Law Commission
Reforming the law

The 6HQWHQFLQJ &RGH
Volume 1: Consultation Paper

Consultation Paper No 23

Law Commission

Consultation Paper No 232

The Sentencing Code

Volume 1: Consultation Paper

27 July 2017

This publication is available at www.lawcom.gov.uk/project/sentencing-code/.

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Right Honourable Lord Justice Bean, *Chair*, Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: This consultation paper is to obtain consultees' views on the draft Sentencing Code.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: The issues paper is available on our website at http://www.lawcom.gov.uk/project/sentencing-procedure/.

Duration of the consultation: We invite responses from 27 July 2017 until 26 January 2018.

Comments may be sent:

By email:	sentencing@lawcommission.gsi.gov.uk.
By post:	Lyndon Harris, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne's Gate, London SW1H 9AG (access via 102 Petty France)
By telephone:	Tel: 020 3334 0200

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission: We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

Contents

Glossary

Bill

A Bill is a proposal for a new law, or a proposal to change an existing law that is presented for debate before Parliament. A Bill can be amended during its process through Parliament and is known as an Act when it receives Royal Assent and becomes law. However, as explained below (see **Commencement** below), a provision in an Act does not have effect unless it has been brought into force.

Clean sweep

The clean sweep is a particular innovation of the Sentencing Code. An issue with the current law is that changes to the law are brought into force in many different ways, with the changes often only applying to offences committed after the implementation of the particular law. This means that the old law which has been repealed must be 'saved' for certain older cases which may still be before the courts. Over time, this has caused there to be many layers of old law still 'saved'. The clean sweep fixes this situation by extending repeals and commencements to all cases, so that the new law applies to all cases and the old law has no application in any case sentenced after the commencement of the Sentencing Code.

Commencement

When primary legislation is enacted by Parliament and receives Royal Assent, it does not necessarily have effect as law immediately. Before legislation can have effect, it must be brought into force. The coming into force of a legislative provision (that is, it having effect) is described as its commencement. See **Commencement provisions** below for details of how legislation is brought into force.

Commencement provisions

In order to give legislation effect, it must be brought into force (see **Commencement** above). If an Act makes no provision for its coming into force it will come into force at the beginning of the day on which the Act receives Royal Assent. This is unusual however and most Acts make specific provision for when they will come into force – these provisions are known as commencement provisions. A commencement provision typically provides either that the legislation will come into force on a certain date or after a certain period of time has elapsed, or alternatively on the instruction of a government minister.

Committal for sentence

Some cases are capable of being dealt with in the magistrates' court or the Crown Court. The Crown Court deals with more serious offences and has greater sentencing powers than the magistrates' court. Where a magistrates' court feels that its powers to sentence are insufficient to reflect the seriousness of the offence, or where the offender is being dealt with in the Crown Court in respect of other offences, the magistrates' court can transfer a case to be sentenced in the Crown Court. In doing so it must either commit the offender to custody or place them on bail, and the process is called committal for sentence.

Consecutive/concurrent sentences

Where two or more sentences are imposed on an offender they can be imposed either consecutively or concurrently. Concurrent sentences are served simultaneously, for example two concurrent sentences of two years result in a total sentence of two years. Where sentences are imposed consecutively, the offender will serve one sentence and then serve the next upon the expiry of the former. For example, two consecutive sentences of two years result in a total sentence of four years.

Consequential amendments

Often when changes are made to the law, such as the introduction of a new sentencing disposal, there is a need for a number of other legislative provisions to be updated to reflect this change so that the law can continue to operate properly. These subsequent changes are known as consequential amendments: they are amendments made in consequence of a new piece of law.

Consolidation Bills

Often the law on a particular topic is contained in more than one Act of Parliament. Consolidation Bills simply restate the current law, bringing the provisions contained in different Acts into one piece of legislation. A consolidation does not change the effect of the existing law, although such an Act occasionally contains minor corrections and improvements.

Current law

The law in force at the beginning of the consultation exercise.

Draft Sentencing Code

The draft Sentencing Code is the subject of this consultation exercise. It is the draft consolidation Bill which when enacted will be the Sentencing Code.

Group of Parts, Parts, Chapters

Legislation is split into Groups of Parts, Parts and Chapters. These allow sections that are thematically linked to be compiled in a single place, and help to aid navigation.

Index offence

The offence for which an offender is being sentenced.

Origins

These can be found in the version of the **draft Sentencing Code** contained in Appendix 2. An origin indicates the location in the current law of a particular provision in the draft Sentencing Code. In some cases there is no single origin and multiple origins are indicated. This occurs where the drafting has brought together multiple provisions and re-drafted them in one provision. Where the drafting used in the draft Sentencing Code has been the result of a **pre-consolidation amendment** (see below) which changed the existing legislation, the origin of the clause will include a reference to “PCA”. Where a clause is not solely the product of consolidation and Parliamentary Counsel (see below) has created a provision or part of a provision to improve the law, this is indicated by the word “drafting” in the origins.

Parliamentary Counsel

Parliamentary Counsel are specialist government lawyers who are responsible for drafting all primary legislation.

Parliamentary procedure

Parliamentary procedure regulates the proceedings of the Houses of Parliament. It includes proceedings governed by certain Acts of Parliament, rulings made by the Speaker in the House of Commons and by the Procedure Committee in the House of Lords, Standing Orders, and established understandings and conventions which have not been codified. There is a special procedure for **consolidation Bills** (see above) which allows the Bill to progress through Parliament more quickly. This is because as a consolidation restates the law, the provisions have already been the subject of debates in both Houses of Parliament.

Pre-consolidation amendment ('PCA')

Pre-consolidation amendments are amendments made to the legislation for the purposes of facilitating the consolidation of the law, and are commenced immediately before the consolidation is enacted (therefore only having effect for the purposes of the consolidation). Pre-consolidation amendments are amendments to legislation that need to be made before the consolidation Bill is introduced to Parliament. They are generally limited to correcting minor errors and streamlining the law in the area being consolidated.

Pre-legislative scrutiny

Ordinarily this phrase refers to the detailed examination of an early draft of a Bill that is carried out by a parliamentary select committee before the final version is drawn up by the government. For the **draft Sentencing Code** (see above), pre-legislative scrutiny also includes the consultation exercises conducted by the Law Commission in determining the content and layout of the Bill.

Sentencing Code

The Sentencing Code is a consolidation of the existing legislation governing sentencing procedure, bringing together provisions from the Powers of Criminal Courts (Sentencing) Act 2000, and Parts of the Criminal Justice Act 2003 among others. Once enacted and brought into force, the Sentencing Code will provide the first port of call for legislation concerning sentencing procedure.

Slip rules

The term slip rule(s) refers to the courts' powers under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates' Courts Act 1980 to alter previously imposed sentences. This can be to correct an error of law or to make other amendments to the sentencing orders imposed on an offender.

Transitional provisions

When the law is changed by Parliament, transitional provisions provide for how the law should apply to cases that straddle the two regimes. These provisions ensure that there is a smooth transition between two different legal regimes, for example, making clear whether certain cases are dealt with under the old law, or the new law, potentially applying either with modification. The issue of transitional provisions is closely connected to **commencement** (see above) and the way in which new laws are given effect.

Transition date

The transition date is the date specified by transitional provisions before, or after, which the old law ceases to apply and the new law begins to apply.

Chapter 1: The Sentencing Code – Introduction and Summary

INTRODUCTION

1.1 Sentencing an offender who has pleaded guilty to, or been convicted of, a criminal offence is one of the main functions of the criminal courts. 1.2 million offenders were sentenced in the criminal courts of England and Wales in the year ending September 2016.[1] In the same year, 4,241 appeals against sentence were heard in the Crown Court.[2] The Court of Appeal (Criminal Division) received 4,072 applications for leave to appeal against sentence, each requiring the attention of a single judge on the papers.[3] Leave to appeal against sentence was granted to be heard before the full court in 1,294 cases.[4]

1.2 The imposition of punishment following the conviction of a criminal offence has an impact on a large number of people either directly or indirectly and it is extremely important that the law governing sentencing procedure is clear and coherent. This is vital not only for offenders but also for the judiciary, the legal professionals who represent defendants and the prosecution, the victims and their families, and the wider public. Further, it is imperative for the smooth and efficient running of the court system that the law governing sentencing procedure is clear and coherent.

1.3 It is equally important that the law governing how sentences are imposed is transparent and accessible. It is fundamental to the rule of the law that the law is sufficiently clear to enable an individual to understand the potential consequences of their actions, and the penalty to which they may be liable. The ability to identify and understand the applicable law is integral not only to the maintenance of public confidence in the criminal justice system but also in ensuring that the defendant knows exactly why the sentence imposed upon them has been passed and whether they have any possible grounds of appeal.

1.4 The current state of the law means that it is simply impossible to describe the legislation governing sentencing procedure as clear, transparent, accessible or coherent. This is not only undesirable in principle but also has negative effects in practice, resulting in unnecessary errors and delays, all of which are costly.

1.5 In this introductory Chapter we explore the problems with the current law, and the scope and aims of the project and briefly describe the way in which we have set out to solve those problems.

---

1 Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q5.1A.

2 Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C12.

3 Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex F.

4 Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex D.

