

THE SENTENCING CODE

GUIDANCE FOR DRAFTERS

This pamphlet is prepared by the Office of the Parliamentary Counsel for members of the Office and for other Government drafters.

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March 2023

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CHAPTER 1 INTRODUCTION

Key principles

1.1 The Sentencing Act 2020 is a consolidation. It represents a significant step-change in sentencing legislation.

1.2 Key principles for drafters when operating in this field are –

- Parts 2 to 13 of the Act are the “Sentencing Code”, which is defined in Schedule 1 to the Interpretation Act 1978; sections of, or Schedules to, the Sentencing Code can be referred to without definition
- new sentencing provisions that are within the ambit of the Sentencing Code should be added to the Code and not drafted as free-standing provisions
- the Sentencing Code should state on its face the cases to which it applies; readers should not have to rely on separate transitional or commencement provision.

Background

1.3 The Sentencing Act 2020 was enacted on 22 October 2020 and came into force on 1 December 2020.

1.4 It is the outcome of a project sponsored by the Law Commission¹ over several years that resulted in two Acts, the Sentencing (Pre-consolidation Amendments) Act 2020 (the “PCA Act”), and the Sentencing Act 2020.

1.5 The PCA Act came into force immediately before the Sentencing Act 2020. It made a number of minor changes to legislation of the kind often made in preparation for a consolidation.

1.6 Section 1, however, removed transitional provisions relating to provisions that are repealed or revoked by the Sentencing Act 2020, for offences of which a person is convicted after the Sentencing Act 2020 comes into force, except where the operation of that section is excluded by Schedule 1 to the PCA Act. This mechanism is described by the Law Commission as the “clean sweep”.

1.7 The effect has been to make current rather than obsolete sentences available. So, until 30 November 2020, the kind of community sentences available for a person convicted then of an offence committed before 4 April 2005 were still those under the Powers of Criminal Courts (Sentencing) Act 2000 that were abolished for new offences by the Criminal Justice Act 2003. As a result of the clean sweep, the community sentence available for that person would be a community order under section 177 of the Criminal Justice Act 2003 (which, in practice, is now the restated version of section 177 in the Sentencing Code).

1.8 There were exceptions from the clean sweep for cases where the overall sentence could have been greater than at the time of commission of the offence, or where a mandatory minimum sentence would have applied that would not have applied at the time of commission².

1. <https://www.lawcom.gov.uk/project/sentencing-code>

2. See Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020.

What the Sentencing Code covers

1.9 Essentially, the Code covers –

- a. sentencing procedure from conviction onwards, and
- b. orders that are generally available to a court when dealing with an offender for an offence.

1.10 It also covers provisions about mandatory sentences.

1.11 But it does not cover –

- a. release from sentences of imprisonment or equivalent sentences for younger offenders (though detention and training orders for under 18s are covered in full);
- b. confiscation orders³;
- c. sentences for particular offences.

1.12 Mandatory sentences aside, the general approach is for the Code to cover orders available on conviction if they can be made by the court when sentencing, without a separate application, and are available generally or for quite a wide category of offences.

1.13 So sexual harm prevention orders that can be made on conviction are covered, but not those for which a separate application has to be made. Exceptionally, criminal behaviour orders are covered, even though the prosecution has to make an application, because they are available on all convictions.

1.14 Conversely, company director disqualification orders⁴ are not covered because the provisions about orders made on conviction could not sensibly be disentangled from those about orders made in civil proceedings. The same applies to domestic abuse protection orders under the Domestic Abuse Bill.

1.15 Forfeiture orders that are available on any conviction (known as “deprivation orders”) are covered by Chapter 4 of Part 7 of the Code, but section 160 lists forfeiture orders available on conviction of particular offences.

1.16 Driving disqualification that is available on conviction generally is covered, but specific orders for offences under the Road Traffic Offender Act 1988 are not covered.

3. Provisions about release remain in Chapter 6 of Part 12 of the Criminal Justice Act 2003 and provisions about confiscation orders remain in the Proceeds of Crime Act 2002.

4. See the Company Directors Disqualification Act 1986.

CHAPTER 2 COMMENCEMENT

Commencement and transition and the clean sweep

2.1 Because of the clean sweep (see paragraph 1.6 above), there is a clear cut-off between the Code and existing law, which is unusual for a consolidation.

2.2 The Code came into force on 1 December 2020⁵ and applies in dealing with a person *for any offence of which the person is convicted after the Code comes into force*⁶.

