Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **Last week a *French* court convicted Ian Bailey of an *Irish* murder in what surely must be the most bizarre and unprecedented case in the history of Irish criminal law. It also raises fears of a serious miscarriage of justice.**

- **Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services has published a report on police effectiveness, efficiency and legitimacy in 14 police forces. While it finds that most forces are coping well with increasingly complex and changing demands in the face of tighter resources, it also finds evidence of serious weaknesses across several forces.**

- **The Sentencing (Pre-consolidation Amendments) Bill 2019 has been introduced in the Westminster Parliament to pave the way for the introduction of a Code consolidating sentencing law and procedure in England and Wales. This will ultimately give effect to the recommendation emanating from a major Law Commission project that commenced in 2014.**

Prosecuting an Irish Murder in France

Extraordinary case

Last week, a French court convicted Ian Bailey in his absence and sentenced him to 25 years for murder. This is merely the latest step in what is surely the most bizarre and unprecedented case in the history of *Irish* criminal law. Although the trial, conviction and sentenced occurred in France, they all relate to an Irish murder that occurred in West Cork more than 22 years ago. The victim was a French woman, Sophie Toscan du Plantier, who was brutally beaten to death outside her holiday home in West Cork in the early hours of a December morning in 1996.

The Garda Síochána (the Irish police) very quickly settled on Ian Bailey as their prime suspect. He was (and still is) permanently resident in the local area. So, it was very much an Irish murder which, in the normal course of events, would be dealt with through the Irish criminal process. The manner and fact of its diversion through the French trial process raise profound concerns of a miscarriage of justice from the effects of a 'mixing and matching' of Irish and French criminal procedure. They also raise serious concerns about the manner in which the European arrest warrant (EAW) has been implemented in Ireland, and the role of the Irish government in facilitating the French trial of an Irish murder.

Insufficient evidence to charge

A critical feature of the French trial is that it was based essentially on the evidence gathered by the Garda investigation. The Irish DPP considered the evidence in the Garda investigation file on several occasions, and each time he decided that it

did not disclose sufficient credible evidence to warrant charging Bailey with the murder. Most unusually, the DPP at the time subsequently described the Garda investigation as "thoroughly flawed and prejudiced" against Bailey.

French prosecution

When it transpired that a prosecution was unlikely in Ireland, the French authorities asserted jurisdiction in the matter on the basis that, under French law, the murder of a French citizen anywhere in the world can be prosecuted in a French court irrespective of the nationality of the accused. Invoking the EU's mutual legal assistance arrangements applicable at the time, they requested the Garda investigation file on the case. Incredibly, this was granted by the Irish Department of Justice, even though it clearly concerned a domestic Irish crime which was still under active investigation by the Garda. Contrary to the Irish DPP's assessment of the evidence in the Garda file, a French examining magistrate concluded that it disclosed sufficient evidence to warrant charging Bailey with the murder.

Differences in national procedures

A vital point to note here is that the French magistrate's assessment of the evidence in the Garda file will likely have been conducted within the norms of French criminal procedure, while the DPP's assessment will have been conducted within the norms of Irish criminal procedure. The difference is instrumental not just in explaining why they reached such conflicting decisions, but also in generating a serious risk of a miscarriage of justice.

In Ireland the criminal investigation is essentially the exclusive preserve of the police who enjoy extensive powers and freedom to gather evidence in a loosely regulated environment. They are not supervised by an independent prosecutor or judicial authority. This, of course, enhances the risk of the police gathering evidence that is false or unreliable, and suppressing evidence that is favourable to the defence. The risk is offset by checks and balances that kick in later in the process in the form of relatively stringent admissibility rules and accusatorial procedures. These will help to filter out Garda evidence that is unreliable or gathered unfairly. The DPP will have conducted his assessment of the Garda file with these checks and balances in mind.

