HOUSES OF PARLIAMENT

Joint Committee on the Consolidation etc. of Bills

Corrected oral evidence: Sentencing Bill [HL], HC 666

Monday 20 July 2020

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Watch the virtual meeting

Members present: Lord Thomas of Cwmgiedd (Chair); Baroness Andrews; Simon Baynes MP; Elliot Colburn MP; Baroness D'Souza; Maria Eagle MP; Lord Eames; Viscount Eccles; Viscount Hanworth; Simon Jupp MP; Baroness Mallalieu; Lord Razzall; Christina Rees MP; Jane Stevenson MP; Baroness Thomas of Winchester.

Questions 1 – 18

Witnesses

I: **Professor David Ormerod QC**, formerly, Law Commission; **Alison Bertlin**, Office of the Parliamentary Counsel; **Douglas Hall**, Office of the Parliamentary Counsel; **Lyndon Harris**, formerly, Law Commission; **Sebastian Walker**, formerly, Law Commission; **Ben Bridge**, Deputy Director, Command, Discipline and Constitutional Law Team, Ministry of Defence Legal Advisers; **Catherine Elkington**, policy official, Ministry of Justice.

Examination of witnesses

Professor David Ormerod QC, Alison Bertlin, Douglas Hall, Lyndon Harris, Sebastian Walker, Ben Bridge and Catherine Elkington.

Q1 **Chair:** May I welcome you all to a public meeting of the Joint Committee on the Consolidation etc. of Bills? The Committee is meeting for the first time since 2014 to consider the Sentencing Bill or Sentencing Code. I am very grateful to the witnesses, who are present in the House, for coming along and explaining the Bill to us, and answering our questions. I will ask them to introduce themselves in a moment. Before I do so, it would be right for me to say two things. First, besides this being broadcast, everything is being transcribed, and of course it is all in public. Secondly, I would ask any members of the Committee who have any interests they wish to declare to do so now.

Baroness Mallalieu: I ought to declare that I was a criminal barrister in practice for 40 years, and I am the mother of a practising criminal barrister down on the western circuit.

Maria Eagle: Before I was elected, I was a practising solicitor.

Christina Rees: I am registered as a non-practising barrister.

Chair: Before I retired, I was also a barrister and a judge. May I ask the witnesses, who I think are now all present, if they could first introduce themselves and very briefly explain their background? I propose to ask them questions on a number of areas. I think they have begun to work out between themselves who will answer which question. Some of the answers may be a little long. Professor Ormerod, would you like to start with an introduction of yourself, and then I will turn to the others in turn?

Professor David Ormerod: I am the co-director of the Judicial Institute at University College London. I was the law commissioner responsible for the project throughout its lifetime. I am a deputy High Court judge, but I am appearing today in an entirely personal capacity.

Alison Bertlin: I am a Parliamentary Counsel and I am the drafter of the Bill.

Douglas Hall: I am also parliamentary counsel, in my case senior parliamentary counsel at the Law Commission.

Lyndon Harris: I am a practising barrister at 6KBW College Hill and an academic at Oxford University. Formerly, with Sebastian Walker, I was the lead lawyer on the Sentencing Code project at the Law Commission.

Sebastian Walker: I presently work at the Attorney-General's Office and I am a member of the Faculty of Law at the University of Cambridge. Formerly, with Lyndon Harris, I was the lead lawyer on the Sentencing Code project at the Law Commission.

Ben Bridge: I am a deputy director in the Ministry of Defence Legal Advisers' team. My legal team supported parliamentary counsel in their work on the Armed Forces consequentials of the Sentencing Code.

Catherine Elkington: I am a senior policy official in the Ministry of Justice.

Q2 **Chair:** Thank you all very much. Can we turn to the areas that we indicated that we thought at least would give us an initial series of questions? The first question is to explain the background to the Bill and the work that has been done by the Law Commission.

Professor David Ormerod: It is probably unnecessary for me to say very much about the Law Commission. It is a statutory non-departmental body, independent of government and sponsored by the Ministry of Justice. It was established by the Law Commissions Act 1965. One of the statutory functions of the Commission is to consolidate and keep the whole of the law of England and Wales under review. The background to this particular project is that it formed part of the 12th programme of law reform, which began in 2014.

It is important that I state from the outset that the consolidation is one of sentencing procedure, not sentencing law generally. The focus is on the law governing each procedural step following a conviction or a guilty plea, not on the maximum penalty that can be imposed for a particular offence. It was an area of law that was an obvious priority for reform. It is clearly important and it is a high-profile part of the criminal process. It also impacts very heavily on a wide range of individuals, with over a million sentences imposed annually.

Despite its importance, I am afraid the current law is failing. It is not clear, accessible or coherent. In one of our many consultations, the Council of Circuit Judges described it as a "disgrace to our jurisprudence". The reasons are well documented. The law is contained in hundreds of separate statutory provisions scattered across dozens of statutes over decades, with overlapping and technical complex provisions. The frequency of amendment of the legislation exacerbates that. Successive sentencing schemes are layered year on year by government, each with a different policy agenda, and that creates its own problems. Each sentencing scheme brings with it its own different commencement dates and transitional regimes. I will return to that.

The technicality in the present law means that it borders on the unworkable. There is a lack of clarity, which means that no lay person is likely to be able to identify the present law. That of course includes the defendant who is being subjected to the sentence. That is not to blame the judiciary. It makes its best efforts to explain the sentence being imposed. The complexity leads to judges, practitioners and others spending more time in the preparation and determination of sentences. Of course, that complexity and deliberation also generates the risk of error.

Parliamentary counsel's note, I know, describes a survey conducted in 2012, which it may be worth me revisiting. Some 400 cases were taken from the Court of Appeal's list, and a careful scrutiny of those demonstrated that 262 involved a sentencing appeal. Of those, 95 involved an unlawful sentence. That was not a sentence on which there was a disagreement about whether the tariff was too high or too low, but whether the sentence was lawful—whether it was imposed within a legitimate power or otherwise.

That is a rather shocking statistic and is not necessarily the whole picture, because, of course, judges have the power to bring cases back under the so-called slip rule to correct them. We are looking at only those that have made their way through uncorrected to the Court of Appeal. Those appeals place an enormous burden on the Court of Appeal, which is already heavily burdened. Over 3,000 sentencing cases are appealed each year. That has a knock-on effect in the criminal justice system. Defendants, witnesses and complainants all feel the effects of delay. All that obviously increases the costs, which the criminal justice system really cannot afford.

There is, further, a policy inhibition. The officials in the Ministry of Justice were very candid with us from the outset of this project that the current state of the law is so confused, and the landscape is so confusing, that they find it difficult to advise Ministers confidently as to the likely effect of suggestions in programme policy Bills on sentencing. All that obviously undermines public confidence enormously.

In this project the commission aimed to produce a single statute that would contain all the primary legislation necessary for a sentencing judge, and do so in a clear accessible way that would be understood not only by practitioners but by lay people. The consultation process, which was a rigorous one, confirmed to us that by consolidating alone, without engaging in detailed extensive policy change, we could remedy many of the ills currently troubling the criminal process.

The commission sought to produce clear legislation, structured in a way that would allow users to navigate and apply the law very efficiently, and to identify the law. We were conscious of the increasing reliance of criminal justice professionals on digital working—people working from tablets, laptops and so on—and, counterintuitively, that meant in many instances that the drafting was longer than it would otherwise be, because clauses or parts were repeated, the length of the Bill mattering less when you are dealing with something in digital form. However, it would also avoid practitioners and others having to hop around within a digital document, which anecdotally is extremely difficult to do.

The code also had external influences. Not only must it be clear, comprehensive and navigable, it must also complement the work done by the Sentencing Council on ensuring consistency in the sentencing decisions. It must accommodate the inevitable frequent amendment by primary legislation. We know that parliamentarians will continue to

produce sentencing Bills with great frequency. We have produced, I hope, a robust structure to the Bill that will allow for future amendment to the code. It has to serve as a living document. That must be the case. We hope that we have done enough to clear the landscape, and that all future sentencing procedure legislation is inserted into the code so that it takes effect through the code, by amendment, substitution, et cetera.

