

EXPLANATORY MEMORANDUM TO
THE SENTENCING (PRE-CONSOLIDATION AMENDMENTS) ACT 2020
(EXCEPTION) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations retain the effect of article 3 of the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2020 (“the 2020 Order”), which provides that the increased surcharge amounts specified in article 2 of that Order only apply where a court deals with a person for an offence committed on or after the date the Order came into force (14 April 2020). This means that the “clean sweep” of sentencing procedural legislation under section 1(3) of the Sentencing (Pre-consolidation Amendments) Act 2020 does not apply to the 2020 Order. This will ensure that offenders sentenced under the forthcoming Sentencing Code (as introduced by the Sentencing Bill which is currently before Parliament) for offences committed before the 2020 Order came into force will not pay a higher surcharge amount than would be applicable at the time of their offence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 This instrument does not have any minor or consequential effects outside England and Wales.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.
- 3.5 The Department has reached this view because the subject matter of the instrument, sentencing procedure, is a devolved matter in Northern Ireland by virtue of omission from Schedules 2 and 3 to the Northern Ireland Act 1998, and in Scotland by virtue of omission from Schedule 5 to the Scotland Act 1998.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Sentencing (Pre-consolidation Amendments) Act 2020 (Exception) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

The Sentencing (Pre-consolidation Amendments) Act 2020

- 6.1 The Sentencing (Pre-consolidation Amendments) Act 2020 (“the 2020 Act”) amends existing legislation to facilitate the enactment and operation of the Law Commission’s proposed Sentencing Code (“the Code”), a consolidation of legislation governing sentencing procedure in England and Wales. The Code will be created by a separate Sentencing Bill which was introduced to the House of Lords on 5 March 2020.
- 6.2 Section 1(3) of the 2020 Act gives effect to a “clean sweep” of sentencing law. The clean sweep will ensure that whenever an offender is convicted after the Code is commenced, the most recent law as consolidated in the Code is applied to them, regardless of when their offence is committed (subject to certain exceptions).
- 6.3 The effect of the clean sweep is to remove historic and redundant layers of sentencing procedural legislation. It operates on provisions that are to be consolidated in the Code, as well as secondary legislation made under legislation being consolidated.
- 6.4 Schedule 1 to the 2020 Act contains a series of exceptions to the clean sweep. These exceptions ensure that offenders sentenced under the Code will not be subject to a greater penalty than that available, or to a minimum or mandatory sentence that did not apply, at the time of their offence.
- 6.5 Section 1(5)(b) of the 2020 Act provides that the Secretary of State may make additional exceptions to the clean sweep by statutory instrument. Section 4 prescribes the parliamentary procedure to be affirmative.

The surcharge

- 6.6 Section 161A of the Criminal Justice Act 2003 (“the 2003 Act”) requires that a court, when dealing with a person for one or more offences committed on or after 1 April 2007, must order the person to pay a surcharge. Section 161B of that Act provides that the Secretary of State may specify the amount of surcharge that is payable in particular circumstances by statutory instrument. The current surcharge levels are set out in the Schedule to the Criminal Justice Act 2003 (Surcharge) Order 2012 (S.I. 2012/1696) (“the 2012 Order”) and vary according to the age of the offender and type of sentence imposed.
- 6.7 The Schedule to the 2012 Order has been amended by further orders made under the 2003 Act, including the Criminal Justice Act 2003 (Surcharge) (Amendment) Order

2014 (S.I. 2014/2120), the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016 (S.I. 2016/389), the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2019 (2019/985) and, most recently, the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2020 (S.I. 2020/310) (“the 2020 Order”).

- 6.8 Article 2 of the 2020 Order provides for increases in the amount of surcharge that is payable by offenders in particular circumstances. Article 3 of that Order provides that the increased amounts do not apply where a court deals with a person for a single offence committed before the date on which the 2020 Order came into force (14 April 2020), or where it deals with a person for more than one offence and at least one of those offences was committed before that date.
- 6.9 The 2012 Order will continue to operate after the Code is commenced but will be amended by the Sentencing Bill to reflect references to the new consolidated Code.

7. Policy background

What is being done and why?

- 7.1 These Regulations provide that the clean sweep does not alter the effect of article 3 of the 2020 Order.
- 7.2 Sections 161A and 161B of the 2003 Act are to be consolidated in the Code. As the 2020 Order was made under those sections, in accordance with the provisions of the 2020 Act the clean sweep will apply to that Order unless steps are taken so that it does not. This would mean that the increased surcharge amounts that are specified in article 2 of the 2020 Order would apply to all offenders sentenced under the Code who committed offences on or after 1 April 2007 (instead of those who committed offences on or after 14 April 2020, as is the case under the current law). Such offenders may have committed offences at a time when the amount of surcharge payable was less than prescribed in the 2020 Order.
- 7.3 By providing that the clean sweep does not alter the effect of article 3 of the 2020 Order, these Regulations will ensure that where a court deals with a person under the Code for an offence committed before the 2020 Order came into force, the amount of surcharge that is payable (as specified in the Schedule to the 2012 Order, as amended) will remain the amount that applied when the offence was committed.
- 7.4 There are already exceptions to the clean sweep at paragraphs 3 – 6 of Schedule 1 to the 2020 Act which ensure that the clean sweep does not alter the effect of the transitional provisions in other orders which made changes to the surcharge (made between 2012 - 2019, as set out at paragraph 6.7). These Regulations are consistent with the approach taken with those exceptions and ensure that the clean sweep does not apply retroactively.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 None.

10. Consultation outcome

10.1 No consultation exercise was conducted. This instrument does not change the policy on the application of the surcharge.

11. Guidance

11.1 No formal guidance has been, or will be, issued in relation to these Regulations.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because there is no, or no significant impact on the private, voluntary or public sector. These Regulations ensure that increases to the surcharge do not apply where a court deals with a person under the Code for an offence committed before the increases came into force.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause. There will be no monitoring on the effect of these Regulations.

15. Contact

15.1 Jack Hickey at the Ministry of Justice (telephone: 07971 828042 or email: Jack.Hickey@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Amy Randall, Deputy Director for Bail, Sentencing and Release Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.