In France, by comparison, the police investigation stage is conducted under the direct supervision of a public prosecutor or investigating magistrate. This helps to minimise the risk of false or unreliable evidence getting into the police file in the first place. Equally, it renders it less likely that evidence favourable to the defence will be left out. Accordingly, there is not the same need to filter the evidence in the police file through stringent admissibility rules and accusatorial procedures. In effect, the checks and balances are distributed differently in the Irish and French criminal processes.

Effects of 'mixing and matching'

The problem in the Bailey case is that the police file was compiled under the loosely regulated Irish investigation and then transplanted unfiltered into the very different French prosecution and trial process. As such, it is hardly surprising that it received a wholly different interpretation there than that reached by the Irish DPP. This arbitrary 'mixing and matching' of two distinct criminal procedures distorts the organic integrity of each. When an element of one is taken out of its natural home-setting and placed in the alien environment

of the other, it can produce an unplanned, hybrid, criminal process.

There can be little doubt that Bailey has suffered unfairly through being subjected to such a hybrid process in which he was denied the benefits of the checks and balances that would have applied had he been dealt with exclusively under one or the other. This can be illustrated by a brief overview of the Garda evidence which was used to secure his trial and conviction in France, even though it was not sufficient to justify a prosecution in the Irish process under which it was gathered.

The primary evidence in the Garda file against Bailey consisted of his own informal 'admissions' to the murder, an 'eye-witness' identification of Bailey placing him near the scene of the crime in suspicious circumstances and third party allegations that Bailey new details about the murder before they were publicly available. None of these sources of evidence can withstand the scrutiny they would have received in an Irish trial. Indeed, they did not even withstand the scrutiny of the Irish DPP.

Informal Admissions

The Garda file includes statements from several witnesses apparently claiming that Bailey had made informal admissions to be the murderer in conversations with them. It is quite clear from those conversations, however, that the "admissions" were sarcastic (or black humour) comments that were not meant to be taken seriously. That is how Bailey explained them to the Garda, and that is how the DPP interpreted them. After examining all of the statements closely in their respective contexts, the DPP described them variously as: reeking of "sarcasm not veracity"; the "antithesis of an admission"; "dangerously unreliable"; or of negligible weight. Accordingly, none of the admissions can be described as being persuasive of guilt. If admitted in evidence at all, they would carry very little weight in an Irish criminal trial. Only one of these witnesses actually appeared to give evidence at the French trial. Nevertheless, the French court considered the statements to be cogent evidence of Bailey's guilt.

The 'Eye-Witness' Account

An eye-witness identification is notoriously susceptible to mistake, especially where it is a fleeting identification, or one made at night or in circumstances of low-visibility. In an Irish criminal trial, the judge must give the jury a warning about the risk of mistaken identity in respect of such evidence. The alleged eye-witness in Bailey's case did not see him committing the crime, nor even place him on the victim's property at the time of the crime. Instead, she claims to have seen a man, whom she later identified as Bailey, on the road near the victim's property in the early morning of the murder.

There were several factors which undermined the reliability and veracity of this evidence. The identification was made from a moving car at night on a dark country road. The person allegedly seen by the witness had his two hands up to the side of his face. The witness did not know Bailey at the time. She claimed that he was the same man that she saw outside her shop in the town a few days earlier, but Bailey did not match that man in height or build. She also claimed that she saw the same man on the road thumbing a life outside the town on the morning before the murder, but that man turned out not to be Bailey. It seems that she only identified the person as Bailey after having been shown a video of Bailey by gardaí for that purpose. Another concern is that the witness has always refused to identify the person

whom she was with in the car at the time, and initially lied in her statement to the Garda to conceal the fact that she was having an extra-marital affair with him. Bailey has always denied being anywhere near the victim's home at the time in question.

The combination of these factors, and others, led the DPP to conclude, unsurprisingly, that this key witness' testimony is unreliable. Subsequent events support that assessment. The witness subsequently withdrew her statement, alleging that it had been extracted from her under pressure by gardaí threatening to expose her extra-marital affair. In later Irish High Court civil proceedings, she proved to be a wholly unsatisfactory witness. When pressed on the many contradictions in her evidence, she said that "she was getting confused with fact and fiction" and was "mixed up". Shortly after that, the trial judge took the most unusual step in the presence of the jury of giving her a warning on the risk of perjuring herself. Nevertheless, the French court accepted her statement in the Garda file as cogent evidence of Bailey's guilt.

