



**Law  
Commission**  
Reforming the law

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## **The Sentencing Code: A Report Summary**

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**Law Com No 382 (Summary)**  
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# Glossary

## Bill

A Bill is a proposal for a new law, or a proposal to change an existing law that is presented for debate before Parliament. A Bill can be amended during its process through Parliament and is known as an Act when it receives Royal Assent and becomes law. However, as explained below (see **Commencement**), a provision in an Act does not have effect unless it has been brought into force.

## Clean sweep

The clean sweep is a technical device which has the effect of removing the need to make reference to previous layers of legislation. It does so by extending provisions which have been partially commenced so that they apply to all cases, and completely repealing provisions which have previously been repealed but partially saved. The result is that the most up to date law applies to all cases, irrespective of the date of the offence. This is subject to some limited exceptions needed to protect an offender's fundamental rights.

## Commencement

When primary legislation is enacted by Parliament and receives Royal Assent, it does not necessarily have effect as law immediately. Before legislation can have effect, it must be brought into force. The coming into force of a legislative provision (that is, it having effect) is described as its commencement. See **Commencement provisions** below for details of how legislation is brought into force.

## Commencement provisions

In order to give legislation effect, it must be brought into force (see **Commencement** above). If an Act makes no provision for its coming into force it will come into force at the beginning of the day on which the Act receives Royal Assent. This is unusual however and most Acts make specific provision for when they will come into force – these provisions are known as commencement provisions. A commencement provision typically provides either that the legislation will come into force on a certain date or after a certain period of time has elapsed, or alternatively on the instruction of a government minister.

## Consolidation Bills

Often the law on a particular topic is contained in more than one Act of Parliament. consolidation Bills simply restate the current law, bringing the provisions contained in different Acts into one piece of legislation. A consolidation does not change the effect of the existing law, although such an Act occasionally contains minor corrections and improvements.

## Current law

The law in force at the beginning of the time of the publication of this Report.

## Draft Sentencing Code

The draft Sentencing Code is the subject of Report. It is the draft consolidation Bill which when enacted will be the Sentencing Code.

## Group of Parts, Parts, Chapters

Legislation is split into Groups of Parts, Parts and Chapters. These allow sections that are thematically linked to be compiled in a single place, and help to aid navigation.

## Parliamentary Counsel

Parliamentary Counsel are specialist government lawyers who are responsible for drafting all primary legislation.

## Parliamentary procedure

Parliamentary procedure regulates the proceedings of the Houses of Parliament. It includes proceedings governed by certain Acts of Parliament, rulings made by the Speaker in the House of Commons and by the Procedure Committee in the House of Lords, Standing Orders, and established understandings and conventions which have not been codified. There is a special procedure for **consolidation Bills** (see above) which allows the Bill to progress through Parliament more quickly. This is because as a consolidation restates the law, the provisions have already been the subject of debates in both Houses of Parliament.

## Pre-consolidation amendment ('PCA')

Pre-consolidation amendments are amendments made to the legislation for the purposes of facilitating the consolidation of the law, and are commenced immediately before the consolidation is enacted (therefore only having effect for the purposes of the consolidation). Pre-consolidation amendments are amendments to legislation that need to be made before the consolidation Bill is introduced to Parliament. They are generally limited to correcting minor errors and streamlining the law in the area being consolidated.

## Prospective

Legislation is prospective where it applies to things on or after its commencement. For example, a new criminal offence will be prospective in that it applies only to offences committed on or after the date on which it comes into force.

## Retrospective

Legislation is retrospective if it has effect in relation to a matter arising before it was enacted or made. Retroactive and retrospective are generally used interchangeably in relation to legislation.

## Sentencing Code

The Sentencing Code is a consolidation of the existing legislation governing sentencing procedure, bringing together provisions from the Powers of Criminal Courts (Sentencing) Act 2000, and Parts of the Criminal Justice Act 2003 among others. Once enacted and brought into force, the Sentencing Code will provide the first port of call for legislation concerning sentencing procedure.

### Slip rule

The term slip rule(s) refers to the courts' powers under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates' Courts Act 1980 to alter previously imposed sentences. This can be to correct an error of law or to make other amendments to the sentencing orders imposed on an offender.

### Transitional provisions

When the law is changed by Parliament, transitional provisions provide for how the law should apply to cases that straddle the two regimes. These provisions ensure that there is a smooth transition between two different legal regimes, for example, making clear whether certain cases are dealt with under the old law, or the new law, potentially applying either with modification. The issue of transitional provisions is closely connected to **commencement** (see above) and the way in which new laws are given effect.