All that was clearly quite a challenge. We spent no fewer than four years working on that, with no fewer than eight lawyers. I am delighted that Lyndon and Sebastian are here. They were the lead lawyers, certainly towards the second half of the project. There was a degree of pressure of time. The current pressures on parliamentary time from Brexit, and other matters, has meant that there has been the relatively unprecedented situation of very little sentencing legislation over the last few years. There was a static target and we had an opportunity to hit it, and codify and consolidate it. We had to work quickly to do that.

May I add a word or two about process? The process was rigorous, working with parliamentary counsel, obviously, but fundamentally we consulted widely, openly, publicly, at every stage. Before we even initiated the work, we held considerable consultation with the judiciary, and others, to identify the problems. We consulted on the present law. Lyndon Harris was responsible for compiling a 1,300-page document setting out the present state of the law. We consulted on that for six months, to ensure that what we were consolidating was an accurate statement of the law. We also consulted extensively on our innovative clean sweep, which would allow us to sweep away historic layers of sentencing. I will have more to say about that, but it was part of this extensive range of consultation.

We consulted on an earlier incarnation of the Bill for no less than six months in 2017. It was hosted on the legislation.gov.uk website. It was the first time a Bill has ever been located there so that people could scrutinise it and try to apply it as if they were dealing with real cases. We consulted more directly as well. We visited various court centres to seek the views of judges directly on how they would wish a Sentencing Code to be structured. If they could put all the parts of the Bill in a particular order, how would they do that? We also had regular meetings, of course, with the Bar Law Reform Committee, the Law Society, and others. This was not a London-centric exercise, let me reassure you. We visited Cardiff, Bristol, Birmingham, Manchester, Leeds, and various other court centres, universities and so on.

Finally, may I say that we were privileged to have the input throughout from parliamentary counsel. Not only does the Law Commission have seconded parliamentary counsel, but, on this project, given the enormity of the drafting task, we had dedicated parliamentary counsel Alison Bertlin, who is not only skilled but passionate for the area. Having spent nine years at the commission, in my experience, I would say that this was a classic work of the Law Commission. It has produced clear, modern and fair law. It will have a positive impact on people’s lives, and save

substantial sums of money. I know that is not a concern of this Committee, but the MoJ economists suggest that it will save in the region of £250 million over the next 10 years. In the words of Andrew Burrows, then a professor, now a Supreme Court justice, in his Hamlyn lecture, "This illustrates beautifully the value of consolidation".

Q3 **Chair:** Thank you very much, Professor Ormerod. Did any other witness wish to add anything to this? If not, we will turn to the second area of questions. Can I ask either you, Professor Ormerod, or one of the other witnesses—Alison Bertlin or someone else—if you could say a little bit about the scope of the pre-consolidation work and how changes to the law were made so that we can be satisfied that, before this Bill is looked at by us, the necessary changes to the law to make it work were made?

Professor David Ormerod: Shall I deal with the main innovation in the Sentencing (Pre-consolidation Amendments) Bill—the clean sweep? Alison Bertlin may wish to say something about Schedule 2 to the 2020 Act. The clean sweep is the most innovative aspect of the work, and it is why we prioritised it as part of this project at the commission. Perhaps I can deal with this in three separate parts. The first is to explain the mischief that we were tackling by this clean sweep mechanism. I have already described the many serious problems. The particular one that we were seeking to solve here relates to the systemic difficulties that arise from the way that we legislate about sentencing procedure.

When new sentencing legislation makes changes to sentencing procedure, the transitional provisions in each new Act have a commencement date, of course, from which the new law will apply and the old law is repealed. They also identify the trigger from which those new provisions will apply. It may be that the new law applies to all convictions after a certain date, or commission of offences after a certain date, or charges after a certain date. Each time there is a new sentencing provision, it applies only after a certain date, and only in relation to certain offenders. Forgive me if I am stating the obvious.

The effect of that, given the frequency of amendments in sentencing legislation, is that we have multiple layers of sentencing. In truth, there are parallel regimes that co-exist each within their own particular timeframe. It becomes very difficult for judges to identify which particular regime operates. If we take suspended sentences, the regime under which a suspended sentence was available was, going back to the Powers of Criminal Courts (Sentencing) Act, quite exceptional. It was only available as an exceptional type of penalty.

That changed with the Criminal Justice Act in 2003, so that a different type of suspended sentence order was applicable to offences committed after the April 2005 commencement date. If an individual comes before the court today and has committed an historic offence, the judge has to be alive to that and think back to the pre-2005 position, and ensure that the order that is imposed complies with the Powers of Criminal Courts (Sentencing) Act 2000 rather than the 2003 Criminal Justice Act. You can appreciate that with dozens of separate layers of sentencing, the risk of

error is enormous. The problem is exacerbated, because the commencement orders are often obscure. The Criminal Justice Act to which I have just referred had 32 separate commencement orders, and they are located in statutory instruments, of course—not the most obvious home.

There is also no consistency on what I have described as the trigger. Some penalties are brought into force in relation to the commission of offences after a certain date, some conviction after a certain date, some charge after a certain date, and so on. It is very easy for judges to make mistakes. That is the problem we are seeking to tackle.

The clean sweep solves that problem by ensuring that, subject to some rare exceptions—I will come back to those—the most current form of the sentencing law is the one we carry forward into the consolidation, so that everyone convicted, once the code is in force, will be dealt with under the code, even if their offence was committed before the code came into force. This will sweep away the historic layers of sentencing.

Going back to my example of the suspended sentence, the trial judge dealing with that, once the code is in force, will have to apply only one regime in Clause 286 of the Bill dealing with suspended sentences, irrespective of the date of the commission of the offence. By removing those historic layers, we avoid the difficulties of judges making errors. All that is of course, as you will appreciate, subject to a very significant safeguard. Wherever consolidating the most recent form of sentencing procedure puts somebody at risk of being sentenced to a graver penalty than was available at the time they committed their offence, we have avoided that. We have preserved the historic less harsh form of the penalty, but specified in the code, on the face of the particular provision, the dates within which it will apply.

I will give you a simple example. Compensation is a good example. Compensation orders can now be made in the sum of up to £5,000. That maximum figure has increased over the last decades. If you go back to the 1970s, the maximum that could be imposed was £400. If we simply consolidated the most recent form of the legislation with a £5,000 maximum, somebody who came before the courts under the code who had committed an offence in the 1970s would be exposed to a graver penalty—£5,000—than that which was available, £400.

We have had to preserve all those historic layers, but we have done so in a much more streamlined fashion. In the relevant clause in the Bill—Clause 142—there is a table that sets out the dates and the maxima that would apply within those dates. Wherever it has been necessary to avoid a graver penalty, we have preserved that in the Bill.

All that has been achieved already by section 1(4) of the Sentencing (Pre-consolidation Amendments) Act. The second category of case that we have been very careful to safeguard against is where legislation has introduced a mandatory minimum offence for two strikes knife

possession, three strikes burglary, three strikes possession of class A drugs, and so on. Again, each of those has been preserved in a much more streamlined fashion, with the relevant dates specified on the face of the Bill. Once the code is in force, a judge sentencing somebody for example for a weapons offence, a bladed-article offence, would be able to see immediately that the mandatory minimum applies only if the offence was committed after July 2015. That is how the clean sweep succeeds in avoiding what was one of the most serious pitfalls in the existing legislation.

May I underline, once again, the rigour of the process there? The team spent a considerable amount of time going through every provision intended to be included in the code, and asked themselves whether, if we were to consolidate the most recent form of that penalty and introduce it into the Bill, it could expose somebody to a graver penalty than they could have had at the date of the commission of their offence. Wherever there was a risk of that, we preserved that historic pocket of the law, but made it very clear within which dates it applied.

The result is that judges will no longer be obliged to refer to the old law. The code contains everything. They will no longer have to engage in that archaeology. The Sentencing (Pre-consolidation Amendments) Act has already provided for that.

There are two further issues that I am happy to elaborate on, although you may have enough information. The first is that this should resolve the problem for ever more, provided that future sentencing procedure legislation is introduced by amending the code and is not left to reside in free-standing legislation.

