

SENTENCING BILL

MEMORANDUM CONCERNING THE DELEGATED POWERS IN THE BILL FOR THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

A. Introduction

1. This memorandum has been prepared by the Ministry of Justice (“the Department”) for the Delegated Powers and Regulatory Reform Committee (“the Committee”) to assist with its scrutiny of the Sentencing Bill (“the Bill”).
2. The memorandum identifies the provisions of the Bill which confer new or modified powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
3. The Bill contains four provisions conferring delegated legislative powers on the Secretary of State. Two of these include a power to amend primary legislation.
4. The Department has considered the use of powers in the Bill carefully and is satisfied that they are necessary and justified.

B. Purpose and effect of the Bill

5. This Bill will further deliver against the 2019 Conservative manifesto that included the following commitment: *“We will introduce tougher sentencing for the worst offenders and end automatic halfway release from prison for serious crimes. For child murderers, there will be life imprisonment without parole.”* and, *“We will continue to fight crime against women and girls, including rape”*.
6. The Bill is a targeted legislative vehicle that ensures we will lock up the most dangerous criminals for longer and aims to prevent further criminalising redeemable offenders by trapping them in a merry-go-round of reoffending. And in doing so, we will take the long-term decisions needed to ensure we always have the prison places we need to keep the public safe from crime.
7. The measures in the Bill will deliver the following:
 - a. For the first time, the courts will be required to impose a Whole Life Order (WLO) on any murderer who kills a single victim with sexual or sadistic conduct, unless there are exceptional circumstances. The courts will also be required to impose a WLO, unless there are exceptional circumstances, in cases for which a WLO is currently the starting point.
 - b. The Bill will ensure those who commit serious sex offences will spend longer behind bars. Serious sex offenders will now serve their entire custodial term in prison.
 - c. For some less serious offenders suspended and community sentences can be more effective at reducing reoffending. We will introduce a presumption in favour of a suspended sentence for custodial sentences of twelve months or less. Judges will still have discretion to impose immediate custody in certain circumstances, for example where offenders pose a significant risk

to a particular individual or have shown disregard for court orders in the past.

- d. We will also introduce new measures to allow lower-risk prisoners serving standard determinate sentences of four years or more to be considered for home detention curfew (HDC), provided their sentence is one where if the offender were sentenced under current legislation, they would be subject to automatic release at the halfway point of their sentence. We will also seek to exclude from HDC offenders who have served a recall for breach of the curfew conditions of HDC within two years of the current sentence, replacing the current lifetime ban; and repeal an exclusion from HDC for prisoners who, under long-repealed provisions, were returned to prison after committing a further imprisonable offence between release from custody and the end of their sentence.

C. General commentary on the delegated powers in the Bill

8. The Bill includes delegated powers which the Department considers necessary for delivering on the aims of the Bill and ensuring a consistent statute book. Some powers permit amendment of primary legislation. The Department has considered the scope of these powers very carefully and has sought to balance the need for powers broad enough to allow us to ensure a functioning criminal justice regime and allow for consequential and transitional provisions to be made, against the need for effective parliamentary oversight and scrutiny.
9. The Department has considered whether delegated powers taken in the Bill should be subject to a sunset provision. In all instances the Department has taken the view that the powers are justifiable without the need for a sunset clause. The powers in the Bill that will need to be exercised, will need to be so indefinitely and are justified on the basis of a continuing need to make the provision they permit and in order to maintain the policy aims as set out in detail in the Bill and supporting documents.
10. In the Department's view, appropriate safeguards are in place in relation to the exercise of the powers, such as the appropriate parliamentary procedure. In some instances, no parliamentary procedure is used, where the Department considers it appropriate due to the precedent for such powers and the restrictions placed upon them.
11. Overall, the Department believes that the Bill represents a proportionate approach to delegated powers that is commensurate with comparable powers and procedures in comparable legislation.

D. Summary of delegated powers in the Bill

Clause and title	Power conferred	Procedure
Clause 9: Consequential provision	A power to make consequential amendments.	Affirmative resolution if amending, repealing or revoking primary legislation; otherwise, negative resolution.
Clause 10: Power to state effect in Sentencing Act 2020 of commencement of amendments made by this Act	A power to state the effect of amendments made by the Bill in the Sentencing Code.	No procedure
Clause 11(6): Extent, commencement and short title	A power to commence provisions of the Bill not subject to automatic commencement.	No procedure
Clause 11(8): Extent, commencement and short title	A power to make transitional, transitory or saving provision.	No procedure

E. Analysis of delegated powers by clause

Clause 9: Consequential provision

<i>Power conferred on:</i>	Secretary of State.
<i>Power exercised by:</i>	Regulations made by statutory instrument.
<i>Parliamentary procedure:</i>	Affirmative resolution if amending, repealing or revoking primary legislation; otherwise, negative resolution
<i>Includes the ability to amend primary legislation:</i>	Yes

Context and purpose

12. Clause 9(1) confers a power on the Secretary of State to make provision that is consequential on the Act. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation.

Justification for taking the power

13. The powers conferred by this clause are wide, but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions made by or under the Act. There are various precedents for such provisions, including section 205(1) of the Police, Crime, Sentencing and Courts Act 2022. The Bill already includes some changes to other enactments as a consequence of the substantive provisions in the Bill, but it is possible that not all the necessary consequential amendments have been identified in the Bill's preparation. There could be a negative impact on the public perception of the criminal justice system if a provision is missed. This could undermine the administration of justice and would need immediate rectification. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with such consequential amendments in secondary legislation.

