

## Sentencing (Pre-consolidation Amendments) Bill

### Memorandum from the Ministry of Justice to the Delegated Powers and Regulatory Reform Committee

#### **A. Introduction**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Sentencing (Pre-consolidation Amendments) Bill (“the Bill”). Following its partial passage through the House of Lords in the last parliament<sup>1</sup>, the Bill was re-introduced in the Lords on 21 January 2020, and is subject to the procedure for Bills implementing Law Commission recommendations. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. It also explains provisions in the Bill which amend existing powers.

#### **B. Purpose and effect of the Bill**

2. The purpose of the Bill is to make amendments to existing legislation in order to facilitate the consolidation of sentencing procedural law via the Law Commission’s Sentencing Code (“the Code”). The Code is a consolidation of legislation which aims to ensure that the law relating to sentencing procedure is readily comprehensible and operates within a clear framework as efficiently as possible.
3. The pre-consolidation amendments are generally limited to correcting minor errors and streamlining the law in the area being consolidated and only have effect for the purposes of the consolidation. They are needed for the Code to operate as intended.
4. The Bill and the Code consolidate the law with an approach referred to as the “clean sweep”. The effect of the clean sweep is to remove historic and no longer needed, layers of legislation. Subject to some limited exceptions needed to protect an offender’s fundamental rights, the clean sweep will allow for all offenders sentenced after the Code comes into force to be sentenced according to the most up to date law irrespective of when they committed the offence.
5. Neither the pre-consolidation amendments nor the Code introduce any new sentencing law. Neither will alter the maximum penalties available for an offence or increase the scope of minimum sentencing provisions.
6. The Bill has two substantive clauses.
7. Clause 1 amends existing sentencing law to allow for a single body of law to apply to all convictions after the commencement of the Code, thus giving effect to the clean sweep. 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

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<sup>1</sup> The Bill as previously introduced was considered by the Committee and reported on without comment in its 57<sup>th</sup> Report of Session 2017-19, published on 18 June 2019.

commenced prospectively. The clean sweep is subject to exceptions (set out in Schedule 1 to the Bill) to ensure that no offender is subject to a greater penalty than that available at the time the offence was committed, or subject to a minimum or mandatory sentence that did not apply at that time.

8. Clause 2 will enable changes to substantive law, the pre-consolidation amendments contained in Schedule 2. This is a standard feature of Bills enabling consolidation to take place.

### **C. Delegated powers**

9. The Bill includes three delegated powers:
  - a power to make further exceptions to the operation of the clean sweep;
  - a power to make further pre-consolidation amendments to the law which facilitate or are desirable in connection with the consolidation; and
  - a power to allow commencement information to be stated on the face of the Code when future amendments are brought into force (this power has been added to the Bill since its original introduction in the last parliament).

It also clarifies the extent, and supports the operation, of existing powers being consolidated in the Code. Since its original introduction in May 2019 the Government has included additional provisions which ensure that existing powers to be consolidated in the Code are not inadvertently drawn too widely, support powers to make subordinate legislation to be contained in the Code so they can operate properly, and others which relate to the possibility of extension of provisions outside the United Kingdom.

#### Clause 1: power to make further exceptions to the operation of the clean sweep

Power conferred on: the Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative resolution procedure

#### *Context and Purpose*

10. The clean sweep effected by clause 1 of the Bill is subject to exceptions.
11. Subsection (4) of the clause ensures that the clean sweep does not increase the maximum penalty for any offence. Subsection (5)(a) gives effect to Schedule 1 which creates a series of exceptions to the clean sweep. 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.
12. The power in subsection (5)(b) confers on the Secretary of State a further power to make regulations to exempt certain provisions from the clean sweep.

#### *Justification for taking the power*

13. The clean sweep will provide for a consolidated statute on sentencing procedure that can apply to offences regardless of when they were committed, even before the

commencement of the Code. However, the Bill must ensure that no one be subject to a greater penalty than that available at the time of the offence in order to ensure compatibility with common law and ECHR protections against retroactive punishment. The Bill as drafted therefore sets out exemptions to the clean sweep, both in an overarching clause (subsection 1(4)) and in Schedule 1, given effect by subsection 5(a).