THE PROBLEMS WITH THE CURRENT LAW

1.6 Owing to continual developments in penal policy over the past 30 years, there has been a deluge of legislation relating to sentencing. The proliferation, on an almost annual basis, of new variations and types of sentencing orders, combined with the way that the law is drafted and brought into force, has resulted in the legislation relating to sentencing procedure being dispersed across dozens of different pieces of legislation with no clear and logical structure.

1.7 As an illustration, we compiled the sentencing law in force as of August 2015. Our compilation was over 1300 pages long and contained provisions from Acts as varied as the Justices of the Peace Act 1361, the Company Directors Disqualification Act 1986 and the Dangerous Dogs Act 1991.[5]

1.8 Even our lengthy compilation document does not convey the true complexity and inaccessibility of the current law. This is because it only contained the current law relevant to sentencing recent offences. In cases which involve older offences, sometimes committed decades earlier, reference must be made to the historic sentencing regimes in place at the time the offence was committed, in addition to the current law. This historic legislation is often technical and complex, with its effect and operation being difficult to decipher. Sometimes even the existence of such laws is not readily apparent.

1.9 The consequence of this state of affairs is that the law on sentencing is overwhelmingly complex and difficult to understand for practitioners and judges, as well as lay people. The extraordinary number of statutory provisions relating to sentencing, and the lack of any over-arching structure within which they sit, means it is almost impossible to identify and navigate the relevant legislation. As such, it is difficult for the court to determine what powers are available, and what duties apply, without reference to a specialist research text. It is not simply that it is difficult to ascertain in which Acts and Statutory Instruments relevant provisions may be contained. Even once those Acts and Statutory Instruments have been identified, their provisions do not take any standard form. This makes it very difficult to understand their effect and how they operate alongside other provisions.

1.10 This complexity means that errors are frequently made when the courts impose a sentence. An analysis conducted in 2012 of 262 randomly selected cases in the Court of Appeal (Criminal Division) demonstrated that the complexity of the legislation is resulting in an extraordinary number of sentences that had been wrongfully-passed: there were 95 unlawful sentences in the sample.[6] These were not sentences which were considered to be only of inappropriate severity, i.e. those which the Court of Appeal (Criminal Division) concluded ought to be reduced on the basis they were manifestly excessive or increased on the basis that they were unduly lenient, but cases in which the type of sentence(s) imposed was simply wrong in law.

---

5 Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from http://www.lawcom.gov.uk/project/sentencing-code/.

6 R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii. Those 262 cases consisted of every criminal appeal numbered 1600 to 1999 in 2012, excluding "those not published, those relating to conviction, non-counsel cases and those that were interlocutory etc."

1.11 Naturally these unlawful sentences should be rectified. Where such errors are identified, they may be corrected either by way of the "slip rule"[7] or by an appeal to a higher court. These additional court hearings mean increased cost to the criminal justice system and delays to other hearings. However in some cases, the errors are not noticed at all. In the 2012 study of 262 randomly selected cases in the Court of Appeal (Criminal Division) referred to above, some of the errors were not identified by either the parties involved in the case or the court, and spotted only by the study.[8] This can lead to injustice which is even worse than simply the increased cost of rectifying errors of law.

1.12 Even where errors are not made, the complexity of the current law means that sentencing hearings place an unnecessary burden on the court system. Often sentencing hearings take an unnecessarily lengthy amount of time owing to the difficulties in identifying and understanding the applicable law. Not only does this cause undue cost and delay in relation to sentencing determinations but it can also have a knock-on effect on the expedition of other hearings.

1.13 All this lies against a backdrop of an over-worked and under-resourced Criminal Justice System where the average time from the charging of an offence, to its final disposal in the Crown Court is 245 days[9] and the average waiting time for an appeal against sentence to the Court of Appeal (Criminal Division) is 5.7 months.[10]

THE PROJECT AND OUR TERMS OF REFERENCE

1.14 Given this background, it is not surprising that the need for the reform of the law of sentencing was endorsed in the strongest of terms when the Law Commission launched the Sentencing Code project in January 2015. The importance of the project was recognised by leading figures in the Criminal Justice System including the Lord Chief Justice, the Director of Public Prosecutions and the heads of both the solicitors' and barristers' professions.[11]

1.15 The Sentencing Code project is part of the Law Commission's 12th programme of law reform.[12] Our terms of reference as agreed with the Ministry of Justice are:

> To consider the codification of the law governing sentencing procedure, understood as the process applicable from verdict to the end of the sentence imposed and to design a sentencing procedure Code, embodied in one Act with a clear framework and accessible drafting. Such a new Code will provide the courts with a single point

---

7 Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates' Courts Act 1980, give the Crown Court and magistrates' courts respectively the power to rectify mistakes and make minor alterations to imposed sentences. These powers are colloquially known as the "slip rule" and in the Crown Court must be exercised within 56 days from the imposition of sentence.

8 R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii. Also available online at http://www.banksr.co.uk/images/Other%20Documents/Unlawful%20orders/2012%20%2811%29%20Sentencing%20illegalities%20Sorted%20by%20error.pdf (last visited 13 June 2017).

9 Ministry of Justice, *Criminal Court Statistics Quarterly: December 2016* (30 March 2017) table T4.

10 Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex B.

11 http://www.lawcom.gov.uk/project/sentencing-code/.

12 Twelfth Programme of Law Reform (2014) Law Com No 354.

of reference, capable of accommodating amendment and adapting to changing needs without losing structural clarity.

To keep in mind the principles of good law: that it should be necessary, clear, coherent, effective and accessible. In short, to make legislation which works well for the users of today and tomorrow.

To ensure that the new Code must not restrict Parliament and the Government's capacity to effect changes in sentencing policy. In particular, the penalties available to the court in relation to an offence are not within the scope of this project except insofar as some consideration of them is unavoidable to achieve the wider aim of a single, coherent Code. Similarly, the Sentencing Code should not in general impinge upon sentencing guidelines, and its drafting will be consistent, and in cooperation, with the work done by the Sentencing Council.

THE AIMS OF THE PROJECT

1.16 The broad aims of the Sentencing Code project are threefold:

(1) to ensure the law relating to sentencing procedure is readily comprehensible and operates within a clear framework;

(2) to increase public confidence in the Criminal Justice System; and

(3) to ensure the Criminal Justice System operates as efficiently as possible.

1.17 Put simply, the aim of the project is to create a single sentencing statute. We have called this statute the Sentencing Code. The Sentencing Code will bring together all of the existing legislation governing sentencing procedure within a single enactment. In doing so it will also ensure the law is framed in clearer, simpler and more consistent language. These changes, in combination with a logical structure, will make the law more accessible for its users: the judiciary, practitioners and members of the public.

A clear framework

1.18 Beyond simply bringing this body of legislation under one heading and clarifying and streamlining it, the project will also introduce a novel approach to dealing with changes to the law, which will substantially simplify the sentencing process in practice. The Sentencing Code will remove the need to make reference to historic law and transitional provisions[13] by applying the current law to all offenders whose convictions occur after the Sentencing Code has come into force (except for where limited exceptions necessary to respect the fundamental rights of offenders apply).[14] We are referring to this change as the "clean sweep".

---

13 Where a change is made to legislation 'transitional provisions' provide clarity in relation to cases which straddle the old and the new law. They provide whether the old or the new law is applied to such cases, as well as providing any necessary modifications. These provisions are commonly contained in secondary legislation and their presence is frequently not obvious. For more information see D Greenberg, *Craies on Legislation* (11th ed 2017) paras 10.1.26-10.1.28.

14 Such as where applying the current law to the offender would result in an offender being subject to a penalty greater than the maximum that was available at the time of the offence, or a minimum sentence, or 'recidivist

1.19 The Sentencing Code will not introduce any new substantive law or sentencing disposals and will not impact upon the sentences that are to be imposed for any offence. It will neither alter the maximum sentences available for an offence, nor will it increase the scope of minimum sentencing provisions. Crucially, the Sentencing Code will not curtail existing judicial discretion in sentencing and will not replace the sentencing guidelines or alter or limit the work of the Sentencing Council. It is not intended or foreseen that implementation and application of the Sentencing Code will have any impact on the prison population. Her Majesty's Prison and Probation Service do not envisage any effect on probation resources.

1.20 The Sentencing Code will be a "living" document capable of amendment. It is our intention that all future amendments to the law relating to sentencing procedure will be made by amendment to this central Sentencing Code to retain the benefits to the law that having a single statutory source will provide.

Readily comprehensible and clear law

1.21 The introduction of the Sentencing Code will provide the law governing sentencing procedure with a clear and coherent structure, as well as re-stating the law in a more certain and accessible manner. It will ensure that judges are aware of all their relevant powers and duties and the full menu of options they have in addressing offending behaviour.

1.22 The Sentencing Code will also re-state the law using modern language, as well as gender-neutral drafting. Streamlining changes will be made to provide added consistency and clarity to the law, and errors and omissions in the current law will be corrected. A guiding principle in the drafting has been a focus on certainty. Sometimes making the effect of the law clearer and more certain has required provisions to be drafted in a longer form, or split into multiple provisions and where this is necessary, we have done so.