# Chapter 1: Introduction and summary

## INTRODUCTION

- 1.1 One of the primary functions of a criminal court is sentencing those who have been convicted of, or pleaded guilty to, a criminal offence. Sentencing serves multiple purposes, including the punishment of offenders, protection of the public and an important communicative function to the offender and society that particular behaviour is not acceptable. In the year ending March 2018, 1.19 million offenders were convicted of, or pleaded guilty to, criminal offences and were dealt with by sentencing courts.<sup>1</sup> In 2016-2017, the Court of Appeal (Criminal Division) received 3,708 applications for leave to appeal against sentence, each requiring the attention of a single judge on the papers.<sup>2</sup> 1,183 appeals against sentence were heard before the full court.<sup>3</sup>
- 1.2 The importance of a smooth-running sentencing system is obvious. Sentencing is important for victims, offenders and the wider public. Timely and efficient sentencing impacts upon public confidence in the system. A system in which delays and unnecessarily incurred costs are prevalent results in other cases being delayed, witnesses and victims having to wait around at court and is a drain on scarce public funds.
- 1.3 It is equally important that the law governing how sentences are imposed is transparent and accessible. It is fundamental to the rule of the law that the law, and in particular the criminal law, is sufficiently clear to enable an individual to understand the potential consequences of their actions, and the penalty to which they may be liable. The ability to identify and understand the applicable law is integral not only to the maintenance of public confidence in the criminal justice system but also in ensuring that the defendant knows exactly why the sentence imposed upon them has been passed and whether they have any possible grounds of appeal.
- 1.4 It is simply impossible to describe the current law governing sentencing procedure as clear, transparent, accessible or coherent. Accordingly, over the past four years, we have conducted work to remedy these defects in the law. We have produced a draft Bill containing the law of sentencing procedure in a simple, coherent and accessible form. If enacted it would save money, reduce delay and bring clarity to an important area of the criminal law.
- 1.5 This introductory chapter serves as a summary of the report and draft Sentencing Code. It sets out the problems stakeholders identified with the current law and traces the history of the project up to this point. It provides an overview of our conclusions

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<sup>1</sup> Ministry of Justice, *Criminal Justice Statistics Quarterly: England and Wales, April 2017 to March 2018 (provisional)* (16 August 2018), 4.

<sup>2</sup> Court of Appeal (Criminal Division) Annual Report 2016-17 (21 August 2018) Annex F.

<sup>3</sup> Court of Appeal (Criminal Division) Annual Report 2016-17 (21 August 2018) Annex D.

and the draft Bill which has been drafted by parliamentary counsel following our instructions.

## **PROBLEMS WITH THE CURRENT LAW OF SENTENCING PROCEDURE**

1.6 With the assistance of stakeholders, we identified numerous problems with the current law of sentencing procedure. The problems can be grouped into three categories:

- (1) the complexity of the law;
- (2) the way in which sentencing legislation is amended; and
- (3) the frequency with which the legislation is amended.

1.7 The following paragraphs summarise each problem and the effect it has had on the current law.

### **The complexity of the law**

1.8 The law governing sentencing procedure is very complex and technical. At one time, a sentencing court had at its disposal only a small number of sentencing orders. In the 21<sup>st</sup> century, there are a vast number of orders enabling the court to impose custodial sentences and community sentences. In addition, there has been a proliferation of ancillary orders – orders which are capable of being imposed in addition to another sentencing order. These include behaviour orders targeted at specific types of behaviour – such as anti-social behaviour, sexual offending and substance-abuse – and disqualification orders and financial orders designed to punish, compensate victims and make reparation. Accordingly, the volume of legislative material to which a sentencing court must have regard is larger than ever before.

1.9 As part of our research in this project, we compiled the sentencing law in force as of August 2015. Our compilation was over 1300 pages long and contained provisions from Acts as varied as the Justices of the Peace Act 1361, the Company Directors Disqualification Act 1986 and the Dangerous Dogs Act 1991.<sup>4</sup> But even our lengthy compilation document does not convey the true complexity and inaccessibility of the current law. This is because it only contained the current law relevant to sentencing recent offences. In cases which involve older offences, sometimes committed decades earlier, reference must be made to the historic sentencing regimes in place at the time the offence was committed, in addition to the current law. This historic legislation is often technical and complex and its effect and operation difficult to decipher. As is explained below, sometimes even the existence of such laws is not readily apparent.

