

# SENTENCING (PRE-CONSOLIDATION AMENDMENTS) BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Sentencing (Pre-consolidation Amendments) Bill [HL] as brought from the House of Lords on 4 March 2020 (Bill 102).

- These Explanatory Notes have been produced by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The purpose of the Sentencing (Pre-consolidation Amendments) Bill (“the Bill”) is to make amendments to existing legislation in order to facilitate the enactment and operation of the Law Commission’s proposed Sentencing Code (“the Code”). The Code is a consolidation of legislation governing sentencing procedure which aims to ensure that the law relating to sentencing procedure is readily comprehensible and operates within a clear framework as efficiently as possible. It will provide the courts with a point of reference which can be amended and adapted to changing needs. The Code re-enacts law already in force. It does not alter its substance or effect.
- 2 The pre-consolidation amendments are generally limited to correcting minor errors and streamlining the law in the area being consolidated by the Code and only have effect for the purposes of the consolidation. They are required, or otherwise desirable, for the Code to operate as intended.
- 3 The Bill and the Code also introduce a new approach to dealing with changes in the law, referred to as the “clean sweep”. The effect of the clean sweep is to remove historic and redundant layers of sentencing procedural legislation. Subject to some limited exceptions needed to protect an offender’s fundamental rights, the clean sweep will allow for all offenders convicted after the Code comes into force to be sentenced according to the most up to date law, irrespective of when they committed the offence.
- 4 Neither the Bill nor the Code introduce any new sentencing law. They do not alter the maximum penalties available for an offence or increase the scope of minimum sentencing provisions.
- 5 The Bill was first introduced in the previous Parliament where, in the 2017-2019 session, it reached House of Lords Report stage, after passing through a Special Public Bill Committee. It was then carried-over to the 2019 session where government amendments were tabled, but the Bill fell before reaching Third Reading. Those amendments have been incorporated into this Bill print.
- 6 Since the Bill was most recently considered in the last parliament the Government has included additional provisions which will correct anomalies in existing legislation that will be consolidated in the Sentencing Code, help to enable the Code to apply to the Armed Forces, ensure that existing powers to be consolidated in the Code are not inadvertently drawn too widely, and support powers to make subordinate legislation to be contained in the Code so they can operate properly.

## Policy background

- 7 The law of sentencing applies to over a million individual cases every year but is currently complex and disparate. The complexity of the current law leads to a disproportionate number of errors and unlawful sentences being imposed, resulting in delays, an unnecessary number of appeals, and an inefficient use of public money.
- 8 The coalition government agreed in 2014 that the Law Commission should undertake a project to consolidate the law relating to sentencing procedure. The Sentencing Code project is part of the Law Commission’s 12<sup>th</sup> programme of law reform.
- 9 In November 2018, the Law Commission published a concluding report of the project<sup>1</sup> alongside a draft

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<sup>1</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>

Sentencing (Pre-consolidation Amendments) Bill and a draft Sentencing Code Bill.<sup>2</sup>

- 10 The aim of the Code is to set out the relevant sentencing provisions in a clear, simple and logical way, to provide the courts with a single point of reference for procedural provisions, which a court would need to rely upon during the sentencing process, and to allow for all updates to sentencing procedure to be made in a single place. Once enacted, the Code will bring clarity to the law, reducing errors and delays.
- 11 The Sentencing Code project has been subject to four formal public consultations (conducted by the Law Commission), including a consultation on the transitions from the current law to the Code (also known as the “clean sweep issues” paper)<sup>3</sup> and a consultation on the draft Code, which included the substantive clauses of the Bill.<sup>4</sup> The provisions in the Code relating to the disposals available for children and young persons were subject to a separate consultation.<sup>5</sup> As with the main consultation, this included an appendix with a description of every pre-consolidation amendment made in relation to those provisions and the reason for making them.
- 12 The Bill has two main objectives: (1) to remove historic layers of sentencing legislation and give effect to the clean sweep; and (2) to make changes to the existing law of sentencing procedure in order to enable the consolidation in the Code to take place. The first, to remove historic layers of legislation, will have the effect of repealing partially saved provisions concerning sentencing procedure which are no longer needed, thereby simplifying the law, and allowing for a single set of provisions to govern the sentencing process for offenders convicted after commencement of the Code, even where the offences were committed before its commencement. The second will also provide the Secretary of State with the power to make further pre-consolidation amendments to the law to enable the consolidation (i.e. the Code) to proceed. Such changes are a standard measure which precedes consolidation Bills. As a consolidation must operate on the current law, it is necessary to make certain changes to allow the consolidation to happen - for example, changing language to avoid inconsistency, correcting error or updating existing statutory references.
- 13 The Bill contains provisions which will enable the consolidation of sentencing law under the Code. Once the Sentencing Code Bill is commenced the Bill will have served its purpose and will largely be repealed.

## Legal background

- 14 The sentencing framework in England and Wales is derived from three key statutes. The Criminal Justice Act 1991 established the current sentencing statutory framework. In 2000, the Powers of Criminal Courts (Sentencing) Act 2000 (“2000 Act”) consolidated further sentencing law in order to bring the relevant sentencing procedures into one statute, but this was in turn surpassed by further legislative provisions. In 2003, the Home Office revisited sentencing procedure and the statutory framework was

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<sup>2</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Complete-Sentencing-Code-V2.pdf>

<sup>3</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf>

<sup>4</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/The-Sentencing-Code-Consultation-Volume-1.pdf>

<sup>5</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/03/YOUTH-CP-FINAL-WITH-ORIGINS-1.pdf>

revised again further with the introduction of the Criminal Justice Act 2003 (“2003 Act”); now the principal statute for sentencing procedure. Subsequently, large parts of the 2000 Act were replaced by Part 12 of the 2003 Act which now sets down the majority of sentencing procedure law in England and Wales.

