



LIAISON COMMITTEE

Uncorrected oral evidence: Review of Investigative and Scrutiny Committees

Wednesday 13 June 2018

11.30 am

Watch the meeting

Members present: Lord McFall of Alcluith (Chairman); The Earl of Courtown; Lord Foulkes of Cumnock; Baroness Hayter of Kentish Town; Lord Lang of Monkton; Lord Smith of Hindhead.

Evidence Session No. 9

Heard in Public

Questions 69 - 73

Witnesses

I: Sir David Bean, Chairman, Law Commission; Professor David Ormerod, Law Commissioner for Criminal Law and Evidence, Law Commission; Jessica de Mounteney, Law Commission.

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Examination of witnesses

Sir David Bean, Professor David Ormerod QC and Jessica de Mounteney.

Q69 **The Chairman:** Good morning and welcome to the Committee. Could you identify yourselves for the record, starting with Professor Ormerod?

Professor David Ormerod QC: I am the Law Commissioner responsible for criminal law.

Sir David Bean: I am a judge in the Court of Appeal and I am the Chairman of the Law Commission.

Jessica de Mounteney: I am parliamentary counsel to the Cabinet Office, currently on secondment to the Law Commission.

The Chairman: As you know, we are undertaking the first review of committees for 25 years and it might be another 25 years before we review our committees again. Given that situation, we are looking for your advice as to the way forward on these issues. Do you have any general observations on that to begin with?

Sir David Bean: The committee that we would particularly like to address you on is the Special Public Bill Committee which is constituted ad hoc for certain law reform measures. There are other committees that we have had interaction with, for example the Constitution Committee, but you know all about them. The Special Public Bill Committee is not very well-known, even among parliamentarians, and perhaps we could say a word about that, either now or later in your questioning.

The Chairman: We will do it later. I think we have a supplementary on this one.

Baroness Hayter of Kentish Town: It may be that this will bring us on to both questions. I am interested in what it is for your work that the House of Lords Committee most offers. If you can imagine we were unicameral or an elected House, what would be missing from your work? In a sense, that might bring you to that question.

Sir David Bean: As you know, our work consists of law reform in areas that are not party-politically controversial. We have the problem certainly at the other end of the Corridor that not many people are interested in what we do and it is not considered justified to take up whipped Floor time in either House. This problem is not short term. It is nothing to do with Brexit, although that makes the problem worse. For decades there has been a problem with getting parliamentary time for law reform that will never feature in anyone's manifesto but which happens to need primary legislation. In this House there was the Jellicoe procedure in the 1990s, but that fell into abeyance. In 2008 this House agreed to a new special procedure, initially on a trial basis, and in 2010 the House voted to establish it permanently.

Typically, the Committee consists of 12 Members of the House of Lords. It hears evidence from witnesses to assure itself that the Bill is indeed uncontroversial and to explain anything that the Committee considers needs explaining. The Committee goes through the Bill clause by clause in the usual way and reports to the House. Report stage is taken on the Floor, but by this time the heavy lifting has been done by the Committee. We think this is a valuable way of considering the sort of Bill which justifies detailed attention from 12 people but does not warrant detailed attention from 800 people. It is particularly valuable when, as you know at the moment, the House is rather preoccupied with more controversial legislation—but, even when times are less remarkable than at present, it is useful. Whether the pressure of mainstream business is great or small, it is surely possible to find 12 members of a House of 800 who can give their time to serve on the Committee. We think it is a very valuable procedure.

Baroness Hayter of Kentish Town: How would it work if we were an elected House? How much do you rely on those 12—and, forgive me, I do not know who the 12 are at the moment, which shows how right you are about us not knowing enough.

Sir David Bean: Perhaps I might take up that point straightaway. It is not a permanent committee. It is constituted ad hoc each time the House authorities and the government business managers agree that a Law Commission Bill should be introduced into this House and that the procedure should be used. The 12 members are found for that Committee, and the next year it will be a different Bill and a different Committee. I am sorry to interrupt.

Baroness Hayter of Kentish Town: Do you rely on a lot of rather expert legal—using the shorthand—people, and, if we were an elected House, would we still be able to fulfil that role, or do you just need good political people, whom you would get by whatever process our House was put together?

