



Sentencing (Pre-consolidation Amendments) Bill [HL] HL Bill 42 of 2019–21

On 11 February 2020, the second reading of the Sentencing (Pre-consolidation Amendments) Bill [HL] is scheduled to take place in the House of Lords.

Summary

The Sentencing (Pre-consolidation Amendments) Bill [HL] is a government bill introduced as a ‘law commission’ bill as part of the Law Commission’s sentencing code project. In 2014, the Coalition Government agreed that the Law Commission (the commission) should undertake a project to consolidate the law on sentencing. In November 2018, the commission published its draft bill which would give effect to a new consolidated sentencing code (the code). When introduced this would take the form of a ‘consolidation bill’. The Government has said that it would be subject to the parliamentary procedure for Law Commission consolidation bills. The code would re-enact law already in force and would not alter its substance or effect. The commission also published a draft Sentencing (Pre-consolidation Amendments) Bill, alongside the draft consolidation bill.

The Sentencing (Pre-consolidation Amendments) Bill would make amendments to the law on sentencing to facilitate the operation and enactment of the code (known as pre-consolidation amendments). The bill would also provide for a “clean sweep” of sentencing law. The explanatory notes to the bill describe this as a “new approach” and would remove historic and redundant layers of legislation. The clean sweep would mean that offenders convicted after the code came into force would be sentenced according to the most up-to-date law, regardless of when the offence was committed (with certain exceptions, for example an offender would not be subject to a greater penalty than available at the time of the offence).

A [version of the bill](#) was first introduced into the House of Lords on 22 May 2019. It was considered in second reading committee on 12 June 2019. This then completed its stages up to report stage but did not receive a third reading. The bill was lost when parliament prorogued at the end of the 2017–19 session. It was carried over into the 2019 session but was lost at dissolution, before its third reading. The explanatory notes to the current bill, HL Bill 42 of session 2019–21, explain that amendments tabled by the Government at third reading have been incorporated into the bill.

Charley Coleman | 4 February 2020

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What is the Law Commission?

The Law Commission was established under the Law Commissions Act 1965 for the purpose of promoting reforms to the law in England and Wales. It aims to:

- ensure that the law is as fair, modern, simple and as cost-effective as possible;
- conduct research and consultations in order to make systematic recommendations for consideration by Parliament; and
- codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes.

The current law commissioners are: Lord Justice Green, chairman; Professor Sarah Green; Professor Nick Hopkins; Professor Penney Lewis; and Nicholas Paines QC.

Separate Law Commissions exist for Scotland and Northern Ireland.

I. What are Consolidation Bills and Pre-consolidation Amendments?

I.1 Consolidation Bills

Consolidation bills bring together, or consolidate, the law in a particular area. They are “invariably” introduced in the House of Lords.¹ Consolidation bills fall into the following categories:

- (a) Bills, whether public or private, which are limited to re-enacting existing law;
- (b) Bills to consolidate any enactments with amendments to give effect to recommendations made by the Law commissions;
- (c) Statute law repeals bills, prepared by the Law commissions to promote the reform of the statute law by the repeal of enactments which are no longer of practical utility;
- (d) Statute law revision bills, which are limited to the repeal of obsolete, spent, unnecessary or superseded enactments;
- (e) Bills prepared under the Consolidation of Enactments (Procedure) Act 1949, which include corrections and minor improvements to the existing law.²

The *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* provides further information on procedures for consolidation bills in the House of Lords.³

I.2 Pre-consolidation Amendments

Pre-consolidation amendments are made to legislation to help the subsequent consolidation of the law in a particular area. They are commenced immediately before the consolidation is enacted. The pre-consolidation amendments therefore only have an effect for the purposes of the consolidation.

¹ House of Lords, [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 2017, para 8.203.

² *ibid.*

³ *ibid.*, paras 8.203–8.209.