1.23 By removing the need to make reference to historic legislation, the Sentencing Code will also greatly aid the transparency of the law. No longer will courts have to make reference to historic versions of legislation, and decipher opaque transitional provisions. For all offenders convicted after the commencement of the Sentencing Code the courts will, by virtue of the clean sweep, need to have reference only to the Sentencing Code itself. Even where exceptions to the clean sweep apply, the Sentencing Code will replicate those historic provisions in the Sentencing Code itself, making clear to which cases they apply – avoiding the need for users to make reference to, and identify, complex transitional provisions. This represents a considerable departure from current practice and is a change we consider will have a significant impact.

Public confidence in the law

1.24 Public confidence is harmed when sentencing decisions are routinely unlawful, unduly lenient or otherwise inappropriate because of the incomprehensible nature of the

premium' (a provision requiring the court to treat the offender more harshly if the offender has previous convictions), that has come into force since the offence was committed. This is discussed in more detail at 3.83 below.

current law. The Sentencing Code would help to reduce these occurrences and thus improve public confidence in the system.

1.25 Similarly public confidence is harmed when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible. As Alison Saunders, the Director of Public Prosecutions, noted at the launch of this project:[15]

> For a victim or witness the court process can seem very daunting and people can often be discouraged from being part of proceedings as they are either worried about the length of time it may take or because they do not understand the process they are about to go through.
>
> Whilst sentencing is only one stage of a trial, it is vital that the public are able to understand the process. This new Code takes the needs of all court users on board and will provide a clear framework for each part of the sentencing procedure, this will allow the public to gain a greater level of understanding of the sentencing process, and hopefully ease some of their concerns.
>
> The introduction of this single Sentencing Code should go a long way to increase clarity and transparency, improving the service provided to the public and their confidence in the sentencing process.

Improving efficiency

1.26 By providing greater certainty and clarity to the law, the Sentencing Code will help practitioners and judges to identify and understand the relevant law more efficiently. This will not only reduce the risk of error, and therefore the number of appeals necessary to correct such errors but it will also help to reduce the amount of court time necessary for sentencing.

1.27 This will free up court resource for other hearings and help reduce the significant delays currently plaguing the criminal court system: the current average waiting time from charge to final disposal of the offence in the magistrates' courts is 55 days[16] and in the Crown Court 245 days.[17]

1.28 Our best quantified estimate of the net financial benefit of the enactment of the Sentencing Code is £255.57 million over ten years.[18]

A HISTORY OF THE PROJECT TO DATE

1.29 Although the publication of this consultation paper marks the beginning of the formal consultation stage of the project, we have sought the views of certain stakeholders since the project commenced in January 2015. The primary purpose of this has been to inform

---

15 All comments from the launch of the project are available together with all publications to date and further information about the project on our website at http://www.lawcom.gov.uk/project/sentencing-code/.

16 Ministry of Justice, *Criminal Court Statistics Quarterly: December 2016* (30 March 2017) table T3.

17 Ministry of Justice, *Criminal Court Statistics Quarterly: December 2016* (30 March 2017) table T4.

18 For further detail, consult the Impact Assessment which accompanies this consultation.

our work in relation to the structure of the draft Sentencing Code and to consider various methods of drafting which could be used.

1.30 We have participated in and conducted roundtable events with key stakeholders in Government[19] and academia;[20] a number of roundtable events with members of the judiciary, including groups of District Judges;[21] and visits to a number of Crown Court centres across England and Wales.[22] This has given us a good starting point from which we can launch the full consultation and we are grateful for the input those groups have had.

1.31 We are grateful to have been regularly invited to participate in meetings with the Sentencing Council, the Law Reform Committee of the Bar Council and the Criminal Law Committee of the Law Society. We have also been invited to discuss the project with Treasury Counsel at the Central Criminal Court, the Criminal Appeal Office, the Crown Prosecution Service and numerous barristers' chambers. The input we have received from these meetings has been immensely valuable.

1.32 Before this main consultation exercise began, we conducted two more specific consultations:

(1) An issues paper seeking consultees' views on the transition to the Sentencing Code (discussed at paragraph 1.35 below); and

(2) The compilation of the current law on sentencing procedure referred to in paragraph 1.7 above which asked for consultees' views on the scope and content of the current law (discussed at paragraph 1.41 below).

1.33 Each of these exercises involved the publication of 2 documents: an initial consultation paper and a subsequent report summarising consultees' responses and making recommendations or drawing conclusions. Both received significant and widespread support from stakeholders.

---

19 We participated in the Whitehall Prosecutors Group meeting on 7 December 2016 attended by representatives from the National Crime Agency; the Environment Agency; the Crown Prosecution Service; the Service Prosecuting Authority; Ofgem; Health and Safety Executive; the Maritime and Coastguard Agency; the Food Standards Agency; Department for Transport; the Serious Fraud Office; the Competition and Markets Authority; Department for Works and Pensions; Natural Resources Wales; Office of the Sentencing Council; Criminal Procedure Rules Secretariat; Ofsted; and the Department for Business, Energy and Industrial Strategy .

20 27 July 2015 attended by Neil Stevenson (Ministry of Justice), John Grealis (Attorney General's Office), Professor Andrew Ashworth QC CBE (All Souls, University of Oxford), Professor Martin Wasik CBE (Keele University), Robert Banks (*Banks on Sentence)*, Lyndon Harris (*Current Sentencing Practice*), Nicola Padfield (Fitzwilliam, University of Cambridge), Professor Barry Mitchell (Coventry University), and Dr Susan Easton (Brunel University).

21 We attended the South Eastern Circuit's quarterly meeting of District Judges on 7 December 2016 at Westminster Magistrates' Court, holding small sessions with 60 District Judges.

22 Manchester Crown Court (Crown Square) (27 April 2017), the Central Criminal Court (2 March 2017), Winchester Crown Court (3 March 2017) and Oxford Crown Court (28 February 2017).

Transition

1.34 When changes are made to the law on sentencing they are often made only prospectively. Transitional provisions frequently ensure that the new law applies only where the offence (for example) was committed after the change was made. This means that in cases involving offences committed before the new provisions came into force, historic versions of the law apply. It is often unclear when this is the case. In addition, identifying the applicable law and how it operates can be difficult. In *R (Noone) v Governor of Drake Hall Prison & another,* Mr Justice Mitting noted that it had taken almost five hours of court time to explain to him the effect of the transitional provisions in question.[23] When the case reached the Supreme Court, Lord Phillips stated that "hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions."[24]

1.35 On 1 July 2015 we published an issues paper.[25] This considered the crucial policy question of how the transition from the current law to the Sentencing Code would operate. In particular, it examined the problems caused by the current approach to transition in sentencing law.

1.36 The issues paper considered how we could introduce the Sentencing Code in the most effective way possible. Our aims were to ensure maximum legal certainty and transparency by minimising the use of complex transitional provisions whilst also respecting the fundamental rights of those affected by the sentencing process.

1.37 Subsequently, on 20 May 2016, we published our final recommendations on the transition to the Sentencing Code.[26] Our key recommendations were as follows:

(1) A Sentencing Code should be enacted that brings all of the primary legislative material with which a court might be concerned during the sentencing process into a single enactment.

(2) The Sentencing Code should effect a "clean sweep" of the legislation, removing the need to make reference to historic law and transitional provisions by applying the current law to all cases except where limited exceptions necessary to respect the fundamental rights of offenders apply.[27]

(3) The Sentencing Code should apply to all cases where the offender was convicted after its coming into force, no matter when the offence was committed.

---

23 [2008] EWHC 207 (Admin), [2008] ACD 43 at [1].

24 [2010] UKSC 30, [2010] 1 WLR 1743 at [1]. More examples are provided at para 3.2 below.

25 Sentencing Procedure Issues Paper 1: Transition (2015), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf. The recommendations in this paper are explained in more detail below in Chapters 3 to 4.

26 A New Sentencing Code for England and Wales (2016) Law Com No 365.

27 These limited exceptions are twofold. First, where to apply the new law would result in a penalty being imposed that would be more severe than the maximum which could have been imposed at the time of the offence. Secondly, where it would result in a new minimum sentence, or requirement to treat a previous conviction as an aggravating factor in sentence, that did not exist at the time of the offence, applying to the offender.

1.38 We made these recommendations on the basis that consultees were overwhelmingly in favour of them. In particular, our "clean sweep" approach received universal support. Strong support for the Sentencing Code in general was received from a number of key stakeholders including the Government, HM Council of District Judges, the Council of HM Circuit Judges and the Crown Prosecution Service. While the "clean sweep" approach is contrary to the normal presumption against retroactivity, for the reasons set out in our issues paper,[28] and following support on consultation, we are confident that it is not only lawful, but desirable.

1.39 His Honour Judge Andrew Goymer, writing on behalf of the Council of HM Circuit Judges, made the following remarks on the impact the clean sweep would have on the unsatisfactory state of the current law. He stated that:

> In general terms we strongly support the proposal. The present state of sentencing law is a disgrace to our jurisprudence. It is totally unacceptable to have so much complexity and uncertainty that result from layer upon layer of statutes that have been brought into effect in a piecemeal fashion or have never been brought into effect at all. We endorse all the comments of the senior judiciary over the years about this deplorable state of affairs.