- 15 Consequently, the majority of current statutory provisions governing sentencing procedure are set out in the 2000 Act and Part 12 of the 2003 Act. The Bill makes pre-consolidation amendments to both the 2000 Act and Part 12 of the 2003 Act.
- 16 The following Acts also make relevant provisions relating to the sentencing of offenders in England and Wales:
  - a. The Serious Organised Crime and Police Act 2005;
  - b. The Criminal Justice and Immigration Act 2008;
  - c. The Coroners and Justice Act 2009;
  - d. The Legal Aid, Sentencing and Punishment of Offenders Act 2012;
  - e. The Offender Rehabilitation Act 2014; and
  - f. The Criminal Justice and Courts Act 2015.
- 17 These Acts (with other related provisions related to sentencing, including the Armed Forces Act 2006) will also be subject to pre-consolidation amendments in Schedule 2 to the Bill.
- 18 Common law procedures that are also relevant when a court is dealing with sentencing were necessarily excluded from the scope of the Sentencing Code project.

## Territorial extent and application

- 19 The majority of the Bill extends to England and Wales only. Subsections (5) and (6) of clause 5 provide that the operation of the “clean sweep” or a pre-consolidation amendment on an existing provision has the same extent as the existing provision. Subsection (7) ensures that regulations to which paragraph 133 of Schedule 2 can apply include regulations that could extend to Northern Ireland and that the power to state commencement information on the face of the Code in paragraph 134 of Schedule 2 could in principle extend to Northern Ireland and/or Scotland. Subsections (8) – (11) provide that any amendment, modification or repeal of the Criminal Justice Act 2003 that is made by, or under the Bill can be extended to the Crown Dependencies and that any amendment, modification or repeal of the Armed Forces Act 2006 (or of any other provision in so far as it is applied by or under that Act) that is made by, or under the Bill directly extends to the Isle of Man and British overseas territories (except Gibraltar), and can be extended to the Channel Islands.
- 20 There are some pre-consolidation amendments that extend to Scotland and Northern Ireland - these deal with circumstances in which a sentence imposed in England and Wales applies to an offender who has, during the period of that sentence, moved to Scotland or Northern Ireland. These amendments extend to those jurisdictions in order to facilitate the consolidation.
- 21 The table at Annex A provides a summary of the position regarding territorial extent and application in the United Kingdom.

# Commentary on provisions of Bill

## Clause 1: Consolidation of sentencing legislation: amendment of law for old offences

- 22 One of the issues with complexity in sentencing laws is the layering of changes to legislation over time – which means that different provisions apply to different offences and offenders, depending on when the offence was committed. For example, there are occasions when an Act is repealed but some provisions in the Act remain in force (are partially saved) for certain circumstances. Clause 1 of the Bill contains a “clean sweep” provision. The clean sweep approach removes the need to identify and apply historic versions of the law, minimising the use of complex transitional provisions, whilst respecting the fundamental rights of those affected by the sentencing process.
- 23 The legal effect of the clause is twofold: first, to fully repeal partially saved provisions concerning sentencing procedure which are no longer needed, and secondly, to fully commence provisions concerning sentencing procedure that have only been commenced prospectively.<sup>6</sup> With limited exceptions, this means that all offenders convicted after commencement of the Code would be sentenced by applying the sentencing law and procedure in the Code regardless of when the offence was committed.<sup>7</sup> The clean sweep applies only to provisions to be consolidated by the Code, and does not apply more broadly.
- 24 The clean sweep is subject to exceptions to ensure that no offender is subject to a greater penalty than that available at the time of the offence, or subject to a minimum or mandatory sentence that did not apply at the time of the offence. These exceptions ensure that the clean sweep does not contravene the general common law presumption against retroactivity, and accords with human rights protections against retroactive criminalisation and retroactive punishment – in particular those provided by Article 7 of the European Convention on Human Rights. Subsections (4) and (5) of this clause give effect to those exceptions. Subsection (4) ensures that the clean sweep does not increase the maximum penalty for any offence. Subsection (5) gives effect to Schedule 1 to the Bill which creates a series of exceptions to the clean sweep necessary to ensure no offender is subject to a greater penalty than that available at the time of the offence, or subject to a minimum or mandatory sentence that did not apply at the time of the offence, and confers on the Secretary of State a further power to make regulations to ensure this.

## Clause 2: Pre-consolidation amendments relating to sentencing

- 25 Clause 2 refers to the pre-consolidation amendments and modifications of sentencing legislation contained in Schedule 2 to the Bill. Such changes are a standard measure which precedes consolidation Bills. As a consolidation must operate on the current law, it is necessary to make certain changes to allow the consolidation to happen. For example, changing language to avoid inconsistency, correcting error or updating existing statutory references.
- 26 The clause also gives the Secretary of State the power to make any further pre-consolidation

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<sup>6</sup> Detailed examples illustrating the clean sweep are given in the Law Commission Report ‘The Sentencing Code’ p.60-71 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>

<sup>7</sup> Detailed examples illustrating the clean sweep are given in the Law Commission Report ‘The Sentencing Code’ p.60-71 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>

amendments to legislation, by statutory instrument laid under the affirmative procedure, to enable the consolidation to proceed. This power is limited only to changes that the Secretary of State is of the opinion facilitate, or are otherwise desirable in connection with, the consolidation. As such, once the consolidation occurs, the power will no longer be able to be used.