2.3 Therefore, anyone convicted of an offence before that date will be dealt with for it under existing law. This means that existing sentencing legislation will remain in place for some time. So, for example, breach of a community order under section 177 of the Criminal Justice Act 2003 will be dealt with under Schedule 8 to that Act, not under the Code.

2.4 Schedule 27 to the Sentencing Act 2020 contains transitional provisions. However, because of the clean sweep, it does not contain all of the transitional provisions normally included in a consolidation.

2.5 Paragraph 1 contains the usual “continuity of the law” provision that “The substitution of the Sentencing Code for the provisions repealed by this Act does not affect the continuity of the law.”⁷

2.6 Subordinate legislation, and specific things relating to the framework of sentencing e.g. accreditation of community programmes, are carried forward under paragraph 2.

2.7 Consequential amendments (see Schedule 24) came into force on the commencement date, and did so for all purposes unless listed in Part 7 of that Schedule, in which case they have effect only in relation to offences of which a person is convicted on or after that date.

2.8 References to the Sentencing Code in documents, and references to the Sentencing Code that result from the amendments in Schedule 24 listed in paragraph 3(2) of Schedule 27, are to be read as including references to previous legislation.

2.9 Paragraph 4 of Schedule 27 provides that references in documents or in statutory provisions that are not amended by Schedule 24 to *existing legislation* include references to the Code, where appropriate.

2.10 Unusually for a consolidation, because of the clean sweep Schedule 27 does not contain a general provision that treats anything done under or for the purposes of a provision repealed by the consolidation as having been done under or for the purposes of the corresponding restated provision. This means, in particular, that references in subsequent legislation to *provisions of the Code* or to *sentences passed under the Code* do not include references to their predecessors.

2.11 Repeals came into force on 1 December 2020 but, except for the repeals mentioned in section 416(8), have effect only in relation to offences of which a person is convicted on or after that date.

5. The date specified under section 416(1) by regulation 2 of the Sentencing Act 2020 (Commencement No.1) Regulations 2020 (S.I. 2020/1236).

6. Sections 2 and 416(3).

7. The court placed some weight on this in *R v Jex and others* [2021] EWCA Crim 1708 (see paragraph 38).

Commencement provision to be stated on the face of the Code

2.12 Where a provision of the Sentencing Code does not apply to all post-commencement convictions (as a result of an exception to the clean sweep), the cases to which it applies are stated on the face of the Code. This was a priority for the Law Commission, and it is seen as an important feature of the Code that that should continue to be the case when the Code is amended.

2.13 So, for example, section 315 provides that the minimum sentence provisions for repeat offences involving weapons apply only where the offence was committed on or after 17 July 2015.

2.14 Schedule 22 contains uncommenced amendments of sentencing legislation which are restated as amendments of the Sentencing Code, and Schedule 23 contains powers to amend the Sentencing Code.

2.15 Where the Sentencing Code is amended by Schedule 22 or under Schedule 23, section 419 allows regulations to be made to amend the Code so that it will state the cases to which the provisions as amended apply (and where other provisions remain in force, to make that clear).

2.16 Once the date of commencement of amendments of the Sentencing Code is known, it should be routine for regulations to make use of the power in section 104 of the Deregulation Act 2015 to state that date in the Sentencing Code, where appropriate⁸.

2.17 All Bills that amend the Sentencing Code should include a provision corresponding to section 419 of the Sentencing Act 2020 (see paragraph 3.13).

8. That power was also used in regulations 3 and 4 of the Sentencing Act 2020 (Commencement No.1) Regulations 2020 (S.I. 2020/1236), made under section 416(1), that replaced references to the commencement date with “1 December 2020”.

CHAPTER 3 POINTS TO BEAR IN MIND WHEN DRAFTING

Should the provisions be added to the Sentencing Code?

3.1 When drafting new provisions that are available on conviction, it will be a question of judgment whether or not they should be in the Sentencing Code⁹.

3.2 In general, the presumption is that provision about orders that can be made on conviction, without a separate application, and are available generally or for a fairly wide category of offences, should be included in the Sentencing Code.

3.3 This might mean drafting parallel provision for similar orders made in different circumstances. But if new orders are available both on conviction and in other circumstances, and the provisions about orders available on conviction cannot realistically be drafted separately then it may be necessary to fall back on a signpost in the Code¹⁰.

3.4 Mandatory sentence provisions should be added to the Code even if they relate only to particular offences.

Where to add provisions to the Code?

3.5 The Code is structured chronologically through the sentencing process and wherever it makes sense to do so is written with the sentencing court in mind.

3.6 This means that it may be best to for provisions about a particular type of order to be inserted in several places in the Code.