1.40 Chapters 3 and 4 of this consultation paper explore these reforms and their technical and practical operation in more detail. The conclusions in those chapters reflect the policy that has been reached as a result of previous consultation. Those policies are not the subject of this consultation exercise.

Current Law

1.41 On 9 October 2015 we published our compilation of the law relating to sentencing as it was on 1 August 2015.[29] This compilation ran to over 1300 pages and was the first time, of which we are aware, that a comprehensive, thematic compilation of the law has been published. This compilation was subject to public consultation and scrutiny for 6 months. We were especially grateful to the Crown Prosecution Service, who provided the current law document to Crown Advocates for use when preparing sentences for hearing as well as undertaking a detailed review of the work for errors and omissions. We are also grateful to the Bar Council, whose members provided particularly detailed notes on a significant proportion of the document.

1.42 On 7 October 2016 we published our interim report on our compilation of the legislation currently in force.[30] Subject to a few minor corrections, consultees agreed that the compilation was accurate and comprehensive. Our compilation of the current law, combined with consultees' answers to the questions we asked relating to the appropriate scope of the Sentencing Code (what the Sentencing Code should, and

---

[28] Sentencing Procedure Issues Paper 1: Transition (2015), Parts 3 to 5 available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf.

[29] Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic pdf and in individual parts from http://www.lawcom.gov.uk/project/sentencing-code/.

[30] Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016) available online at http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf.

should not, include), then formed the basis of our instructions to Parliamentary Counsel in drafting the Sentencing Code itself.

NEXT STEPS

1.43 This consultation paper is an important milestone for the project as it contains a draft version of the Sentencing Code. We have produced introductory commentary to each of the Sentencing Code's main Parts to highlight and explain the various decisions we have made in the course of drafting. In addition, throughout this consultation paper we ask a number of consultation questions. The aim of these questions is to assist us in improving the Sentencing Code and we thank consultees in advance for taking the time to submit responses to them.

1.44 Over the course of a six month consultation period, the draft Sentencing Code will be available for public pre-legislative scrutiny. Over the course of this consultation period we will host a number of consultation events with judges, academics and practitioners and hope to receive detailed comments on the structure and content of the draft Sentencing Code.

1.45 This consultation will also be accompanied by what we have termed "embedding work". Previous attempts at the consolidation of sentencing law, such as the Powers of Criminal Courts (Sentencing) Act 2000, have been frustrated by being rapidly overtaken by other legislation. While this paper is subject to consultation we will be working closely with Parliamentary stakeholders, and those responsible for the drafting of legislation, to emphasise the benefits of the Sentencing Code remaining the main source of legislative sentencing material, and that amendments should be enacted in a way that retains the benefit of our new approach to transitional arrangements.

1.46 We will also be working with other key stakeholders to ensure that the Sentencing Code is understood and well presented. It must work efficiently alongside the Sentencing Council Guidelines and the Criminal Procedure Rules. We will be working closely with The National Archives to ensure that the Sentencing Code is digitally displayed in an appropriate manner that reflects and complements its novel structure. This may involve the use of innovative display tools allowing users simultaneously to view complementary external material. We will also be continuing to work with the Judicial College, the Criminal Appeal Office and the representative professional bodies to ensure that training is in place to familiarise the judiciary and practitioners with the Sentencing Code.

1.47 Once this consultation period ends, we will publish the final version of the Sentencing Code. This final version will incorporate the comments consultees have made on the draft Sentencing Code and will be accompanied by a final report. This will, we anticipate, be published in spring 2018.

1.48 Our intention is for the Sentencing Code to be enacted as a consolidation Bill. Our report will form the basis of the work of the consolidation committee in enacting the Sentencing Code into law. We explain how this process operates at paragraph 1.56 below.

THE SENTENCING CODE

1.49 Chapter 2 of this consultation paper explores the scope (what is included in the Sentencing Code, and what is not) and structure of the Sentencing Code.

1.50 The Sentencing Code will contain all those provisions of primary legislation which a Court conducting a *sentencing exercise* would *need* to exercise its functions properly. This includes those provisions which impose a duty on the court or on a court officer, in addition to those which provide the court with a discretionary power.

1.51 In the course of drafting we have taken the decision to exclude from the scope of the Sentencing Code the law relating to road traffic sentencing, confiscation, and the administration and enforcement of sentences. While some of these areas may be ripe for reform we have regarded them as separate exercises. This is because they constitute distinct and self-contained bodies of law. In particular, while those provisions relating to the administration and enforcement of sentence were initially part of our Terms of Reference with the Ministry of Justice for this project, it was quickly recognised that to include all such provisions within the Sentencing Code would be such an enormous task that we could not achieve it in the time-frame of this project with the resources available. The construction of the Sentencing Code is a time-sensitive exercise. Consolidation of the existing law of sentencing procedure has had to be completed within a limited time-frame not least to avoid being overtaken by new legislation. This time constraint has meant that, given limited resources and access to parliamentary counsel, a more restrictive approach was suitable. This approach to scope was consulted on as part of our consultation on our compilation of the current law relating to sentencing and respondents unanimously endorsed it.[31]

1.52 Owing to the ongoing review of the Youth Justice System in England and Wales currently under consideration by the Government and in the interests of using resources most effectively and avoiding any duplication, those provisions relating to specific youth justice orders have been excluded from the draft Sentencing Code. We do intend, however, to include these orders in the final version of the Sentencing Code when any reform proposals from government are clear. Where these specific youth justice orders have been omitted from the draft Sentencing Code, we have included placeholder headings to indicate where these provisions will be found in the final Sentencing Code.

1.53 In relation to some specific areas of law, we have considered it undesirable to transpose provisions from the current law into the Sentencing Code because of the undesirable impact it would have on that other area of law.

1.54 By way of example, the Animal Welfare Act 2006 contains provisions that relate to offenders who have been convicted of certain animal cruelty offences. These provisions give the court the power to make disqualification, destruction and deprivation orders. If these provisions were to be transposed into the Sentencing Code, they would be severed from the distinct and self-contained body of law to which they rightly belong in the Animal Welfare Act 2006. In addition, if the user were to find these provisions in the Sentencing Code, he or she would potentially be unaware of additional non-sentencing measures remaining in the 2006 Act. More unhelpfully still, the user who expects to find

[31] Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016) available online at http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf.

the power where it logically belongs in the 2006 Act would instead find only a gap in consequence of the provision having been transposed into the Sentencing Code.

1.55 To mitigate the effects of being unable to incorporate every provision within the Sentencing Code, the draft Sentencing Code includes what we have termed 'signposts'. These draw the user's attention to those powers which may be found outside the Sentencing Code. This ensures that without disrupting the coherence of other areas of law, the Sentencing Code is comprehensive and that users of the Sentencing Code can be confident that they are aware of all of the relevant legislative provisions.

Consolidation

1.56 To reduce the burden the Sentencing Code will have on valuable Parliamentary time, and to maximise its prospects of enactment, it will take the form of a consolidation Bill. The process of consolidation is described by *Craies on Legislation* as:

> [The replacement of] the existing law on a particular matter with a new Act which makes no substantive change but presents the entire material in a newly organised structure and in language that is both modern and internally consistent.[32]

1.57 A consolidation Bill is therefore one that combines a number of existing Acts of Parliament on the same subject into a single Act so as to improve the clarity and certainty of the law without altering its substance or effect. Drafting the Sentencing Code as a consolidation Bill allows it to take advantage of the special procedure for such Bills. This procedure takes up minimal time in the debating chambers of the Houses of Parliament, with parliamentary scrutiny instead provided by a Joint Committee of the two Houses.[33]

1.58 This procedure means there are limits on the extent of the reforms that can be achieved by the Sentencing Code.[34] The Sentencing Code will not codify the common law relating to sentencing or enact policy reform of the law in this area as was originally contemplated as part of this project.

1.59 The Sentencing Code is not, however, a *mere* consolidation of the law on sentencing. As we have already explained, it will go beyond mere consolidation by implementing the "clean sweep" of historic legislation, reflecting the recommendations made in the transition report.[35] This will significantly simplify the sentencing process in practice, resulting in increased efficiency and fewer errors.[36] Further, the Sentencing Code will make a number of streamlining changes in the interests of clarity and certainty. For

---

32 D Greenberg, *Craies on Legislation* (11th ed, 2017) para 1.9.1.

33 The Joint Committee on Consolidation Bills. For more information, see http://www.parliament.uk/business/committees/committees-a-z/joint-select/consolidation-committee/ (last visited 1 June 2017); D Greenberg, *Craies on Legislation* (11th ed 2017) paras 5.3.1-5.3.4; and Form and Accessibility of the Law Applicable in Wales: A Consultation Paper (2015) Law Commission Consultation Paper No 223, paras 7.11-7.15.

34 The consolidation process, and the limits it creates in changing the effect of the law are explored in more detail at para 2.9 below.

35 A New Sentencing Code for England and Wales (2016) Law Com No 365.

36 The benefits of the clean sweep are explored in more detail at para 3.20 below.

example, it will improve the language used throughout the law and for the first time create a coherent structure.