### **The way in which sentencing legislation is amended**

1.10 There are various different methods by which primary legislation can be amended. Amendments to sentencing law have been brought about by various means, with no discernible standard approach. Sometimes changes to the law are effected by amending previous enactments, sometimes they are introduced in their own

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<sup>4</sup> Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.



enactments, and in some cases they are even introduced by modifying the effect of other enactments (without making any actual amendment to the wording of those provisions).

- 1.11 Additionally, the way in which amendments are brought into force lacks consistency; for example, some amendments are brought into force with retrospective effect, whereas most are prospective only. Where amendments are brought into force prospectively only, there is no single standard approach, for instance by reference to the date of conviction. On the contrary, amendments are commenced by reference to a number of different events, including the date of the conviction, the date of the offence and the date of the start of proceedings.
- 1.12 The practice of amending the law in this manner means that different versions of the law apply depending on when the offender is convicted, when the offence was committed, and when proceedings are begun (among other events). For those cases where relevant events have occurred prior to the commencement of new provisions, there is a need to preserve previous regimes so that older cases are still catered for. It is frequently unclear when this is the case and, similarly, it is not always apparent which version of the law applies to a particular offence. This creates additional difficulties for both courts and practitioners.
- 1.13 The result is that the law is amended in numerous different ways, brought into force by reference to a number of different points in time and is located in numerous different Acts. This all creates unnecessary difficulty in locating, understanding and applying the law.

### Frequency of amendments

- 1.14 Over the past 30 years the law governing sentencing procedure has been continually amended, with at least 14 major pieces of primary legislation in 1991, 1993, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014, 2015 and 2018.<sup>5</sup> This legislation has created, amended and repealed sentencing orders and the procedure relating to the sentencing of offenders.
- 1.15 Parliament is, of course, entitled to amend the law as frequently as it wishes and the law must be able to accommodate frequent amendment to reflect changing societal needs and Parliament's wishes. However, the frequency with which such amendments are made compounds the problems created by the complexity of the law and the way in which amendments are made. The faster such changes are made and the increased volume of such changes, the more difficult it is to locate the law and understand it.

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<sup>5</sup> Criminal Justice Act 1991, Criminal Justice Act 1993, Crime (Sentences) Act 1997, Crime and Disorder Act 1998, Powers of Criminal Courts (Sentencing) Act 2000, Proceeds of Crime Act 2002, Criminal Justice Act 2003, Serious Organised Crime and Police Act 2005, Serious Crime Act 2007, Criminal Justice and Immigration Act 2008, Coroners and Justice Act 2009, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Offender Rehabilitation Act 2014, Criminal Justice and Courts Act 2015 and Assaults on Emergency Workers (Offences) Act 2018.

## The result

- 1.16 The consequence is that the law governing sentencing procedure is complex, difficult to locate, and difficult to understand, even for experienced judges and practitioners. This means that errors are frequently made when the courts impose a sentence.
- 1.17 An analysis conducted in 2012 of 262 randomly selected cases in the Court of Appeal (Criminal Division) demonstrated that the complexity of the legislation is resulting in an extraordinary number of sentences that have been wrongfully passed. Of the sample of 262 cases, 95 involved unlawful sentences.<sup>6</sup> These were not sentences which were considered to be only of inappropriate severity (ie those which the Court of Appeal (Criminal Division) concluded ought to be reduced on the basis they were manifestly excessive or increased on the basis that they were unduly lenient) but cases in which the type of sentence imposed was simply wrong in law.
- 1.18 A recent example of this can be found in *R v Maxwell*,<sup>7</sup> where Lord Justice Treacy, then Chair of the Sentencing Council, observed:
- The original grounds of appeal were confined to the straightforward assertion that the overall sentence was too long, particularly having regard to totality. After the single Judge had granted leave to appeal on that basis, lawyers in the Criminal Appeal Office identified a large number of matters which had gone wrong below and drew them to the attention of the court and the parties. Much time was expended by the Office and then by the individual members of the court in considering the problems identified. The time taken will have been many times that expended in the Crown Court at the original hearing. Those resources could have been much better deployed in dealing with other cases.<sup>8</sup>
- 1.19 He noted that such problems are not untypical, and arise from the complexity of modern sentencing legislation, combined with the resourcing pressures placed upon courts.
- 1.20 Such unlawful sentences should be rectified. Where errors are identified, they may be corrected either by way of the “slip rule”<sup>9</sup> or by an appeal to a higher court. These additional court hearings mean increased cost to the criminal justice system and delays to other hearings. In some cases, the errors may not be noticed at all and therefore go uncorrected.
- 1.21 The problems do not merely increase the risk of error, however. The difficulty faced by those who need to locate, interpret and apply the law places an unnecessary burden on the criminal justice system. It can result in sentencing hearings taking an

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<sup>6</sup> R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii. Those 262 cases consisted of every criminal appeal numbered 1600 to 1999 in 2012, excluding “those not published, those relating [solely] to conviction, non-counsel cases and those that were interlocutory etc.”