3.7 So, for example, a requirement for the court to state why a particular order is not being made appears in the general provisions about sentencing, not among the main provisions about those orders¹¹.

3.8 Another example is that provisions about the procedure for adopting sentencing guidelines remains in the Coroners and Justice Act 2009, but the requirement that a court follow the guidelines appears in the Code.

3.9 In general the Code provides –

- a. what a particular kind of order is
- b. when it is “available” - in other words what hard and fast conditions apply
- c. what factors apply to the court in deciding whether to make the order.

3.10 The point is that the court can first identify which orders are “available” - i.e not ruled out by age, date or type of offence etc - and only then are the discretionary factors relevant.

3.11 Expressing the power to impose a sentence in the form “where the court may make an order requiring ...” often subsumes all of those three matters. The approach taken by the Code is to separate them out.

9. See the discussion at paragraphs 1.9 to 1.16.

10. See, for example, clause 52(3) of the Domestic Abuse Bill (as introduced in the House of Lords on 7 July 2020), which inserts a new section 378A into the Code.

11. See sections 53 to 55.

What commencement provisions will apply?

3.12 If possible this should be stated on the face of the amendments. Where this is done, remind the Department to exercise the power in section 104 of the Deregulation Act 2015 when bringing the provision into force, if appropriate.

3.13 Further, any Bill that amends the Sentencing Code should, as a matter of routine, include provision that corresponds to, or applies, section 419 of the Sentencing Act 2020. For an example, see section 47 of the Counter-Terrorism and Sentencing Act 2021¹². Remind the Department to exercise that power, where appropriate, when commencing the provisions.

3.14 If changes to sentencing law are proposed to take effect by reference to the date of commission of the offence, rather than the date of conviction, ask the Department whether that is necessary. The Law Commission’s analysis that underpinned the clean sweep concluded that in many cases that was not required by Article 7 of the ECHR¹³.

Signposts

3.15 Where new powers are being conferred on a sentencing court, but are not being added to the Sentencing Code, consider whether to add a signpost to the powers. In general, the Sentencing Code should contain signposts to provisions about orders that a court can make when dealing with an offender for an offence if they are not included in the Sentencing Code¹⁴.

Referring to pre-Code legislation or sentences

3.16 References in legislation passed or made since enactment of the Sentencing Act 2020 to provisions of the Code, or to sentences passed under the Code, will cover only those provisions or sentences. They will not cover provisions repealed (or revoked) and re-enacted by the Sentencing Act 2020, or sentences passed under those earlier provisions (see paragraph 2.10)¹⁵.

3.17 If drafting a provision that needs to cover those earlier provisions, or sentences under them, as well as provisions of the Code or sentences under it, remember that express provision will be needed.¹⁶

12. <https://www.legislation.gov.uk/ukpga/2021/11/section/47>. For the justification of the power, see paragraphs 40 to 46 of the Delegated Powers Memorandum for that Bill: <https://publications.parliament.uk/pa/bills/lbill/58-01/129/5801129-DPM.pdf>.

13. <http://www.lawcom.gov.uk/app/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf>.

14. For example, sections 160 and 379 list orders for forfeiture and behaviour orders that can be made under other legislation.

15. The position is the same for references to the Code in pre-enactment legislation except where the references result from amendments by provisions of Schedule 24 to the Sentencing Act 2020 listed in paragraph 3(2) of Schedule 27 (see paragraph 2.8).

16. Examples are the definitions of “detention and training order” and “further detention order” in section 163(6) of the Police, Crime, Sentencing and Courts Act 2022 (<https://www.legislation.gov.uk/ukpga/2022/32/section/163>), and section 256AZA(6) of the Criminal Justice Act 2003, inserted by that 2022 Act (<https://www.legislation.gov.uk/ukpga/2003/44/section/256AZA>).

Amending pre-Code legislation

3.18 Because the legislation replaced by the Code will continue to operate for cases where the offender was convicted before the commencement date, when amending the Code consider whether it is necessary to amend the legislation it replaces as well¹⁷.

Standard scale

3.19 The standard scale is moved to section 122 of the Sentencing Code, for convictions after commencement of the Code. Schedule 1 to the Interpretation Act 1978 has been amended to reflect this.

Maximum sentences of imprisonment on summary conviction

Either-way offences

3.20 Section 154(1) of the Criminal Justice Act 2003 (whose commencement was previously used, in drafting either-way offences with a 12 month limit on sentence on summary conviction, as the trigger for ending the transitory 6 month limit) was restated as paragraph 24(2) of Schedule 22 to the Sentencing Act 2020.