Prior knowledge of the murder scene

The Garda file also contained statements from a few journalists and others which the Garda interpreted as establishing that Bailey was in possession of prior knowledge and material relating to the murder which only the murderer was likely to have. The DPP considered that these statements simply did not match the independently established facts, and were exposed by those facts as being false, mistaken or unreliable. The DPP also found that the Garda file omitted other witness statements which exposed the evidential weaknesses in many of the key statements that were included. Once again, however, the French court attached significant weight to the latter as evidence of Bailey's guilt.

Forensic evidence

Bailey consistently denied any involvement in the murder. He cooperated fully with the Garda investigation, and voluntarily submitted to being photographed, fingerprinted and having blood and hair samples taken while in Garda custody. Despite the bloodied and frenzied nature of the violent attack in a briar strewn area that left about 50 wounds and briar scratches on the victim's body, no forensic evidence was found linking Bailey to the crime scene. Had Bailey been the killer it is inconceivable that he would not have left traces of blood, skin, clothing, fibres or hair at the scene. The Garda file did contain statements to the effect that Bailey was seen to have scratches on his arms in the days following the murder. The DPP, however, found that these were more consistent with Bailey's account that they were incurred by killing turkeys and climbing a tree to cut down the top for a Christmas tree. The French court, however, preferred the Garda version at face value.

Other evidential matters

It must also be said that the credibility of the case constructed by the Garda was undermined by some of the methods they used in the investigation. These included presenting Bailey publicly as a ruthless and unrestrained killer who might strike again in the local community. This depiction of Bailey is astounding given that the Garda did not present any cogent evidence linking him directly to the crime or as a murderous threat to the local community. The DPP considered that the Garda action could have played a part in witnesses re-interpreting innocent or innocuous conversations with Bailey as something

more sinister and indicative of his guilt. Separately, there is evidence that the Garda gave clothes, tobacco and money to a local destitute drug abuser in an attempt to persuade him to befriend Bailey to see if Bailey would say something incriminating about the murder. It would also appear that they attempted to apply pressure unlawfully on the independent DPP to have Bailey charged.

Equally disturbing is the fact that a substantial body of evidence in Garda possession has gone missing. Incredibly, this includes a blood-spattered gate recovered from close to where the body of the victim was found, a French wine bottle found in the field next to the murder scene, 139 original witness statements (including from some of the central witnesses) and five files on suspects (on Bailey, his partner and three other suspects). Several critical pages from the contemporaneous Garda record book of the progress of the investigation were deliberately and carefully cut out of the book while it was in Garda possession.

These aspects cast a serious cloud over the credibility of the Garda investigation and the evidence they compiled against Bailey. If he was tried in Ireland, they would be used effectively to discredit the prosecution case. Since they did not form part of the police file, they did not feature in the French trial.

Conclusion

What emerges from all of this is that the Irish police investigation into an Irish murder did not secure sufficient credible evidence against a suspect even to warrant putting him on trial in Ireland, let alone to secure his conviction. The legitimate and necessary checks and balances in Irish law and procedure would have avoided the suspect being convicted unjustly on the basis of the unadulterated police file. By lifting that file and inserting it unfiltered into the French prosecution and trial process, the checks and balances that would otherwise have been applicable to it are lost. Insofar as the French court seems to have accepted the 'evidence' in the Garda file at face value and isolated from the context in which it was obtained, it is difficult to avoid the conclusion that Ian Bailey is the victim of a serious miscarriage of justice.