The Law Commission has stated that pre-consolidation amendments are “generally limited to correcting minor errors and streamlining the law in the area being considered”.⁴ In the case of the Sentencing (Pre-consolidation Amendments) Bill, the bill’s pre-consolidation amendments include, for example, “changing language to avoid inconsistency, correcting error or updating existing statutory references”.⁵ The Sentencing (Pre-consolidation Amendments) Bill is a specific bill to implement pre-consolidation amendments for the code. It is not itself a consolidation bill.⁶

2. Law Commission Sentencing Code Project

2.1 Background to the Consolidation

The Law Commission has described current sentencing law as inefficient and lacking in transparency. It has argued that it is incredibly complex and hard to understand “even for experienced judges and practitioners”.⁷ When the commission compiled the current law on sentencing it reached 1,300 pages.⁸ The sentencing code would reduce it to 450 pages.⁹ The 1,300 pages only include law that would be applied if a court was sentencing an offence committed today. Currently, courts must also apply historic versions of sentencing law in cases that involved offences committed in the past. The commission has argued that even the existence of historic versions of the law were not readily apparent.

The complexity of the current law can have practical effects on sentencing. The commission has cited a 2012 analysis of 262 randomly selected cases from the Court of Appeal (Criminal Division). This found that 36 percent of the sample cases involved unlawful sentences that the court should not have made.¹⁰ The commission argued that this demonstrated that the current law was resulting in an “extraordinary number of sentences that have been wrongly passed”.¹¹ It has explained that such errors could be serious. For example, the minimum sentence may not have been passed when it should have, or an offender may have been subject to a longer prison sentence that should not have been available for that offence. Correcting these errors can have financial costs because additional hearings may be needed and can cause delays to other hearings. The commission has also argued that the difficulty of interpreting the law also has a cost. This is because it can increase the length of sentencing hearings. The commission found that “the current delay between an offence being charged and it being disposed of in the crown court is 204 days”.¹² It cited an average waiting time of five and a half months for an appeal against sentence to the Court of Appeal. The commission has said that the current best estimate suggests that enactment of the code would save £256.05 million over ten

⁴ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, p 3.

⁵ [Explanatory Notes](#), para 12.

⁶ House of Commons, ‘[Written Statement: Interim Response to The Sentencing Code Volume 1: Report \(Law Com No 382\)](#)’, 22 May 2019, HCWS1581.

⁷ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, para 1.16.

⁸ Law Commission, [The Sentencing Code: Summary of Report](#), November 2018, p 2.

⁹ *ibid.*

¹⁰ *ibid.*, p 3.

¹¹ *ibid.*

¹² *ibid.*

years.¹³

The Law Commission has argued that the new sentencing code would have three key benefits:

- it would make the law simpler and easier to use;
- it would increase the public’s confidence in the criminal justice system; and
- it would increase the efficiency of the sentencing process.

The explanatory notes to the Sentencing (Pre-consolidation Amendments) Bill also set out the aim of the code, which 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.¹⁴

The sentencing code project has been subject to four formal consultations conducted by the Law Commission.¹⁵ The first two consultations led to the following reports by the Law Commission:

- [A New Sentencing Code for England and Wales: Transition—Final Report and Recommendations](#), May 2016, HC 30 of session 2015–16, Law Com No 365
- [Sentencing Law in England and Wales: Legislation Currently in Force—Interim Report](#), 7 October 2016

The commission’s final report was principally concerned with the third and fourth consultations.¹⁶

2.2 Pre-consolidation Amendments and the Clean Sweep

The Law Commission has said that the code had been drafted as a consolidation bill because of the “intense pressures” on parliamentary time.¹⁷ It said that this would minimise the time taken in both Houses to pass the legislation. The commission has argued that because the bill would be consolidating law already in force, parliament has already debated the provisions and so a reduced scrutiny procedure is appropriate.

¹³ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, para 1.34.

¹⁴ [Explanatory Notes to the Sentencing \(Pre-consolidation Amendments\) Bill](#), para 10.

¹⁵ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, para 2.13.

¹⁶ Final report: Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382; Consultation papers: [The Sentencing Code: Volume: Consultation Paper](#), 27 July 2017, Law Commission Consultation Paper No 232; and [The Sentencing Code: Disposals Relating to Children and Young Persons](#), 23 March 2018, Law Commission Consultation Paper No 234.

¹⁷ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, p 6.