1.60 To achieve this the Sentencing Code will require two paving provisions to be included in a government Bill which will precede the main consolidation: one to give effect to the "clean sweep" of historic sentencing law; and another to provide the Secretary of State with the power to make a number of pre-consolidation amendments to the law to enable the consolidation to proceed. Any pre-consolidation amendments made to the law under such powers will be limited to minor streamlining and tidying changes that are in the interests of the consolidation of sentencing law.

THE DRAFT SENTENCING CODE

1.61 As stated above, the majority of this consultation paper takes the form of commentary on the accompanying draft Sentencing Code Bill. It also contains a number of consultation questions relating to the draft Sentencing Code Bill. We hope that with the assistance of this commentary, consultees will be able to scrutinise in detail the draft Sentencing Code (or those parts of it in which they have interest and expertise) and provide us with suggestions on how to refine it further.

1.62 There are three appendices to this consultation paper:

(1) Appendix 1: a table explaining the pre-consolidation amendments that have been made in the draft Sentencing Code.

(2) Appendix 2: the draft Sentencing Code.

(3) Appendix 3: the draft clauses necessary to make pre-consolidation amendments.

1.63 The draft Sentencing Code as published runs to 285 clauses and 18 schedules. It is split into five Groups of Parts:

(1) Introductory provisions and overview

(2) Provisions applying to sentencing Courts generally

(3) Disposals

(4) Further powers relating to sentencing

(5) General Provisions

Part 1: Introductory provisions and overview

1.64 Part 1 of the draft Sentencing Code contains those introductory provisions necessary to understand the operation of the Sentencing Code. Clause 2 provides where the Sentencing Code applies (its commencement) which is discussed in detail in chapter 4 of the consultation paper. Clause 1 provides an overview of the structure of the entire Act – a novel creation of drafting. Clauses 277 and 276 define "sentence" and details how the age of the offender is to be determined in the context of the Sentencing Code.

Parts 2 to 4: Provisions applying to sentencing Courts generally

1.65 Part 2 sets out the powers which the court may exercise before sentence: those provisions relating to the courts' powers to defer sentencing, or to send the offender to appear before a different, appropriately empowered, court for sentencing. Only minor streamlining changes have been made to the law which is consolidated in this Part and there is accordingly no accompanying commentary.

1.66 Part 3 contains the provisions governing sentencing procedure: powers to order information and reports; the power to make derogatory assertion orders;[37] the duty to order payment of a surcharge;[38] the duty to order payment of a criminal courts charge;[39] and the duties to explain and give reasons for the sentence imposed.

1.67 Part 4 contains the provisions relating to the exercise of the courts' discretion when sentencing: the purposes of sentencing; the application of Sentencing Guidelines; the information to be taken into account; and the assessment of the seriousness of an offence for the purpose of sentence.

1.68 Parts 3 and 4 are discussed in chapter 5 of the Consultation Paper – General Provisions.

Parts 5 to 10: Sentencing Powers

1.69 Part 5 contains the powers of the court to make absolute or conditional discharges in respect of an offence.[40] Only minor streamlining changes have been made to the law consolidated in this Part and there is accordingly no accompanying commentary.

1.70 Part 6 provides a placeholder for the courts' powers to make referral orders for offenders aged under 18, and for the power to make orders requiring an offender's parents to enter into recognizances. These are youth justice system disposals, and as noted above, due to constraints of resource and the likelihood of impending review these provisions have not yet been re-drafted in the draft Sentencing Code. This part, labelled "orders relating to conduct", also includes a signposting provision to orders made under the Street Offences Act 1959.

---

37 Derogatory assertion orders are orders made by the Crown Court imposing reporting restrictions on false or irrelevant assertions made by an offender or his advocate during the course of a sentencing hearing that are derogatory to a person's character. The powers to make such orders are contained in the Criminal Procedure and Investigations Act 1996, ss 58 to 61.

38 By virtue of the Criminal Justice Act 2003, s 161A, a court when sentencing an offender for an offence committed after 1 April 2007 must also order them to pay a surcharge. The surcharge is colloquially known as the 'victim surcharge' as revenue raised through it is used to support victim services.

39 By virtue of the Prosecution of Offences Act 1985, s 21A, a court when sentencing an offender for an offence committed on or after 13 April 2015 has a duty to impose a criminal courts charge order. A criminal courts charge order is an order to pay a charge in respect of the costs of providing the judiciary and the rest of the court systems in respect of the criminal proceedings in question.

40 Where the court is of the opinion that in light of the circumstance of the offence and offender it is neither necessary nor appropriate to impose punishment the court may make an order discharging the offender. Such a discharge may be absolute or conditional. If the offender is discharged conditionally the sole condition is that the offender should commit no further offence during a specified period (which may not exceed three years) – if they do then they will be liable to be re-sentenced for the offence. The effect of an absolute discharge is that the conviction shall be disregarded for all future purposes.

1.71 Part 7 contains the powers of the court to make financial orders and orders relating to property. This includes the powers of the court to order payment of fines; to impose compensation orders; and to make orders forfeiting or depriving the offender of property. We have included here a placeholder for the inclusion of restitution orders,[41] although these provisions have not yet been included in the draft Code. This Part is discussed in chapter 6 of the Consultation Paper – Fines and Financial Orders.

1.72 Part 8 contains the provisions relating to the power to disqualify an offender from driving, disqualify an offender from owning certain animals and disqualify an offender from being the director of a company.

1.73 Part 9 contains the provisions relating to the courts' powers to impose community sentences. The scope is primarily those provisions relating to the imposition of community orders. Although the orders specific to the youth justice system – youth rehabilitation orders – have not yet been included in the Draft Code, a placeholder has been provided. This Part is discussed in Chapter 7 of the Consultation Paper – Community Orders.

1.74 Part 10 contains the provisions relating to the courts' powers to impose custodial sentences. This includes those general provisions governing the imposition of a custodial sentence; the different variations of custodial sentence available for those aged under 18, 18 to 20, and 21 and over; the minimum sentence provisions applicable to certain offences; the effect of life sentences; and sentence administration.

1.75 Part 10 also contains the provisions relating to the powers of the court to suspend a custodial sentence so that it only takes effect on the commission of a further offence, or when requirements attached to its suspension are breached.

1.76 Those provisions relating to the powers of the court to suspend custodial sentences in Part 10 are discussed in chapter 8 of the Consultation Paper – Suspended Sentence Orders. Those other provisions in Part 10 are discussed in chapter 9 of the Consultation Paper – Custody.

Parts 11: Further powers relating to sentencing

1.77 Part 11 contains those provisions relating to other ancillary orders. These include the power to make criminal behaviour orders,[42] restraining orders (following an acquittal and a conviction) and other behaviour orders.[43]

---

41 A restitution order is an order made by the court to return stolen property (or the value of the stolen property) to the person entitled to the property.

42 Criminal behaviour orders were introduced by part 2 of the Anti-Social Behaviour, Crime and Policing Act 2014, replacing Anti-Social Behaviour Orders (ASBOs). They can be imposed by a court on conviction to and place restrictions on an offender's behaviour so as to prevent them from engaging in behaviour that will cause harassment, alarm or distress to others.

43 Behaviour orders are those orders which are imposed by a criminal court, on conviction of an offence, with the intention of regulating the future behaviour of the subject of the order, either by prescribing certain behaviour (e.g. by obliging the subject to report their address to the police) or prohibiting certain behaviour (e.g. acting as a company director), whether for a determinate or indeterminate period from the date of order.

1.78 This Group of Parts is discussed in chapter 10 of the Consultation Paper – Ancillary orders.

Parts 12 to 14: General provisions

1.79 Part 12 contains the provisions relating to the courts' powers to review previously imposed sentences - either because an offender made an agreement to provide assistance in a further prosecution, has been given a reduction in sentence, and did not provide such assistance, or subsequent to sentence, has agreed to provide such assistance.

1.80 Part 12 also contains the provisions relating to recognizances,[44] and miscellaneous provisions relating to sentencing: including the power to alter a Crown Court sentence under the "slip rule"[45] and for the Secretary of State to make rules relating to community orders and suspended sentence orders.

1.81 Part 13 contains those provisions relating to the interpretation of the Sentencing Code. Part 14 contains procedure governing rules made under the Sentencing Code, powers to amend it, and transitional provisions and consequential amendments.

1.82 As technical Parts there is no accompanying commentary dedicated to either parts 13 or 14, although discussions in chapters 3 and 4 of this consultation paper touch on Part 14.

CONSULTATION

1.83 Consultation on the draft Sentencing Code will be open for a six-month period, closing on 26 January 2018. We invite consultees to scrutinise closely the draft Sentencing Code, checking for any errors or omissions. We also encourage readers to engage with the accompanying consultation paper and the questions it contains. We do not expect that any one consultee will engage with the reading and commenting on the whole draft Sentencing Code but would encourage consultees to engage with any specific areas with which they have a particular interest or expertise. Comments on the wording of the new drafting, the structure of the draft Sentencing Code, and its contents are all welcome. We would remind consultees however that it is outside the remit of this project to make substantive policy changes to the law on sentencing.

1.84 Consultation responses should be provided:

(1) By email to: sentencing@lawcommission.gsi.gov.uk; or

(2) By post to: Lyndon Harris, Law Commission, Post Point 1.54, 1st Floor, the Tower, 52 Queen Anne's Gate, London SW1H 9AG.