Sir David Bean: The Special Public Bill Committee does not consist entirely or even mainly of lawyers. It is often chaired by a retired judge. The composition of the Committee is agreed, I understand, through the usual channels, with a certain number of Conservatives, Labour, Liberal Democrats and Cross-Benchers. There are rules about what constitutes a conflict of interest and so on, but the idea is to have 12 people who are interested in the subject and can make a contribution.

You asked what would happen if you were an elected Assembly or if this place were unicameral. The Scottish Parliament has recently introduced a form of special procedure. The Law Commission of England and Wales's writ does not run north of the border. There is the Scottish Law Commission, and I am sure it could tell you more if you wanted the details. In that unicameral elected body there is a Delegated Powers and Law Reform Committee, and in the last three years some Scottish Law Commission Bills have been taken through that procedure.

Q70 The Earl of Courtown: That is very interesting, but I will move on now to the Joint Committee on Consolidation Bills. Do you have any comments on its work? What can we learn from the Welsh and Scottish experience about timetabling consolidation Bill work?

Sir David Bean: I do not have any personal experience of consolidation Bills. My colleague Jessica de Mounteney of the Office of the Parliamentary Counsel, seconded to us, does from past work in that office. As you will appreciate, consolidation Bills have gone out of fashion. In the 40 years up to the end of 2006 there were more than 200 consolidation Acts. Since New Year's Day 2007 there have been only two. Not many people know that. The Joint Committee is, as I understand it, constituted at the beginning of each Parliament, but it has not had much work to do. There was the Charities Act 2011 and the Co-operative and Community Benefit Societies Act 2014, and that is it.

We hope very much that next year Parliament will have before it a big consolidation Bill to do with the law and procedure of sentencing, about which Professor Ormerod can tell you anything you would like to know. I will put it this way: that is phase two of the parliamentary process. The difficulty has been that, before a consolidation Bill can be introduced, there has to be pre-consolidation paving work. That has normally historically been done by adding a couple of clauses to a passing government Bill on a connected subject and then the paving clauses go through in no time at all. This year there has not been a criminal justice Bill before your House, or the other place, and so we are trying to find ways of getting the paving clauses introduced before the consolidation committee can do its work. As I say, David can tell you more about this, but that is the only current consolidation project.

Professor David Ormerod QC: Could I add something in relation to consolidation? I think it is often undervalued. I am not sure that the parliamentary and committee process can do much to enhance the realisation of that value. To take the Sentencing Code project as an example, it does far more than bring together all the law in one place, although that of course has great benefit. In doing so, it reduces the complexity of the law and reduces the phenomenal rate of error that is currently occurring in the law. In doing so, it renders the law more accessible, so it has a positive benefit in terms of public confidence and huge financial savings. Ministry of Justice analysts estimate that over £250 million might be saved by consolidation over the next decade. Given that it will go through a committee and not be a great burden on parliamentary time, that is a huge saving and a very efficient process. As the Chairman says, that is inhibited by the current inability to secure these pre-consolidation amendment clauses in a government Bill with sentencing in its scope.

Sir David Bean: We would suggest, if I might go back to the last subject, that it would be very suitable indeed for the Special Public Bill Committee, because the paving clause Bill has, in effect, one substantive clause, which David could tell you about, and all the rest is the mechanism of getting the legislation into exactly the right shape where it

can be the subject of a consolidation Bill. That would be a wonderful thing for a Committee to do because the remainder of the House, let alone the other place, would not be interested.

- Q71 **Lord Lang of Monkton:** I am very sympathetic on this consolidation issue and appalled by the figures you have just quoted, which are in your paper as well. I would like to ask Professor Ormerod and Ms de Mounteney a question in view of what you have said about this, Sir David. In your paper you touch on two possible ways of accelerating the process. You talk about codification rather than consolidation and technical reform. You also talk about the joint committee producing some pre-consolidation amendments which could be put through, I think, although you do not say so, secondary legislation. Perhaps you could comment on both those against the instinctive reaction that I have, which is that people will say, "Hang on a minute, this is going to change the law". People will be suspicious of it. They will feel that you are taking shortcuts, cutting things out and possibly changing the law. On the secondary legislation point, if I am right that that is what you are considering, you are going into territory where there has been a huge battle raging, as I am sure you know, between the Executive and Parliament over what we see as the transfer of powers from Parliament to the Executive through secondary legislation and statutory instruments. Would you like to comment on that?