### Clause 3: Interpretation

27 This clause lists the Acts referred to in the Bill and caught by the phrase “the Acts relating to sentencing”. It also clarifies what is meant by other definitions or defined phrases used throughout the Bill.

### Clause 4: Regulations

28 Clause 4 requires any relevant regulations made under clause 1, that will create an exception to the clean sweep, or clause 2 to be made by a statutory instrument that is laid in and approved by both the House of Commons and House of Lords. Any such regulations are to come into force in accordance with clause 5.

### Clause 5: Commencement, extent and short title

29 Subsection (1) confirms that, to enable regulations to be made under clause 1(5)(b) and clause 2(2), the Sentencing (Pre-consolidation Amendments) Act comes into force on Royal Assent. Subsections (2) and (3) of clause 5 confirm that the clean sweep and any exceptions to it in Schedule 1 or regulations under clause 1, and the pre-consolidation amendments in Schedule 2 and any further amendments made under clause 2, do not come into force unless a consolidation of the legislation relating to sentencing – in practice, the Sentencing Code - is enacted and that if the Code is enacted those provisions will come into force immediately before the consolidation date (i.e. the date at which the Code comes into force). Clause 5(3) also provides that those provisions will only relate to an offence of which a person is convicted on or after the date that the Code comes into force.<sup>8</sup>

30 Subsection (8) replicates the power conferred by section 338 of the Criminal Justice Act 2003 to allow for the pre-consolidation amendments in Schedule 2 and any further pre-consolidation amendments made under clause 2 in relation to the Criminal Justice Act 2003 to be extended to the Crown Dependencies.

31 Subsections (9) – (11) of clause 5 directly extend the pre-consolidation amendments of armed forces legislation (the Armed Forces Act 2006 and legislation applied by or under it) contained in Schedule 2, and any further pre-consolidation amendments made under clause 2, to the Isle of Man and British overseas territories (except Gibraltar), and also replicate the power conferred by section 384 of the Armed Forces Act 2006, which allows for any of the provision of that Act to be extended to the Channel Islands.

32 Clause 5 also sets out the territorial extent of the Bill (see paragraphs 17 to 19 above).

## Schedules

### Schedule 1: Section 1: Exceptions

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<sup>8</sup> For the purposes of the Bill, the definition of someone being convicted includes a special verdict under section 1 of the Criminal Procedure (Insanity) Act 1964, a finding mentioned in section 5(1)(b) of that Act being made of the person’s having done the act or made the omission charged (following a finding of being under a disability), and a conviction by a service court.

33 This Schedule lists the exceptions to the “clean sweep”. As noted in paragraph 22 above, exceptions to the clean sweep policy have been identified in order to comply with Article 7 of the ECHR and to not breach common law standards of fairness.

### Surcharge and Criminal Courts Charge

34 The exceptions given in paragraphs 1-6 of Schedule 1 mean that offenders who committed offences at a time when the victims surcharge or criminal courts charge did not exist, or when the amount payable under the surcharge was less than prescribed in the most recent legislative revision, would not, under the Code, be subject to an additional, more severe penalty.

### Compensation Orders

35 A compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence. Paragraphs 7-11 preserve the limit for old cases committed before the commencement of changes to compensation order provisions in various Acts.

### References to legal aid etc

36 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made consequential amendments to the provisions relating to legal representation in proceedings relating to the imposition of custodial sentences or certain requirements under a youth rehabilitation order. The exception at paragraph 12 ensures that certain provisions operate correctly where legal aid was made available prior to 1 April 2013.

### Driving disqualification

37 Section 38 of the Road Traffic Act 1991 extended the power to order driving disqualification to offences of common assault, and offences involving an assault for which driving disqualification was not previously available. Section 39 of the Crime (Sentences) Act 1997 extended the power to order driving disqualification to all offences. The effect of these provisions is now reproduced in sections 146 and 147 of the Powers of Criminal Courts (Sentencing) Act 2000. Without the exceptions in paragraphs 13 and 14 the courts would be able to impose driving disqualification orders, in addition to a fine or imprisonment (or both), where they were not previously available. This would subject some offenders to a more severe penalty under the Code than that which applied at the time of the offence.

### Youth rehabilitation orders: curfew requirements

38 Section 81 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 increased the maximum curfew requirement that can be attached to a youth rehabilitation order – which, in contrast to adult community orders, may be imposed for both imprisonable and non-imprisonable offences. The exception in paragraph 15 ensures that a higher maximum curfew requirement cannot be attached to a youth rehabilitation order than applied at the time of the commission of the offence.

### References to remands of children

39 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made changes in respect of the remand of children and young persons. The exception in paragraph 16 ensures that those children and young persons remanded before 2012 have their time on remand credited for a custodial sentence imposed in relation to that remand.

### Detention and training orders

40 The exception in paragraph 17 means that for offences committed before 1 February 2015 a further period of supervision is not applied after a detention and training order has expired.