---

[44] A recognizance is a sum of money provided in recognition of an obligation – in the context of sentencing a recognizance is often provided as surety for bail, and conditional upon the offender returning to the court when required.

[45] Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 gives the Crown Court the power to rectify mistakes and make minor alterations to imposed sentences. This power is colloquially known as the slip rule.

1.85 We may publish or disclose information you provide to us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.

1.86 If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

Consultation Question 1.

Does the draft Sentencing Code reflect the current law on sentencing, bearing in mind those pre-consolidation amendments that have been proposed, and the effect of the clean sweep?

THE CRIMINAL TEAM MEMBERS WORKING ON THE PROJECT

1.87 The following members of the criminal law team have worked on this consultation paper at various stages: Jessica Uguccioni (team manager); Paul Humpherson (team lawyer); Lyndon Harris (team lawyer); Karl Laird (team lawyer); Vincent Scully (research assistant); Sebastian Walker (research assistant) and Harry O'Sullivan (research assistant).

1.88 We are grateful to the Office of the Parliamentary Counsel who have been responsible for preparing the draft Sentencing Code.

Chapter 2: Scope and Structure of the Sentencing Code

INTRODUCTION

2.1 The creation of a comprehensive Sentencing Code necessarily involves a question of its scope. Which legislative provisions should appear in the Sentencing Code and to which types of case should it apply? These are decisions which must meet the demands of a number of competing priorities, and we have therefore attempted to draw a consistent, principled policy to guide the Sentencing Code's contents.

2.2 An additional, but related, issue then arises as to the arrangement of the Sentencing Code. How should the legislative provisions be organised to best meet the needs of the Sentencing Code's users?

2.3 The purpose of this chapter is to describe the policy we have adopted in the course of making decisions relating to the Sentencing Code's contents, and to its structure and organisation.

CURRENT LEGISLATION IN FORCE

2.4 The first step towards producing the Sentencing Code was to take an exhaustive approach to finding and collating the law of sentencing procedure. It was to this end, that we created and published our compilation of the current law on sentencing procedure in October 2015.[46] As an illustration of the volume and extent of the law, that document ran to 1300 pages and contained provisions from several dozen different statutes. It also contained many references to common law material which we felt comprised the law of sentencing.

2.5 The 'Legislation currently in force' document asked for consultees' views on whether it was a comprehensive and accurate statement of the law. Apart from supplying a number of minor corrections, consultees approved the contents of the 'Legislation currently in force' document as a basis for drawing together a sentencing procedure Code.

GENERAL PURPOSE AND AIMS OF THE SENTENCING CODE

2.6 The Sentencing Code seeks to bring the procedural law of sentencing, which is descriptive of sentencing powers and duties, into a single statutory framework. The existing legislation governing sentencing, for the most part currently found in Part 12 of the Criminal Justice Act 2003, and in the Powers of Criminal Courts (Sentencing) Act 2000 ('PCC(S)A 2000'), will be repealed and restated as new provisions of the Sentencing Code.

---

[46] Sentencing Law in England and Wales — Legislation currently in force (2015), available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Sentencing_law_in_England_and_Wales_Issues.pdf.

2.7 The Sentencing Code does not seek to make alterations to maximum penalties for any offence, nor to introduce any new type of sentence. The penalties available to the court in relation to an offence are not within the scope of the project and will not change. In this respect, the Sentencing Code will be a faithful replication of the effect of the legislation currently in force. The only significant changes made by the Sentencing Code will be those effected by the clean sweep, which will ensure that all courts sentencing an offender convicted after commencement of the Code will sentence by reference to the law contained in the Code.

2.8 Changes to substantive sentencing policy are not within the scope of the project, but we nevertheless intend to make many streamlining and consistency improvements to the law, as well as enacting the clean sweep approach to transition.

Implementation and the decision to enact the Sentencing Code as a consolidation

2.9 To maximise the prospects of the draft Sentencing Code being enacted, we have, after detailed discussions with Parliamentary Counsel and considering the significant current pressures on parliamentary time, concluded that the vast bulk of the Sentencing Code should be enacted in the form of a consolidation Bill.

2.10 The draft Sentencing Code is a Bill of considerable size, comprised at publication of 285 clauses and a further 18 schedules despite the numerous streamlining changes that have been made. While it is significantly shorter than our 1300 page compilation of the current law on sentencing, it is clear that enactment by way of the normal public Bill process would require an entire Government justice Bill to achieve. Legislating for the Sentencing Code would have to be a high priority within parliament, and a high enough government priority to compete for Parliamentary time successfully against other departments' flagship programme Bills. Implementation by way of a government programme Bill was accordingly deemed unrealistic even before the acute pressure on Parliamentary time and extremely tight Parliamentary business management which have resulted from the referendum on leaving the European Union, and more recently the outcome of the General Election.

2.11 The decision was therefore taken that a consolidation Bill as the vehicle for the main body of the Sentencing Code was the best option, despite the implications this had for our ability to make significant policy changes to the law on sentencing, and to codify common law.

2.12 The Sentencing Code is not, however, a *mere* consolidation of the law on sentencing. It will go beyond mere consolidation by including reforms such as the "clean sweep" of historic sentencing legislation recommended in the transition report.[47]

2.13 The Sentencing Code will also make a number of streamlining changes in the interests of clarity and certainty. It will improve the language used throughout the law, create a coherent structure, and will also make more substantial changes to correct errors and inconsistencies.

2.14 It will achieve these changes through two methods:

---

[47] A New Sentencing Code for England and Wales (2016) Law Com No 365.

(1) Notes – In the course of consolidating the law it is inevitable that obvious minor errors or anachronisms are noticed, such as missed consequential amendments, where the intended effect of the law is certain. Such minor errors can be resolved by making changes in the draft Sentencing Code to clarify the effect of the law. When the Bill is introduced to the Joint Committee it must be accompanied by a Note drawing the attention of the Joint Committee to these changes and explaining how the re-drafted position replicates, in effect, the current position.

(2) Pre-consolidation amendment – where a substantive change needs to be made to the law this can be achieved by a pre-consolidation amendment of the law. Pre-consolidation amendments are amendments made to the legislation for the purposes of the consolidation, and are commenced immediately before the consolidation is enacted (therefore only having effect for the purposes of the consolidation).

2.15 The Sentencing Code will therefore require two paving provisions to be included in a Bill which precedes the main consolidation. Clause 1 of that Bill will implement the recommendations of the transition report, effecting the "clean sweep" approach,[48] and clause 2 of that Bill will make a number of pre-consolidation amendments – as well as providing the Secretary of State the power to make further pre-consolidation amendments by way of secondary legislation.

2.16 Clause 2(2) provides that:

> The Secretary of State may by regulations make such further amendments of sentencing legislation as in the Secretary of State's opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or a substantial part of the Acts relating to sentencing (with or without other sentencing legislation).

2.17 This power will be exercisable by way of a statutory instrument subject to an affirmative resolution[49] and there is limited scope for the types of change that can be made under it. Ordinarily, only minor streamlining and tidying changes can be made to the law in the interests of the consolidation: any changes of policy are outside the scope of this power. Where a more significant change is envisaged clause 2(3) provides the following:

> (3) In exercising the power under this section, the Secretary of State may have regard in particular to the desirability of removing differences between provisions relating to—
>
> (a) …
>
> (b) powers of different courts to deal with offenders subject to particular sentences;
>
> (c) powers of different courts to provide for when sentences are to take effect.

2.18 This clause allows for streamlining changes in those specific areas that would go beyond those normally permitted under a pre-consolidation amendment power. These

---

48 The operation of clause 1 is explained in detail below at 3.63.

49 See clause 4.

powers are limited to streamlining changes, and therefore will not make any significant changes to the law.

2.19 While the decision to enact as a consolidation Bill has inevitably resulted in limits on what can be achieved in this project we continue actively to explore ways of achieving further reform to the law of sentencing. This might be achieved, for instance, by taking broader powers to change the law in the preceding Bill, or through other mechanisms for reform which might run in parallel with, or follow immediately on from, the main consolidation Bill.

WHERE WILL THE SENTENCING CODE APPLY: JURISDICTIONAL SCOPE

2.20 The Sentencing Code will present the procedural sentencing law available to criminal and appellate courts in England and Wales.

2.21 We do not anticipate that the Sentencing Code will have any impact on the substantive sentencing law applicable in Scotland or Northern Ireland, nor the Crown Dependencies.

2.22 The Ministry of Defence is actively considering whether the Sentencing Code will be applicable in relation to criminal proceedings instituted in the service justice system. We remain in discussion with the Ministry of Defence as we have been since the inception of the project.

2.23 Much of the sentencing procedure in the Armed Forces Act 2006 (this Act provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice) runs parallel to provisions of the Criminal Justice Act 2003 and the Powers of Criminal Courts (Sentencing) Act 2000 which apply to the civilian courts, and changes to criminal procedure in civilian courts are often reflected in parallel changes for service courts.

2.24 Our provisional view is that the enactment of the Sentencing Code should be reflected in the applicable armed forces legislation as there is no clear justification for the civilian and service jurisdictions to diverge on the enactment of the Sentencing Code. If the Ministry of Defence reaches this same conclusion, then it is intended that the necessary drafting changes will be made before the Code is enacted.