3.21 However the position has changed as a result of –
commencement regulations¹⁸ bringing paragraph 24(2) into force for either-way offences only,
the Judicial Review and Courts Act 2022¹⁹, and
regulations under paragraph 14A of Schedule 23²⁰.

3.22 The combined effect is that –

- the limit in section 224 of the Code (general limit on magistrates’ court’s power to impose imprisonment or detention in a young offender institution) is –
6 months in the case of a summary offence;
12 months in the case of an either-way offence, but reduced to 6 months for convictions on or after 30 March 2023;
- paragraph 24 of Schedule 22 to the Sentencing Act 2020 has been repealed and replaced by paragraph 24A which amends the 6 month limit in the case of a summary offence to 12 months (yet to be commenced);
- paragraph 14A of Schedule 23 allows regulations to switch the limit in section 224 for an either-way offence between 6 months and 12 months;
- Schedule 1 to the Interpretation Act 1978 defines the “general limit in a magistrates’ court” by reference to section 224(1) of the Code as it applies to an either-way offence from time to time.

17. For example, breach of a community order imposed on a person convicted before 1 December 2020 will be dealt with under Schedule 8 to the Criminal Justice Act 2003, not Schedule 10 to the Code.

18. See the Criminal Justice Act 2003 (Commencement No. 33) and Sentencing Act 2020 (Commencement No. 2) Regulations 2022 (S.I. 2022/500) which brought paragraph 24 of Schedule 22 to the Sentencing Act 2020 into force on 2 May 2022.

19. See in particular section 13 of and paragraph 21 of Schedule 2 to the Judicial Review and Courts Act 2022.

20. The Sentencing Act 2020 (Magistrates’ Court Sentencing Powers) (Amendment) Regulations 2023 (S.I. 2023/298).

Summary offences

3.23 Section 281 of the Criminal Justice Act 2003 remains where it is and has not been amended.

References to Schedules

3.24 Schedules 1 to 21 are part of the Sentencing Code and can be referred to as “Schedule X to the Code”. Schedules 22 onwards are not part of the Code and must be referred to as “Schedule Y to the Sentencing Act 2020”.

Re-sentencing

3.25 A power to “re-sentence” an offender (for example, on breach of an order) will attract the definition in section 402.

References to a local authority

3.26 The term “local authority” is defined only where necessary. In expressions such as “a youth offending team established by a [specified] local authority” a definition is not necessary because it clearly refers to local authorities that have the function of establishing such teams.

Power to extend to the Channel Islands and Isle of Man

3.27 Provisions of the Criminal Justice Act 2003 that are consolidated by the Code are capable of being extended to the Channel Islands or the Isle of Man under section 338 of that Act. Later Acts that amended the Criminal Justice Act 2003 applied that section to those amendments. That power is preserved at section 415(1) and (2). It has not been exercised in relation to any of the provisions being consolidated.

3.28 If amending a provision that derived from the Criminal Justice Act 2003, check with the Ministry of Justice whether section 415(1) should be applied to the amendments.

Exercising the power in section 419 of the Sentencing Act 2020

3.29 The power in section 419 of the Sentencing Act 2020 is a power, exercisable where amendments in Schedule 22 to the Act are brought into force or a power in Schedule 23 to amend the Act is exercised, to secure that –

- a. the Act states on its face the purposes for which, or cases in which, the changes apply, and
- b. where one set of provisions replace another but both will continue to operate in parallel for different purposes or cases, both remain in the Act and state the purposes for which, or cases in which, they apply.

3.30 What those purposes or cases are will be determined by the relevant commencement and saving provisions in the commencement regulations under section 417 that relate to the Schedule 22 amendment, or the regulations under Schedule 23.

3.31 Related amendments under section 419 can be made in the same regulations, but their commencement may need to be postponed until after the amendments being made by

Schedule 22 or under the Schedule 23 power have come into force.²¹

21. See the Criminal Justice Act 2003 (Commencement No. 33) and Sentencing Act 2020 (Commencement No. 2) Regulations 2022 (S.I. 2022/500). Regulation 4 brought paragraph 24 of Schedule 22 to the Sentencing Act 2020, which amended section 224 of the Code, into force on 2 May 2022 “but only for the purposes of offences which are triable either way”.

Regulation 6(1) amended section 224 of the Code to make clear its effect for both summary and either-way offences. In doing it so replaced words that had just been substituted, for some purposes, as a result of regulation 4. In order to make the order of amendments clear, regulation 6 came into force at 12.01am on 2 May 2022, just after regulation 4.