Chair: We will come back to that.

Professor David Ormerod: Of course. The second matter is that, if you want to look underneath the bonnet to understand how this operates, you should speak to Alison rather than the showroom salesman—me. Ask the engineer, the technician who has devised what is a fiendishly clever device by which all that can be achieved.

Chair: Alison Bertlin, do you want to add anything briefly about the issues we have been discussing: namely, that all changes have been accommodated in the consolidation Act?

Alison Bertlin: David has said a lot about the clean sweep, so I will not go over that. With consolidation it is very common that points emerge that it would be convenient to correct. Very often a government programme policy Bill will include a schedule of pre-consolidation amendments, or a power will be taken to make an order with pre-consolidation amendments, which allows tidying-up changes to be made. The sorts of tidying-up changes I am talking about are alignment between similar provisions in different Acts, or where perhaps there has been a missed consequential, or to remove out-of-date references.

There is a schedule of those amendments in the Sentencing (Pre-consolidation Amendments) Act. It will come into force immediately before the consolidation Bill comes into force, so the consolidation Bill will consolidate the law as amended by that schedule. The Sentencing (Pre-consolidation Amendments) Act is now enacted, so that Act is one of the bits of sentencing law that is being consolidated. The consolidation Bill needs to consolidate the law as amended by that Act.

Chair: Thank you very much indeed.

Q4 **Viscount Hanworth:** We have heard of graver and more stringent penalties in the modern code, but we did not hear of more lenient penalties. Are there any instances of more lenient penalties? If so, how would those be dealt with in comparison to the previous penalties?

Alison Bertlin: The code itself does not affect the penalty for any individual offence. As David said, it consolidates sentencing procedure as it is. It does not affect the maximum penalty for any offence.

Viscount Hanworth: If there were a lesser penalty in the modern code, the more severe penalty at the time of commission of the offence would be imposed. Do I understand correctly?

Lyndon Harris: Perhaps I can assist on that point. The appropriate sentence is a matter for the discretion of the sentencing judge. The code and the clean sweep that Professor Ormerod was talking about concerns the limitations of the sentencing court's powers. To ensure compliance with Article 7, and common law principles against retroactivity, the code needed to ensure that it was not possible for somebody to be exposed to a graver penalty, but of course it is a matter of discretion for each sentencing judge as to the appropriate sentencing within their sentencing powers.

Baroness D'Souza: I may have missed this and I want to clarify it, because it takes up the point made by Viscount Hanworth. Does that mean that those who were unlawfully sentenced may have recourse to the courts once this Bill is in force?

Professor David Ormerod: The Bill makes no change to the scope or power of appeals. Somebody who has already been subjected to a penalty under the existing law will have no new ground of appeal on the basis of the introduction of the code. The code will apply to anybody convicted on or after its commencement, but it will not have any impact on previous convictions.

Q5 **Baroness Andrews:** This is slightly a process point. You talk about the layering of the law, which is why this has been such an extraordinarily difficult exercise. The layering also includes picking up the SIs. You talked about SIs particularly in relation to commencement orders and so on. Does the consolidated Bill have any delegated powers? How have you accommodated those sorts of changes? Have things gone into the Bill that might previously—I am not looking for Henry VIII powers—have

been in delegated legislation? Has it also been that sort of exercise?

Alison Bertlin: The Bill touches on various delegated powers. There are some powers simply to make regulations that have been restated in the Bill. There are some powers to amend the Bill, which restate powers in existing legislation to amend existing legislation.

All those powers are in Schedule 23 to the Bill.

The Bill restates very few pieces of secondary legislation. It is remarkable how little [secondary legislation] there is in sentencing law that has needed to be restated. There is one amendment of Schedule 21 to the Criminal Justice Act 2003. There was a change to the conditions for referral orders. Both of those are in the Bill because they were [made under] Henry VIII powers to amend sentencing legislation and have been taken in. Does that answer your question?

Baroness Andrews: It does, absolutely. That is very interesting, thank you.

Q6 **Lord Razzall:** I do not know if this is the right moment to ask my question, which is about the deletion of obsolete terms, which is obviously quite a fascinating topic, bearing in mind that there are elements of criminal law on the statute book that go back centuries. How far back did you go in deleting the relevant obsolete terms? You explained the basis upon which you did it, but how far back did you go?

Alison Bertlin: The terms that we have not restated are simply those in the legislation that we were consolidating. We were not doing a statute law revision exercise, where one is looking positively for spent provisions and repealing them. All I did in consolidating and not restating obsolete terms was that if I came across something that referred to, say, a local probation board and there is no longer such a board, I did not restate that term. I was not looking for old legislation.

Q7 **Baroness Thomas of Winchester:** This may not be the right place for asking this question, but is there any danger in the future of an uncommenced sentence being put into the code? It is in a Bill, but it has not been commenced; there is no commencement date.

Chair: We will ask specifically for that to be illustrated and, if we could come back to it at that point, I think it might help the witnesses.

Professor David Ormerod: May I correct myself? It is so confusing, but when I described the compensation orders as a good example, I stated that the maximum is £5,000. Parliamentary counsel reminds me that it is now unlimited. The point I was making stands that there are those layers of maxima, but it is now in fact unlimited; £5,000 was the last maximum set before the unlimited.

Q8 **Chair:** Can we move on to two closely interrelated questions? Can you tell us what the Bill covers in relation to sentencing, but, as importantly, what it does not cover? I think it would be helpful if whichever of you has

been nominated to explain this could deal with those two areas.

Alison Bertlin: The Bill consists of an introductory Part 1, the Sentencing Code itself, which is Parts 2 to 13, and a concluding Part 14, which deals with matters such as commencement and extent, and introduces a number of technical schedules. It is a pure consolidation Bill. It consolidates the legislation as amended by the Sentencing (Pre-consolidation Amendments) Act.

At the moment, the majority of sentencing legislation is in one of three Acts: the Powers of Criminal Courts (Sentencing) Act 2000, Part 12 of the Criminal Justice Act 2003, and Part 1 of the Criminal Justice and Immigration Act 2008. We are consolidating most of the sentencing procedure from those three Acts. Most changes to sentencing procedure since 2008 have amended the Criminal Justice Act 2003, but there is a lot of relevant legislation scattered across a number of Acts, which will become apparent.

The code brings all this together in one place, starting with conviction, and sets out sentencing legislation in the order in which it is needed for the sentencing process. Part 1 outlines the structure of the code and applies it, as David said, to cases where a person is convicted after the commencement date. As Clause 1 sets out, it starts with powers that are exercisable before sentence, so powers to defer sentence, or to send an offender to a different court for sentencing. Parts 2 and 3 deal with general procedure when sentencing. They cover surcharge, criminal courts charge, pre-sentencing reports and duties to explain. That includes the duty for the court to explain the sentence, and the duty for the court to explain why it has not made an order where it has a power to make, say, a compensation order or a parenting order. Those appear in the general parts rather than in the parts about compensation or parenting orders, where they could easily be overlooked.

Part 4 deals with general provisions about the exercise of the court's discretion. It starts with the purposes of sentencing, the court's duty to follow sentencing guidelines, and aggravating and mitigating factors. Here again, we have brought together legislation from other Acts—for instance, the Misuse of Drugs Act 1971—and put the relevant part of that into the code. The code moves on to particular discharges and orders that can be made, in order of severity. It starts with orders for absolute and conditional discharge. Then there are referral orders and reparation orders; fines and other financial orders, including the standard scale; disqualification; and then community sentences and custodial sentences. It sets out behaviour orders that are available on conviction generally. Finally, there is a part that deals with other provisions such as the slip rule, which David has mentioned.

In general, the code does not deal with particular sentences for particular offences. It deals with sentencing procedure. It does not cover the maximum sentence for any offence. The appropriate place for that is alongside the offence-creating provision.