WHEN WILL THE SENTENCING CODE APPLY: TEMPORAL SCOPE

2.25 The temporal scope of the Sentencing Code is that it will apply to sentencing exercises in cases in which conviction, or other special verdict,[50] is obtained after the date on which the Sentencing Code comes into force, irrespective of the date on which the offence took place. The policy we have adopted with regard to the Sentencing Code's commencement is discussed in greater detail in chapter 4 below.

[50] Finding of not guilty by reason of insanity, or finding of unfitness to plead and that the accused had done the act or made the omission charged; see sections 4A and 5 of the Criminal Procedure (Insanity) Act 1964.

WHAT WILL THE SENTENCING CODE CONTAIN: INCLUSION POLICY

2.26 Our starting point is that the Sentencing Code should contain all the provisions of primary legislation which a court conducting a *sentencing exercise* would *need* to exercise its functions properly. This includes those provisions which impose a duty on the court or on a court officer, or those which provide the court with a discretionary power. As currently drafted, the Sentencing Code stops short of including those matters which a court may find it useful to be aware of, but which do not actually in themselves inform the court of its powers or duties.

'Sentencing'

2.27 We consider that 'sentencing' is descriptive of the process by which a person is *dealt with for an offence* by the court in its response to a conviction, a special verdict[51] or, in the case of a restraining order, even on acquittal.

2.28 The court's determination of the sentence and declaration of that decision represent the termination of criminal proceedings for the offence, save for the limited circumstances when sentence is re-opened for review, amendment or revocation.

2.29 The idea that sentencing brings criminal proceedings to a close is also subject to the significant exception of the application of the confiscation regime. We do not deal with confiscation proceedings in this paper as they were never within the scope of the Sentencing Code project. We believe that it is useful to distinguish confiscation from sentencing on the basis that the Proceeds of Crime Act 2002 forms an existing, self-contained body of law. Confiscation will be addressed further at paragraph 2.105 below.

'Dealt with for an offence'

2.30 In most cases sentencing procedure law applies on conviction. The Sentencing Code will apply more widely than this however. It will also apply in cases including the accused being found unfit to plead, on a verdict of not guilty by reason of insanity and in various other circumstances.

2.31 The first scenario in which the Code will apply to an event other than a conviction relates to insanity or unfitness to plead. In a case where an accused person had been found not guilty by reason of insanity, or had been found unfit to plead, but was subsequently found to have done the act or made the omission charged, the court will have powers to make certain orders in disposing of the case. We believe that although these orders cannot punish the accused individual,[52] they do however respond to the need to avoid future harm and the need to achieve rehabilitation in a manner similar to normal criminal sentencing. They also take place at the same point in the proceedings. For this reason, we believe that it is appropriate for these powers to be placed in the Sentencing Code.

2.32 Secondly, the existence of the power to impose a restraining order on acquittal provides a further instance in which sentencing follows an event other than a conviction. Under

---

51 As above, fn 50.

52 Because there is no conviction. In such cases, the accused individual would either be found not guilty by reason of insanity, or would have been unable to participate effectively in a trial and therefore found unfit to plead. For further detail on the aims and purposes of imposing disposals in respect of mentally ill offenders, see LC 364 (2016) Unfitness to Plead: https://www.lawcom.gov.uk/project/unfitness-to-plead/.

the Protection from Harassment Act 1997, section 5A, the court has a power to make restraining orders against a person who has been acquitted, in the interests of protecting a person from harassment by the accused. As with the version of the restraining order available on conviction, this order too responds to the potential for future harm and offending. The making of the order also occurs at a similar point in criminal proceedings. Furthermore, the power logically belongs alongside the similar power to make restraining orders on conviction; provisions for the enforcement and review of restraining orders are applicable to both types of orders and should be kept together. Accordingly, we feel that the provision empowering the court to make restraining orders against acquitted individuals should be accommodated in the Sentencing Code.

2.33 Thirdly, the statutory powers of the court to bind-over to keep the peace are capable of being exercised otherwise than on an individual's conviction or a special verdict. With the exception of the power under section 115 of the Magistrates' Courts Act 1980, which can only be exercised after a full hearing of a complaint, these powers can be exercised by the courts at any point in criminal proceedings and in respect of "individuals who are before the court" including witnesses giving evidence and complainants. These powers are often used in the disposal of criminal proceedings, and will therefore be referred to in the Sentencing Code, however this will be by way of signposting provisions. This will be discussed at paragraph 2.84 below.

2.34 Given the examples mentioned above, we believe that this group of orders, available other than on criminal conviction, fall within the scope of the Sentencing Code.

Consultation Question 2.

Do consultees approve of the policy we have adopted with regard to the inclusion of provisions in the Sentencing Code?

CONTENTS OF THE SENTENCING CODE

2.35 As described above, the Sentencing Code will contain provisions in the current law that are being repealed and replaced by a provision of the Sentencing Code which has the same legal effect. One result of this, for example, will be that the Powers of Criminal Courts (Sentencing) Act 2000 is entirely repealed.

2.36 By way of an overview, the Sentencing Code will include the disposals available to the court, the necessary procedural law and provisions for sentencing hearings themselves. It will also include various orders available to sentencing courts which properly cannot be described as primary sentencing orders, such as ancillary orders and the provisions which allow for the post-sentence enforcement of sentences.

2.37 The following paragraphs describe the contents of the Sentencing Code, and, where necessary, the policy decisions which have been made about whether to include the particular subject matter.

Introductory provisions and overview

2.38 Provisions in the introductory Group of Parts describe the Sentencing Code's commencement and provide certain widely applicable definitions.

Provisions applying to sentencing courts generally

2.39 The second Group of Parts makes provision for powers which allow criminal courts to take necessary procedural steps, as well as provisions guiding the court in the exercise of discretion.

2.40 Primarily, these restate those committal and remission provisions of the Powers of Criminal Courts (Sentencing) Act 2000 which ensure the offender will be sentenced before the appropriate court with sufficient jurisdictional powers. For example, the restatement of section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 allows for the magistrates' court to transfer an offender for sentencing in the Crown Court in a case where the magistrates' courts' sentencing powers are insufficient to respond commensurately to the seriousness of the underlying offence.

2.41 Further powers under this category provide for the deferment of sentence. The practical effect of these is that the court can postpone sentencing an offender, providing an opportunity for an offender to demonstrate remorse or a real intention to engage with rehabilitation. These provisions subsequently provide for the powers of the court which ultimately sentences that offender.

2.42 This Group of Parts also includes those provisions which empower or require the court to make certain enquiries to obtain information prior to sentencing. These are mainly concerned with the pre-sentence report, but also provide for certain powers relating to the offender's financial means and mental health.

Criminal courts charge and surcharge

2.43 The criminal courts charge and statutory ('victim') surcharge are located in this section. These share many characteristics with the other financial impositions available to the court. However, we consider that it is more appropriate for these charges to be found in this procedural part of the Sentencing Code because the court does not have discretion with regard to their imposition and, in almost all cases, the court is required to make an order applying these charges.

2.44 We are considering whether the imposition of the surcharge should become an automatic consequence of conviction, to be calculated and imposed after sentence as an administrative matter. This is addressed in further detail at paragraph 5.2 below.

2.45 It is important to note at this point that the criminal courts charge is still in force, albeit that in practical terms it has no application. This state of affairs was brought about by virtue of statutory amendment omitting the secondary legislation which provided the applicable charge levels.[53] This means that the duty to impose the criminal courts charge still technically applies, though the charge has no monetary value.

---

[53] Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015 SI No 1970, reg 2.

Principles applicable while sentencing

2.46 A further category of provisions in this group prescribes certain over-arching principles to which the sentencing court must have regard while exercising discretion. These include, for example, the purposes of sentencing, the general duty of the court to have regard to the existence of any applicable sentencing guidelines, and the approach to be taken to seriousness and aggravating and mitigating factors.

Primary sentencing orders and further powers relating to sentencing

2.47 The third Group of Parts in the Sentencing Code provides for primary sentencing orders. These orders are those which are capable of standing alone as the entire disposal of the case.

2.48 This is to be contrasted with the further ('ancillary') orders, which may be imposed by the court, but only in combination with an order imposing a disposal. These further powers relating to sentencing are located in the fourth Group of Parts. We think that it is useful as a matter of presentation for the Sentencing Code to signal clearly the class of sentencing orders from which the court must always select at least one order, and the class containing those powers which the court may additionally exercise: ancillary to the primary standalone disposal.

2.49 We believe that the table on the following page expresses the correct categorisation of all disposal and further powers, in so far as they are organised structurally in the Sentencing Code. For each order there are different applicable conditions that must be met for the court to make that order. This table reflects our understanding of the way the law currently operates, and is nothing more than a structure to assist in presentation.