<sup>7</sup> [2017] EWCA Crim 1233.

<sup>8</sup> [2017] EWCA Crim 1233 at [45].

<sup>9</sup> Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates’ Courts Act 1980 give the Crown Court and magistrates’ courts respectively the power to rectify mistakes and make minor alterations to imposed sentences. These powers are colloquially known as the “slip rule” and in the Crown Court must be exercised within 56 days from the imposition of sentence.

unnecessarily lengthy amount of time, as practitioners and judges spend more time than is necessary in identifying and understanding the applicable law. This causes undue cost and delay in relation to sentencing hearings, and also has a knock-on effect on other hearings.

## **THE PROJECT AND OUR TERMS OF REFERENCE**

- 1.22 When seen against the background of such systemic problems, it is no surprise that the project has been supported, in the strongest terms, from the outset. The importance of simplifying and clarifying the law of sentencing procedure was recognised by leading figures including the Lord Chief Justice, the Director of Public Prosecutions and the heads of both the solicitors' and barristers' professions.
- 1.23 The Sentencing Code project is part of the Law Commission's 12th programme of law reform.<sup>10</sup> Our terms of reference as agreed with the Ministry of Justice are:

To consider the codification of the law governing sentencing procedure, understood as the process applicable from verdict to the end of the sentence imposed and to design a sentencing procedure Code, embodied in one Act with a clear framework and accessible drafting. Such a new Code will provide the courts with a single point of reference, capable of accommodating amendment and adapting to changing needs without losing structural clarity.

To keep in mind the principles of good law: that it should be necessary, clear, coherent, effective and accessible. In short, to make legislation which works well for the users of today and tomorrow.

To ensure that the new Code must not restrict Parliament and the Government's capacity to effect changes in sentencing policy. In particular, the penalties available to the court in relation to an offence are not within the scope of this project except insofar as some consideration of them is unavoidable to achieve the wider aim of a single, coherent Code. Similarly, the Sentencing Code should not in general impinge upon sentencing guidelines, and its drafting will be consistent, and in cooperation, with the work done by the Sentencing Council.

## **THE AIMS OF THE PROJECT**

- 1.24 The broad aims of the Sentencing Code project are threefold:
- (1) to ensure the law relating to sentencing procedure is readily comprehensible and operates within a clear framework;
  - (2) to increase public confidence in the criminal justice system; and
  - (3) to ensure the criminal justice system, so far as it relates to sentencing procedure, operates as efficiently as possible.
- 1.25 From the outset, the means by which we have sought to achieve these aims has been to produce a single sentencing statute. We have called this statute the Sentencing

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<sup>10</sup> Twelfth Programme of Law Reform (2014) Law Com No 354.

Code. The Sentencing Code will bring together the existing legislation governing sentencing procedure within a single enactment. In doing so it will also ensure the law is framed in clearer, simpler and more consistent language. These changes, in combination with a logical structure, will make the law more accessible for the public, the judiciary and practitioners.

### **A clear framework**

- 1.26 Beyond simply bringing the law of sentencing procedure into one enactment, the project will also introduce a novel approach to dealing with changes to the law, which will substantially simplify the sentencing process in practice. Earlier in this chapter, we referenced the problem of commencing amendments to the law which apply prospectively only, and noted that this can sometimes require the preservation of an old provision to ensure that older cases are still catered for. We explained how this made the task of locating and understanding the law more difficult.
- 1.27 Accordingly, the Sentencing Code will remove the need to make reference to historic law and transitional provisions<sup>11</sup> and apply the current law to all offenders whose convictions occur after the Sentencing Code has come into force (subject to limited exceptions necessary to respect the fundamental rights of offenders).<sup>12</sup> We are referring to this change as the “clean sweep”. No longer will courts have to make reference to historic versions of legislation, and decipher opaque transitional provisions. For all offenders convicted after the commencement of the Sentencing Code the courts will, by virtue of the clean sweep, need to have reference only to the Sentencing Code itself. Even where exceptions to the clean sweep apply, the Sentencing Code will replicate those historic provisions in the Code itself, making clear to which cases they apply. This will avoid the need for users to make reference to, and identify, complex transitional provisions. This represents a considerable departure from current practice and is a change we think will have a significant impact.