The next step in this extraordinary case seems to be (another) French European arrest warrant (EAW) for Bailey's surrender to serve the 25-year sentence in France. That, in itself, presents quite an extraordinary situation. In effect, it will be asking the Irish High Court to surrender an Irish resident to serve a sentence of imprisonment in France for an Irish murder, in respect of which the Irish DPP has decided there is insufficient credible evidence even to charge him. The fact that such an application is even tenable can be attributed to the unusual nature of the EAW instrument, coupled with the even more unusual manner in which Ireland has implemented the relevant EU legislation in Irish law (a disturbing issue in itself, see https://www.irishtimes.com/opinion/ian-bailey-case-heading-towards-miscarriage-of-justice-1.3903137).

A further twist is added by the fact that the Supreme Court refused to surrender Bailey in 2012 pursuant to an EAW aimed at putting him on trial in France. The High Court emphatically rejected a second French attempt in 2017. Presumably, a third attempt will make its way to the Supreme Court, and possibly from there to the European Court of Justice or the European Court of Human Rights. Even after more than 22 years of oppressive investigation, litigation and an apparent miscarriage of justice, there appears no

end in sight to this bizarre and unprecedented case.

Assessment of Police Effectiveness, Efficiency and Legitimacy

HMICFRS report

A few weeks ago, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS, formerly Her Majesty's Inspectorate of Constabulary) published a report on emerging themes from the first group of PEEL inspections of police forces in England and Wales for 2018/19. PEEL refers to police:

- *effectiveness*: how effective a force is at preventing and investigating crime, protecting vulnerable people and tackling serious organised crime;
- *efficiency*: how a force manages demand and plans for the future; and
- *legitimacy*: how legitimately a force treats the public, how ethically it behaves and how it treats its workforce.

HMICFRS conducts an annual inspection of the performance of each of the 43 police forces in England and Wales and rates them on each of these criteria as outstanding, good or requiring improvement. The report, published a few weeks ago, gives an overview of the emerging themes from the PEEL reports on a group of 14 police forces comprising: City of London, Cumbria, Durham, Dyfed-Powys, Essex, Gloucestershire, Greater Manchester, Humberside, Kent, Leicestershire, Norfolk, Nottinghamshire, West Midlands and Wiltshire.

Overview

Generally, HMICFRS found that the forces were performing well in terms of keeping people safe, reducing crime, using resources efficiently and treating their workforce and the communities they serve fairly and with respect. Equally, however, they also found that several forces are straining under significant pressures as they try to meet growing complex and high-risk demand with dwindling resources. Moreover, these pressures are increasing and are affecting different forces in different way. Although it does not expressly refer to it, the report echoes some of the serious concerns raised by the House of Commons Home Affairs Committee in their Report *Policing for the Future* published in October 2018 (see Criminal Justice Notes, November 2018, https://blogs.kent.ac.uk/criminaljusticenotes/2018/11/06/the-future-of-policing/)

Changing environment and demands

The report noted that the nature of demand on policing is changing and is increasingly complex, with the growth of crime online, the need to examine data on personal devices and improvements in identifying and understanding vulnerable victims. This is complemented by a significant growth in serious high-risk crime, such as: homicides, robbery, sexual offences, domestic abuse and crimes involving knives and sharp instruments. These changes are happening at a time when policing is experiencing severe restrictions on resources. In addition to the pervasive effects of budget cuts, for example, most forces are suffering from a high level of detective vacancies. Meeting the growing and changing nature of demand within tighter resource constraints is proving to be the most significant challenge for policing today.

Positive developments

There are some positives in the report's findings on how forces are coping. Several were responding by using technology to manage demand and resources more effectively. This includes: making use of shared services, adjusting shift patterns to align with peaks in demand, using digital technologies to achieve a speedier response to those at risk and working with academics to understand demand through demographics and 'big data'. In many forces these advances are complemented by an improved understanding of hidden forms of vulnerability, including: modern slavery, 'county-lines' (gangs based in large urban centres using vulnerable people to sell prohibited drugs in small towns and rural areas in other counties) and 'cuckooing' (drug dealers taking over the home addresses of vulnerable persons to store and distribute prohibited drugs). Commendably, there is also evidence of increased awareness and knowledge of how to protect and support people in mental health crisis.