The commission has explained that the Sentencing (Pre-consolidation Amendments) Bill is needed to give effect to what it describes as the “clean sweep” of historic sentencing law. It would also make technical legal amendments to the law to allow the consolidation to proceed. These are known as pre-consolidation amendments. The commission has argued that the clauses are “entirely uncontroversial and have been heavily consulted on”. The clean sweep had received “unanimous support” from those that responded to its consultation.¹⁸ This included academics, judges and “all strands of the legal profession”.¹⁹ Clause 1 of the bill would give effect to the clean sweep. Clause 2 would give effect to the pre-consolidation amendments. The commission has described the clean sweep as follows:

The clean sweep is a technical device which has the effect of removing the need to make reference to previous layers of legislation. It does so by extending provisions which have been partially commenced so that they apply to all cases, and completely repealing provisions which have previously been repealed but partially saved. The result is that the most up to date law applies to all cases, irrespective of the date of the offence. This is subject to some limited exceptions needed to protect an offender’s fundamental rights.²⁰

The clean sweep would mean that courts would no longer have to consider the issue of transition and the date of the commission of the offence when applying sentencing legislation. The Law Commission has argued that the clean sweep would bring “much needed clarity and transparency” to sentencing.²¹ It also believes that this should reduce errors and significantly increase efficiency. This is because judges would no longer need to spend time identifying and interpreting transitional provisions and “complex historic sentencing regimes”.²²

The commission also made recommendations for the reform of sentencing law not reflected in either the code or in the pre-consolidation amendments bill.²³ It said that both bills could be implemented without the additional reforms. The commission has said that these further recommendations would amount to changes to the penalties available to the court. They were therefore outside the terms of reference of the commission’s consolidation project.²⁴

2.3 Government Response

In its interim response to the Law Commission, the previous Government, under Theresa May, said that it considered the consolidation of sentencing law to be “a major step forward in simplifying what is often a complex and technical area of law”.²⁵ It also stated that it believed it was “absolutely vital”

¹⁸ Law Commission, [The Sentencing Code: Summary of Report](#), November 2018, p 6. For a summary of the responses to the Law Commission’s consultation on the clean sweep see: Law Commission, [A New Sentencing Code for England and Wales: Transition: Final Report and Recommendations](#), May 2016, Law Com No 365, paras 3.1–3.54.

¹⁹ *ibid.*

²⁰ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, p 1.

²¹ *ibid.*, para 4.42.

²² *ibid.*

²³ *ibid.*, paras 13.1 and 13.2.

²⁴ *ibid.*, para 13.3. The recommendations, for changes outside the scope of the consolidation project, are set out in chapter 13.

²⁵ House of Commons, [‘Written Statement: Interim Response to The Sentencing Code Volume 1: Report \(Law Com No 382\)’](#), 22 May 2019, HCWS1581.

that errors in sentencing were minimised and that those involved were not put through the time and expense of “unnecessary” appeals.²⁶

The Government also stated that it was looking at substantive sentencing law reform. It said that such substantive reform was separate from the consolidation of the law in this area. It would bring forward the consolidation bill to give effect to the code as separate legislation to any wider reform. The Government also agreed that the commission’s further recommendations were out of scope of the consolidation itself.

The Conservative Party’s 2019 general election manifesto included several references to changes in sentencing, including:

- Introducing “tougher sentencing for the worst offenders and end automatic halfway release from prison for serious crimes”.²⁷
- Doubling the maximum sentence for assaulting emergency service workers “such as police officers, firefighters and paramedics”.²⁸
- Tougher community sentences.
- Introducing “tougher sentences for animal cruelty”.²⁹

The December 2019 Queen’s Speech included a Counter Terrorism (Sentencing and Release) Bill, a Sentencing Bill and the Sentencing (Pre-consolidation Amendments) Bill.³⁰

The background briefing notes to the Queen’s Speech explained that the “substantive reforms” in the Sentencing Bill would be distinct from the “important task of making sure that sentencing procedural law is clear and accessible to those that need to use it”.³¹

2.4 Sentencing (Pre-consolidation Amendments) Bill: Sessions 2017–19 and 2019

A [version of the bill](#) was first introduced into the House of Lords on 22 May 2019. It was considered in second reading committee on 12 June 2019.³² It was then committed to a special public bill committee.³³ The special public bill committee reported the Sentencing (Pre-consolidation Amendments) Bill to the House on 23 July 2019.³⁴ It completed its stages up to report stage but did not receive a third reading. A number of amendments had been made to the bill. The bill was the subject of a carry over motion. In the new session it proceeded through its stages up until third

²⁶ House of Commons, [‘Written Statement: Interim Response to The Sentencing Code Volume 1: Report \(Law Com No 382\)’](#), 22 May 2019, HCWS1581.

