



BRIEFING PAPER

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Sentencing Bill [HL] 2019-21

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Summary

The [Sentencing Bill \[HL\] 2019-21](#) was introduced in the House of Commons on 9 September 2020 and is due to have its second reading and all remaining stages on 30 September 2020.

Explanatory notes have not been published because the Bill is a [consolidation bill](#). [Drafter's notes on the Sentencing Bill](#) from the Office of the Parliamentary Counsel were published in July 2020. A [European Convention on Human Rights Memorandum](#) for the Bill was published in March 2020 when the Bill was introduced in the House of Lords.

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 Bill would introduce a sentencing code. 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, for example by changing maximum sentences; instead it will re-enact the law already in force in a more logical framework.

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 would remove historic layers of legislation. All offenders convicted after the code comes into force would be sentenced according to the most up to date law with some limited exceptions. These exceptions would protect the fundamental rights of an offender not to be subject to retroactive punishment.

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

The Sentencing (Pre-consolidation Amendments) Act 2020

Before the sentencing code can be enacted as a [consolidation bill](#) there was a need for "paving provisions" to be passed in a pre-consolidation bill. The [Sentencing \(Pre-consolidation Amendments\) Act 2020](#) received Royal Assent on 8 June 2020. It gives effect to the "clean sweep" and makes changes to the existing law of sentencing procedure to enable the consolidation in the code to take place.¹

¹ For background see the Library briefing [Sentencing \(Pre-consolidation Amendments\) Bill \[HL\] 2019-20](#), 13 March 2020

Extent and commencement

The substantive provisions of the Sentencing Bill extend only to England and Wales, with two main exceptions which relate to the treatment outside England and Wales of sentences passed by a court in England and Wales and to the application of the code for the purposes of the Armed Forces.²

The Bill will come into force on a date to be specified by the Secretary of State in regulations.³ The sentencing code will apply to any offender who is convicted on or after that date.

² For details of the exceptions see the [Drafter's Notes](#), paragraph 12 and clauses 414 and 415

³ Clause 416

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.

In 2014 the Government asked the Law Commission 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.⁴

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. It said there has been 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 cause 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 randomly sampled in the Court of Appeal (Criminal Division) involved unlawful sentences which the court should not have made.⁵ The [Drafter's notes](#) for the Sentencing Bill refer to more recent analysis that found that, of 52 cases listed in that court in June 2019, 14 of the sentences contained some unlawful element.

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

⁴ Law Commission, [The Sentencing Code: Summary of the Report](#)

⁵ Law Commission, [The Sentencing Code: Summary of the Report](#)

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.⁶

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](#)⁷
- [The Sentencing Code Volume II: Draft Legislation](#)⁸

⁶ Law Commission, [The Sentencing Code: Summary of the Report](#), p3

⁷ HC 1724, Law Com No 382, 22 November 2018

⁸ HC 1725, Law Com No 382, 22 November 2018

The Law Commission has published summaries of its report:

- 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. It accepted the recommendation to enact the draft Sentencing Code Bill and draft Sentencing (Pre-consolidation Amendments) Bill.⁹

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. The Law Commission says this 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 Drafter's note explains what the code will contain:

The code will contain the provisions on which a court needs to rely during the sentencing process, including those detailing the orders which a sentencing court may impose, the general legislative principles of sentencing, case-management functions such as committal from one court to another, and breaches of existing orders.¹⁰

The code will not generally include substantive criminal offences or the provisions for maximum penalties for offences. These will remain located in the legislation dealing with particular areas of law.

The code will not restrict the discretion judges have when sentencing, nor will it 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".¹¹ The current approach to amending 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.

⁹ [Written Statement: Interim Response to The Sentencing Code Volume 1: Report \(Law Com No 382\)](#), 22 May 2019, HCWS1581.

¹⁰ See [Drafter's notes on the Sentencing Bill](#), p2 for further explanation of what legislation is and is not included in the consolidation

¹¹ See [Issues Paper 1 – Transition](#), 1 July 2015

Courts will apply the law in the new sentencing code for all offenders convicted on or after 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.¹² The clean sweep will not apply to cases in which it would result in a more severe penalty than the maximum which could have been imposed at the time of the offence, or in which the application of the clean sweep would result in an offender being subject to a minimum sentence which did not apply at the time of the offence.

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” and the exceptions are provided for by the [Sentencing \(Pre-consolidation Amendments\) Act 2020](#).

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 could be enacted as a consolidation bill there was a need for a small number of provisions to be passed in another bill. The Law Commission has described these as paving provisions. They are now contained in the [Sentencing \(Pre-consolidation Amendments\) Act 2020](#) which received Royal Assent on 8 June 2020. It gives effect to the “clean sweep” and makes changes to the existing law of sentencing procedure to enable the consolidation in the code to take place.¹³

Once the Sentencing Bill is enacted the Sentencing (Pre-consolidation Amendments) Act 2020 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.¹⁴ The Law Commission reported that the project has “received strong support from all stakeholders and the near-universal endorsement of every proposed reform”.¹⁵

¹² See Law Commission, [Issues Paper 1 – Transition](#), 1 July 2015, parts 3 and 4 for explanation and discussion of the principle of non-retroactivity

¹³ For background see the Library briefing [Sentencing \(Pre-consolidation Amendments\) Bill \[HL\] 2019-20](#), 13 March 2020

¹⁴ Gov.uk, press release, [Sentencing Code unveiled in Parliament](#), 5 March 2020

¹⁵ Law Commission, [The Sentencing Code Volume I: Report](#), para 2.10. See also [Appendix 5 – main consultation analysis](#).