Negative impacts on service delivery

On the other hand, several forces have been less successful in adapting to the new and changing environment. HMICFRS found that there is still significant room for improvement across many forces in aligning resources, skills and planning to changing patterns of demand. While there have been improvements in identifying incidents of domestic abuse, there is still a concern with the number and quality of risk assessments in some forces on domestic abuse, stalking, harassment and honour-based violence. Neighbourhood and local policing, for example, continue to be undermined by a pattern of redeploying local officers to higher-risk work, often in an unplanned reactive manner. Such practices are not being sufficiently monitored in some forces.

Attempting to cope with a wider range of activities is having a negative effect on the quality and speed of police response rates and investigations. In some forces this is leading to in-experienced and under-qualified officers investigating high volume crimes, such as burglary, without appropriate supervision. Investigation failings were found most frequently in these crimes, with a consequential effect on negative outcomes. At least one quarter of the victims were not getting the service they should expect. Poor supervision of investigations was a serious matter of concern, with supervision in as many as one third of cases being rated poor.

Stop and search

The manner in which police officers use their powers and discretion has a critical effect on public trust and confidence in policing, the law and the state. The use of stop and search powers, for example, has been a constant source of friction between the police and marginalised communities; contributing to alienation and, on occasions, serious and widespread rioting. Given the increased reliance on these powers to combat the upsurge in knife crime, it is particularly important that their use is closely and effectively monitored for unfairness or abuse. Once again, however, the report finds that too many forces are still failing to follow best practice on this front.

Some forces don't monitor a sufficiently comprehensive set of data on how they use stop and search powers. Some are missing opportunities to learn from reviewing body-worn video footage. In 2017, HMICFRS recommended that all forces should monitor and analyse comprehensive

stop and search data: to understand the reasons for disparities; to take necessary action on the results of such monitoring and analysis; and to publish the results of the analysis and action by July 2018. Disappointingly, no forces were found to be fully compliant. In particular, there was a lack of monitoring of the 'find rates' by ethnicity for different types of search. There was also a slight reduction in the number of stops and searches that satisfied the basic pre-requisite of 'reasonable suspicion' compared with 2017. Moreover, not all of the inspected forces had effective or suitable external processes and panels to scrutinise their use of stop and search.

Internal corruption

Rooting out internal corruption in a police force is vitally important not just for improving professionalism and ethical standards within the force, but also for enhancing public confidence in the police and respect for the rule of law. However, the nature of policing and the police organisation is such that rooting out corruption is one of the most difficult challenges to crack. An internal unit focused on tackling corruption is essential, but it is no guarantee of success. HMICFRS found that there was significant room for improvement on this aspect.

Some of the forces have poorly resourced counter-corruption units and significant vetting backlogs. Despite its 2016 recommendation that all members of the police workforce should have at least the lowest level of vetting clearance for the roles, HMICFRS found that some forces still had a lot more work to do to reach that basic level. It also found that some forces did not comply with approved professional practices on strategic risk assessment for corruption and insider threats. In particular, very few forces had fully implemented a 2016 recommendation to seek intelligence on potential abuse of authority for sexual gain.

Health and well-being of police personnel

Last, but not least, is the impact of the changing policing environment on police personnel. HMICFRS found that the health and wellbeing of the police workforce are being adversely affected by pace of change, the increasing exposure to more stressful forms of crime, higher workloads, longer hours and cancellation of leave and rest days. Forces have an inconsistent understanding of the risks associated with these aspects. While forces are increasingly good at providing support following traumatic incidents, they are less effective at providing day-to-day supports. Occupational health services are struggling to meet the demand. Ultimately, a professional and ethical police service cannot be delivered to the highest standards by personnel without the supports to help them cope effectively with the stressful demands generated by the changing policing environment.