²⁷ Conservative Party, [Conservative Party Manifesto 2019](#), November 2019, p 18.

²⁸ *ibid*, p 19.

²⁹ *ibid*, p 4.

³⁰ Prime Minister’s Office, [The Queen’s Speech 2019: Background Briefing Notes](#), 19 December 2019.

³¹ *ibid*, p 71.

³² [HL Hansard, 12 June 2019, cols 13–34GC](#).

³³ UK Parliament website, [‘Special Public Bill Committee on the Sentencing \(Pre-consolidation Amendments\) Bill \[HL\]’](#), accessed 27 January 2020. The committee also took oral and written evidence (see: UK Parliament website, [‘Special Public Bill Committee on the Sentencing \(Pre-consolidation Amendments\) Bill \[HL\]: Publications’](#), accessed 27 January 2020).

³⁴ [HL Hansard, 23 July 2019, cols 1–12](#).

reading, but was lost when parliament was dissolved for the 2019 general election.

Speaking at the previous bill's second reading committee on 12 June 2019, Lord Keen, Advocate General for Scotland, stated that the bill's two objectives were to:³⁵

- remove historic layers of legislation; and
- make changes to the existing law of sentencing procedure to facilitate the consolidation in the sentencing code.

Lord Keen emphasised that the bill was only concerned with sentencing procedure and was not concerned with sentencing policy.³⁶ He said that the bill had received a broad consensus of support “from across the judiciary and the wider legal profession”.³⁷ The bill's objectives were supported by all Members who spoke in the debate.

At the bill's special public bill committee, the House agreed a number of amendments to the bill. Lord Keen explained that these mainly related to adding further exceptions to the clean sweep, as provided for by schedule I.³⁸ He said that this would ensure that no offender was subject to a greater maximum penalty that would have been available to the courts at the time the offense was committed, or subjected to a minimum or mandatory sentence that did not apply at the time. Lord Keen said that they were largely required to reflect recent changes to the law and to make sure that “we can incorporate sentencing provisions in so far as they relate to the Armed Forces into the sentencing code”.³⁹

The explanatory notes to the current bill, HL Bill 42 of session 2019–21, explain that amendments tabled by the Government at third reading have been incorporated into the bill.⁴⁰ It also explains that since the bill was most recently considered in the last parliament, further provisions have been incorporated which:⁴¹

- 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.

³⁵ [HL Hansard, 12 June 2019, col 16GC.](#)

³⁶ *ibid*, col 13GC.

³⁷ *ibid*, col 14GC.

³⁸ [HL Hansard, 23 July 2019, col 1.](#)

³⁹ *ibid*.

⁴⁰ [Explanatory Notes](#), para 5.

⁴¹ *ibid*, para 6.

3. Sentencing (Pre-consolidation Amendments) Bill: Session 2019–21—Summary of Clauses and Provisions

The Sentencing (Pre-consolidation Amendments) Bill consists of five clauses and two schedules.

Clause 1 contains provisions for carrying out the “clean sweep” of historic sentencing law. This would:

- remove the need to apply historic versions of the law;
- minimise the use of complex transitional provisions; and
- respect the fundamental rights of those affected by the sentencing process.⁴²

The clause would “fully repeal partially saved provisions concerning sentencing procedure which are no longer needed”.⁴³ It would also “fully commence provisions concerning sentencing procedure that have only been commenced prospectively”. The Law Commission’s report on the consolidation provides a worked example of the effect of the clean sweep in practice.⁴⁴ The clean sweep would apply only to provisions that would be consolidated by the code and would not apply more broadly.⁴⁵

The clean sweep would mean that all offenders convicted after the code entered into force would be sentenced under current sentencing law. This would be regardless of when the offence was committed. However, the operation of clause 1 would be subject to exceptions. These would ensure that an offender is not subject to a greater penalty than that available at the time of the offence. Nor would they be subject to a minimum or mandatory sentence that did not apply at the time of the offence.⁴⁶ The explanatory notes to the bill explain that this was to make sure that the clean sweep did not contravene the general common law presumption against retroactivity. It also accorded with human rights protections against retroactive criminalisation and retroactive punishment.⁴⁷ In particular, the explanatory notes cited those provided by article 7 of the European Convention on Human Rights.⁴⁸ In its consultation, the Law Commission argued that “the only limitation” with this approach is the need to retain a record of historic maximum penalties for all offences.⁴⁹ However, the commission believed that, in most cases, comparing the severity of the proposed sentence under the code with the historic maximum sentence would be simple, as long as the court had a copy of the code and any relevant historic maximum sentences.