### **Readily comprehensible and clear law**

- 1.28 The introduction of the Sentencing Code will, for the first time, provide a clear and coherent structure to the law governing sentencing procedure, as well as re-stating the law in a more certain and accessible manner. It will simplify the task of a sentencing judge, making it easier to locate and apply their sentencing powers and duties.
- 1.29 Another important change made is to modernise the drafting. Some of the legislation governing the law of sentencing procedure is old and uses outdated terminology. Further, much of the legislation refers to “him” and “his” when referring to the offender

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<sup>11</sup> Where a change is made to legislation “transitional provisions” provide clarity in relation to cases which straddle the old and the new law. They provide whether the old or the new law is applied to such cases, as well as providing any necessary modifications. These provisions are commonly contained in secondary legislation and their presence is frequently not obvious. For more information see D Greenberg, *Craies on Legislation* (11th ed 2017) paras 10.1.26-10.1.28.

<sup>12</sup> Such as where applying the current law to the offender would result in an offender being subject to a penalty greater than the maximum that was available at the time of the offence, or a minimum sentence, or “recidivist premium” (a provision requiring the court to treat the offender more harshly if the offender has previous convictions), that has come into force since the offence was committed. For a full list of the exceptions in the Sentencing Code see Appendix 1 to the Report.

or the victim. The Sentencing Code will modernise the terms used, so as to make them more relevant and familiar to users of 21<sup>st</sup> century legislation and is drafted in gender neutral terms.

- 1.30 The Code will also streamline the law to provide added consistency and clarity, and errors and omissions in the current law will be corrected. We have adopted certainty as our guiding principle while drafting the Sentencing Code itself. On occasion, prioritising certainty has resulted in some provisions being drafted in a longer form than the provision from which they originate, or a single provision has been divided into more than one provision. We regard this as necessary to realise the aims of the project and note that as legislation is increasingly viewed electronically rather than in hard copy, the length of the legislation is less of an issue than it previously would have been.

### **Public confidence in the law**

- 1.31 Public confidence is harmed when sentencing decisions are routinely unlawful, unduly lenient or otherwise inappropriate because of the incomprehensible nature of the current law. The Sentencing Code would help to reduce these occurrences and thus improve public confidence in the system.
- 1.32 Similarly, public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible. As Alison Saunders, then Director of Public Prosecutions, noted at the launch of the project:

For a victim or witness the court process can seem very daunting and people can often be discouraged from being part of proceedings as they are either worried about the length of time it may take or because they do not understand the process they are about to go through.

Whilst sentencing is only one stage of a trial, it is vital that the public are able to understand the process. This new Code takes the needs of all court users on board and will provide a clear framework for each part of the sentencing procedure, this will allow the public to gain a greater level of understanding of the sentencing process, and hopefully ease some of their concerns.

The introduction of this single Sentencing Code should go a long way to increase clarity and transparency, improving the service provided to the public and their confidence in the sentencing process.

### **Improving efficiency**

- 1.33 The Sentencing Code will make the law governing sentencing procedure clearer, easier to navigate, and simpler to apply. This will reduce the risk of error, and therefore the number of appeals necessary to correct such errors, but it will also help to reduce the amount of court time necessary for sentencing. This will, in turn, free up court resource for other hearings and help reduce delays currently present in the system.

- 1.34 The current best estimate of the net financial benefit of the enactment of the Sentencing Code is a saving of £256.05 million over ten years.<sup>13</sup>

