

Guidance to support the operation of Standing Order 26C on Consolidation Bills

Issued by the Llywydd under
Standing Order 26C.3 following
consultation with the Business
Committee

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Consolidation Bills

- 1.** A Consolidation Bill may be introduced by a member of the Government for the purpose of consolidating existing primary legislation, secondary legislation, and common law (Standing Order 26C.2).
- 2.** This guidance is issued by the Llywydd under Standing Order 26C.3 and is intended to be read alongside Standing Order 26C generally, and Standing Order 26C.2 especially. It provides further detail on the nature of consolidation bills and the extent to which they may revise, update and change existing law.

The purpose of a Consolidation Bill

- 3.** The purpose of a Consolidation Bill is to improve access to the law by:
 - bringing together all, or most, of the (generally primary) legislation on a specific subject or topic to improve accessibility, and
 - modernising its form and drafting, to make it easier to understand and apply.
- 4.** The purpose of a Consolidation Bill is not to bring about policy reform of any significance. Developing and scrutinising a Consolidation Bill should therefore be a legal, technical process that focusses on the consolidation of the existing law rather than the merits of the policies enshrined in it.

The extent of what a Consolidation Bill may do

- 5.** A Consolidation Bill may result in proposed legislation which looks very different to the original text. In order to present the existing law that applies in Wales in a modern and accessible form, it may be appropriate to make significant presentational changes that do not change the effect of that law.
- 6.** A Consolidation Bill may propose changes to the law only of the types stipulated in Standing Order 26C.2. Further detail on the provisions of Standing Order 26C.2, together with relevant examples of what those provisions mean in practice, are included in the Annex to this guidance.

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7. The process of consolidation is complex and likely to reveal inconsistencies and anomalies in existing legislation. A modern and accessible restatement of existing law may also necessitate, or benefit from, minor amendments. Such amendments may, however, only be minor and should not be contentious. Any other change falling outside of this definition must be pursued through a reform Bill and considered by the Senedd following the usual legislative procedure under Standing Order 26.

Documentation to accompany a Consolidation Bill

8. At the same time as the Member in charge introduces a Consolidation Bill, he or she must also lay an Explanatory Memorandum (EM) which includes those things specified in Standing Order 26C.9. One of those provisions (SO 26C.9(iv)) requires the EM to include tables of origin and destination in order to help explain how the law has been re-presented. The EM must also include drafters' notes explaining the approach that has been taken in drafting the Bill. In addition a set of Explanatory Notes to each Consolidation Bill must be prepared.

Annex to the guidance

Details of the provisions contained in Standing Order 26C.2 – with examples of use:

Standing Order 26C.2(i)

A Consolidation Bill may restate existing legislation with any changes of structure, language or format that are considered appropriate for the purpose of improving the presentation of the law and ensuring consistency with current drafting practice

1. Changes permitted under Standing Order 26C.2(i) may include:
 - a. renumbering and rearranging provisions (for example, dividing or combining existing sections or Parts, or moving material between sections and Schedules);
 - b. expressing provisions in a way that reflects their actual legal effect (for example adopting terminology that reflects devolution and other transfers of functions that have taken place since the existing legislation was passed);

Examples:

- in addition to devolution and transfer of functions, the Consolidation Bill should be expected to reflect all other legal changes that have altered the meaning of the existing legislation. For example, wherever the maximum fine that a magistrates' court could impose for an offence would have been £5,000 before 12 March 2015, it was converted into an unlimited fine by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. So earlier provisions creating liability to a maximum fine of £5,000 would now be restated as creating liability to "a fine";
- there may have been changes in the law since the existing legislation was enacted, which mean that the words that are required to achieve a particular legal effect are different from those that were required when

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the existing legislation was drafted. For example, the Legislation (Wales) Act 2019 reversed the presumption that Acts of the Senedd do not bind the Crown, so the provision that needs to be made to ensure that a Consolidation Bill binds the Crown to the same extent as the original legislation is likely to be different.

- c. changing the language of legislation that exists only in English to facilitate the production of a coherent bilingual Bill;
- d. adopting gender neutral language and modernising language in any other way (including by omitting redundant wording);
- e. adding, removing or changing labels and headings;

Examples:

- a Consolidation Bill may replace labels used in existing legislation with ones that give a better sense of what is being referred to. For example, the Law Commission has noted that planning legislation uses a number of labels that might be regarded as misleading or uninformative, such as “planning contravention notice” and “appointed person”;
 - existing legislation may use labels and headings that are not needed in a restatement of the law for Wales because their only purpose is to distinguish between “English” and “Welsh” cases. Labels of this kind may be removed or replaced with more suitable terms;
 - legislation may contain labels that are no longer useful because of changes in circumstances. For example, the Law Commission have observed that the distinction between a “local planning authority” and a “mineral planning authority” in planning legislation is not needed in Wales because they are always the same authority (whereas they may be different under the two-tier system of local government that still applies to most of England).
- f. adding new tables, formulae or other ways of presenting information;
 - g. adding navigational aids such as overviews and signposting provisions (including signposts to legislation not included in the consolidation but relevant to it);

- h. setting out in full provisions of other legislation that are incorporated into the consolidated legislation;

Example:

- if Act A provides that certain provisions of Act B apply to it, it will often be more accessible to repeat those provisions in full in the restatement of Act A (particularly if any modifications are needed to make them work properly in the context of Act A).
- i. adding, removing or changing punctuation or conjunctions; and
- j. correcting typographical errors, incorrect cross-references and similar obvious mistakes.