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.¹⁶

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.¹⁷

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.¹⁸

¹⁶ [New Sentencing Code to help prevent unlawful sentences being handed out](#), 22 November 2018

¹⁷ Ibid

¹⁸ Law Commission, [The Sentencing Code: Summary of the Report](#)

2. The Bill in the Lords

The Bill received [second reading](#) in the Lords on 25 June 2020 and was widely supported. It was then referred to the Joint Committee on Consolidation Bills. The Joint Committee took [oral evidence](#) from experts involved in the sentencing code project including Professor David Ormerod QC, who was formerly the Law Commissioner responsible for the project and the drafter of the Bill, and Alison Bertlin of the Office of the Parliamentary Counsel.¹⁹

Professor Ormerod explained the background and purpose of the code. He also explained the operation of the innovative “clean sweep” (including the limited exceptions)²⁰ and the problems that it seeks to overcome. Alison Bertlin explained the structure of the Bill and what it covers. Professor Ormerod gave evidence on what the Bill did not cover and why, and on the use of signposting within the code to other legislation. The witnesses explained to the Committee how the code would be used in practice, particularly by sentencers and lawyers, and how the code addresses the problems the Law Commission had identified with the current law.

The Committee’s report [concluded](#) that “the Bill is pure consolidation and represents the existing law”.²¹

Some changes were made to the Bill in Joint Committee because of recent developments in the law, to improve the Bill’s drafting and to make corrections required as a result of further checking of the Bill.²²

On 29 July 2020 the Bill reached committee stage in the Lords. No changes were suggested to the Bill so it [went directly to third reading](#) under a procedure known as “order of commitment discharged”. It received [third reading](#) on 8 September 2020 and was sent to the Commons.

¹⁹ Joint Committee on the Consolidation etc. of Bills, [Corrected oral evidence: Sentencing Bill \[HL\]](#), HC 666, 20 July 2020

²⁰ Provided for in the Sentencing (Pre-consolidation Amendments) Act 2020

²¹ Joint Committee on Consolidation Bills, [Sentencing Bill \[HL\]. First Report of Session 2019–21](#), HL Paper 108, HC 666, 22 July 2020

²² For information about these amendments see: [Notes about proposed amendments for Joint Committee](#), 21 July 2020

3. The Bill

The Sentencing Bill contains the sentencing code which would consolidate all the existing legislation governing sentencing procedure.²³

The Sentencing Bill has 420 clauses and 29 Schedules. A [table of origins](#) has been published which shows where the law contained in each clause of the Bill can currently be found. No explanatory note has been published (because the bill is a consolidation) but a [drafter's note](#) from the Office of Parliamentary Counsel has been provided which gives background information and comment on specific provisions of the Bill.

Overview – Part 1

Part 1 of the Bill introduces the code. **Clause 1** gives an overview of the code's structure and **clause 2** states that the code will apply to cases where a person is convicted on or after the commencement date

The code is structured in the order in which it is needed for the sentencing process and is contained in parts 2 to 13 of the Bill. These parts are grouped as follows:

Before sentencing – Part 2

Part 2 is about powers exercisable by a court before passing sentence. The clauses in this part (**clauses 3 to 29**) concern matters including deferment of sentence and powers to send an offender to a different court for sentencing.

Sentencing – parts 3 and 4

Part 3 is about court procedure when sentencing. The clauses in this part (**clauses 30 to 56**) provide for such things as pre-sentence reports, the victim surcharge and the court's duty to give reasons when passing a sentence.

Part 4 is about the discretion a court has when sentencing. Clauses in this part (**clauses 57-78**) include provisions on the purpose of sentencing, the court's duty to follow sentencing guidelines, assessing seriousness, and various aggravating and mitigating factors that can affect sentencing.

Sentences -parts 5 to 11

Part 5 (**clauses 79 to 82**) is about absolute and conditional discharges.

Part 6 (**clauses 83 to 117**) is about orders relating to conduct. This includes provisions concerning referral orders and reparation orders.

Part 7 (**clauses 118 to 161**) is about fines and other orders relating to property. It includes provisions relating to compensation orders, restitution orders and deprivation orders.

Part 8 (**clauses 162 to 172**) is about disqualification, including provisions concerning disqualification from driving.

²³ The Bill is a consolidation bill. The Library briefing [The Law Commission and Law Commission Bill Procedures](#), October 2015, sets out the procedure for such bills.

Part 9 (**clauses 173 to 220**) is about community sentences. It includes provisions about community orders and youth rehabilitation orders.

Part 10 (**clauses 221 to 329**) is about custodial sentences. It includes general provisions about custodial sentences and provision for particular custodial sentences for those aged under 18, over 18 and over 21. It also contains provisions concerning suspended sentences, dangerous offenders, minimum sentences and the administration of custodial sentences.

Part 11 (**clauses 330 to 379**) is about behaviour orders available on conviction. This part includes provisions on criminal behaviour orders, sexual harm prevention orders, restraining orders and parenting orders.

General – parts 12 and 13

Part 12 (**clauses 380 to 396**) contains miscellaneous and general provision about sentencing and part 13 (**clauses 397 to 406**) deals with interpretation of the terms in earlier parts.

Schedules

The Sentencing Bill has 29 schedules.

Schedule 22 of the Bill contains provisions to amend sentencing procedure that have been enacted but have not yet been brought into force. These provisions will remain in Schedule 22 until they come into force. At this point they will be moved into the body of the code and the date from which they apply will be specified within the code.

In the future any provisions concerning sentencing procedure that are enacted but not immediately brought into force will go into Schedule 22 until they are ready to be brought into force.

The body of the code itself will therefore only contain provisions that are in force, reducing the risk of practitioners and judges seeking to apply provisions that are not in force.

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