## HISTORY OF THE PROJECT

- 1.35 This Report represents the conclusion of our sentencing procedure project. As noted above, work began in January 2015. We met with stakeholders to gather evidence as to the problems with the current law and set about producing preliminary proposals. During the project we have conducted four formal public consultation exercises:
- (1) The consultation on the issue of the transition from the current law to the Sentencing Code (also known as the “clean sweep” issues paper) which ran from 1 July 2015 to 26 August 2015.<sup>14</sup>
  - (2) The consultation on the “current law document” (which set out our understanding of the current sentencing procedure law in England and Wales) which ran from 9 October 2015 to 9 April 2016.<sup>15</sup>
  - (3) The “main” consultation paper on the draft Sentencing Code which ran from 27 July 2017 to 26 January 2018.<sup>16</sup>
  - (4) The further consultation on the disposals only available for children and young persons in the draft Sentencing Code which ran from 23 March 2018 to 27 April 2018.<sup>17</sup>
- 1.36 During the consultation periods, we held public and private events at which we presented our preliminary proposals and sought the views of the judiciary, practitioners, other criminal justice professionals and members of the public. In particular, we spoke to over 1400 people during the “main” consultation period.<sup>18</sup>
- 1.37 An analysis of consultation responses followed each consultation exercise which informed our approach to the production of the Sentencing Code and the way in which we recommend that it should be implemented. Throughout the project, we have worked closely with the Office of the Parliamentary Counsel who have been responsible for the drafting of the Sentencing Code and the pre-consolidation amendment clauses.
- 1.38 We have previously produced two reports during the lifetime of this project:

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<sup>13</sup> For further detail, consult the Impact Assessment which accompanies this Report.

<sup>14</sup> Sentencing Procedure Issues Paper 1: Transition (2015), available at <http://www.lawcom.gov.uk/wpcontent/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf>.

<sup>15</sup> Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.

<sup>16</sup> The Sentencing Code (2017) Law Commission Consultation Paper No 232.

<sup>17</sup> The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

<sup>18</sup> For more details of the public consultation process, see Chapter 2 of the Report.



- (1) a report on transition from the current law to the Sentencing Code (the “clean sweep” paper) (20 May 2016);<sup>19</sup> and
  - (2) an interim report on the “current law document” (7 October 2016).<sup>20</sup>
- 1.39 We have now produced the final Report for this project, recommending that the Government enact the Sentencing Code as a consolidation Bill. The final report is comprised of:
- (1) The Sentencing Code: Report (Volume 1);
  - (2) The Sentencing Code: Draft Legislation (Volume 2);
- 1.40 A full consultation analysis (Appendices 5 and 6) are available online, as well as an accompanying impact assessment.

## IMPLEMENTATION

- 1.41 During the lifetime of the project, we were faced with a decision as to the best way to achieve the benefits that a Sentencing Code could provide. Principally, this question concerned the method by which the Sentencing Code would become law. The result of the referendum on exiting the European Union and a general election have left little parliamentary time for large Bills requiring detailed and lengthy debate in parliament. Accordingly, for the project to continue, we had to find a method of implementation which would not burden parliament with lengthy debates at a time when there is more pressure on parliamentary time than perhaps ever before.
- 1.42 We concluded that this would be best achieved by drafting the Sentencing Code as a consolidation Bill. The process of consolidation is described by *Craies on Legislation* as:
- [The replacement of] the existing law on a particular matter with a new Act which makes no substantive change but presents the entire material in a newly organised structure and in language that is both modern and internally consistent.<sup>21</sup>
- 1.43 A consolidation Bill combines a number of existing Acts of Parliament on the same subject into a single Act so as to improve the clarity and certainty of the law without altering its substance or effect. Drafting the Sentencing Code as a consolidation Bill allows it to take advantage of the special procedure for such Bills. This procedure takes up minimal time in the debating chambers of the Houses of Parliament, with parliamentary scrutiny instead provided by a Joint Committee of the two Houses.<sup>22</sup>

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<sup>19</sup> A New Sentencing Code for England and Wales (2016) Law Com No 365.

<sup>20</sup> Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016) available online at [http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing\\_Interim\\_Report\\_Oct-2016.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf).

<sup>21</sup> D Greenberg, *Craies on Legislation* (11th ed, 2017) para 1.9.1.

<sup>22</sup> The Joint Committee on Consolidation Bills. For more information, see <http://www.parliament.uk/business/committees/committees-a-z/joint-select/consolidation-committee/> (last visited 1 June 2017); D Greenberg, *Craies on Legislation* (11th ed 2017) paras 5.3.1-5.3.4; and Form and Accessibility of the Law Applicable in Wales: A Consultation Paper (2015) Law Commission Consultation Paper No 223, paras 7.11-7.15.

This absence of scrutiny is legitimate because, as a consolidation re-enacts law already in force, parliament has already debated the substance of the provisions.

