

## **Sentencing Code – 10 things you need to know**

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As the Law Commissioner for Criminal Law, Professor Ormerod led the work of the Law Commission to produce the Sentencing Code.

## The Sentencing Code – 10 things you need to know

### 1. What is the Code?

The “Sentencing Code” is a consolidation of existing sentencing procedure law. It brings together over 50 pieces of primary legislation relating to sentencing procedure into one single Act. That exercise provided an opportunity to remove ambiguities in drafting, produce a more coherent structure to the order in which provisions appear, and introduce greater consistency of language. It has been drafted with the needs of judges in mind and seeks to make the law more readily accessible. It will mean that any sentencing exercise should be capable of being resolved by reference to the Code, Sentencing Council Guideline(s) and the CrimPR/ CrimPD. The Act is published [here](#).

### 2. From what date and to which cases does it apply?

The Code applies **only** to convictions on or after commencement date (1 December 2020). But the “Clean Sweep” approach in the Code means that it applies to **all** convictions on or after that date irrespective of the date of the commission of the offence.

There will be transitional cases where some offences before the court for sentencing will be governed by the Code and others by the pre-Code law but this will diminish quickly with time. What matters is the date of conviction. Judges will need to be vigilant as to the date of conviction if, for example, an offender absconds and is apprehended, was convicted in absence or, e.g. the conviction was before 1 December but sentencing is after that date because reports were sought. Schedule 27 (transitional provisions) provides for continuity of the law if a Court faces pre-Code and Code matters.

The Code applies to England and Wales. It extends to Scotland and Northern Ireland only where it is necessary e.g. to facilitate the transfer of orders (e.g. a community order) and the offender proposes to move from one jurisdiction to another

### 3. What is the “Clean Sweep”

The most innovative aspect of the Code is that it will apply to every person convicted on or after the date of the commencement of the Code (1<sup>st</sup> December 2020). This is subject to the important safeguard that, because of the way the Code has been drafted, no one will be at risk of being sentenced to a heavier penalty than could have been imposed at the date of the commission of his or her offence. The way that has been achieved is by a technical drafting device in the Sentencing (Pre-consolidation Amendment) Act 2020. All that any judge or advocate applying the Code needs to know is that where someone is being sentenced under the Code, the provisions already guard against any unfair retrospectivity.

Where there was any risk that retrospectively applying the most modern form of the law (as consolidated in the Code) might expose someone to a harsher penalty than was available at the date of their offence, the “old” (less harsh) provision has also been included in the Code. It is clear on the face of any such provision to which date range of offending it applies. (See e.g. the drafting of CII 273 and 283 of the Bill and Sch 15). The practical benefit is that courts will no longer have to make reference to historic versions of legislation, and decipher opaque transitional provisions

The Code is retrospective but does not contravene art.7 nor any common law principle against retrospectivity because it is drafted in such a way that no one can be

sentenced to a harsher penalty than could have been imposed at the date of the commission of their offence. There should be no basis on which an art. 7 or retrospectivity argument arises before the court.

#### 4. How will resentences be dealt with?

The Code does not apply to the re-sentencing of offenders in the case of appeals and slip rule hearings where the conviction pre-dates the commencement of the Code. Similarly, the Code does not apply to a case of breach of an order imposed before the Code (see Cl 2(3)). Reference to the pre-Code law must be had.

Where the Code does apply (all cases of conviction on or after 1/10/20) powers on resentencing have been harmonised so they should be much easier to apply. In the Crown Court the Court will always have the powers that the original sentencing court would have had if the offender had just been convicted (ie. the powers the original court would have at the date of this resentencing hearing). In a case where the offender was aged under 18 when convicted of the offence, the resentencing court must apply the powers the original court would have at the date of this resentencing and treat the offender as if he or she were the same age as when in fact convicted. (See generally Cl 402).

#### 5. What the Code does not do

The Code is a consolidation. It does **NOT** change any maximum sentence for any offence. It does not alter any mandatory minimums. It does not alter (by increasing or decreasing) the severity of penalty an offender will receive for an offence. It does not introduce or repeal any type of sentencing order. It is not designed to have any impact on the prison population or indeed the applicability, or likelihood of application, of any type of sentence.