Conclusion

The HMICFRS report, together with the HAC report on *Policing for the Future*, highlights the very real challenges facing policing today and for the years to come. There is no simple blueprint for meeting these challenges in a manner that will ensure the delivery of a professional, ethical and quality policing service for all. Increased resources are vital, but they will not be sufficient in themselves. Much will depend on the capacity of the police organisation and personnel to develop creatively, swiftly and meaningfully in response to the new environment and challenges. Equally, there is an important

role for local communities and society as a whole to determine what they need and want from their police service in this changing environment, and how that should be delivered.

Sentencing Code

Introduction

A Bill has just been introduced in the Westminster Parliament paving the way for the introduction of a Sentencing Code for England and Wales. This can be traced back to 2014 when the Law Commission was tasked by the government with a project to consolidate the law and procedure on sentencing in England and Wales. The Commission delivered its report, together with a draft Code and a supplementary Bill in November 2018. It is the latter that has been introduced in Parliament under the title *Sentencing (Pre-consolidation Amendments) Bill 2019*.

Complex sentencing law and procedure

Sentencing is arguably the most significant feature of criminal practice. About 1.2 million offenders are sentenced each year in the courts of England and Wales. Sentences imposed span a wide range, including: imprisonment, a wide variety of community sanctions, fines, financial orders and compensation/reparation orders, as well as ancillary orders such as licence confiscation, freedom of movement restrictions and registering or reporting obligations. The impact on individual offenders and their families can be life changing. More broadly, the mere existence and operation of the complex web of punishments and procedures at the heart of our criminal process reflect our social and democratic values.

It is fundamental to the rule of law that the criminal law (which includes sentencing law and procedure) is sufficiently clear and accessible to enable an individual to understand the potential consequences of his or her actions and the penalty to which he or she may be liable. There is a very strong case for saying that the current sentencing law and procedure does not always meet this standard. Indeed, the Law Commission stated bluntly that "[i]t is simply impossible to describe the current law governing sentencing procedure as clear, transparent, accessible or coherent." The volume of legislative material to which a sentencing court must have regard is larger, more diverse and complex than ever before. The Commission compiled 1,300 pages of currently applicable provisions from Acts as varied as the Justices of the Peace Act 1361, the Company Directors Disqualification Act 1986 and the Dangerous Dogs Act 1991. Over the past 30 years alone there have been no less than 14 major pieces of primary legislation on sentencing procedure.

Navigating through this legislative thicket to find the law and procedure applicable to the particular facts of an individual case is a daunting exercise replete with the capacity for error. The Commission's 1,300-page compilation comprises only the law applicable to recent offences. A court dealing with an older offence may have to find the sentencing provisions applicable at the time the offence was committed and interpret them in the light of subsequent amendments. This task is rendered substantially more complex by the speed and frequency of amendments, and the diverse methods in which the laws might be amended.

While most amendments apply prospectively (i.e. from the date they come

into force), some apply retrospectively (i.e. to reach offences committed, or convictions recorded, before the amendment came into force). Even for the mainstream prospective measures, there is no consistency in the manner of their application. Some might apply only to offences *committed* after they came into force, some might apply only to offences where the *proceedings were commenced* after they came into force, some might apply only to *convictions* recorded after they came into force, and so on. Amending the law in this manner can make it very difficult for judges and practitioners, let alone laypersons, to identify which particular version of the sentencing laws applies to the facts of an individual case. Inevitably, the result is frequent and costly errors in sentencing and, ultimately, a serious blemish on the rule of law.

Benefits of a single Code

The Law Commission was charged with the monumental task of converting this complex mass of statutory enactments into "one Act with a clear framework and accessible drafting". The aim was to produce a single Code which would provide the courts with a single point of reference, and which was capable of accommodating amendments and adapting to changing needs without losing structural clarity. In particular, the Code should be informed by "the principles of good law"; namely that it should be "necessary, clear, coherent, effective and accessible." In doing so, however, the Commission had to avoid restricting the capacity of Parliament and the government to effect changes in sentencing policy. Penalties available to the sentencing courts were off-limits, except to the extent that some consideration of them was unavoidable to achieve the fundamental aim of a single coherent Code.