- 1.44 This procedure means there are limits on the extent of the reforms that can be achieved by the Sentencing Code.<sup>23</sup> The Sentencing Code will not codify the common law relating to sentencing or enact policy reform of the law in this area as was originally contemplated as part of this project. In a limited number of cases, where proposed or possible reforms go beyond what can be achieved in this project, we have made recommendations as to the future reform of the law.
- 1.45 The Sentencing Code is not, however, a *mere* consolidation of the law on sentencing. As we have already explained, it will go beyond mere consolidation by implementing the “clean sweep” of historic legislation, reflecting the recommendations made in the transition report.<sup>24</sup> This will significantly simplify the sentencing process in practice, resulting in increased efficiency and fewer errors.<sup>25</sup> Further, as noted, the Sentencing Code will make a number of streamlining changes in the interests of clarity and certainty. For example, it will improve the language used throughout the law and for the first time create a coherent structure.
- 1.46 To achieve this the Sentencing Code will require two paving provisions to be included in a normal Public Bill which will precede the main consolidation: one to give effect to the “clean sweep” of historic sentencing law; and another to provide the Secretary of State with the power to make a number of pre-consolidation amendments to the law to enable the consolidation to proceed. Any pre-consolidation amendments made to the law under such powers are limited to minor streamlining and tidying changes that are in the interests of the consolidation of sentencing law. These clauses have been drafted as a stand-alone Bill, but could also be incorporated into any other Public Bill. It is possible they could be introduced through the special procedure for Law Commission Bills.<sup>26</sup>
- 1.47 The project has therefore produced two pieces of legislation: (1) the pre-consolidation amendment clauses (which could take effect as a stand-alone Bill or as part of another criminal justice Bill); and (2) the Sentencing Code (consolidating the current law of sentencing procedure).<sup>27</sup>
- 1.48 It is important to note that the neither the Sentencing Code nor the pre-consolidation amendment clauses will introduce any new substantive law or sentencing disposals and will not impact upon the sentences that are to be imposed for any offence. It will neither alter the maximum sentences available for an offence, nor will it increase the scope of minimum sentencing provisions. Crucially, the Sentencing Code will not curtail existing judicial discretion in sentencing and will not replace the sentencing guidelines or alter or limit the work of the Sentencing Council. It is not intended or

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<sup>23</sup> The consolidation process, and the limits it creates in changing the effect of the law are explored in more detail in Chapter 3 below.

<sup>24</sup> A New Sentencing Code for England and Wales (2016) Law Com No 365.

<sup>25</sup> The benefits of the clean sweep are explored in more detail in Chapter 4 of the Report.

<sup>26</sup> As to which, see Chapter 11 of the Report.

<sup>27</sup> For a general discussion of the way in which we recommend the Sentencing Code be implemented, see Chapter 11 of this Report.



foreseen that implementation and application of the Sentencing Code will have any impact on the prison population.

## **THE SENTENCING CODE**

### **The contents of the Sentencing Code Bill**

1.49 The Sentencing Code contains 416 clauses and 28 Schedules. It is broken down into Parts which follow the chronology of a sentencing hearing, with thematic grouping of provisions where possible. The structure adopted is intended to aid navigation and comprehension, while minimising the risk of error through omission or confusion.

1.50 The Sentencing Code is arranged as follows:

- (1) First Group of Parts
  - (a) Part 1 (introductory provisions and overview)
- (2) Second Group of Parts (Provisions applying to sentencing courts general)
  - (a) Part 2 (Powers exercisable before sentence, including deferment of sentence and committal and remission powers)
  - (b) Part 3 (Procedure, including pre-sentence reports and derogatory assertion orders)
  - (c) Part 4 (Exercise of court's discretion, including the purposes of sentencing and the determination of the seriousness of an offence)
- (3) Third Group of Parts (Disposals)
  - (a) Part 5 (Power to impose absolute and conditional discharge)
  - (b) Part 6 (Orders relating to conduct, including referral orders and reparation orders)
  - (c) Part 7 (Financial orders and orders relating to property, including fines, compensation orders and forfeiture orders)
  - (d) Part 8 (Disqualification, including driving disqualification and disqualification orders relating to the keeping of animals)
  - (e) Part 9 (Community sentences, including youth rehabilitation orders and community orders)
  - (f) Part 10 (Custodial sentences, including suspended sentence orders, imprisonment, detention and extended sentences)
- (4) Fourth Group of Parts (Further powers relating to sentencing)
  - (a) Part 11 (Behaviour orders, including criminal behaviour orders and sexual harm prevention orders)

- (5) Fifth Group of Parts (Miscellaneous and supplementary provision)
  - (a) Part 12 (Miscellaneous provision about sentencing, including the power to require the parent or guardian of a person under 18 to pay a fine or other financial order when convicted of an offence)
  - (b) Part 13 (Interpretation, including the meaning of “sentence”)
  - (c) Part 14 (Supplementary provision, including regulation-making powers)