2. ‘Current drafting practice’, as referred to in Standing Order 26C.2, means the legislative drafting practice for the time being used by the Office of the Legislative Counsel.

Standing Order 26C.2(ii)

A Consolidation Bill may clarify the application or effect of existing law

3. If the application or effect of existing provisions is unclear (because their drafting creates doubt or ambiguity, such as uncertainty about when a period of time ends or about which bodies are subject to a duty), a Consolidation Bill may clarify the intended meaning, for example by spelling out more clearly when a particular provision or definition applies. Where the existing legislation is bilingual, clarification may include reconciling any ambiguities in either language or both.

4. Clarification may involve filling in gaps in the legislation, for example by including definitions of terms that the existing legislation does not define, or by spelling out that the application of a provision is limited to the particular cases in which it is relevant.

Example:

- this may include clarifying the effect of transfers of functions “in relation to Wales” by providing a clearer territorial limit in a Consolidation Bill

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(and a corresponding territorial limit in any enactment which forms part of the consolidation but which will continue to apply to England after the Consolidation Bill is passed).

5. Clarification of intent may also involve rectifying the position where the wording of existing provisions does not reflect the meaning they are understood to have in practice, or where different enactments make provision about the same matter which is or may be contradictory.

Example:

- the Co-operative and Community Benefit Societies Act 2014 (a consolidation Act of the UK Parliament) removed a requirement for there to be “special reasons” for registering a society, to reflect how the provisions were applied in practice and were originally intended to be applied. This was not about inconsistency in the legislation itself.

6. Where a Consolidation Bill seeks to clarify the meaning of existing provisions in any of the ways outlined above, it should do so in the way that best reflects the meaning that the provisions are understood to have, or that the legislature is believed to have intended.

7. A Consolidation Bill may also incorporate the effect of case law about the meaning of the existing legislation, or rules of common law that are closely related to the statutory provisions, in order to provide a more complete restatement of the existing law. A Consolidation Bill is not intended to codify free-standing rules of common law, but it may be appropriate to incorporate case law that affects the operation of existing legislation, for example by clarifying its meaning or by expanding or limiting its effect in a way that is not set out on its face.

Example:

- in restating an offence of possessing salmon caught at a time when fishing was not permitted, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 included a defence which had not been set out in the previous legislation but which had been recognised by the courts.

Standing Order 26C.2(iii)

A Consolidation Bill may remove or omit provisions which are obsolete, spent or no longer of practical utility or effect;

8. Omitting a provision means it may be repealed for Wales and/or not included in the Consolidation Bill;

9. There is some overlap between obsolete provisions, spent provisions, and provisions which are no longer of practical utility or no longer of practical effect. In general:

- a. an obsolete provision would include a provision which is out-of-date, for example because it is about bodies, persons or things which are no longer in existence or use;
- b. a spent provision is one which applies to a situation which can no longer exist, such as a provision conferring a function which cannot be used again (for example, because the original legislation provided for one action to be taken and this has been done, or the conditions for use can no longer be met); and
- c. a provision no longer has practical effect if, in practice, circumstances have rendered the provision irrelevant or unnecessary. This includes:
 - i. provisions which are no longer necessary as legal provision is available elsewhere (either within the Consolidation Bill or in other legislation applicable in Wales) which has an equivalent legal effect.
 - ii. provisions that were never commenced and there is no likelihood that they ever will be commenced in Wales; or if the provision was commenced but never used and there is no prospect of the provision being used in Wales; or it was commenced and used, but has not been for a significant period and there is no expectation of future use; or the provision may have been superseded by other Acts, provisions or circumstances (Note: although powers are given to Ministers, 'likelihood' here is not just whether current Ministers might intend to use a power, but whether there is a realistic likelihood of the power being used by any government.)

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Examples:

- the Town and Country Planning Act 1990 contains various provisions about pre-1948 breaches of planning control that were relevant when the first Town and Country Planning Act came into force. The Law Commission have observed that most of these no longer have any practical effect and could be omitted from a consolidation;
- the Housing Act 1985 (a consolidation Act of the UK Parliament) repealed a previous power to amend local Acts, as 15 years had passed without the power being exercised;
- the Co-operative and Community Benefit Society Act 2014 (a consolidation Act of the UK Parliament) did not replicate provisions of the Industrial and Provident Societies Act 1965 which referred to people who had made a nomination under the Act before 1 January 1914, on the basis that nobody who had made such a nomination would still be alive in 2014;
- the uncommenced repeal of “or (2)” in section 60(3) of the Industrial and Provident Societies Act 1965 Act was not reproduced in the Co-operative and Community Benefit Society Act 2014 as there was no intention of commencing the repeal (the repeal was contained in a 1992 Act);
- the Co-operative and Community Benefit Societies Act 2014 removed a specific offence of making a false statutory declaration on the basis that there was already a general offence of making false statutory declarations that covered the same conduct.