Once fully implemented, the Code should have a transformative effect on sentencing law and procedure. It should bring much greater clarity to the law and procedure, making it more accessible, reducing the number of errors and making sentencing hearings faster and more efficient. For the most part, the Code will be a consolidation measure bringing the complex strands of statutory enactments into one place and presenting them in a much more coherent, structured and user-friendly format. It will not make any substantive changes to the law. So, it will not affect the existing maximum or minimum penalties for individual offences, nor will it impact on the Sentencing Guidelines or the work of the Sentencing Council. Equally, it will not result in an offender being subject to a greater penalty than that applicable at the time he or she committed the offence.

"Clean sweep" approach

A defining feature of the Commission's new (draft) Code is what it refers to as the "clean sweep". This is a vital part of the strategy to make the Code clearer, simpler and more accessible. Critically, the Code provisions will apply to all offenders whose convictions occur after it has come into force. This will remove the current need to identify and apply historic law and transitional provisions. Subject to limited exceptions necessary to respect the fundamental rights of offenders, the courts (and other users) will only have to refer to the provisions of the Code itself. As acknowledged by the Commission, "[t]his represents a considerable departure from current practice and is a change we think will have a significant impact."

The "clean sweep" approach is complemented by drafting changes aimed at modernising old and outdated terminology prevalent in the current

legislation. These drafting changes will employ gender neutral terms and generally modernise the terminology to make it "more relevant and familiar to users of 21st century legislation". Equally, the Code will "streamline the law to provide added consistency and clarity, and errors and omissions in the current law will be corrected." To this end, certainty is adopted as the guiding principle.

Two complementary enactments

Although the Code will not alter existing penalties provided by law or reframe sentencing policy or principles, it is more than a conventional consolidating exercise. The "clean sweep" approach and the drafting changes will clearly effect substantive changes to the law that are inconsistent with a mere consolidating measure. Accordingly, the introduction of the consolidating Code requires two separate enactments. One of these will provide for the Code itself. The other, the Sentencing (Pre-consolidation Amendments) Bill, contains what the Commission refers to as "two paving provisions" to make way for the consolidating Code. These will amend the existing law to provide for the "clean sweep" approach and the other substantive changes that will be reflected in the Code.

The key provisions of the Pre-consolidation Bill will only come into force if the Code Bill itself is passed (see further below). If the Code Bill is passed, the key amending provisions of the Pre-consolidation Bill will come into force immediately before the date on which the Code Bill comes into force. The net effect is that the Code Bill will qualify as a consolidating measure as, technically, it will be consolidating the law applicable immediately before it came into force. One of the spin-off benefits of this is that it will be subject to a fast-track legislative procedure.

Pre-consolidation amendments Bill

The Pre-consolidation Bill was introduced in Parliament on 22 May, with the second reading in Grand Committee scheduled for 12 June. It consists of five sections and two schedules, and it runs to 45 pages. The key provisions are highly technical and difficult to interpret. It seems that the first of these paves the way for the "clean sweep" approach. This is achieved essentially by amending current (pre-Code) legislative provisions so that the consolidation can apply uniformly to offenders convicted after it comes into effect, without having to include exceptions for some offenders who would otherwise be entitled to be dealt with in accordance with legislative provisions applicable, for example, at the time they committed the offence. Amending such pre-Code enactments in this manner helps ensure that the Code qualifies as a consolidating measure, in that it is not seen to effect a substantive change to the pre-Code law.

It is expressly stated that this 'clean sweep' provision does not apply where the effect would be to increase the maximum term of imprisonment or maximum fine applicable to the offence. Similarly, it does not apply to certain situations in a list of 37 disparate provisions spanning: surcharge and criminal courts charge, compensation orders, references to legal aid, driving disqualification, references to remands of children, detention and training orders, life sentences, mandatory life sentences and mandatory minimum sentences. The Secretary of State is also given a power to make regulations to exempt any pre-existing provision from the effects of the amendment.