On forfeiture, it covers the general power to make a forfeiture order, to make a deprivation order, that is available on any conviction. However, there are a number of other forfeiture powers on the statute book that relate to particular orders and particular property to be confiscated in relation to a particular offence. There is a signpost to that clause. Clause 160 has quite a long table of other forfeiture orders that are available under other powers. In the code at least there is a signpost reminding courts that there are other powers available. All mandatory sentences are covered.

I would mention behaviour orders. The code considers criminal behaviour orders and restraining orders that are available on any conviction. It also covers sexual harm prevention orders and parenting orders where they are available on conviction, and binding over orders. Again, there is a signpost to other behaviour orders that are available in specific cases.

The code sets out in full provisions for custodial sentences for 18 to 20 year-olds. For those adults, the appropriate custodial sentences are still sentences of detention in a young offender institution and custody for life, rather than sentences of imprisonment. Section 61 of the Criminal Justice and Court Services Act 2000 will abolish those sentences, and instead those adults will be subject to imprisonment, but that section has not been brought into force.

The result is that all sentencing legislation since 2000 has been drafted in terms of imprisonment, and the position for under 21s has relied on transitory modification. Any court dealing with a person aged under 21 must know that a reference to imprisonment has to be read in that context as detention in a young offender institution or custody for life. The code has set that out in full. There are amendments in Schedule 22 to the code to remove that part and extend the imprisonment provisions to all adults when the Criminal Justice and Court Services Act provision comes into force.

I have talked about what the Bill covers. Obviously, a line has to be drawn. It cannot cover everything. Some things will always be excluded. I will hand over to David at this point.

Professor David Ormerod: As to what we excluded, it might be useful for me to explain something about the policy approaches that we adopted within the Law Commission. By way of introduction, it is perhaps worth emphasising two things. We consulted extensively, as on all other aspects of the Bill. Some of the suggestions made by consultees led to us incorporating material which we would not otherwise have included. As examples, Alison referred to the clauses in the Misuse of Drugs Act and the Psychoactive Substances Act—Clauses 64 to 70-something. Those were in response to a direct question in the main consultation. People recognised that although they were specific to a particular type of offence, they were likely to be overlooked unless included within this code.

The second introductory point is to underline the importance of what Alison has already referred to—the signposting, the cross-referential drafting. We should not see what is in and out of the code as a purely binary question as to practical effect. That is too simple a view. There are provisions introduced into the code in full, but there are also very many valuable signposts, so that a judge is less likely to make the kind of error by overlooking a particular provision.

One of my favourite examples, and I will probably get this clause wrong as well, is in relation to the company director disqualification. The provision that deals with that is housed in the Company Directors Disqualification Act of 1986, not the most obvious place for a criminal judge to look when dealing with sentencing. When we were choosing whether or not to move that provision into the code, we realised that all that was necessary was for the judge to be aware of the existence of that provision. Thus it was sufficient to signpost from the code in Clause 172 back to the 1986 Act. We did not need to disturb the provision from the 1986 Act. Signposting is, I think, a very valuable aspect of this consolidation. I know that it is quite a controversial matter in drafting terms, because they are non-operative clauses, but, as to their practical effect, for judges they will be very valuable indeed.

I will turn to the questions that we asked ourselves at the commission in deciding what the scope of the Bill should be. First, as I have already said, it is sentencing procedure, so anything to do with a maximum sentence was out of scope. Secondly, we had to think about what the concept of sentencing meant. That resulted in disposals that are not in fact sentences. Although they might be dealt with by the criminal court at the same point in the trial proceedings as a sentence, they are not formally a sentence. Confiscation, for example, is not a sentence. It might be described as a penalty, but it is quite distinct, it has its own code, and it would be disruptive to include that. It would also have been impossible to include that within the Sentencing Code because of its volume. It remains in the Proceeds of Crime Act 2002, and is, in fact, under review by the Law Commission at the moment. Where necessary, signposts from the code refer back to the Proceeds of Crime Act.

Some other non-sentencing disposals include, for example, the powers available to a court when a defendant has been found mentally unfit to plead. A trial of the facts then takes place before a jury. Its verdict, or decision, is that the defendant has done the act or not. In the event that it finds that the defendant has committed the act, that is not a conviction, so there is no sentence to be imposed. There are disposals available to the judge. They are not sentencing, and again, after some debate and consultation, we decided that they should remain in the 1964 Criminal Procedure (Insanity) Act, with appropriate signposts. We also made recommendations that that Act be clarified and that there be amendment to that Act.

There are some other examples. A restraining order under the Protection from Harassment Act 1997, which can be made on an acquittal and not

on a conviction, was again something that we deliberated about. We decided that it was not a sentence and ought not to feature in the code. We made a number of decisions to exclude material from the scope because they were not formally matters of sentence. The code includes only things related to procedure and sentencing, and, crucially, only things relating to sentencing which the judge needs to know to deliver a lawful sentence. It really was about something only making the cut and getting into the code if it was necessary for the judge to have it, and not just things that might be nice to have.

For example, the powers that govern the constitution of the Sentencing Council would not be relevant to a judge making a sentencing determination. They are about sentencing or sentencing procedure. They are not in the code because there is no practical need for them to be known by, the judge making the sentencing determination. It remains in the Coroners and Justice Act. Similarly, powers of appeal are properly housed in the Criminal Appeal Act, and elsewhere. However, as I have already mentioned, the power of the trial judge to review within 56 days of his or her sentence and to correct an error under the slip rule, is brought into the code at Clause 385, because that is a power the judge needs to know.

Other exclusions on that basis were matters dealing with release, recall and licence. For over a decade it has been established in the case law that judges do not need to concern themselves generally with release. That is a matter of prison administration and so on. Where, exceptionally, it is necessary for a judge to do so, for example in relation to detention and training orders for under 18 year-olds, it is dealt with in the code. That was a very important principle that prescribed the scope.

Finally, or perhaps penultimately, our decisions about scope were influenced by whether including something within the code would be counterproductive; whether to move a provision into the code would create greater incoherence elsewhere. I gave the example of the Company Directors Disqualification Act. Were we to have moved the provision from the 1986 Act into the code, we would have left a gaping hole in the 1986 Act, and it would not have been obvious to a judge dealing with company directors generally where that provision had gone. The Sentencing Code might not have been the obvious place to look. The signpost in the code was an adequate solution to that.

Other examples of us leaving existing coherent codes well alone, but signposting, include all the driving penalties, particularly penalties and disqualifications related exclusively to driving offences. They will remain in the Road Traffic Offenders Act. Other examples include forfeiture, to which Alison has already referred. The general forfeiture provisions are in here, but the more obscure ones are signposted appropriately so that we do not disturb other codes.

Finally, we were constrained by the fact that this is a consolidation. We were not seeking to include within the drafting matters of common law,

no matter how long established or how well established. Although *Goodyear* indications, *Newton* hearings and so on have been a matter of common law for decades, they were not suitable for inclusion within consolidation, because we were not seeking to make any change to the policy. Those were the factors that influenced the Law Commission's approach to the scope of the code.

Q9 **Baroness Andrews:** This may not be a fair question, but I think it is a fairly obvious one. In the very first page of the drafter's note, you talk about the number of cases involving unlawful sentences, which we were all quite shocked to read. Are you happy that your approach to exclusion and inclusion now picks up most of those sorts of cases?

Lyndon Harris: Perhaps I could offer a view on that. We were very clear during the consultation period that we wanted to hear from judges and practitioners as to what would be of greatest utility to them. While we went into the exercise at the very beginning with an idea of what we thought might be included and might be excluded, it was very much informed, as Professor Ormerod has said, by what we were told by consultees. After analysing all those responses, and discussing it with parliamentary counsel and among ourselves, we took the view that to be of the greatest utility to practitioners, if a provision was not necessary to be included in the Bill it was necessary for it not to be included in the Bill, because otherwise the Bill would be cluttered with provisions that a sentencing court does not need.

Speaking for myself, and I am sure Professor Ormerod and Sebastian agree with me, I am very content that everything that ought to be there as regards making a judge's life easier is in there. Where we were told that it was not necessary, or we formed the view that it was not necessary for it to be included, it was right to exclude it and put in a cross-reference—a signposting provision—to that. We should be very clear that the approach to this was what was going to make the sentencing court's life easier, and to avoid all these unlawful sentences. Yes, I am very happy with that.