Standing Order 26C.2(iv)

A Consolidation Bill may make minor changes to existing law for the purposes of achieving a satisfactory consolidation;

10. This could include:

- a. resolving inconsistencies in the application of the law in different cases, where the reasons for a difference are no longer applicable or cannot be identified;

Examples:

- removing or reconciling inconsistencies in regulation making powers across different provisions;
 - ensuring that where a matter is dealt with on the face of one Act, but by subordinate legislation in another Act, both can be dealt with in primary or secondary legislation (as may be appropriate);
 - ensuring like cases are treated in the same way in the Consolidation Bill, for example by reconciling any inconsistencies between provisions which have come from different enactments or by extending general provisions or definitions in one of the existing Acts to cover all of the enactments being consolidated;
 - in cases where notice must be given in writing, and some existing legislation states the requirement for writing expressly but some does not, the requirement to give notice in writing can be set out in all of the provisions (or none of them if it is so obvious as to not need stating).
- b. correcting mistakes or anomalies in the legislation;
- c. ensuring the consolidated legislation would be compatible with the Convention rights. This may include incorporating the effect of case law which has rendered the existing provision(s) compatible with Convention rights; or amending or omitting an existing provision or making new provision where it is clear such a change is necessary to ensure that the law is compatible with the Convention;
- d. providing that the consolidated legislation will operate correctly in relation to Wales taking account of any cross-border issues between England and Wales;

Example:

- the consolidation of legislation relating to the National Health Service in England and Wales reproduced the law separately for England and Wales in the National Health Service Act 2006 and the National Health Service (Wales) Act 2006. Both Acts provided a territorial limit for the

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exercise of functions and made provision about certain cross-border issues.

- e. ensuring consistency in and between the English language and Welsh language texts of the Bill;
- f. moving provisions from subordinate legislation to primary legislation (and occasionally from primary to subordinate legislation) or changing the form of subordinate legislation or the procedure that applies to it, to improve the consistency or coherence of the relevant body of legislation;

Examples:

- where provisions about a particular issue are contained partly in primary legislation and partly in subordinate legislation, it may be appropriate to move provisions from one level to the other, so that everything about that issue is in the same place. For example, if regulations or orders deal with an important issue affecting how the legislation works, material in the regulations or orders might be more appropriately restated in the Bill;
- where there is a power to use subordinate legislation to modify the operation of primary legislation, and all the necessary modifications have already been made, it may be appropriate to incorporate the modifications into the restatement of the primary legislation, and the power to make modifications may not be needed;
- where forms or other points of detail are set out in primary legislation, it may be appropriate to provide for them to be specified in regulations instead, particularly if they are likely to need regular updating. Or it may be appropriate simply to require people to use forms published by Ministers or other public bodies, rather than including the forms in legislation;
- it may be appropriate to replace powers to make directions of general application (as opposed to directions addressed to specific individuals) with powers to make regulations;
- where an existing power to make subordinate legislation is not subject to any Senedd procedure, but such a power would nowadays be

expected to attract Senedd procedure, a Consolidation Bill may restate the power with an appropriate procedure. A Consolidation Bill may also remove other inconsistencies and anomalies in procedural provisions.

Standing Order 26C.2(v)

A Consolidation Bill may make other changes to the law which the Law Commission of England and Wales recommend are appropriate for inclusion within a Consolidation Bill

11. Under Standing Order 26C.2(v) changes to the law which do not fall within the other paragraphs of that Standing Order may be included in a Consolidation Bill on the recommendation of the Law Commission. For a change to be made under paragraph (v), the Law Commission must not only recommend that the change is made, but must also identify the change as one that it would be appropriate to make in a Consolidation Bill.

12. Paragraph (v) does not mean that Consolidation Bills can be used to give effect to all law reform proposals made by the Law Commission. It is only intended to cover changes to the law which it would be convenient to make at the same time as consolidating the existing law. Such changes should not involve significant new policy nor be controversial. Examples of this type of change could include amending a set of procedural requirements to ensure that they work better in practice, or simplifying them to remove redundant steps from the procedure.

Standing Order 26C.2(vi)

A Consolidation Bill may include appropriate transitional and savings provisions, and consequential amendments and repeals of existing legislation (including amendments to ensure the existing legislation continues to operate correctly in relation to England);

13. Standing Order 26C.2(vi) includes:

- a. making consequential amendments to legislation that is not incorporated, or is incorporated only in part, in the Consolidation Bill.

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This includes making sure that the legislation left behind continues to operate satisfactorily with no change in legal effect (or no more change than is required by the consolidation). It may involve making extensive amendments to the legislation to remove provisions that apply to Wales and to make clear that some or all of its provisions will in future apply only to England;

- b. providing a power to make further consequential amendments to legislation that are needed as a result of the consolidation;
- c. repeals necessary to deal with consolidation, including repeals of obsolete and spent provisions, and missed amendments and repeals (i.e. ones which should have been included in earlier Acts);
- d. savings and transitional provisions.