### Detention of child for specified period

41 Paragraph 7 of Schedule 2 to the Offensive Weapons Act 2019 (“the 2019 Act”) extends the category of

offences for which a sentence can be imposed by section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 to certain offences under the Firearms Act 1968. Paragraph 8 of Schedule 2 to the 2019 Act provides that this extension will only apply to offences committed after paragraph 7 of Schedule 2 to the 2019 Act comes into force. These provisions in Schedule 2 to the 2019 Act are not yet in force.

- 42 The exception in paragraph 18 will ensure that if regulations are made to commence paragraphs 7 and 8 of Schedule 2 to the 2019 Act, an offender is not subject to the extended category of offences for offences committed before the date paragraph 7 is brought into force.

### Life sentences other than the mandatory life sentence for murder etc

- 43 The provisions in paragraphs 19 - 26 would mean that offenders are not exposed to a mandatory life sentence which did not exist, or in circumstances that did not apply, at the time of the offence.

### Mandatory life sentence for murder etc

- 44 The exceptions in paragraphs 27 - 31 mean a higher starting point for sentencing would not be applied to cases where it did not apply at the time of the offence.

### Mandatory minimum sentences

- 45 The exceptions in paragraphs 32 - 43 mean that an offender will not be exposed to a mandatory minimum sentence which did not exist at the time of the commission of the offence, or to a minimum sentence in circumstances that did not apply at the time of the commission of the offence.

## Schedule 2: Sentencing Consolidation: Pre-Consolidation Amendments

- 46 This Schedule makes a number of pre-consolidation amendments to existing legislation relating to sentencing for the purposes of enabling the enactment of the consolidation of sentencing law: the Sentencing Code. The pre-consolidation amendments are limited to those which facilitate, or are otherwise desirable in connection with, the consolidation. Pre-consolidation amendments are made to the Powers of Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 2003 and the Criminal Justice and Immigration Act 2008 and other primary and secondary legislation relating to sentencing, including the Armed Forces Act 2006.
- 47 These pre-consolidation amendments will only come into force immediately before the consolidation of sentencing legislation (the Code) comes into force.
- 48 The pre-consolidation amendments are principally organised in this Schedule by reference to the legislation they amend. They can broadly be categorised as:
- a. clarifying the legislation or removing an element of ambiguity from it;
  - b. remedying a missed consequential provision in earlier legislation;
  - c. repealing or omitting provisions in existing legislation that are either spent or now considered unnecessary to repeat;
  - d. simplifying, streamlining, or making more consistent sentencing procedure;
  - e. ensuring consistency in re-sentencing or committal powers;
  - f. ensuring consistency in relation to the powers of different courts to provide for when sentences or particular requirements of sentences are to take effect; and
  - g. giving effect to the “clean sweep” in relation to future amendments.
- 49 Appendix 2 to Volume I of the Law Commission’s Report on the Sentencing Code (22 November 2018,

Law Com No 382, HC 1724)<sup>9</sup> explains the effect and purpose of every pre-consolidation amendment contained in Schedule 2 to the draft Sentencing (Pre-consolidation Amendments) Bill as published in Volume II of that report. A number of amendments have been made to the Bill since its initial publication in November 2018.

### Categories (a) to (d)

- 50 A significant proportion of the pre-consolidation amendments in this Schedule fall into categories (a) to (d): being of clarificatory effect; correcting errors in existing legislation; omitting unnecessary provisions or wording; or simplifying, streamlining or making more consistent sentencing procedure.
- 51 Examples of the sort of change made by category (a) are those amendments which clarify that notices issued by the Secretary of State may be withdrawn (see, for example, paragraphs 85 or 110(12)); or those amendments which replace references to remitting a “case” (sending for trial), with references to remitting an “offender” (see, for example, paragraph 14(3)). These are generally amendments that are required to ensure consistency in the Code where replicating differing wording in a single Act could introduce a doubt that the provisions are intended to have differing effects.
- 52 An example of category (b) amendments are those replacing references to the Education and Library Board (abolished on 12 December 2014 by section 3 of the Education Act (Northern Ireland) 2014) with references to its replacement, the Education Authority (see, for example, paragraph 112(6)).
- 53 An example of category (c) are those amendments omitting defunct references to local probation boards, which were abolished by section 11 of the Offender Management Act 2007 on 1 March 2008 (see, for example, paragraphs 24(5) or 110(3)).
- 54 Finally, examples of category (d) are the amendments transferring the duty to provide copies of a youth rehabilitation order on the breach of such an order from the proper officer of the court to the court itself, for consistency with the provisions relating to the making of such an order (see, for example, paragraph 111(18)); or the amendments aligning mental health treatment requirements available as part of a community order or a suspended sentence order with their equivalent under a youth rehabilitation order, expressly allowing such requirements to specify different kinds of treatment for different periods (see, for example, paragraph 79(2)).
- 55 Most of the amendments made to existing legislation by the pre-consolidation amendments in categories (a) to (d) are of this technical nature. Others in these categories might appear to make more significant changes. The following paragraphs (54 - 70) identify and explain these changes.

### Minimum sentences and offenders aged 18 to 20

- 56 By virtue of section 89 of the Powers of Criminal Courts (Sentencing) Act 2000 offenders convicted under the age of 21 cannot be sentenced to imprisonment. Where an offender aged 18, 19 or 20, is convicted and the court wishes to impose a custodial sentence they must impose either a sentence of detention in a young offender institution (under section 96 of the Powers of Criminal Courts (Sentencing) Act 2000) or a sentence of custody for life (under sections 93 or 94 of the Powers of Criminal Courts (Sentencing) Act 2000).
- 57 These sentences are to be abolished by section 61 of, and Schedule 7 to, the Criminal Justice and Court

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<sup>9</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>

Services Act 2000 so that any offender convicted aged 18 or over may be sentenced to imprisonment. These provisions have not yet been commenced. At present, where a provision requires a sentence of imprisonment to be imposed on an offender aged 18 or over, to provide that for offenders aged 18 to 20 that is to be read as requiring a sentence of detention in a young offender institution (or if the offence has a maximum penalty of life, a sentence of custody for life).

