

The Sentencing (Pre-consolidation Amendments) Bill – European Convention on Human Rights

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Sentencing (Pre-consolidation Amendments) Bill (“the Bill”). On introduction in the House of Lords, Lord Keen QC made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA 1998”) that in his view the provisions of the Bill are compatible with Convention rights.
2. Only the clauses which contain substantive ECHR issues are discussed. The Department considers that the clauses of this Bill which are not covered by this memorandum do not give rise to any substantive ECHR issues.

Summary of the Bill

3. The Law Commission was tasked by the Ministry of Justice in 2014 to consider, clarify and consolidate the current legislative framework for sentencing of offenders. Current legislative provisions on sentencing run to approximately 1300 pages, containing complex transitional and savings provisions which must be referenced by the courts to set sentences. The Bill is part of a two-stage process of consolidation; the Bill will make pre-consolidation amendments to acts relating to sentencing prior to the introduction of a separate Sentencing Code Bill, which will codify and consolidate the changes and bring a single, consolidated Code into force.
4. Clause 1 sets out the “clean sweep” mechanism which operates retroactively on the historical layers of transitional and savings provisions in sentencing legislation to nullify their effect by extension or repeal sufficient so the subsequent Sentencing Code, from the date of its commencement, will apply to all offenders convicted of a criminal offence, extending all current sentencing disposals to all offences. The “clean sweep” mechanism can only operate in the event of a subsequent consolidating Act being passed by Parliament, and acts relating to sentencing will remain unaffected by the Bill until a consolidating Bill has also been passed, thus allowing the Bill’s amendments on current sentencing legislation to operate.
5. Clause 1 also provides for Schedule 1 of the Bill, which excepts certain sentencing legislation such as minimum terms or recidivist premiums from the operation of the clean sweep in to secure the rights of offenders from receiving a heavier penalty which would otherwise engage and potentially infringe Article 7 ECHR. These exceptions will be restated in the subsequent Code, with their transition dates preserved.

6. Clause 1, however, also does not operate on any individual penalty maxima for a specific criminal offence. All penalty maxima for individual criminal offences remain unaffected by the Bill. Those maximum penalties in current criminal law statute that may be received by an offender being sentenced under the procedural provisions under the Code are unaffected by the operation of Clause 1 or the Code. They are not included in the Bill or the Sentencing Code, remaining in the relevant criminal statute.
7. Clause 1 will not operate to increase or amend any minimum or maximum penalty that may be received by an offender. Clause 1(4) excludes explicitly the operation of Clause 1 where it would otherwise have the effect of increasing the maximum term of imprisonment or detention or the maximum fine to which any offence is subject. Clause 1(5)(b) provides for further regulations to be made to ensure that the clean sweep does not affect the application of the repealed provisions, and that further exceptions can be made to Schedule 1 to ensure that an offender cannot, by dint of the consolidation process, receive a heavier penalty.
8. Clause 2 provides the pre-consolidation amendments in Schedule 2 of the Bill. These are the pre-consolidation amendments required on current sentencing legislation to enable the consolidation prior to the commencement of the subsequent Sentencing Code. This is required in order that acts relating to sentencing are consolidated and clarified to bring the Sentencing Code Bill forward. The amendments and modifications in Schedule 2 do not however alter the underlying purpose of sentencing legislation and are for consolidation only as provided for in the Law Commissions Act 1965 – these purposes of sentencing legislation, as previously presented to, and approved as Acts of Parliament, remain the same. The pre-consolidation amendments in Schedule 2 will not come into force unless there is a consolidation Bill passed in by Parliament; acts relating to sentencing will remain legally unaffected by the Bill until a consolidation has been passed, thus allowing the Bill's amendments to operate.
9. Clause 2 also provides for regulations making powers to be exercised by the Secretary of State to make further amendments as required or in connection with the consolidation.
10. Finally, the Bill makes the necessary legal provision for the short-title of the Bill, interpretation, commencement, the extent, regulations and parliamentary procedures.

Legal Issues raised by the Bill

11. Clause 1 raises issues under Article 7 ECHR (no punishment without law). Article 7(1) prohibits a retroactive increase in the penalty applicable to a criminal offence.

Article 7 and the right of no punishment without law

12. In relation to the availability of a heavier penalty:

- Article 7 unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage; *Del Río Prada v. Spain*
- The principle of non-retroactivity of criminal law applies both to the provisions defining the offence and to those setting the penalties incurred; *Jamil v. France*, *M. v. Germany*, and *Gurguchiani v. Spain*.
- Regarding the severity of the penalty, the Court confines its consideration to ensuring that no heavier penalty is imposed than that which was applicable at the time of commission of the offence. Issues relating to the appropriateness of a penalty do not fall within the scope of Article 7.
- Consequently, changes to sentencing law which do not involve possibility of imposing a sentence above the historic maximum sentence available at the time of the commission of the offence are compliant with Article 7.

13. The Department is therefore content that the provision in Clause 1, together with exceptions made in Schedule 1, do not give rise to an issue of compatibility with Article 7 ECHR, and that Clause 2 and Schedule 2 do not give rise to an issue of compatibility with Article 7 ECHR.

14. The Department is therefore satisfied that the Bill is compatible with Article 7 ECHR.

Ministry of Justice

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