Professor David Ormerod: I do not want to mislead the Committee. Of course there were consultees who asked for more. There were individuals who would have liked us to engage more with and to challenge some of the sentencing policy. That was impossible within the terms of reference that had been agreed with the Ministry of Justice, and, as Lyndon has said, it was more important for us to have a comprehensive consolidation that will, by the clean sweep and the signposting alone, make such a significant difference. There were people who would have liked more, but I am afraid they cannot have everything.

Q10 **Lord Eames:** I was intrigued by the remark made a few moments ago about the interpretation of the significance of moving something into the code. Can the experts say a little more as to how satisfied they are that they have dealt fully with that grey area where there is possible misinterpretation by a judge?

Professor David Ormerod: May I start by saying that the exercise was painstaking? We started by trying to identify the present law. The document produced ran to some 1,300 pages. That was put out for public consultation for six months. It was used as a primary source by the Crown Prosecution Service, for example, so when we started work on consolidation we were confident that we had the present law properly understood and laid before us. If you look at some of the signposting, even in some of the forfeiture orders, which we both used as examples, you will see how obscure some of the other legislation is. You would not necessarily assume that it contained sentencing-related provisions. We are as confident as we can be, after extensive consultation, that we have been comprehensive, yes.

Q11 **Maria Eagle:** I wanted to refer briefly to the clean sweep. Obviously the clean sweep helps to ensure that mistakes are not made on the basis of the past, but there are exceptions to the clean sweep. As I recall from my time on the Committee on the pre-consolidation Bill, as it was, now Act, there were provisions in that for creating new exceptions to the clean sweep, so that, going forward, there may be changes, or things that sentencers should have in mind that are not in the code, in the sense that they are new exceptions to the clean sweep, for example. Will there be any signposting of that? How are sentencers to cope if they are getting used to the idea that the code has it all, with the moving feast that is new exceptions to the clean sweep?

Alison Bertlin: The clean sweep will operate on the commencement date when the code comes into force. After that, there will be no new exceptions. If there is new legislation that will operate by, say, the date of commission of the offence, the new legislation should add to the code a statement that it will operate by reference to the date of commission of the offence. That is a matter for the new legislation.

There is, in fact, one new exception to the clean sweep that will not affect the drafting of the code itself. There are exceptions to the clean sweep for the amounts in the surcharge orders. A new order was made increasing the amounts after the Bill was introduced. There is a statutory instrument going through Parliament at the moment that will provide an exception from the clean sweep, in the same way as for all the previous exceptions to the surcharge order. However, it does not affect the drafting of the code because it is a statutory instrument under the existing legislation.

Professor David Ormerod: May I add to that? It goes to the point I was making about this having to be seen as a living document. In the future, when legislation will add to the Sentencing Code, as I hope it will, any new sentencing procedure provision should be seen as potentially being inserted into and amending the code. The question for the Government in introducing that will be, "Can we insert this into the code so that it will apply in relation to everybody dealt with after the enactment of that new piece of legislation, or, if it will expose somebody who has committed the offence before that date to a potentially graver penalty, do we have to

state on the face of the code the new date from which this provision applies?" Once that culture takes hold of specifying on the face of the new provision as it is inserted into the code, hopefully the code will be maintained healthily.

Viscount Hanworth: Is the printed form of the consolidated Bill, and the signposts therein, the only means by which judges will inform themselves of the law, or do you envisage that there will be subsidiary means of assisting them?

Chair: Could you come back to this question? Viscount Hanworth, they will deal with how the courts will apply it in practice.

Viscount Hanworth: I will wait for the appropriate time.

Baroness Mallalieu: How will the practitioners be kept up to speed? This will obviously be ongoing and there will be regular changes. Is the Law Commission playing any part in that? What will be the mechanism for keeping the code updated? What will be the mechanism for transmitting the changes to the practitioners, as well as the judges, when the Act, as it becomes, is in use?

Q12 **Chair:** Can we come back to those questions in a minute? Can we cover the existing legislation and then deal with how the judges will be told and how the code will be kept up to date? May I ask a very quick question about the existing Bill? I think we can deal with this very briefly. It obviously extends to England and Wales. Does it have any impact on Scotland or Northern Ireland?

Alison Bertlin: Essentially, the code will extend only to England and Wales, except in two main respects. The first is where it deals with the treatment in Scotland or Northern Ireland of a sentence passed under the code by a court in England and Wales, for example, where a community sentence is transferred to Scotland or Northern Ireland. The second is where it is applied for the purposes of the Armed Forces. On that, the Armed Forces Act creates a sentencing regime for the Armed Forces and service courts that consists partly of free-standing provisions in that Act, and partly of sentencing provisions applied by that Act. Schedule 25 to the Bill will amend the Armed Forces Act 2006, so that in future the provisions that it applies will be provisions of the Sentencing Code. All the provisions of the Bill, so far as they are either applied by or amend the Armed Forces Act 2006, extend to the UK and the Isle of Man and the British Overseas Territories, apart from Gibraltar, and can be extended to the Channel Islands, in line with other Armed Forces legislation.

To complete the picture on extent outside England and Wales, the Criminal Justice Act 2003 can be extended to the Channel Islands and the Isle of Man. Although no order has ever been made to extend any of the provisions being consolidated, in order to consolidate them accurately, we have to preserve that power. That is done for the provisions derived from that Act. Of course, consequential amendments of legislation that extend

to Scotland and Northern Ireland themselves extend to Scotland and Northern Ireland.

Q13 **Chair:** Thank you very much. Can we now move to the issue raised by Baroness Thomas, and ask you about one quite interesting and difficult part of the Bill?

This question deals with powers covered in the Bill. There are two different types of provision. The first is powers that are still on the statute book but may not be in operation. One example is the criminal courts charge. What has happened to that? Secondly, what has happened to pieces of criminal legislation that have been put on the statute book but have never been bought into force? That was Baroness Thomas's question. I wanted you now to deal with this issue. I hope I have understood it correctly.

Alison Bertlin: The criminal courts charge is included in the code even though the charge is effectively currently set at zero. Because the statutory mechanism in primary legislation is still in place and still in force, and it could be revived if further regulations were made under what is now Clause 48 of the Bill, that is in the code. However, a lot of legislation to amend sentencing has been enacted but never brought into force. That is in Schedule 22 to the code. We will repeal that and restate it as amendments of the code.

The kinds of provisions in that schedule deal with, for example, pre-sentence drug testing. There are new minimum sentences for corrosive substances and some firearms offences under the Offensive Weapons Act 2019 that have not yet come into force. I have already explained how we are dealing with detention in young offender institutions and custody for life. There are amendments in Schedule 22 to take out those provisions when the section that abolishes those offences comes into force. They will come into force automatically at the same time. There are amendments that make changes as a result of the UK leaving the EU. They will come into force on the IP implementation date at the end of the year. So, we have a schedule of amendments to the code that are waiting to come into force, either automatically or by commencement regulations, depending on how the existing amendments would come into force.

Q14 **Chair:** Thank you very much indeed. Can we turn to two very important areas of questioning? They relate to how, as is inevitable, the code will be amended. There are two pieces of legislation presently being considered: the Domestic Abuse Bill, and the Counter-Terrorism and Sentencing Bill. This is the point raised by Viscount Hanworth and Baroness Mallalieu.

The other point raised by them, if we can deal with it separately, is how all this will work. How will the judges and practitioners be helped? That question was also raised by Baroness Andrews. Can we deal with the first group of questions first: namely, how is the code to be amended and kept up to date? How is this to work for the future, bearing in mind that the Powers of Criminal Courts (Sentencing) Act 2000 failed within a few years of its enactment?

Alison Bertlin: There are, as you say, two Bills going through Parliament at the moment that will amend the code: the Counter-Terrorism and Sentencing Bill and the Domestic Abuse Bill. The Counter-Terrorism and Sentencing Bill amends the code. It starts the practice of new sentencing provisions being added to the code and not being free-standing. It sets off down that track of amending the code.