- 58 Section 110 of the 2000 Act (minimum of seven years for third class A drug trafficking offence) and section 51A of the Firearms Act 1968 (minimum sentence for certain offences under s.5) require the courts, in the case of an offender aged 18 or over, to impose a custodial sentence of at least 7 or 5 years (respectively). In the case of an offender aged 21 or over this will always be a sentence of imprisonment. In the case of an offender aged 18 to 20 these sections have been amended so that the court must impose a sentence of detention in a young offender institution of at least the requisite length. Reference has not also been made to the availability of sentences of custody for life under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000. This is because specific references to imprisonment for life are not required in the case of offenders aged 21 or over.
- 59 It is not the intention of these provisions that, where a minimum sentence applies to an offender aged 18 to 20, the courts cannot impose a sentence of custody for life where they consider the seriousness of the offence, and the danger the offender poses to the public, justify it.
- 60 To resolve this ambiguity amendments are made to section 110 of the 2000 Act by paragraph 38 and to Article 2(b) of the Firearms (Sentencing) (Transitory Provisions) Order 2007 (SI 2007/1324) by paragraph 137 so that in both provisions it is clarified that the court may impose a sentence of custody for life where the minimum sentence applies, the offender is aged 18 to 20, and the offence carries a maximum sentence of life imprisonment.
- 61 Another example of this issue also applies in relation to section 225 of the Criminal Justice Act 2003, which requires the court to impose a life sentence on certain persons convicted of serious offences aged 18 or over. Section 225 already clarifies that where a person is aged 18, 19 or 20, the sentence that must be imposed is one of custody for life, not imprisonment for life. In some references in that section to imprisonment for life there is not a corresponding reference to custody for life. Paragraph 139(2) therefore amends Article 3(4) of the Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005 (SI 2005/643) to ensure that in all places they appear, such references in section 225 also refer to sentences of custody for life.

### Minimum sentences and reductions in sentence for assisting the prosecution

- 62 Section 73 of the Serious Organised Crime and Police Act 2005 allows the Crown Court, when sentencing offenders who plead guilty in proceedings before that court and who have entered into a written agreement to provide assistance in any investigation or prosecution, to reduce the sentence imposed on such offenders to reflect the extent and nature of the assistance given or offered. In particular, section 73(5) provides that nothing that requires a minimum sentence to be passed in respect of any offence limits the power of the court to pass a reduced sentence.
- 63 Paragraphs 59 and 131(2) make amendments clarifying the effect of this provision. Paragraph 59 amends section 150 of the Criminal Justice Act 2003 to clarify that a community order may still be imposed where a minimum sentence applies (except for murder offences, where the penalty is fixed by law as a life sentence) to an offender where a sentence is being reduced due to the extent and nature of the assistance given or offered. Paragraph 131(2) simply lists the minimum sentences to which section 73(5) refers. Both changes are made to improve legal transparency.

### Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000

- 64 Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 required the court to impose a life sentence where an offender aged 18 or over was convicted of a second serious offence (listed in that section) committed after 30 September 1997. Section 109 was repealed by the Criminal Justice Act 2003

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with effect from 4 April 2005.

- 65 It was repealed twice as was the drafting practice at the time. The first repeal was effected by section 303 of the Criminal Justice Act 2003, and the second by section 332 of, and Part 7 of Schedule 37 to, the 2003 Act. Both repeals were commenced on 4 April 2005 by the Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950). The second repeal was subject to an explicit saving in paragraphs 5(2)(c)(xii) and 6 of the 2005 Order, providing that the repeal did not have effect in relation to offences committed before 4 April 2005. There was though no explicit saving in relation to the first repeal. This leaves an ambiguity.
- 66 The intent of the savings in the 2005 Order must have been to preserve section 109 of the 2000 Act where a second serious offence was committed before 4 April 2005. Accordingly, paragraph 136 removes the ambiguity by amending the 2005 Order to insert a savings provision in relation to the repeal of section 109 by section 303 of the Criminal Justice Act 2003. This clarification will apply to anyone convicted after the Bill comes into force.

### The availability of fines in the Crown Court

- 67 Section 163 of the Criminal Justice Act 2003 provides the Crown Court with the power to impose a fine of any amount instead of, or in addition to, dealing with the offender in any other way in which the court has power to deal with them. This section is subject to specific restrictions, including where a sentence falls to be imposed under sections 110 or 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (minimum sentences for repeat class A drug trafficking or domestic burglary offences, respectively).
- 68 Paragraph 63 omits the reference to section 110 of the Powers of Criminal Courts (Sentencing) Act 2000. It does this because all the offences to which section 110 of the 2000 Act applies (relating to drug trafficking offences) already have maximum sentences allowing for imprisonment and an unlimited fine to be imposed. Accordingly, even where a minimum sentence applies under section 110, a fine may still be imposed alongside a custodial term. It was considered that the retention of the reference to section 110 risked confusing matters and introducing doubt here.
- 69 The reference to section 111 of the 2000 Act has not been omitted because the maximum sentence for burglary under section 9 of the Theft Act 1968 does not confer on the Crown Court the power to impose a sentence of imprisonment and a fine. Accordingly, to omit the reference to section 111 would be to confer on the Crown Court the power to also impose a fine where the minimum sentence under section 111 applied, and therefore increase the maximum sentence available for the offence.