### **The contents of the Sentencing (Pre-consolidation Amendments) Bill**

- 1.51 We have noted that two clauses are needed to enable the Sentencing Code to be implemented as a consolidation Bill. These can either be enacted as a stand-alone Bill or as part of another criminal justice Bill. We have drafted the clauses as a stand-alone Bill, to aid presentation and comprehension, however, although it is not necessary that they be enacted as such.
- 1.52 The Bill contains five clauses, only two of which are substantive. Clauses 3-5 concern interpretation, power to make regulations and commencement, all of which would be merged with similar provisions if the clauses were to be enacted as part of another criminal justice Bill. Clause 1 effects the “clean sweep” change, removing the need to make reference to historic layers of legislation which are no longer necessary. Clause 2 makes the pre-consolidation amendments which are necessary in order to bring about the consolidation, making streamlining changes and correcting previous drafting errors.
- 1.53 Pre-consolidation amendments are entirely uncontroversial and a standard device used in consolidation Bills. No substantive policy change may be made and the changes are limited to those which facilitate, or are otherwise desirable in connection with, the consolidation.

### **THE FUTURE**

- 1.54 Earlier in this chapter, we noted that what had led, in part, to the current problems with the law of sentencing procedure was the frequency and nature of amendments made to it. Parliament has the absolute right to make as many amendments, of whatever nature and in whatever form it wishes, and our report does not seek to undermine that in any way.
- 1.55 What this report does seek to do, however, is influence the way in which such amendments are made. The Sentencing Code is drafted as, and is intended to be, a “living” document which is capable of amendment. In fact, it is important that when future changes are made to the law relating to sentencing procedure, they are made by amendment to the Sentencing Code. Sentencing law should continue to be found in the Sentencing Code, not in separate enactments.
- 1.56 We recommend, however, that such amendments are made in a manner that continues to secure the many benefits that the Sentencing Code will bring. In particular, key information relating to the applicability and commencement of any change to sentencing law should be displayed on the face of the relevant provision in

the Sentencing Code, rather than in an obscure provision in the Code or in a piece of secondary legislation.<sup>28</sup>

- 1.57 Such an approach will ensure that the clarity, simplicity and transparency of the law of sentencing procedure brought about by the Sentencing Code will remain, along with the attendant financial benefits.
- 1.58 First, however, the Sentencing Code and the Sentencing (Pre-Consolidation Amendments) Bill must be enacted.

#### **Recommendation 1.**

- 1.59 We recommend that the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill be enacted.

### **FURTHER RECOMMENDATIONS**

- 1.60 Beyond the core recommendation of this report – to enact the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill – this Report also makes a number of further recommendations for the reform of sentencing law.
- 1.61 These further recommendations for reform have not been reflected in either of the draft Bills and both Bills can be enacted and implemented without the accompanying reforms.
- 1.62 The principal reasons for not having given effect to these further recommendations in the draft Bills are:
- (1) The recommendations would amount to changes to the penalties available to the court, and are therefore outside the terms of reference of this project.
  - (2) The recommendations are for further consideration by government, as the potential reforms may require a more careful consideration of the practical or policy impacts, and may need to be accompanied by wider reform.
  - (3) The recommendations would not be suitable for pre-consolidation amendments and would therefore need separate primary or secondary legislation. That is either because of the extent to which they amount to a substantive change in the law, or because they amend the law in a way that does not affect the consolidation.
- 1.63 This does not, of course, detract from the merits of these recommendations, all of which have been informed by the extensive consultation we have undertaken in the course of this project. We believe all of them merit careful consideration by government and hope that they will be implemented by future primary legislation.

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<sup>28</sup> For discussion of the way in which the benefits which will be brought about by the enactment of the Sentencing Code, see Chapter 12 of the Report.

## **ACKNOWLEDGMENTS**

- 1.64 A number of members of staff at the Law Commission have worked on this project during its lifetime: Lyndon Harris (team lawyer); Sebastian Walker (research assistant); Paul Humpherson (team lawyer); Harry O’Sullivan (research assistant); Vincent Scully (research assistant) and Katie Jones (drafting assistant); David Connolly (team manager); Jessica Uguccioni (team manager). We are also particularly grateful to the members of the Office of the Parliamentary Counsel who have been responsible for the drafting of the Bill.