#### 6. What types of sentence are not in the Code?

It was not possible to consolidate every type of disposal that might be applied in a criminal case. For example, the Code does not restate or replace the legislative material in the Road Traffic Acts; nor does it deal with confiscation. The Code does not include those provisions which govern the release of offenders from custody, probation, or license arrangements. They are not matters that it is necessary for the sentencing judge to deal with in determining a sentence. To assist the judge the Code provisions sign-post the existence of other disposals to which the judge should have regard. There are signposts to relevant provisions in other enactments (e.g. cl 172 signposts the Company Directors Disqualification Act 1986, s2.) and to other relevant provisions *within* the Code (e.g. in relation to disposals where there is a need to obtain a pre-sentence report, the source of that duty (cl 30 of the Code) is signposted).

#### 7. How is the Code structured?

The Parts, chapters and provisions of the Code are set out in a logical order designed to enable judges and practitioners to find the material easily. In essence, the parts reflect the chronology of the sentencing process. See p.4 below. Relevant provisions of the Code also provide clear tables to follow to assist users (see eg Cl 201 on community orders).

For each type of sentence, the Code deals separately for relevant ages of offender. This should make application of the law easier, particularly when dealing with children and young people. (See for example, provisions dealing separately with EDS for those under 18 cl 254; for those aged 18-20 cl 266; and those aged 21 cl 279). Currently

s.226A applies to those aged 18 or above and s.226B to those aged 18 or under. The Code is much clearer, more user friendly and will prevent the type of error that occurred in [Thompson and ors \[2018\] EWCA Crim 639 at \[47\]](#).

8. [How can I find which Code provision replaces the one in the existing law?](#)

Origins and Destinations tables have been created. Every provision under the pre-Code law is listed alongside its Code equivalent, but the Code provision numbers may change during the Parliamentary process. Once the Code is enacted these will be widely circulated, posted on the Judicial College website and included in training materials. One other feature of the Code is that it re-enacts any pre-existing provisions even if not yet commenced (e.g. s 154 CJA 2003 re: 12 month sentences in the magistrates' court), but these will be less likely to confuse since they are contained in a Schedule (Schedule 22) until, if ever, commenced.

9. [How will the Code sit alongside the Sentencing Council Guidelines?](#)

The Code has been drafted with the Council's work firmly in mind. The Council has been consulted throughout its development. Nothing in the Code will conflict with the Council guidelines. In fact, the Code should ensure that the guidelines are easier to apply since the structure of the Code follows the sentencing process more logically. The Code also requires the judge to follow the Council guideline in all cases (irrespective of the date of the offence (not merely "to have regard to" the guidelines - currently the position for pre-2010 cases).

10. [The future](#)

The Sentencing Code is drafted as, and is intended to be, a "living" document which is capable of amendment. It is important that when future changes are made to the law relating to sentencing procedure, they are made by amendment to the Sentencing Code. Sentencing law should continue to be found in the Sentencing Code, not in separate enactments. It is hoped that future amendments will be drafted in such a way that when inserted into the Code they will apply to any one to be sentenced irrespective of the date of the Commission of their offence unless it is necessary to make the amendment prospective only (to avoid imposing harsher penalties retrospectively), in which case that will be clear on the face of the provision.

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The **Sentencing Code** is arranged as follows:

(1) First Group of Parts

Part 1 (introductory provisions and overview)

(2) Second Group of Parts (Provisions applying to sentencing courts general)

Part 2 (Powers exercisable before sentence, including deferment of sentence and committal and remission powers)

Part 3 (Procedure, including pre-sentence reports and derogatory assertion orders)

Part 4 (Exercise of court's discretion, including the purposes of sentencing and the determination of the seriousness of an offence)

(3) Third Group of Parts (Disposals)

Part 5 (Power to impose absolute and conditional discharge)

Part 6 (Orders relating to conduct, including referral orders and reparation orders)

Part 7 (Financial orders and orders relating to property, including fines, compensation orders and forfeiture orders)

Part 8 (Disqualification, including driving disqualification and disqualification orders relating to the keeping of animals)

Part 9 (Community sentences, including youth rehabilitation orders and community orders)

Part 10 (Custodial sentences, including suspended sentence orders, imprisonment, detention and extended sentences)

(4) Fourth Group of Parts (Further powers relating to sentencing)

Part 11 (Behaviour orders, including criminal behaviour orders and sexual harm prevention orders)

(5) Fifth Group of Parts (Miscellaneous and supplementary provision)

Part 12 (Miscellaneous provision about sentencing, including the power to require the parent or guardian of a person under 18 to pay a fine or other financial order when convicted of an offence)

Part 13 (Interpretation, including the meaning of "sentence")

Part 14 (Supplementary provision, including regulation-making powers)