14. The power in subsection (5)(b) would allow the Secretary of State to add further exemptions should these become necessary, for example in the event that a new mandatory penalty (such as a minimum penalty or other compulsory disposal), is introduced to the statute book between Royal Assent of the Bill and the commencement of the Code, or in the event that the need for further exemptions comes to light.
15. Once the clean sweep has taken effect and the Code comes into force, this power will no longer be needed or used. However, the power needs to be preserved to provide certainty that the exceptions to the clean sweep are maintained.

#### *Justification for the procedure*

16. The Law Commission's draft Bill set out that use of this power would be subject to the affirmative procedure. Regulations under this clause will need to be subject to particular scrutiny, given the importance of ensuring the correct retrospective application of the Code (albeit the power can only disapply retrospective application, not apply it). This has in principle the same effect as ensuring that a provision, which most often will be in primary legislation, will continue to apply for "old" offences notwithstanding the introduction of the Code. It is considered that the affirmative procedure ensures appropriate parliamentary scrutiny over the use of this power.

#### Clause 2: power to make further pre-consolidation amendments

Powers conferred on: the Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative resolution procedure

#### *Context and purpose*

17. Clause 2 of the Bill enables changes to substantive law, the pre-consolidation amendments contained in Schedule 2 to the Bill. This is a standard feature of Bills enabling consolidation to take place.
18. The main reasons for pre-consolidation amendments are those which:
  - a. clarify the legislation or remove an element of ambiguity from it;
  - b. remedy a missed consequential provision in earlier legislation;
  - c. repeal or omit provisions in the existing legislation that are either spent or now considered unnecessary to repeat;
  - d. simplify, streamline, or make more consistent sentencing procedure;
  - e. ensure consistency in re-sentencing or committal powers;
  - f. ensure 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. give effect to the clean sweep in relation to the future exercise of existing powers.

19. Clause 2(2) gives the Secretary of State the power to make further pre-consolidation amendments to existing legislation to enable the consolidation to proceed. This power is limited only to changes that the Secretary of State is of the opinion are required to facilitate the consolidation or are otherwise desirable in connection with it. Clause 2(3) particularises this to set out that the power may be used to remove unnecessary differences in the law governing a) forfeiture; b) powers of different courts to deal with offenders who are subject to particular sentences; or (c) powers of different courts to provide for when sentences or particular requirements of sentences are to take effect.

*Justification for taking the power*

20. In the course of the Sentencing Code project, the Law Commission identified provisions in sentencing legislation that required streamlining or clarification ahead of consolidation in the Code. These amendments are set out in Schedule 2 to the Bill.
21. However, a power to make further amendments is necessary given the sheer complexity of the current law, to allow for changes after the Bill receives Royal Assent, and up until passage of the Sentencing Code Bill – for example, in the event there are further changes to criminal justice legislation during that period, or in the event that the need for further pre-consolidation amendments becomes apparent. These changes are limited to changes that the Secretary of State is of the opinion are required to facilitate the consolidation. They would not make policy changes.
22. Such powers are a common feature of consolidation exercises and can be found in:
- section 36 of the National Health Service Reform and Health Care Professions Act 2002;
  - section 407 of the Communications Act 2003;
  - section 321 of the Pensions Act 2004;
  - section 76 of the Charities Act 2006;
  - section 72 of the Electoral Administration Act 2006; and
  - section 47 of the Flood and Water Management Act 2010.

If needed, these would effect the sorts of changes already set out in Schedule 2 to the Bill.

23. For example, 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.
24. However, the current 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).