The code contains an innovative provision for when the amendments in Schedule 22 are brought into force. The effect of it is to allow the commencement provisions—to be stated in the code itself, so that it is not necessary to look at separate commencement provisions to find out the cases to which they apply. The Counter-Terrorism and Sentencing Bill extends that power in Clause 419 to that Bill. Thus, when that Bill comes into force, it will be possible for the commencement provisions relating to that Bill to be added to the code, so they will appear on the face of the code. That will set an example for how this can be done.

The Domestic Abuse Bill has a new domestic abuse protection order, and a signpost to that will be added in what will be Clause 378A, I think. We have talked about how this will be dealt with in future. We are planning guidance for drafters of legislation that will remind them of the principles that new sentencing provisions that are within the ambit of the Sentencing Code should normally be added to the code rather than be free-standing, and that the code should state on its face the cases to which it applies, so that readers should not have to rely on separate transitional or commencement provisions.

Professor David Ormerod: All this was anticipated. We realised the failings of the Powers of Criminal Courts (Sentencing) Act. The significant differences are: the clean sweep, so we start from a clearer landscape, and the anticipation that there will need to be frequent amendment. That is dealt with, as Alison has said, by having Schedule 22 there so that uncommenced provisions from legislation will go into Schedule 22 until they are ready to be brought into life, until life is breathed into them, and then they will make their way into the body of the code. Because of Clause 419, when they do so, the date from which they apply will be specified on its face in the body of the Bill and not lost in an obscure statutory instrument in a commencement order.

Q15 **Chair:** You have explained that, and perhaps more questions could be asked, but I think it is easier if you answer this question first. Obviously, this is a very long and complex Bill, and you will be adding sections and taking things out. How are the judges, barristers, solicitors and members of the legal profession going to be kept up to date? What assurance can you give us that this will solve the problem for the future, both the problem of complexity and the problem of amendment? How do you envisage it will work in practice?

Professor David Ormerod: I will begin with some headlines on that and I know the team, Sebastian and Lyndon, have some good examples of the way in which it will resolve some of those practical difficulties.

The first point is that this is a comprehensive code. Practitioners will have one primary source of legislation to turn to. With the trinity of the code, the Criminal Procedure Rules and the Sentencing Council guidelines, they will have all the information they need to deal with a sentencing exercise. That is the first thing; it is comprehensive. Secondly, because we have consulted so extensively with practitioners and judges, we are confident that the structure will assist them. It flows naturally through the sentencing process. That is one of the important aspects of structure.

The other is that we have separated out the provisions dealing with those under 18, those 18 to 21 and those over 21. That will avoid some of the errors that arise because people are trying to map different regimes across different age groups. It is a more easily navigable piece of legislation. I have already mentioned that it is probably longer as a result of that, because provisions have often been repeated. It may be that provisions have been repeated within each of the sections to which they apply, if it makes it easier for a practitioner or a judge to see that requirement, rather than have them cross-refer back to a definitions section several hundred sections away in the Bill.

There are also the tables to which we have already alluded. There is the forfeiture table and a table listing the requirements that can be imposed as part of the community penalty, and so on. Those are set out in a very clear table. Lots of thinking has been done about the useability for judges and practitioners. I will hand over to the team, who I know have some examples of particular problems that we have resolved, and then I can come back, unless, Alison, you have something to add.

Alison Bertlin: If we are talking about the way the material is set out, we start, as I have said, in a logical order at the beginning of the process and bring in what the court needs to know at a particular point. There are the duties that require courts to follow sentencing guidelines, but we have left in the Coroners and Justice Act the provisions about how the guidelines are set out. For instance, on release, there is the requirement for the court to determine the amount of time that somebody has spent on bail subject to a qualifying curfew because that counts towards the release time. The requirement to calculate it is in the code and the rest of it is left in the release provisions. Again, it is there for the court to be prompted to do what needs to be done.

Might I also mention that signposts are used in various different ways? We have talked about signposts to other orders that are available, but where there is interaction with other legislation—for instance, where a surcharge order cannot be made where confiscation proceedings have been postponed—there is a signpost to the provision in the Proceeds of Crime Act that prevents that, which should help to avoid a pitfall. As David says, there are signposts to other definitions in the code.

Another technique that we have used is applying setting out in full. For aggravating factors such as hostility, rather than applying a definition

from the Crime and Disorder Act for racial and religious hostility we have set that out in full so that it is there.

Lyndon Harris: Professor Ormerod mentioned the use of repetition, and I thought it might be helpful to give an example of that. Currently, section 226 of the Criminal Justice Act 2003 provides for the power to impose an extended determinate sentence, and section 226A provides that power for those aged 18 to 20 and 21-plus.

In some cases, that has led to a sentencing court imposing an extended sentence of imprisonment on an offender who was aged 18 to 20, so that was an unlawful sentence because, by virtue of section 89 of the Powers of Criminal Courts (Sentencing) Act, somebody aged under 21 cannot receive a sentence of imprisonment.

In the Sentencing Code, we have separated those out. That is what Professor Ormerod was referring to when he was talking about repetition. Those two powers combined in section 226A are in two separate parts of the Bill to try to avoid a sentencing court falling into that sort of error. That is an example of that. Perhaps I can run through a couple of very brief examples where the team are of the view that the approach taken—

Chair: Please could you deal with this quite briefly? You have explained the main structure and we have one more question that we must cover.

Lyndon Harris: In relation to examples from the Bill, the first, perhaps, is that we have structured the provisions in a different way. We have made much more of the concept of availability. Courts are now faced with a provision that states very clearly when an order is available or is not available. It seems to us, based on our experience and consultation, that that is likely to assist in avoiding courts imposing orders where they are not available because, more overtly than in the current legislation, that issue is dealt with.

To refer back to the example given of the power to reflect dates on the face of the Bill, in a case in which you, Lord Thomas, were presiding—GJD in 2015—the sentencing judge imposed the now repealed IPP sentence, in circumstances where it was not available by reference to the commencement date. It is hoped that with the power to reflect the commencement date now on the face of the Bill that sort of error would not occur.

I know there was a question about training and how the practitioners and judges were going to be made aware of this. Professor Ormerod and I are involved in judicial training with the Judicial College. We have been having discussions with the relevant people there. We are discussing a programme of lectures at the moment, and online materials of course, because of the current Covid-19 situation. I hope the Committee can be reassured that that is all in hand and that the training is taken care of.

Secondly, in relation to practitioners, there are the usual updating lectures by, for example, the Criminal Bar Association. That will be dealt

with towards the end of the year. Both Sebastian and I work on the textbook *Archbold*, and you may know that Professor Ormerod does the same in relation to *Blackstone's*. We have all been in touch with the publishers to ensure that all that material is reflected in the new editions of the works when they will come out, hopefully to coincide with the commencement of the code.

Chair: Thank you very much. I was going to ask Baroness Mallalieu and Viscount Hanworth whether those answers have to some extent at least assured them that this has all been thought through.

Q16 **Viscount Hanworth:** Not to the full extent. Some 20 years ago I published a 700-page mathematical textbook. This has 659 pages but it contains a lot of signposts. In my book, I was able to make extensive cross-references within the text, because I also produced a digital version of the text. What I could not do at the time was make references to other texts that were quoted in the book. That would be possible nowadays using modern technology and the web. Do you have anything like that in view? It would surely be of tremendous assistance to judges and clerks of the court if they could use something like that with a degree of artificial intelligence attached to it.

Lyndon Harris: The intention is that it will be hosted on the legislation.gov.uk website. Hypertext links will be available through that, and through the commercial databases—Westlaw, Lexis Library, LawTel and so on—and will allow for hypertext linking between the different statutory instruments. I am sure that with some additional functionality it could be made to link through to the relevant Sentencing Council guidelines and the Criminal Procedure Rules. As I said, with that trilogy you have everything that a sentencing judge would need. I hope that can all be done.

Viscount Hanworth: Can that be done with the commercial rights of Lexis and Butterworths? Are you quite free to implement these things yourselves?