Clause 1(3)—under definitions set out in clause 1(1)—provides for the operation of the clean sweep. However, clause 1(3) is subject to exceptions in clause 1(4) and (5), along with schedule 1:

Subsection (4) ensures that the clean sweep does not increase the maximum penalty for any

⁴² [Explanatory Notes](#), para 22.

⁴³ *ibid*, para 23.

⁴⁴ Law Commission, [The Sentencing Code Volume 1: Report](#), November 2018, HC 1724 of session 2017–19, Law Com No 382, pp 60–5.

⁴⁵ [Explanatory Notes](#), para 23.

⁴⁶ *ibid*, para 24.

⁴⁷ *ibid*.

⁴⁸ [European Convention on Human Rights](#), article 7.

⁴⁹ Law Commission, [Sentencing Procedure Issues Paper 1: Transition](#), 1 July 2015, para 5.31.

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.⁵⁰

Clause 1(5)(b) provides that clause 1(3) is also subject to:

[A]ny provision made by regulations made by the secretary of state for the purpose of securing that [clause 1(3)] does not affect the application of particular repealed provisions.

Clause 1(8) provides for definitions of further terms used in the clause.

Clause 2 makes reference to schedule 2. This contains pre-consolidation amendments required for the consolidation to be enacted. The explanatory notes state that such changes are a “standard measure which precedes consolidation bills”.⁵¹ The amendments fall into the following broad categories:

- (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.⁵²

A “significant proportion” of the amendments in schedule 2 fall into the categories (a) to (d).⁵³ The explanatory notes describe most of these amendments as being of a technical nature, and provide examples to illustrate each of the categories.⁵⁴ The explanatory notes also identifies and explains examples of other amendments that fall within these categories, which “might appear to make more significant changes”.⁵⁵ The explanatory notes provide specific examples of these changes. Clause 2 would also give the secretary of state powers to make further pre-consolidation amendments through regulations.⁵⁶ The power would be limited to amendments that, in the opinion of the secretary of state, facilitate “or are otherwise desirable in connection with, the consolidation”.⁵⁷ Once the consolidation occurs the power would no longer be able to be used.

⁵⁰ [Explanatory Notes](#), para 24.

⁵¹ *ibid*, para 25.

⁵² *ibid*, para 48.

⁵³ *ibid*, para 50.

⁵⁴ *ibid*, paras 51–4.

⁵⁵ *ibid*, paras 55.

⁵⁶ *ibid*, para 26.

⁵⁷ *ibid*.

Clause 3 provides for the interpretation of terms used in the bill. Clause 4 provides that any power to make regulations in clauses 1 or 2 is exercisable by statutory instrument and may not be made unless a draft has been laid before and approved by a resolution of each House. Such regulations would come into force in accordance with clause 5.

Clause 5 sets out the bill's commencement provisions. As far as is necessary to enable regulations under clauses 1 and 2 to be made, the bill would come into force on the day on which it is passed.⁵⁸ However, such regulations, and the bill in general, cannot come into force until the sentencing code has been passed. Once the code itself has been passed, the Sentencing (Pre-consolidation Amendments) Bill would come into force immediately before the consolidation date:

Subsection (1) [of clause 5] 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 (ie 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.⁵⁹

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.⁶⁰ 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.⁶¹ The bill's explanatory notes provides further details on the bill's territorial extent:

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 Sentencing 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.⁶²

⁵⁸ Sentencing (Pre-consolidation Amendments) Bill [HL], clause 5(1).

⁵⁹ [Explanatory Notes](#), para 29.

⁶⁰ *ibid*, para 108.

⁶¹ *ibid*, para 107.

⁶² *ibid*, para 19.