### Appeal rights: restitution orders and parenting orders

- 70 There are inconsistencies in the current law relating to express powers to appeal against sentences. The general position is that section 108 of the Magistrates' Courts Act 1980 grants offenders the right to appeal against sentences imposed in the magistrates' court to the Crown Court, and section 9 of the Criminal Appeal Act 1968 grants offenders the right to appeal against sentences imposed in the Crown Court to the Court of Appeal.
- 71 Despite these general powers of appeal, the legislation providing for some particular sentences provides for an express power of appeal. Generally, these express powers of appeal are included for the avoidance of doubt, and principally appear alongside an express provision relating to similar orders that are not imposed on conviction.
- 72 In the current law, although they are generally redundant their existence does not present any problems. By consolidating the law into a single enactment (the Code), the existence of express powers of appeal in relation to a few sentences, but not in relation to others, risks implying that there is no power to appeal against those other sentences. Accordingly, paragraphs 49(3)(c) and 119(3) repeal section 149(3)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 and section 10(5) of the Crime and Disorder Act 1998,

which provide express powers of appeal against restitution orders (where imposed for an offence taken into consideration) and parenting orders respectively. Such orders may be appealed under section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968 regardless, and therefore these changes do not alter the legal position.

### Category (e): re-sentencing and committal powers

73 A number of the pre-consolidation amendments in Schedule 2 fall into category (e): amendments that are desirable in ensuring consistency in re-sentencing or committal powers.

### Re-sentencing

- 74 As noted above, the Code will give effect to a clean sweep of sentencing law, ensuring that whenever an offender is convicted after the Code is commenced, the most recent law as consolidated in the Code is applied to them, regardless of when their offence is committed (subject to specific exceptions). The aim of the clean sweep is to avoid the need for courts to make reference to multiple historic versions of the law, and to avoid the errors that result from that requirement presently.
- 75 The clean sweep is principally achieved through the universal change effected by clause 1 (and the exceptions in Schedule 1). One example of where the clean sweep policy is not achieved by clause 1 is in the case of provisions giving a court the power to re-sentence an offender.
- 76 At present, a large number of the powers to re-sentence an offender in the Crown Court are powers for the court to deal with the offender "in any way in which he could have been dealt with for that offence by the court which made the order". The intended effect of such provisions was to ensure that where an offender is being re-sentenced by a court with greater powers than the original sentencing court (i.e. being re-sentenced in the Crown Court for an offence originally sentenced in the magistrates' court) the re-sentencing court is limited to the same jurisdictional powers as the original sentencing court.
- 77 While the current law achieves that effect, the current statutory wording has a further, unintended, effect which is to require the re-sentencing court to apply the sentencing law as it applied to the original sentencing court. If, for example, there has been a change to sentencing law between the original sentencing and re-sentencing, such as the introduction of a new requirement available as part of a community order, the re-sentencing court would have to continue applying the old law (and the new requirement would not therefore be available to them).
- 78 By contrast, re-sentencing powers in the magistrates' court are generally powers to deal with the offender "in any way in which it could deal with him if he had just been convicted by the court of the offence". This wording provides the magistrates' courts with their present legislative powers, rather than the powers available to the original magistrates' court.
- 79 Schedule 2 makes a large number of amendments to ensure that whenever a court is re-sentencing they are applying the current law, and not that in force at the time of the original sentencing. In line with the intended effect of the current provisions, the amendments ensure that where the Crown Court is re-sentencing an offender who was originally sentenced by a court limited to magistrates' courts' sentencing powers those limits still apply to the re-sentencing court. Further, the amendments ensure that whenever an offender was convicted as a child they are re-sentenced as if at the age at which they were convicted (replicating the effect of the present law in relation to re-sentencing those convicted under the age of 18). Clause 2(3)(b) also confers on the Secretary of State specific powers to remove the differences between powers of different courts to deal with offenders subject to particular sentences.
- 80 The same changes are also made to powers to amend existing orders.
- 81 The relevant amendments can be found at paragraphs 18(3), (4), (5), (6) and (7), 36(3), 52(2), (3) and (8), 53(2) and (3), 83(2) and (3), 100(4), (5), (8), (9), (10), (12) and (14), 101(6), 102(11) and 111(3), (5), (7), (8), (9), (10), (11), (13) and (14).