25. 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.
26. Schedule 2 to the Bill therefore makes a large number of pre-consolidation amendments to ensure that whenever a court is re-sentencing someone, they are applying the current law, and not that in force at the time of the original sentencing. However, clause 2(3)(b) particularises the general power to make pre-consolidation amendments, conferring on the Secretary of State specific powers to further remove the differences between powers of different courts to deal with offenders subject to particular sentences, should the need for these become evident. As with the general power, these changes are limited to changes that the Secretary of State is of the opinion are required to facilitate the consolidation or are desirable in connection with it. They would not make policy changes.
27. Another type of amendment in Schedule 2 to the Bill involves those which are 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. The amendments made can broadly be sub-categorised into two types.
28. The first type of amendments are those affecting when a sentence starts. The most significant of these amendments is the amendment to section 154 of the Powers of Criminal Courts (Sentencing) Act 2000. 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, noted that there is no corresponding legislative provision for the magistrates' court, although current practice is the same. They consulted on extending section 154 to the magistrates' court to provide a statutory basis for this current practice, and after near-unanimous support from consultees recommended such an extension. The amendment at paragraph 51 of Schedule 2 accordingly extends section 154 so that unless the court orders otherwise sentences imposed by the magistrates' court also take effect from the beginning of the day on which they are made.
29. The second type are those which align the language used to refer to periods of time and better clarify when these begin. 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). It is, therefore, no longer standard drafting practice to use "from", and amendments have therefore been made in Schedule 2 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.
30. The power in clause 2(3)(c) particularises the general power to make further pre-consolidation amendments, allowing the Secretary of State to remove further differences between provisions relating to powers of different courts to provide for when sentences or particular requirements of sentences are to take effect. As with the general power, these changes are limited to changes that the Secretary of State is of the opinion are required to facilitate the consolidation. They would not make policy changes.

31. Once the Code comes into force this power will not be needed any more.

*Justification for the procedure*

32. The Law Commission's draft Bill set out that use of this power would be subject to the affirmative procedure. Although the power is limited to amendments which are needed to facilitate, or are desirable in connection with, the consolidation of sentencing procedure, it has the potential to amend a broad range of sentencing provisions in criminal justice legislation, much of it in primary legislation. It is considered that the affirmative procedure ensures appropriate parliamentary scrutiny over the use of this power.

Paragraph 134 of Schedule 2: power to allow commencement information to be stated on the face of the Code

Powers conferred on: the Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: no procedure

*Context and Purpose*

33. The Code will be a comprehensive statement of the law that applies when sentencing a person convicted of an offence after it has come into force, regardless of when the offence was committed. Where certain provisions do not apply to all such convictions, the intention is that this should be made clear on the face of the Code. This will save users of the Code from needing to look at commencement orders and regulations in order to establish that a provision that appears on its face to apply to all cases actually has a more limited application.

34. For example, the Code will consolidate section 34(3) of the Magistrates' Courts Act 1980, which provides for a fine to be available as an alternative to imprisonment in certain cases. The fine became unlimited as a result of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, but the combined effect of section 85(4)(a) of that Act and of Article 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 11) Order 2015 (S.I. 2015/504) was to retain the previous limit for offences committed before 12 March 2015. The Code will include express provision to make this clear, which will save users of the Code from needing to look at other provisions in order to discover that what appears to be an unlimited fine is actually limited in certain circumstances.

35. Some provisions that are to be included in the Code will not have been commenced by the time the Code comes into force, and it is possible that when they are commenced they will be commenced subject to limitations that are similar to the limitation in S.I. 2015/504. The consolidation will also include powers to amend certain provisions of the Code, and they may be exercised so as to make provision that is subject to savings or transitional provisions.

### *Justification for taking the power*

36. In order to ensure that the Code continues to take a consistent approach where uncommenced provisions are brought into force subject to savings or transitional provisions, or amendments are made that are subject to savings or transitional provisions, it is necessary to have a power to state the effect of those savings or transitional provisions in the consolidation. This power is provided by paragraph 134 of Schedule 2 to the Bill.
37. Sub-paragraph (1) allows regulations to make provision in connection with the coming into force of uncommenced or amending provisions. The regulations will be able to amend the legislation that is being consolidated so as to specify the cases in which, or the purposes for which, the provision in question will have effect (paragraph (a)). The regulations will also be able to make provision to secure that provisions that are to continue to have effect only for particular purposes or in particular cases remain in primary legislation instead of having effect only by virtue of transitional, transitory or saving provision (paragraph (b)).
38. The intended use of paragraph (b) is for cases where the traditional drafting approach would involve substituting new provision for the existing provision, but with the existing provision continuing to have effect for certain cases by virtue of transitional, transitory or saving provision. Paragraph (b) will allow regulations to provide for both the existing provision and the new provision to be included in the Code, with each stating the cases to which it applies (for example, the existing provision might apply in relation to offences committed before 1 January 2022, and the new provision in relation to offences committed on or after that date). This will allow for parallel provisions to exist in the legislation where this is helpful to users of the legislation.
39. Sub-paragraph (2) allows consequential amendments to be made to other legislation. Such amendments may be necessary, for example to correct existing cross-references to provisions of the Code where parallel provisions have been added to the Code as a result of exercising the power conferred by sub-paragraph (1)(b).