Jessica de Mounteney: I can comment from a technical point of view. I did a consolidation relating to the National Health Service way back in 2006, which brought to an end the last of the big tranches of consolidations. In relation to that project, we had a power to make pre-consolidation amendments by order. The scrutiny of those amendments was undertaken by the Joint Committee on Statutory Instruments. I recognise that the landscape has changed quite considerably since 2006 and, obviously, the DPRRC is very jealous of this and of the other House losing any power. I would say in relation to pre-consolidation amendments that they have a fairly defined scope. They are allowed only for the purpose of facilitating consolidation. Although that does not have any precise definition, it has a clearly understood parameter. In relation to the National Health Service consolidation, I think we made something in the region of 150 to 200 very technical amendments, which were cleared by the JCSI prior to the main consolidation going through. Certainly at that time—and it was 12 years ago—there was no concern that that was being used in any underhand or devious way.

Lord Lang of Monkton: I am sure it would not be the intention, but it is what people might perceive.

Jessica de Mounteney: It is. I suppose the only answer is that one would hope that consolidation is a different world from the world where the Houses would be concerned about those kinds of amendments. There is certainly no guarantee of that, because the political landscape has undoubtedly changed considerably in the intervening period.

Professor David Ormerod QC: As the Chairman said, and Jessica has emphasised, the Sentencing Code project divides into two parts. The bulk of the work—450 clauses or so—is pure consolidation, and I cannot see that being considered to be controversial because it is a re-enactment of something that Parliament has already enacted, and nothing untoward should be seen in re-enacting it in a purer form, in a clearer, more robust structure.

The second element which comes first in time is that we need these pre-consolidation amendment clauses. They are both technical and uncontroversial and would seem therefore to be ideal candidates for the Special Public Bill Committee. There is a forest of very technical detail about the circumstances in which amendments will need to be made to facilitate the consolidation itself. They are uncontroversial in the sense that they would not give rise to a change in any maximum penalty. They are not designed to give rise to any change to the prison population. They are designed simply to facilitate a clearer statement of the law in the consolidation Bill, subject to the one innovation we have introduced which we have described as the “clean sweep”, which allows for the layers of historic sentencing legislation to be removed so that anybody dealt with in the criminal court after the Sentencing Code is introduced will be sentenced under that code, irrespective of the date of the commission of the offence.

We have consulted extensively on this and there is unanimous support for it. It allows us to break the cycle of this layering of sentencing legislation. It is very technical and it is completely uncontroversial in political terms, so it would seem to be a very good candidate for the Special Public Bill Committee. The problem is that sentencing is a controversial subject—but that does not mean, of course, that the clauses have to be controversial or that the consolidation itself has to be controversial.

Q72 Lord Lang of Monkton: I raise it simply to say that if you are proceeding in these direction, it would be very important in the way you present it to emphasise the fact that there is absolutely no underlying motive. The Constitution Committee recently interviewed the Lord Chancellor and pressed him on consolidation issues, and I know that you are interested as well, particularly on the sentencing side of things. What are the main parliamentary barriers to consolidation, other than the ones that you have mentioned? Is it the fact that it is very time consuming, that it involves a lot of people and that it is costly to do, or are there other issues that we ought to address?

Professor David Ormerod QC: There are probably two parliamentary barriers. The one that we have just discussed—finding a vehicle for the pre-consolidation amendment of clauses—is the most acute for the Sentencing Code project. Finding a government Bill with the relevant subject matter within its scope is a particularly challenging prospect at the moment, and use of the Special Public Bill Committee could resolve that.

The second, which I have already mentioned, is that consolidations are undervalued and that greater awareness of the financial and other savings and the efficient use of parliamentary time might assist. I am not so sure that that is a matter for parliamentary committee work. Rather, there should be greater awareness within government and Whitehall departments of the value that consolidations can bring.

Lord Lang of Monkton: You have not tackled the immigration legislation recently.

Sir David Bean: We have not. We have been asked by the Home Office to do a scoping project on streamlining the Immigration Rules as part of our new programme. As I am sure you know, Lord Lang, that is not primary legislation; it is a very special type of secondary legislation. The idea is that it should be possible to make the Immigration Rules, whatever their political content, simpler, easier to use and easier to search. Further ahead, there is also a need for the immigration primary statutes to be consolidated. That is not going to happen in the next year or two. You can think of as many reasons as I can for why substantive immigration law may change in the next year or two, but at that point there is a very good case for consolidating that—and that would be an old-fashioned consolidation.

Lord Lang of Monkton: That would take a long time.