## Committals

- 82 Schedule 2 makes a number of amendments in order to ensure consistency in relation to sentencing powers on committal from the magistrates' courts to the Crown Court for sentence. There are principally three types of amendments to powers of committal that are of note.
- 83 The first series of amendments relates to the particular wording of the powers to sentence an offender after they have been committed for sentence. Under sections 4, 4A, 5, 5A and 7 of the Powers of Criminal Courts (Sentencing) Act 2000 the court's powers on committal are those they would have if the offender had "just been convicted of the offence on indictment" (or in the case of section 7 the powers the magistrates' court would have if it had "just convicted him of the offence").
- 84 The effect of this provision appears to be to deem the offender to have been convicted on the day of sentencing, rather than the day they were actually convicted. In *R v Robson* [2006] EWCA Crim 1414, [2007] 1 Cr. App. R. (S.) 54, the Court of Appeal was required to consider whether this meant that where an offender had crossed a relevant age threshold between his original conviction and his sentencing on committal this meant he should be sentenced by reference to his current age rather than his age at conviction. The court held it did not. The word "just" in these powers is potentially misleading and has therefore been omitted in the relevant places by paragraphs 8(2), 9(3), 10, 11 and 13.
- 85 The second series of amendments relates to section 6 of the 2000 Act which provides that where a magistrates' court has committed an offender to be sentenced in the Crown Court, they may also commit to the Crown Court additional offences to be dealt with at the same time. The intent of this provision is to allow all relevant matters to be dealt with at once by the same court. This is not only administratively easier, but also helps to ensure that the resulting sentence is consistent with the principles of totality, and that the discretion of the Crown Court is not fettered by a sentence imposed by the magistrates' court.
- 86 Section 6 of the 2000 Act applies only where an offender is committed under a power listed in subsection (4) of that section. At present there are a few notable omissions from that section, namely the powers to commit an offender for sentence under section 6(6) or 9(3) of the Bail Act 1976 (committal for offences of absconding by person released on bail or agreeing to indemnify sureties in criminal proceedings, respectively), section 43 of the Mental Health Act 1983 (power of magistrates' courts to commit for restriction order) and paragraph 22(1) of Schedule 8 to the Criminal Justice Act 2003 (committal for commission of a further offence while community order is in force). These omissions cause practical problems. In *R v De Brito* [2013] EWCA Crim 1134, [2014] 1 Cr. App. R. (S.) 38, having committed an offender under paragraph 22(1) of Schedule 8 to the Criminal Justice Act 2003 to the Crown Court, the magistrates' court also purported to commit him to that court for the further offence under section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. They did not, however, have that power and therefore the sentence ultimately imposed by the Crown Court was unlawful. Paragraph 12 therefore amends section 6(4) of the 2000 Act to ensure that it applies where offences are committed under those provisions.
- 87 The third notable amendment relating to committal powers is that made to section 147 of the 2000 Act by paragraph 48.
- 88 Section 147 provides the Crown Court with the power to disqualify an offender from driving where they used a motor vehicle for the purposes of their offence. The power is available where the Crown Court convicts the offender of certain offences, or where the offender is convicted of such an offence by the magistrates' court and committed for sentence to the Crown Court under section 3 of the 2000 Act.
- 89 Paragraph 48 omits subsection (1)(b) of section 147 so that a driving disqualification can be imposed where the offender is committed for sentence under any power that gives the Crown Court the power to deal with the offender as if they had been convicted on indictment. This change does not impact on a maximum penalty and in all cases the order would have been available if the offender had been committed under a different provision.

## Category (f): when sentences take effect

- 90 Another category of pre-consolidation amendments are those in category (f): amendments desirable in ensuring consistency in relation to the powers of different courts to provide for when sentences or particular requirements of sentences are to take effect. A specific power has been taken in clause 2(3)(c) for the Secretary of State to remove differences between provisions relating to powers of different courts to provide for when sentences or particular requirements of sentences are to take effect. The amendments made can broadly be sub-categorised into two types.
- 91 The first type of amendments are those affecting when a sentence starts and when a sentence ends.
- 92 The most significant of these amendments is the amendment to section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 by paragraph 51. Section 154 provides that any sentence imposed by a Crown Court takes effect from the beginning of the day on which it is made unless the court otherwise directs. The Law Commission, in their consultation on the Sentencing Code (Law Commission Consultation Paper No 232: paragraph 10.23) noted that there is no corresponding legislative provision for the magistrates' court, although current practice is the same. The amendment at paragraph 51 accordingly extends section 154 so that, unless the court orders otherwise, sentences imposed by the magistrates' court take effect from the beginning of the day on which they are made.
- 93 Other amendments in this category are of a similar nature. For example, the amendments effected by paragraph 31(4) and 110(17) ensure that specific sentences take effect at the beginning of the day on which they are imposed unless ordered otherwise.
- 94 The amendments effected by paragraphs 66(3) and 110(19) ensure that sentences finish at the end of the final day on which they must be complied with, to remove the uncertainty about when they end if expressed to end "on" that day.
- 95 The second type are those which align the language used to refer to periods of time and better clarify when periods begin.
- 96 For example, in a number of enactments the maximum period for the sentence is expressed as a period "from" the date of the order. A period of time running "from" from a particular event is ambiguous and will usually be taken to exclude the day on which the event takes place (although not always): see *Dodds v Walker* [1981] 2 All E.R. 609. It is, therefore, no longer standard drafting practice to use "from", and amendments have therefore been made to replace these references with descriptions of a period "beginning with" the date of the order, clarifying that the day of the order itself is counted: see paragraphs 17, 25(5), 46(2) and 128.
- 97 Similarly, a number of provisions relating to requirements that can be imposed as part of a community order or a suspended sentence order express the maximum period that such requirements can be imposed for as a period "beginning with the day on which it is made". These provisions are potentially ambiguous as to whether the maximum period begins from the day the order itself is made, or the day the requirement is imposed (which can be later). Amendments have been made to clarify that the intended effect is the latter: see paragraphs 75, 76 and 78.

