The Law Commission welcomes the Constitution Committee’s inquiry. We have been advised that the Committee is at present conducting the first part of its inquiry dealing with the drafting of legislation and that issues relating to the passage of primary legislation through Parliament, or the approval of secondary legislation by Parliament, will form the second part of the inquiry. When that stage is reached we would wish to make a submission to the Committee about the Parliamentary process as it affects the Commission’s work, in particular the special procedure for Law Commission Bills.

The founding statute of the Law Commission (and of the Scottish Law Commission) was the Law Commissions Act 1965. Section 3 (1) of that Act includes the following:

“It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete or necessary enactments, the reduction of separate enactments and generally the simplification and modernisation of the law, and for that purpose - …

(d) to prepare from time to time at the request of the Minister [the Lord Chancellor] comprehensive programmes of consolidation and statute law revision and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister. …”

Consolidation

Over the half century since the 1965 Act was passed the value of consolidation has in our view if anything increased. This is for two reasons. The first is that unlike a Queen’s Printer’s copy, a statute in digital form can be readily updated when the legislation is amended. Secondly, statute law is accessible free of charge on the internet, so that (provided that the website is kept up to date) a single Act of Parliament containing all the statute law on one subject can be a useful resource available to the public as well as to lawyers.

There are a number of areas in which consolidation would be worthwhile, including immigration law about which previous witnesses have given evidence to the Committee. It is striking to note that in the period between the 1965 Act and the end of 2006 Parliament passed over 200 consolidation Acts, but in the last ten years there have only been two such Acts: the Charities Act 2011 and the Cooperative Societies and Community Benefits Act 2014. It appears that there is now little support for devoting the scarce and expensive resource of Parliamentary Counsel to the drafting of traditional consolidations, although, as noted by the Leader of the House of Commons in his evidence to your Committee’s inquiry, the Office of the Parliamentary Counsel guidance continues to highlight the need for legislation to be coherent and accessible to the user and mentions “where possible consolidating legislation” as one way of achieving this objective.

The proposed Sentencing Procedure Code

In its early years the Law Commission embarked on some massive codification projects, for example codification of the law of contract, which proved to be impracticable. More recently
the great majority of the Law Commission’s work has been concerned with law reform, but
the Commissioners have not lost sight of our statutory duty to promote the simplification and
modernisation of the law. An important current project, which forms part of the
Commission’s Twelfth Programme approved in 2014 by the then Lord Chancellor, the Rt
Hon Christopher Grayling MP, is the preparation of a Sentencing Procedure Code. We
emphasise that this Code will not be a set of guidelines, which are the responsibility of the
Sentencing Council; it will deal with procedural matters. It is not designed either to increase
or to decrease the prison population, but to rationalise and streamline a large mass of
statutory provisions which in their current form run to 1,300 pages.

The enactment of the Code will be achieved in two stages. The first stage will be the
introduction, either as a separate Bill or as part of a Government programme Bill, of a small
number of pre-consolidation or paving clauses. The second stage will be a Consolidation Bill.

The pre consolidation or paving provisions required fall within two categories. The first is a
standard pre-consolidation amendment power allowing minor changes to be made to the law
to produce a satisfactory consolidation. Such powers commonly precede a major statutory
consolidation, see for example the National Health Service Reform and Health Care
Professions Act 2002, s. 36. The draft Statutory Instruments to make the changes are
conventionally published prior to enactment of the power in order to provide guidance on how
the power granted is intended to be used.

The other paving provision, to run in parallel to this, is a clause to implement the
recommendations on transition we made in our report “A New Sentencing Code for England
and Wales. Transition – Final Report and Recommendations”: sweeping away historic
complexities of sentencing procedure which are currently retained and to which judges are
compelled to have regard in many cases. This would have the effect that, in most cases, the
law set out in the Code would apply in all cases, irrespective of the date of the offence. The
one exception, which reflects a rule well established in both domestic law and under Article 7
of the ECHR, will be that no defendant can receive a sentence greater than the statutory
maximum which applied at the time the relevant offence was committed.

While the Commission is actively working to simplify and streamline the law in the course of
this project, the Sentencing Procedure Code will be a very substantial piece of legislation. In
addition to the benefits which will be achieved through bringing all of the law on sentencing
into a single place, and the ‘clean sweep’ approach to transitional provisions and historic
layers of law, the Code provides a flagship opportunity for championing ‘good law’
initiatives and experimenting with innovative ways of using technology to improve the
experience of the users in navigating legislation.

Technology and the new Code

The Commission is currently in active discussion with the National Archive regarding ways
in which the legislation.gov.uk platform or something similar to it could be harnessed to
explore new ways to allow scrutiny of, and interaction with, draft legislation. The current
intention is for a draft version of the new Sentencing Procedure Code to be hosted online for
a lengthy period of pre-legislative public scrutiny, in a format which clearly shows users how
the law would look if enacted, and encourages user-friendly interaction, for example, through
the use of tables, flow-charts, and filtering tools.
For instance, the drafting of the Code includes frequent signposting provisions, designed to assist users by alerting them to the existence of related provisions whether elsewhere in the Code or in other legislation. When used digitally, such signposts could link users at the click of a button to that other material, and users might be able to drag some or all of the related information onto the same screen as the initial provision they are viewing, for instance by hovering the cursor over the link. Filtering tools could enable users to see more or less background detail depending on a user’s purpose and needs. Users could choose to hide provisions which are limited in their geographical extent if they do not apply to the case. Alternatively, users might choose to view or hide details such as commencement information; provisions that are not yet in force; detailed tables of origins etc. if not needed for their purpose, or if conducting quick initial research.

This functionality dovetails neatly with the novel approach to legislative ‘meta-information’ which is informing the drafting of the Sentencing Procedure Code. On the traditional approach, important information relating to the relevance of a legislative provision (such as its commencement date, and whether it has retrospective effect) is often hidden in commencement orders and other secondary legislation, whereas information not of current importance to most users sits alongside the primary law in force, potentially distracting an unwary user (and on occasion even the wary judge or lawyer). The drafting of the Code is being undertaken wherever possible to remedy these defects of the traditional approach, for instance by including commencement dates on the face of the primary legislative provisions, and relegating un-commenced amendments to Schedules until they are brought into force, when they will be promoted to the body of the Code. Where the limitations of current legislative drafting conventions prevent us from fully realising such ambitions, we hope to use the digital medium through which most users will engage with the law to help us achieve the same ends, by allowing users to hide distracting information and highlight key features such as the dates on which, and places in which, the law is actually in force.

These are examples of the way in which technological tools can be harnessed to improve ease of navigation of legislation, and which are informing our approach to drafting the new Sentencing Procedure Code. Depending on the response on consultation, and during user testing, we hope that these and many more technologies can be employed which will make the law of sentencing clearer and more accessible.

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