Sir David Bean: Yes.

Lord Foulkes of Cumnock: You said that consolidation is technical and uncontroversial, but some of my colleagues do not agree. How do you convince them?

Sir David Bean: It is the most technical form of legislation that there is. Consolidation in the Westminster definition, in this building, means changing substantively nothing. There are very strict rules about what changes can be made, which Jessica knows better than I, but, broadly, if you are referring to a body or a form of order or something that no longer exists, you can change that, and you can change dates and so on, but you substantively you can change nothing.

I have had an exchange of correspondence with Lord Adonis, who did a blog suggesting that sentencing procedure law should not be consolidated because that might lead to more people being sent to prison and the effort should be devoted to sending fewer people to prison. As David told you a moment ago, our sentencing procedure consolidation should not result in any increase or decrease in the prison population, so I wrote back to Lord Adonis to explain why I thought he was wrong. It is, with respect, not a good argument against consolidation to say, "Well, you ought to be changing the law substantively". That is a matter for you folk and the other place. However, we think the law ought to be simpler, easier to find, easier to look up and easier to apply.

Lord Foulkes of Cumnock: So it is a rule that when you consolidate you

cannot change anything substantively, as it were.

Sir David Bean: Yes.

Lord Foulkes of Cumnock: Is the reduction in the number not a function of Brexit? Is it not twofold? First, there is this involvement of EU law into British law. I think David Davis said that 6,000 civil servants are working on Brexit, which presumably means that they cannot do anything else.

Sir David Bean: I can best respond to that by saying that the Law Commission has scope to do law reform work that other public servants do not have time for at the moment, for the reasons you have just set out.

Lord Foulkes of Cumnock: So you could do it.

Sir David Bean: We can do some work. We should not do politically controversial work, but there is some reform work in our programme just begun which Whitehall departments and their legal departments simply do not have time for.

The Chairman: Professor Ormerod, can I ask you a potentially silly question? If we go back to paragraph 17, you say: "To go back to sentencing, there has been an independent survey that suggests that around 30% of appeals in the Court of Appeal Criminal Division on sentencing involve an unlawful sentence. That is because of a mistake by the judge as to the powers available in relation to the sentencing determination".

If I have it correct, the powers are there but they are spread out. What you are doing by consolidation is bringing them all together. Why the judges are making those mistakes is beyond me. Is it because the law is so complex that the judges do not understand it?

Professor David Ormerod QC: It is in part that. To explain the survey, it was a survey of 262 appeals in relation to sentencing review and, of those, 95 or 96 were found to have an unlawful sentence. There was no disagreement between the appellate court and the trial judge about the tariff or the length of the penalty that could be imposed but, rather, whether the power existed to impose that penalty at all. Part of the problem is the volume. There are over 1,300 pages of primary legislation dealing with sentencing procedure spread across several centuries of legislation.

Part of the problem is systemic. In criminal justice the way we legislate on sentencing is year on year to layer different criminal justice Bills, each with their own transitional provisions. You will introduce a Bill in 2000 and in 2002 another Bill will introduce amendments to what has become the Act, but of course the amendments will take effect only in relation to people who are dealt with after a particular date.

In any particular case, a judge is dealing with a series of parallel sentencing regimes that operate within a specific date range, and the risk of applying the wrong one is a significant cause of that high number. By bringing all the legislation together we reduce that risk, but we have done far more than that in the code. We have restructured the legislation having consulted extensively with the judges. Over 1,400 people were consulted in the course of our consultation. We structured the Bill in a way that will work best for judges and practitioners. We decluttered the Bill, if I can use that expression, by moving more of the technical material into schedules, leaving the primary provisions to do the work.

The Chairman: I cannot get away from my point that the complexity is leading to a lack of understanding.

Professor David Ormerod QC: Yes, in part; the complexity and frequency of amendment.

The Chairman: The Office of the Parliamentary Counsel has expressed good law as that which is "necessary, clear, coherent, effective and accessible". It seems as if people are not listening to you.

Jessica de Mounteney: The main issue from a drafter's point of view is resource. You would probably get the answer from almost any civil servant that in an ideal world there would be lots of resource available for consolidating, but, unfortunately, in political terms at the moment there are probably more pressing matters, because it takes a long time to consolidate.

The Chairman: Could the Law Commission not do a submission and say, "Look, we'd better get ahead with this politically", because if 30% of our appeals are unlawful, there is a lot of human misery and cost there?