Justification for the procedure

14. If regulations made under this power do not amend or repeal primary legislation, they will be subject to the negative resolution procedure (by virtue of clause 9(6)). The affirmative procedure is not considered necessary or suitable for any applicable amendments which might be made to secondary legislation by virtue of this clause, as any applicable orders and regulations will have no impact or very little impact on rights and will be administrative or procedural in nature. If regulations made under this power do amend or repeal provision in primary legislation, they will be subject to the affirmative resolution procedure (by virtue of clause 9(5)) which is the standard approach for a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 10: Power to state the effect of amendments to the Sentencing Code

<i>Power conferred on:</i>	Secretary of State.
<i>Power exercised by:</i>	Regulations made by statutory instrument.
<i>Parliamentary procedure:</i>	No procedure.
<i>Includes the ability to amend primary legislation:</i>	Yes

Context and Purpose

15. The Bill makes amendments to sentencing procedure in England and Wales. Those amendments will be made to the Sentencing Code (the “Code”) which contains the consolidated form of sentencing procedural law. The Code is intended to be a comprehensive statement of the law that applies when sentencing a person convicted of an offence, regardless of when the offence was committed. In order to preserve the Code’s comprehensiveness, it is necessary that, where the Code is amended, the effect of commencement of those amendments is stated on its face. This saves users from needing to look at commencement regulations in order to establish where a provision applies and therefore makes it easier to interpret the Code.
16. Clause 9 provides that the power in section 419(1) of the Code to state the effect of commencement provisions applies to any amendment or repeal made under the Bill. Section 419(1) provides a power for the Secretary of State to make regulations that amend the Code to state the position in relation to the coming into force of an amendment or repeal made by Schedule 22,¹ or under Schedule 23,² to the Code.
17. The Code can be amended by regulations made under section 419(1) in order to specify the cases in which, or the purposes for which, the amendment or repeal will have effect (section 419(1)(a)). Regulations made under this section can also secure that any provision of the Code which, as a result of the amendment or repeal, is to continue to have effect only for particular purposes or in particular cases, remain in the Code instead of having effect by virtue of transitional, transitory or saving provision (section 419(1)(b)). This makes it easier to navigate the position on commencement as it will be clear from the Code what class of persons an amendment applies to without the need to look at commencement regulations.
18. The extension of the section 419(1) power to any amendments or repeals made by the Bill will mean it is possible to amend the Code, in the same manner as section 419(1) allows it to be amended with reference to Schedule 22 and Schedule 23 of the Code, so as to specify clearly in primary legislation the cases in which, or the purposes for which, the provision in question has effect.

¹ Schedule 22 contains a list of uncommenced amendments to the Sentencing Code.

² Schedule 23 contains a list of powers to amend the Sentencing Code.

Justification for taking the power

19. In order to ensure that the Code continues to take a consistent approach where uncommenced provisions are brought into force, 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 Code.
20. To ensure the continuing usefulness of the Code as a consolidation of sentencing procedure law, the same clarificatory regulations are required for amending legislation such as the provisions contained in this Bill.

Justification for the procedure

21. 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. Section 419 of the Code is not subject to any procedure. These powers are similar in nature to the following provisions:
 - a. section 7(2)(a) of the Offender Rehabilitation Act 2014, which gives power to amend two sentencing Acts so as to replace a reference to a date on which a provision of the Offender Rehabilitation Act 2014 comes into force with the actual date on which it did so, and to insert provision explaining the date; and
 - b. section 104 of the Deregulation Act 2015, confers a power on Ministers to amend legislation — primary and secondary — by statutory instrument in order to spell out dates described in it.
22. None of these powers is subject to parliamentary procedure. The power in section 7(2)(a) of the 2014 Act was welcomed by the Committee in its 1st Report of the 2013 – 14 session.
23. It is standard practice to include this power when amendments are made to the Code: see, for example, section 47 of the Counter-Terrorism and Sentencing Act 2021 and section 206 of the Police, Crime, Sentencing and Courts Act 2022.

Clause 11(6): Commencement powers

<i>Power conferred on:</i>	Secretary of State
<i>Power exercisable by:</i>	Regulations made by statutory instrument
<i>Parliamentary procedure:</i>	No procedure
<i>Includes the power to amend primary legislation:</i>	No

Context and purpose

24. Clause 11(6) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

Justification for the power

25. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

26. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 11(8): Power to make transitional or saving provision

<i>Power conferred on:</i>	Secretary of State.
<i>Power exercisable by:</i>	Regulations made by statutory instrument.
<i>Parliamentary procedure:</i>	No procedure
<i>Includes the power to amend primary legislation.</i>	No

Context and purpose

27. Clause 11(8) provides power to the Secretary of State to make transitional and saving provisions in connection with the coming into force of any provision so far as is necessary for this Act.

Justification for taking the power

28. When a new provision comes into force, it is often necessary to make transitional, transitory or savings provision to ensure a smooth transition between the old and the new law. It is not possible to establish in advance all transitional, transitory, or saving provisions that may be required. A power is needed to avoid any legal uncertainty or legal lacunas after the Bill comes into force.

29. The power can only be used to settle legal uncertainties and therefore the power cannot be used to make wider policy changes.

Justification for the procedure

30. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure.

Ministry of Justice
14 November 2023