Undoubtedly, the concept of the "clean sweep" can make a significant contribution to clarity, accessibility and coherence. It must also be said, however, that the technical manner in which it is achieved in the Pre-consolidation Bill is anything but clear and accessible. It will challenge the interpretation skills of even the most expert judges and practitioners. In particular cases, there is a real danger that it will become a potent source of the very same ills that it is intended to address.

The other key provision in the Bill amends and modifies a very large number of disparate sentencing provisions essentially to iron out inconsistencies and uncertainties that have developed in successive enactments and amendments over the years, and to modernise terminology. The amendments and modifications are set in Schedule 2 which runs to 126 paragraphs. The Secretary of State can also make further amendments and modifications to existing sentencing legislation as necessary by regulations. The intention is that all of these changes will be incorporated as part of a single, structured, coherent and consistent body of sentencing law and procedure in the consolidating Code.

Which comes first?

As noted above, it is envisaged that the Pre-consolidation Bill will only come into force if the consolidating Code itself is passed. At the same time, the latter can only be enacted as a consolidating measure if the amendments to the pre-existing law are effected by the former. This has resulted in peculiar commencement provisions for the Pre-consolidation Bill. They stipulate that the Bill will come into force on the day it is passed, insofar as that is necessary to allow the Secretary of State to make regulations under its key provisions. It is also stipulated, however, that the Bill itself and any such regulations made under it will only come into force if the consolidating Code is passed. It is further stated that once the consolidating Code is passed, the Bill (insofar as it is not already in force) together with regulations made under it, comes into force immediately *before* the date on which the consolidating Code comes into force. This is tantamount to solving the 'chicken and egg' conundrum. Critically, the Bill and regulations, insofar as they apply to a person convicted of an offence, only apply in respect of a person convicted after the Code comes into force (the "clean sweep").

The draft Code

Clearly, the consolidating Code is the main course. The necessary Code Bill has not yet been introduced in Parliament. It can be expected, however, that it will reflect the draft prepared by the Law Commission. This contains 416 clauses and 28 schedules and runs to 323 pages. The core provisions are collected and presented together in Parts which broadly follow the chronology of a sentencing hearing. The Parts, in turn, are grouped together as: introductory provisions and overview; general provisions applying to sentencing courts; disposals (sentencing options); further powers relating to sentencing; and miscellaneous and supplementary provisions. It is worth listing the Parts in each of the core substantive groupings as they convey a sense of the scope and coherent structure of the Code.

The general provisions applying to sentencing courts comprise:

(a) Part 2: Powers exercisable before sentence, including deferment of sentence, and committal and remission powers.

(b) Part 3: Procedure, including pre-sentence reports and derogatory assertion orders.
(c) Part 4: Exercise of court's discretion, including the purposes of sentencing and the determination of the seriousness of an offence.

Disposals comprise:

(a) Part 5: Power to impose absolute and conditional discharge.
(b) Part 6: Orders relating to conduct, including referral orders and reparation orders.
(c) Part 7: Financial orders and orders relating to property, including fines, compensation orders and forfeiture orders.
(d) Part 8: Disqualification, including driving disqualification and disqualification orders relating to the keeping of animals.
(e) Part 9: Community sentences, including youth rehabilitation orders and community orders.
(f) Part 10: Custodial sentences, including suspended sentence orders, imprisonment, detention and extended sentences.

Further powers relating to sentencing comprise:

(a) Part 11: Behaviour orders, including criminal behaviour orders and sexual harm prevention orders.

The future

The introduction of the Code will not dispense with the need to make future amendments to sentencing law to accommodate policy and procedural developments. In order to retain the critical clarity and coherence of the Code, however, it is vital that future amendments are made to the Code rather than in the form of separate enactments. The Law Commission envisages the Code as "living document" that will be amended from time to time. Moreover, any such changes to sentencing law should be displayed on the face of the relevant provisions, rather than in an obscure provision of the Code or in secondary legislation. This will help retain the Code's clarity, simplicity, coherence and transparency. It remains to be seen whether the Code and the Pre-Consolidating amendments will deliver on these objectives.