Sebastian Walker: The code will be supplemented by the Sentencing Council's guidelines and the Criminal Procedure Rules. It will be also be accessible on legislation.gov.uk, and from any of the commercial providers such as Westlaw and the Lexis Library. It will also be supplemented by these practitioner texts we have just been talking about. *Archbold* and *Blackstone's* are the two main practitioner texts. Specific sentencing textbooks will reproduce the provisions of the code and reproduce the other provisions that are signposted. They will provide the guidance to the courts as to how those provisions have been interpreted by the Court of Appeal previously. Those additional editorial texts will provide the extra assistance that cannot be provided in legislation.

Viscount Hanworth: Thank you.

Q17 **Chair:** I hope we have covered the Bill itself, save for the final question

we must ask you, but we have 162 amendments to consider in the course of this meeting. Would it be possible, Alison, to explain very briefly—I emphasise that—the purpose of these amendments, so that we can see their overall context before we consider them individually?

Alison Bertlin: The Bill was introduced in March. There has been extensive checking since then. Inevitably, on a project of this scale, and it is not at all unusual on a consolidation, points emerge that need to be corrected, and further developments happen over that time. We have five categories of amendments. There are amendments to change the commencement date. At the moment, the date is set at 1 October 2020. Clearly, there has been a lot of delay because of coronavirus, and there are amendments to change that. There are some corrections to the code that have, as I have explained, emerged from checking, and one would expect to find some corrections.

There are also amendments to improve the drafting. Inevitably, as you work through, you find things where it could be expressed better and differently, so the opportunity is taken to propose amendments to do that, to try to make the code as clear as possible. Some amendments arise from recent legislation. There are amendments due to the Coronavirus Act. Some amendments are needed because of the Corporate Insolvency and Governance Act 2020, other legislation related to coronavirus and recent secondary legislation. One or two are needed because provisions have not come into force as expected.

There are some other corrections to the consequential amendments. There is a group of amendments that add the consequential amendments of the Welsh language texts in Welsh legislation. There is one group of amendments that deals with the consequential amendments on the repeal of one provision in the Counter-Terrorism Act 2008. I hope that gives you a quick overview of what the amendments are there for.

Q18 **Chair:** Thank you. May I turn to the last question from me? The question that we have to be satisfied about is whether this is pure consolidation and represents the existing law. In the course of what you have told us, you have said that you have tried to improve the way in which some of the legislation is laid out and some of the language used, but could you very briefly explain that, as far as you and others who have looked at this can see, there has been no alteration to the law other than that that was made by the pre-consolidation Act?

Alison Bertlin: The process of consolidation, as David Ormerod said at the beginning, is rigorous. It has been looked at very carefully. There has been a lot of consultation. You have asked me to explain some of the drafter's notes for the Joint Committee. Those notes serve two purposes. They are there to explain where it may not be obvious from the way it appears, because the material has been rearranged, that it reflects the existing law. Occasionally, there are points on which it is necessary to take a decision as to the construction, and the notes also explain that. Would you like me to explain?

Chair: Give us one illustration of where the law may not be exactly the same as is written in current statutes, but the way in which you have drafted something still represents the law as it is.

Alison Bertlin: The note on Clause 315 shows the drafting process behind this and is quite a good illustration of some of the techniques that have been used. It shows how the code has brought together provisions from different places and has restated provisions that extend outside England and Wales, where we have restated only the England and Wales aspect and left it for other parts of the UK. It also shows how we have dealt with legislation that is not in force and an exception to the clean sweep.

This brings together several provisions that require a court to impose a minimum sentence for a repeat offence—an offence involving a weapon or bladed article—so Section 1 of the Prevention of Crime Act 1953 and Sections 139 and 139A of the Criminal Justice Act 1988, where somebody has a bladed or offensive weapon in a public place or on school premises. The 1988 Act offences extend to Northern Ireland as well as England and Wales. For each case, a court in England and Wales is required to impose a minimum sentence if the offender was aged 16 or over at the time of commission and had a previous relevant conviction.

For all these offences the previous relevant convictions are the same. They are one of the kinds of offences I have described, or a similar offence in Scotland, Northern Ireland, another member state, or a Service offence. Because they are the same categories of existing offences, and the same minimum sentence applies in each case, it is possible to bring them all together into a single clause.

That is what has happened here. Clause 315 rewrites provisions from three separate sections in different Acts. Although the provisions in the 1988 Act extend to Northern Ireland, and the offences in those sections extend to Northern Ireland, the minimum sentence provisions apply only to a court in England and Wales sentencing somebody and therefore have no application in Northern Ireland. The Bill repeals the minimum sentence provisions in their entirety because they have no application to a court in Northern Ireland or an offence committed in Northern Ireland. That is how that has been dealt with in the code.

I might just draw your attention to subsection (1)(b), which is an example of how an exception to the clean sweep has been dealt with. Here we have provided that it only applies where the offence was committed on or after—this is the date when the minimum sentence requirements were originally introduced—17 July 2015. Of course, if there had been no exception to the clean sweep, this limitation would have been swept away. Here we have reproduced the existing position because of the exception to the clean sweep.

It is also an example of how the code deals with future amendments. There is a new offence in the Offensive Weapons Act 2019 of having a

corrosive substance in a public place. Paragraph 69 of Schedule 22 will add that to Clause 315, because, again, the minimum sentence will be the same and the list of relevant convictions will be the same, and so it will slot in very neatly.

There is a further level of complication, because of course this covers offences in member states, and that will change after EU exit. There is yet another set of amendments in Schedule 22 to make those amendments at the end of the implementation period. I hope that is an example of how we have distilled the provisions from various different places, in fact three different Acts, and preserved the existing commencement provisions. Where there is an exception to the clean sweep, we have dealt with uncommenced amendments in Schedule 22. We have also dealt with amendments that in places extend outside England and Wales, and we have only consolidated the England and Wales aspect.

Chair: Thank you very much indeed. Those are the questions that I had discussed we should ask you, and various questions have been asked as we have gone along. I hope this approach will mean that when we turn to look at the Groups of Parts of the Bill, we can proceed much more quickly. I was going to pause at this stage and ask if, on these general approach questions, anyone has any further issues they wished to raise. When we get to each Group of Parts there will be an opportunity for further questions

You have shown us the huge amount of work that went into the Bill and the care that has been taken. Also, the care in your preparation for this evidence session has evidently been enormous. I hope that you have not been overburdened by it. I think you have been able to give us a complete account of what has happened. By going through this in detail, and working out whether this extraordinarily complex legislation is effectively consolidated, we can be reassured by you, I think, that you have done everything possible. May I express my own gratitude, and I am sure that of the entire Committee, for what you have done?

We will now look at the Bill in the Groups of Parts into which it is organised. If members of the Committee have the Bill, I propose going through the Bill more formally and looking at each Group of Parts. It is a formidable procedure and, because there are these 162 amendments, I am afraid that I have to do an awful lot of talking. I can only say that this is now the much less interesting part, having been able to question on them. If there are further individual questions, please do not hesitate to ask and I shall pause.

Can we turn to look at the First Group of Parts? It is probably easiest to look at this by taking the contents on the front of either the first volume or the second volume of the Bill. The First Group of Parts is really the overview and the application of the code. I was going to ask on each of these parts whether any of the witnesses wished to add anything, or whether any members of the Committee have any questions they wanted

to ask about this Group of Parts, and the amendment that is proposed to Clause 2, before I put these questions formally to the Committee.

The question is that Clause 1 stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

Can I turn to Clause 2, Amendment 1? The question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

Can I turn to the last of the questions in relation to this First Part of the Bill? The question is that Clause 2, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

I think that is the shortest Part of this. Can we now turn to the Second Group of Parts? You will see that is the Group of Parts that deals with provisions applying to sentencing courts generally. Part 2 deals with powers before sentence, Part 3 with procedure, and Part 4 with provisions relating to the exercise of the court's discretion. I was going to ask the question of witnesses if there was anything they wished to say, or members of the Committee wished to ask about these particular Parts of the Bill, that is the Second Group of Parts. If no one has any comments, could I turn to ask the short question in relation to these.