Sir David Bean: You are quite right. I sit in the Court of Appeal Criminal Division and I am amazed at how routine it is that a mistake has been made that nobody has spotted at trial: not the trial judge, not the defence counsel, not the prosecution counsel. An appeal comes to our court where the defence is saying, "Five years is too long. It should have been three", or something, and the staff of the Criminal Appeal Office, who know about these things, point out that the sentence was not just, arguably, too long but was unlawful. This is something of a scandal. It has been pointed out time and time again. Our sentencing procedure consolidation project is designed to meet it.

As to the case for consolidation more generally, we have made it, we constantly make it, but it must be said, as Jessica has just said, that consolidation is an expensive process because parliamentary counsel are a scarce and expensive resource. Once it gets to your House and the other House as a consolidation Bill, it takes up almost no parliamentary time except in the Joint Committee—traditionally about five minutes in each House—but there are funding implications of doing consolidation projects. Our core funding has been very substantially cut in the last eight years and if we were starting now we could not possibly undertake

a project such as sentencing procedure consolidation unless the request to do a particular consolidation came with funding.

The Chairman: We are undertaking a review of committees. We want to ensure that they are fit for the next five, 10 or 20 years as a result of it. It seems to me that there is a wider implication here for the review of committees, because we have established a Joint Committee on Consolidation Bills and yet we are going along with the same old practice. We need something from you as we go along—further papers on this—so that we get an understanding, the House of Lords can carry out its business in an efficient way, and we end up with the definition that the Office of the Parliamentary Counsel gives of good law. Do you accept that? If you do, we would look for further information from you.

Sir David Bean: We do, and we would be very happy to correspond further with you, but the short answer is: please cherish the Special Public Bill Committee procedure and use it, because there is so much that we do that can best be handled by a committee of 12 rather than a House of 800.

Professor David Ormerod QC: Can I add one supplementary point in relation to the complexity and the systemic problem of the layering of legislation that I described? Once the consolidation has occurred and there is a new Sentencing Code, as I hope there will be, it is important to guard against that code becoming contaminated, as it were, by subsequent legislation that introduces new criminal justice and sentencing procedure that does not take effect through the code.

I would encourage parliamentarians that whenever there is an amendment and whenever there is a new sentencing procedure after the code has been introduced, it takes effect through the code by substituting, repealing and amending the code so that there is only ever one primary source. That will go a long way to reducing the risk of error. That is a burden placed upon Parliament, whether by committee or otherwise, to protect the purity of a code once it has been produced.

The Chairman: I think it is well worth us hearing further on that, so that we can all play our part in there being more efficiency and better law as a result.

Q73 **Baroness Hayter of Kentish Town:** I have two separate questions. The first is to Professor Ormerod. You were talking about the rules on consolidation whereby you can only take out bodies that no longer exist, and things like that. Clearly, there is a move to having gender neutral legislation. Are you able to do that?

The separate different issue, which has already been touched upon by Lord Lang, is immigration. We are about to have a new immigration Bill and it is going to become highly political. I am interested to know how on earth you can clear up the rules at a time when there is a very hard-fought new Bill going through.

Sir David Bean: I will take the second point and perhaps ask Jessica to answer the first point.

On the second point, at the moment we are at the scoping stage. We have been asked to take a chunk of the Immigration Rules and produce a draft of what they might look like if they were cleaned up. If that finds favour, following consultation we might be asked to do a draft of the whole lot. It is a big project. If you have an immigration Bill before you in the current Session, that will be over and done with long before we get to redrafting the whole of the Immigration Rules, if indeed we do.

Jessica de Mounteney: On the other point about gender-neutral drafting, one of the great things about consolidating is that you have the freedom to improve the language and make it as modern and clear as you like. The only thing as a drafter that you have to represent to the Joint Committee on Consolidation Bills is that you have not changed the law. A consolidation Bill will often look very different from its previous component parts, but as long as you have not changed the law you can do a lot. Yes, you would always consolidate in gender-neutral terms.

Baroness Hayter of Kentish Town: Automatically.

Professor David Ormerod QC: That has been very well received.

Jessica de Mounteney: New legislation is always drafted in gender-neutral terms now.

The Chairman: If there are no further points, can I thank the three of you for your evidence, and particularly for your paper, which has been very helpful? If we can continue this dialogue, I think that will be very helpful for us all. Your evidence has been excellent. Thank you very much.