## Category (g): commencement of future orders

- 98 The final category of pre-consolidation amendments are those in category (g): amendments necessary to provide for the clean sweep policy in relation to future amendments to the law.
- 99 As referred to above, the principal effects of the clean sweep are given effect by clause 1 (and the exceptions in Schedule 1). There are some specific cases where amendments are necessary to achieve the desired result (such as with powers to re-sentence discussed above). A distinct category of these are the series of amendments necessary to existing order-making powers to amend the law, to provide that any such amendments may have effect for any conviction occurring on or after the change is commenced, regardless of when the offence is committed. These amendments are intended to provide that as the law

is amended after the clean sweep it will remain a single body of law. Clause 1 does not affect these powers as it only operates on existing transitional provisions, not those that may come into force in the future.

- 100 For example, some of the amendments alter the Secretary of State's power to amend the maximum fine or maximum period for which the requirement can be imposed, so that the change to the maximum can apply to any offender convicted after the change comes into force, not only for any offender whose offence was committed after that time.
- 101 As with the clean sweep itself, these amendments have only been made where they will not have the effect of increasing the maximum penalty available for the offence, or of exposing an offender to a minimum penalty that did not exist at the time of their offence. The relevant amendments can be found at paragraphs 19(2), 21, 32(2), 52(3), 91, 94, 96, 100(7), 102(7), 106(4), 110(15), 111(6) and (19), 112(12) and 132.

## Commencement

- 102 Most of the Bill will come into force immediately before "the consolidation date" - i.e. when the Sentencing Code itself comes into force. The exceptions are the powers to make orders under clauses 1 and 2 which come into force upon Royal Assent.

## Financial implications of the Bill

- 103 There are no financial implications as a result of this Bill.

## Parliamentary approval for financial costs or for charges imposed

- 104 This Bill does not require either a money resolution or a ways and means resolution.

## Compatibility with the European Convention on Human Rights

- 105 The Government considers that this Bill is compatible with the European Convention on Human Rights. The Lord Chancellor and Secretary of State for Justice, Rt. Hon. Robert Buckland QC MP has provided a statement under section 19(1)(a) of the Human Rights Act 1998 to that effect. The operation of clause 1 engages Article 7 of the European Convention as it operates with retrospective effect on the Acts relating to sentencing. Schedule 1 to the Bill lists those exceptions made to the operation of clause 1 to ensure that no heavier penalty or minimum or mandatory sentence is imposed on an offender than was available at the date of the offence.

## Related documents

106 The following documents are relevant to the Bill and can be read at the stated locations.

The following were published on 22 November 2018, reference LC382:

- The Sentencing Code Volume I: Report (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Sentencing-Code-report-Web-version-1.pdf>)
- Summary of Sentencing Code Report (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Summary-of-Sentencing-Code-Report.pdf>)
- The Sentencing Code Volume II: Draft Legislation (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Complete-Sentencing-Code-V2.pdf>)
- Welsh Summary Of Sentencing Code Report (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Sentencing-Code-Welsh-Summary-of-Report.pdf>)
- Appendix 5 - Main Consultation Analysis (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Appendix-5-Main-consultation-analysis.pdf>)
- Appendix 6 - Consultation Analysis: Children and Young Persons (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Appendix-6-Consultation-Analysis-Children-and-Young-Persons.pdf>)
- Sentencing Code Impact Assessment (<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/11/Sentencing-Code-Impact-Assessment.pdf>)
- Executive Summary of Sentencing Code Report ([https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/12/6.5138\\_LC\\_Sentencing-code-summary-report\\_Web.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/12/6.5138_LC_Sentencing-code-summary-report_Web.pdf))

A full list of consultations and supporting documents can be found at <https://www.lawcom.gov.uk/project/sentencing-code/#the-sentencing-code>

## Annex A - Territorial extent and application in the United Kingdom

107 Subject to the provisions set out in clause 5(5) to (11), the provisions of the Bill extend and apply to England and Wales only.

108 Clause 5(5) to (11) provides that the operation of the clean sweep or a pre-consolidation amendment on an existing provision has the same extent as the existing provision.

109 The table below sets out the pre-consolidation amendments in the Bill which extend beyond England and Wales in the United Kingdom.

Provision in Schedule 2	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative Consent Motion needed?
Paragraph 101	Yes	Yes	Yes	Yes	Yes
Paragraph 103	Yes	Yes	Yes	Yes	Yes
Paragraph 112	Yes	Yes	No	Yes	Yes (NI only)
Paragraph 133	Yes	Yes	No	Yes	No
Paragraph 134	Yes	Yes	Yes	Yes	No

### Minor or consequential effects<sup>10</sup>

110 As a Bill that gives effect to proposals contained in a report by a Law Commission, the exception at Standing Order 83J (10)(e) of Standing Orders of the House of Commons relating to Public Business applies.

### Subject matter and legislative competence of devolved legislatures

111 The subject matter of the Bill, sentencing procedure, is a reserved matter in England and Wales under paragraph 8(1)(c) of Schedule 7A to the Government of Wales Act 2006. It is a devolved matter in Scotland by virtue of omission from Schedule 5 to the Scotland Act 1998, and Northern Ireland by virtue of omission from Schedules 2 and 3 to the Northern Ireland Act 1998.

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<sup>10</sup> References in this Annex to an effect of a provision being minor or consequential are to it being minor or consequential for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

# SENTENCING (PRE-CONSOLIDATION AMENDMENTS) BILL

## EXPLANATORY NOTES

These Explanatory Notes relate to the Sentencing (Pre-consolidation Amendments) Bill [HL] as introduced brought from the House of Lords on 4 March 2020 (HL Bill 102).

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