### *Justification for the procedure*

40. The power is subject to no Parliamentary procedure. This is because the power will not be used to make any substantive changes to the law: it will be used only to state the effect of commencement provisions. Commencement powers are not generally subject to Parliamentary procedure. In addition, this power is similar in nature to section 7(2)(a) of the Offender Rehabilitation Act 2014 and section 104 of the Deregulation Act 2015, which were also subject to no Parliamentary procedure. The power in section 7(2)(a) of the 2014 Act was welcomed by the Committee in its 1<sup>st</sup> Report of the 2013-14 session.
41. There may be cases in which the power conferred by paragraph 134 is exercised in the same instrument as another power. This is particularly likely to be the case where an amendment of the Code is being made by subordinate legislation. In such a case the result of the pre-consolidation amendment made by paragraph 133 of Schedule 2 (see paragraphs 46 and 47) is that, if the other power is subject to a higher level of Parliamentary procedure, the higher level will also apply to the power conferred by paragraph 134.

### Amendments to existing powers

42. A number of the pre-consolidation amendments in Schedule 2 to the Bill contain amendments to existing order-making powers in sentencing legislation. In some cases these amend the powers so that they consistently refer to the ability of the Secretary of State to make consequential amendments, so that these powers can be streamlined in the Code. In other cases, existing powers are amended so that any changes to the law made under them can apply to offenders convicted after those changes are made (regardless of when their offence happened). This brings those powers into line with the clean sweep and commencement policy of the Bill. The table at **Annex A** sets out the powers being amended by the pre-consolidation amendments.
43. The process of consolidation, which takes order-making powers from their original context, also requires some provisions to ensure their scope remains properly focused and so they can function properly in their new, consolidated form.
44. The pre-consolidation amendment at paragraph 67 of Schedule 2 to the Bill limits the provisions of the Criminal Justice Act 2003 that can be amended by statutory instrument in consequence of provision made under section 178 of that Act about the review or amendment of community orders. As a result, the power will be exercisable only in relation to the main provisions of the 2003 Act that relate to community orders, and this will enable the Code to contain a more precisely targeted power than is the case under the current law.
45. Paragraphs 106(3) and 110(21) of Schedule 2 make similar amendments to the Criminal Justice and Immigration Act 2008 in relation to Youth Rehabilitation Orders. In particular the Bill amends the powers set out in section 4(3) of that Act which allow the Secretary of State to make Orders relating to the definition of a “responsible officer”, and in paragraph 35(3) of Schedule 1 which contains delegated powers relating to the review of Youth Rehabilitation Orders. Again, these amendments will enable the Code to contain more precisely targeted powers than is the case under the current law.
46. The Code will consolidate a number of different powers to make subordinate legislation. Those powers do not at the moment deal consistently with cases where powers that are subject to different levels of Parliamentary scrutiny are exercised in the same instrument. These differences in treatment can present practical problems when exercising different powers in the same instrument. It also makes it difficult to consolidate the existing powers accurately.
47. Paragraph 133 of Schedule 2 is intended to deal with both of these problems by providing that where powers that are to be included in the Code and that are subject to different Parliamentary procedures are exercised in the same instrument, the highest level of Parliamentary procedure of the various powers will apply. So (for example) where provisions that are not subject to any Parliamentary procedure are included in the same instrument as provisions that are subject to affirmative resolution procedure, affirmative resolution procedure will apply to the whole instrument. This is based on the approach taken in section 1292(3) and (4) of the Companies Act 2006, which rewrote existing company law in a new Act.

