

Summary of recommendations of LC365

The Law Commission has proposed a “clean sweep” approach to sentencing law. This will stop sentencing judges from routinely having to look back to old versions of the law when conducting sentencing exercises, by applying the latest rules to all sentencing exercises except where fundamental rights considerations demand something different. In those cases, the “old” law will still be in the Code, but with the precise conditions of application clear on its face, rather than in an obscure commencement order.

The Law Commission of England and Wales recommends that:

1. The New Sentencing Code for England & Wales has effect for all sentencing hearings begun on or after the date on which it is brought into force. A sentencing hearing begins when the offender is convicted or pleads guilty.
2. The application of the new rules of procedure in the sentencing code to all future cases is subject to some important limitations so as to respect Article 7 ECHR and common law rights against retrospective legislation, in particular that:
 - a. The total penalty being imposed, taken as a whole, should be no more severe than the maximum which could have been imposed for the offence(s) at the time of their commission.
 - b. New laws creating minimum sentences should only apply to cases where the offence for which the court is sentencing the offender occurs after they have been brought into force.
 - c. Any new laws created which mandate some increase in sentence because of the offenders’ past offending should only apply to cases where offence for which the court is sentencing the offender occurs after they have been brought into force.
 - d. New laws creating types of sentences without identifiable last possible release dates should only be available in cases where the offence for which the court is sentencing the offender occurs after they have been brought into force.

The Code will have the benefit of dramatically reducing the amount of effective law, and make it much easier to work out what the applicable law in any given case actually is.

This solution was endorsed by consultees representing practitioners, the judiciary and academics:

Professor Andrew Ashworth QC: “I think the paper confronts the difficult issue of non-retroactivity in a way that is both practical and compatible with the current understanding of the European Convention on Human Rights.”

Bar Council: “We agree with the Law Commission’s analysis of Article 7 rights and the principle of non-retroactivity...therefore...provided the Article 7 rights of offenders remain protected, the New Sentencing Code should represent a ‘clean sweep’ so that sentencing options are included within a single document and apply from a particular point.”

Council of HM Circuit Judges: “In general terms we strongly support the proposal. The present state of sentencing law is a disgrace to our jurisprudence. It is totally unacceptable to have so much complexity and uncertainty that result from layer upon layer of statutes that have been brought into effect in a piecemeal fashion or have never been brought into effect at all...we agree with [the Commission’s analysis of] retrospective effect.”