The question is that Clauses 3 to 78 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

Can we turn to the Third Group of Parts, which is probably one of the longest parts of the Bill? These deal with what lawyers call disposals: that is, the various sentences that can be passed for all types of offences, from conditional discharge right through to imprisonment. Do any of the witnesses wish to say anything about these parts of the Bill? Do members of the Committee wish to ask any questions about these parts of the Bill, or the amendments that are proposed to these parts of the Bill? May I therefore turn to the issues that arise?

The question is that Clauses 79 to 118 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 119, Amendment 2, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 119, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

On Clause 120, Amendment 3, the question is that this amendment be

agreed to. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is: Clause 120, as amended, stand part of the Bill. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clauses 121 to 243 stand part of the Bill en bloc. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

In Clause 244, Amendments 4 and 5, the question is that these amendments be agreed en bloc. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clause 244, as amended, stand part of the Bill. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

In Clause 245, Amendments 6 and 7, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clause 245, as amended, stand part of the Bill. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clauses 246 to 262 stand part of the Bill en bloc. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

In Clause 263, Amendment 8, the question is that this amendment be agreed to. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clause 263, as amended, stand part of the Bill. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clauses 264 to 310 stand part of the Bill en bloc. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

In Clause 311, Amendment 9, the question is that this amendment be agreed to. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clause 311, as amended, stand part of the Bill. As many as are of that opinion will say “content”; the contrary “not content”. The contents have it.

The question is that Clauses 312 to 329 stand part of the Bill en bloc. As many as are of that opinion will say “content”; the contrary “not content”.

The contents have it.

I think we have now got through a major part of the Clauses of the Bill, but we have an awful lot more of these questions that I must put. Can we therefore turn to the Fourth Group of Parts? These are the parts that deal with further powers of the court and the types of order that can be made. I was going to ask if the witnesses wished to add to anything to what they have already said on this point, or members of the Committee had any questions they wished to ask of the witnesses. Can I therefore address the various questions that arise on this Group of Parts?

The question is that Clauses 330 to 352 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 353, Amendment 10, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 353, as amended, stand part of the Bill. As many are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clauses 354 to 375 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 376, Amendment 11, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 376, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clauses 377 to 379 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

Can I now turn to the Fifth Group of Parts, Parts 12 and 13? This covers Clauses 380 to 406. These deal with miscellaneous provisions such as time to pay, alteration of the times of sentences and the commencement of sentences. I will again ask the question as to whether any of the witnesses have any comments on this part of the Bill, or whether any members of the Committee wish to ask any questions of the witnesses about this detailed part the Bill.

The first question is that Clauses 380 to 396 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 397, Amendment 12, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary

"not content". The contents have it.

The question is: Clause 397, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clauses 398 to 406 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

I now turn to the final parts of the Bill before turning to the Schedules. This is the Sixth Group of Parts, Part 14. It covers Clauses 407 to 420. They are supplementary and interpreting provisions. I was going to ask if the witnesses wish to add anything to what they have already said in relation to these particular Parts of the Bill. Do any Members have questions about this Part of the Bill or any question on the Clauses in this part of the Bill?

Professor David Ormerod: Without wanting to prolong proceedings, could I labour the point that the code has to be seen as a living document? I wanted to refer simply to a statement by Lord Gardiner, who created the Law Commission of course back in 1965, writing a few years later of his ideal statute. He said, among other things, that it would be written in ordinary simple words and so on, and that, "It will of course be axiomatic that you never have another Act on the same subject at the same time; you simply amend the code".

Q19 **Chair:** I am very grateful to you for making that point. It has least given me a chance to have a glass of water. It is a point very well made. I keep on referring back to the Powers of Criminal Courts (Sentencing) Act, which was intended to do the same as this but did not succeed. Are there any questions arising out of what Professor Ormerod said?

Can I turn to the questions that must be put about this Group of Parts and clauses?

The question is that Clauses 407 to 413 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 414, Amendment 13, the question is that this amendment be agreed. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 414, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 415 stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 416, Amendments 14 to 18, the question is that these

amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 416, as amended, stand part of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Clause 417, Amendments 19 to 25, the question is that these amendments be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clause 417, as amended, stand part of this Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Clauses 418 to 420 stand part of the Bill en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

I now turn to the Schedules in the Bill. We have had extensive discussion about the way in which some of the Schedules operate. Do the witnesses want to add anything about the Schedules, or the way in which they are intended to work? I was going to ask the members of the Committee whether they had any questions about the Schedules or any of the amendments that are proposed, bearing in mind the extensive nature of the amendments to the Schedules. There are now a whole series of questions, as you can see.

The question is that Schedules 1 to 3 be the First, Second and Third Schedules to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 4, Amendments 26 to 30, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 4, as amended, be the Fourth schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 5, Amendment 31, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 5, as amended, be the Fifth Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 6 be the Sixth Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 7, Amendments 32 to 34, the question is that these

amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 7, as amended, be the Seventh Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 8, Amendments 35 and 36, the question is that these amendments be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 8, as amended, be the Eighth Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 9, Amendment 37, the question is that this amendment be agreed to. Content as many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 9, as amended, be the Ninth Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 10, Amendments 38 to 40, the question is that these amendments be agreed en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 10, as amended, be the Tenth Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedules 11 to 15 be the 11th to the 15th Schedules to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 16, Amendments 41 to 42, the question is that these amendments be agreed en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 16, as amended, be the 16th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 17, Amendment 43, the question is that this amendment be agreed to. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 17, as amended, be the 17th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedules 18 to 21 be the 18th to 21st Schedules to the Bill. As many as are of that opinion will say "content"; the contrary

"not content". The contents have it.

In Schedule 22, Amendments 44 to 50, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 22, as amended, be the 22nd Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 23, Amendments 51 to 53, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 23, as amended, be the 23rd Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 24, Amendments 54 to 131, the question is that these amendments be agreed en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 24, as amended, be the 24th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 25, Amendments 132 to 134, the question is that these amendments be agreed en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 25 be the 25th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 26, Amendments 135 and 136, the question is that these amendments be agreed en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 26, as amended, be the 26th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 27, Amendments 137 to 151, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 27, as amended, be the 27th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

In Schedule 28, Amendments 152 to 162, the question is that these amendments be agreed to en bloc. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 28, as amended, be the 28th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

The question is that Schedule 29 be the 29th Schedule to the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

We have one more to do.

The question is that this be the Title of the Bill. As many as are of that opinion will say "content"; the contrary "not content". The contents have it.

Thank you all very much indeed. We have a couple of things that we must do. The first is that we must make a report to each House. It is suggested that the report is normally in a very standard format. A draft of it was circulated in the event that we approved the Bill, and it is to say:

"The Committee has considered the Sentencing Bill that was referred to it. The Committee has heard evidence on the Bill and is of the opinion that the Bill is pure consolidation and represents the existing law. The Committee has made amendments set out in the Annexe to the report to improve the Bill's form. There is no point to which the special attention of Parliament should be drawn. If this report is agreed to, it will be the first report of this Joint Committee in the Session 2019 to 2021."

Are Members content with that report, which is in a very formal standard form way? The contents have it.

Might I ask Maria Eagle if she would be kind enough to present the report to the House of Commons and to report on the minutes of the proceedings to the House?

Maria Eagle: Certainly. I will do that.

Chair: May I ask the leave of the Lords Members that I might make a report to the House in those terms? The contents have it.

I conclude by thanking everyone for their patience and endurance in dealing with what must be one of the most complicated consolidation Bills. I am not sure that it would go back quite to rival Lord Birkenhead's attempt to sort out land law, but I hope at least we have made some steps to sorting out sentencing law, and that the practical steps will be honoured and carried through, and that Parliament will do what it is meant to do and alter this code only when changing sentencing. Perhaps someone, at some other time, will look at trying to see if we can simplify the code, but none of that is for us.

Thank you all very much indeed. May I again in public thank the staff of the Joint Committee for the huge amount of work that they have done in enabling us to consider the Bill so expeditiously and, once again, thank

the expert witnesses for their attendance upon us today, for the very careful preparation they have made, and for the huge volume of extraordinarily time consuming and difficult work they have done over the preceding years?