### Armed Forces – territorial extent

48. Other provisions in the Bill relate to the scope of existing powers to extend the law on sentencing procedure beyond the United Kingdom. These are included in the current Bill in order that the existing law can be accurately consolidated in the Code and that there can be certainty about their extent.
49. The power to extend provisions of the Criminal Justice Act 2003 to the Crown Dependencies in section 338 of that Act has never been used but for the purposes of this consolidation exercise clause 5(8) extends that existing power to amendments to that Act arising from the Bill. This has been agreed with the Crown Dependencies.
50. Sentencing provisions applying to the Armed Forces are intended to be included in the consolidation of sentencing law. The Bill therefore also needs to make provision for their inclusion, and any pre-consolidation amendments that may be necessary. Clause 5(10) extends the power in section 384 of the Armed Forces Act 2006 to make provisions of that Act apply with modifications to the Channel Islands, British overseas territories and the Isle of Man to any amendments made to Armed Forces-related provisions by the Bill. The Crown Dependencies have agreed to this provision, and the British overseas territories were consulted.
51. For completeness, it is worth noting that the powers being taken in clause 5 can never in practice themselves be used, as they will come into force just before the consolidation of sentencing law in the Code. The Code will then contain powers to make the territorial extensions as described above.
52. This is needed to ensure the existing law in relation to sentencing procedure is consolidated accurately and to accommodate the clean sweep and any necessary pre-consolidation amendments for provisions that apply to the Armed Forces, given the territorial extent of the Armed Forces Act 2006.

**Annex A**

<b>Existing Power</b>	<b>Description</b>	<b>Amended by (paragraph in Schedule 2)</b>	<b>Effect of amendment</b>
Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA"), s15(1)	Power to vary the maximum period of a conditional discharge	19(2)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
PCCSA, s17(4)	Power to alter the conditions for compulsory referral conditions to a youth offender panel.	21	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
PCCSA, s30(4)	Power to alter the conditions for compulsory referral conditions to a youth offender panel; power to set criteria for members of youth offender panels; power to amend the types of young offender to which extension of a referral order can be made.	23	Allows consequential amendments to be made under this power
PCCSA, s103(2)	Power to set the period of supervision of a detention and training order	32(2)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
PCCSA, s104B(7)(b)	Power to make provision about interaction between sentences of detention and custodial sentences	34	Allows consequential amendments to be made under this power
PCCSA, s160(6)	(Applies to all orders made under the PCCSA)	129	Allows transitory, transitional and savings provisions to be made under this power

			(excluding for purposes of provision not being replicated in the Sentencing Code)
PCCSA, Schedule 1 para 6A(7)	Power to set the maximum fine to pay following breach of a youth offender contract.	52(3)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
Criminal Justice Act 2003 ("CJA"), s223	Power to set limits for unpaid work requirements, curfew requirements, exclusion requirements, and alcohol abstinence and monitoring requirements	91	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
CJA, s236A(7)	Power to amend the offences triggering a special custodial sentence for certain offenders of particular concern	94	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
CJA, s269(6)	Power to amend Schedule 21 (minimum terms for mandatory life sentences)	96	Prohibits an order made under this power from having effect in relation to an offence committed before the order comes into force
Criminal Justice and Immigration Act 2008 ("CJIA"), s4(3)	Power to make provision regarding "responsible officer" and "qualifying officer" in relation to youth rehabilitation orders	106(4)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
CJIA, Schedule 1 para 27	Power to amend limits (for youths) on unpaid work requirement, curfew requirements, exclusion requirements, local authority residence	110(15)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence

	requirements and fostering requirements		
CJIA, Schedule 2 para 25	Power to amend maximum period of fostering requirements	111(19)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
CJIA, Schedule 3 para 17(2)	Power to make amendments to requirements of transferred youth rehabilitation orders in consequence of changes to the law in Northern Ireland.	112(12)	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence
Counter-Terrorism Act 2008, s33	Power to amend list of offences considered to have a terrorist connection for purposes of sentencing	132	Aligns powers to make orders apply to any offender convicted after their commencement irrespective of the date of the offence (for England and Wales)