb 2020 c2246

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