Powers in respect of adult offenders on conviction (18+)	
Primary sentencing orders (orders which are capable of being imposed without another sentencing order)	Further orders relating to sentencing (orders which may only be imposed in addition to a primary sentencing order)
Absolute discharge Conditional discharge Fine Compensation order Deprivation order[54] Driving disqualification under PCC(S)A 2000 Animal Welfare Act 2006 orders (deprivation, disqualification, forfeiture of licences) Dangerous Dogs Act 1991 orders (disqualification and destruction orders) Company Directorship Disqualification Unlawful profit order (Prevention of Social Housing Fraud Act 2013) Community order Street Offences Act 1959 order Suspended sentence order Custodial sentence Hospital order	Restitution order Criminal behaviour order Restraining order Licensed premises exclusion order Serious crime prevention order Football banning order Prohibition order (Psychoactive Substances Act) Slavery and trafficking prevention order Travel restriction order SHPO

[54] Forfeiture powers under other enactments will be signposted in the Sentencing Code, see para 2.66 below. These powers do not clearly fall into either of the categories in this table, but they will be located in Clause 113 under the Third Group of Parts.

Specific additional powers in respect of youth offenders on conviction (under 18)	
Primary sentencing orders	Further orders relating to sentencing
Referral order Reparation order Youth rehabilitation order Detention and training order	Binding over of parent or guardian Parenting Order
Powers available on special verdict (insanity/ unfitness)	
Primary sentencing orders	Further orders relating to sentencing
Absolute Discharge Hospital order Supervision order	
Powers available on acquittal	
Primary sentencing orders	Further orders relating to sentencing
The issue of dealing with an offender for an offence is not raised as no conviction or special verdict is obtained.	Restraining Order
Powers available generally, often used to dispose of criminal proceedings	
Primary sentencing orders	Further orders relating to sentencing
Bindover to keep the peace (statutory powers)	

2.50 Notwithstanding the above arrangement, those powers which are specifically applicable only to youth offenders will not be included in the draft Sentencing Code at this time. This is discussed in more detail at paragraph 2.92 below.

Consultation Question 3.

Do consultees agree with the above categorisation of sentencing powers? This categorisation is designed to assist in ensuring that the Bill is structured in the most effective manner. It will dictate whether provisions are placed in the third Group of Parts "primary sentencing powers" or the fourth Group of Parts "further powers relating to sentencing".

Consultation Question 4.

Further to the above proposal, do consultees believe that it would be useful to include provision directing the court that in every case in which it deals with an offender for an offence, it must always make at least one "primary sentencing powers" order, and may make appropriate additionally orders from the "further powers relating to sentencing"?

Custody

2.51 A substantial amount of the Sentencing Code is devoted to those provisions which govern the imposition of custodial sentences. The Sentencing Code presents these provisions in three categories, each applicable to the three age distinctions drawn by the prison system: offenders under 18, offenders at least 18 but under 21 and offenders aged 21 and over. This has been done to assist the user of the Sentencing Code and to clarify that the differently named types of custodial order are available to only certain age groups.

2.52 As will be discussed at paragraph 2.92 below, the draft Sentencing Code as presented alongside this consultation paper does not, at this stage, include provision for Detention and Training Orders. Our policy with respect to youth court disposals can be found below.

General provisions

2.53 A fifth and final Group of Parts contains miscellaneous provisions that relate to sentencing generally. Notably, this includes provisions which give effect to the schedules which follow, as well as the provision governing the Crown Court's power to make orders about when a sentence is to commence.

2.54 The Group of Parts further contains interpretive provisions with certain necessary definitions.

Schedules

2.55 To allow the Sentencing Code to be more easily navigable, certain technical details and more minor matters which would not be of concern to most sentencing courts – such as the provisions relating to the enforcement of community orders – have been placed in schedules. For example, as well as containing the usual material relating to consequential amendment and repeals, the schedules to the Sentencing Code will provide for individual Community Order requirements. We think that this is a useful approach and one to which users of sentencing legislation are accustomed. This allows for the main body of the Sentencing Code to be more concise and navigable.

2.56 The draft Sentencing Code accompanying this consultation paper will not yet include the schedule material which provides for the necessary repeals, and consequential amendments. This material will be made available at a later date.

Consultation Question 5.

Do consultees approve of those matters which we have included within the Sentencing Code? Do all of them belong in the Sentencing Code?

SIGNPOSTING IN THE SENTENCING CODE

2.57 A Sentencing Code of "maximum inclusion" would repeal and replace all sentencing provisions in the current law. This would have the benefit of being exhaustively comprehensive, and allow us confidently to say that the Sentencing Code alone would provide the source of law in all future sentencing exercises.

2.58 However, we must also consider the effect that this would have on other aspects of the law aside from sentencing. Powers reproduced in the Sentencing Code would be severed from the specific body of law to which they rightly belong. This potentially deprives the user who finds the power in the Sentencing Code of important context and enforcement regimes. More unhelpfully still, the user who expects to find the power where it logically belongs, instead finds only a gap left by the repeal. A simple example here is the power to make company director disqualification orders, currently found in the Company Directors Disqualification Act 1986. It provides powers available when sentencing, but rightly belongs to a coherent and self-contained body of law, and would be less useful if "uprooted" and moved to the Sentencing Code. This particular example is described in more detail below.

2.59 We must therefore avoid disrupting the law beyond the narrow reach of sentencing procedure. The Sentencing Code should contain every sentencing related provision, insofar as is possible, without creating unhelpful gaps in existing coherent regimes.

2.60 The solution we have adopted is to 'signpost' the relevant legislation in the Sentencing Code. We have included in the Sentencing Code non-operative provisions, which serve only to draw the user's attention to the existence of powers that may be found outside the Sentencing Code within their more appropriate body of law. These provisions will not themselves provide the law, but will allow the Sentencing Code to present a comprehensive statement of the law of sentencing. Crucially, they will achieve this without disrupting the coherence of the law found elsewhere.

2.61 This policy itself presents a challenge to the parliamentary drafting convention that each provision of statute law should be operative and express something not presented elsewhere. The signpost provisions will not themselves make unique statements of law, rather, they will have the effect of repeating statements of law found elsewhere.

2.62 Nevertheless, we feel that the usefulness of these signposts is such that they merit inclusion. They represent a compromise that allows the Sentencing Code to be comprehensive, but avoid detracting from the coherence of other areas of law.

2.63 The following paragraphs provide examples of the principal areas of sentencing law as to which we have opted to include signposts as opposed to directly repealing and restating the law. We consider each example in turn.

Company directors disqualification

2.64 The Company Directors Disqualification Act 1986, sections 2 and 5 provide powers for the sentencing court on conviction to disqualify a person from holding a management type position within a company. These powers are contained within a regime that deals with the effects of such a disqualification generally including how it should be enforced. Directorship disqualification is also available in respect of a variety of other circumstances which do not relate to criminal proceedings, such as insolvency or breaches of companies regulations.

2.65 The powers are therefore of a type which should be brought to the sentencing court's notice, but it would not be appropriate to remove these powers from their current legislative context and insert them into the Sentencing Code. The Company Directors Disqualification Act 1986 would become incoherent and less useful if the specific type of disqualification available on conviction were removed from that Act; this would separate those provisions from the body of law which governs the delivery and enforcement of the order. For these reasons, the directorship disqualification powers will be signposted in the Sentencing Code by use of a provision which alerts the court to its powers elsewhere at the relevant point in the proceedings.

Context-specific forfeiture powers

2.66 The general power of the sentencing court to make orders for the deprivation of property used to facilitate offending has been repealed and restated in the Sentencing Code itself. It is available for all offences, and is available to the sentencing court following conviction.

2.67 However, there are many other forfeiture powers available to the sentencing court, but which apply only following conviction for specific offences. As such, these powers are referred to in the Sentencing Code by signposts. Clause 113 provides a list of these signposts, for example those applicable in relation to drugs, firearms and terrorism.

Animals

2.68 The Animal Welfare Act 2006 contains powers for offenders who have been convicted of certain animal cruelty offences to be subject to specific disqualification, destruction and deprivation orders. We believe that the users of this material will expect those powers to continue to be found alongside the body of law which provides for that type of regulation and the relevant offence-creating provisions. As such, we have provided signposts to the Animal Welfare Act 2006 orders which are available on conviction. We have taken the same approach with the powers in the Dangerous Dogs Act 1991.

Mental health

2.69 A sentencing court is required to deal with certain offenders in a specific way in the following three contexts:

(1) where the court makes a finding that an accused individual is unfit to plead;

(2) where trial results in a verdict that the defendant is not guilty by reason of insanity; and

(3) where a convicted offender is neither unfit to plead, nor not guilty by reason of insanity, but at the time of sentencing suffers from a mental disorder.

2.70 Under the current law, where a special verdict is returned that the accused is not guilty by reason of insanity, or findings have been made that the accused is unfit and that they did the act or made the omission charged against them, the court must impose either a hospital order (with or without a restriction order); a supervision order; or an absolute discharge.[55]

2.71 The power to make a supervision orders, and the provisions relating to such orders, are found in Part 1 of schedule 1A to the Criminal Procedure (Insanity) Act 1964.

2.72 The powers to make a hospital order and a restriction order are found in sections 37 and 41 of the Mental Health Act 1983 respectively and the power to make an absolute discharge is found in section 12 of the Powers of Criminal Courts (Sentencing) Act 2000. As these orders are normally available only on conviction, section 5A of the Criminal Procedure (Insanity) Act 1964 makes provision for those sections to be applied with a number of modifications.

2.73 To understand and apply the law requires not only reference to provisions spread across a number of Acts, but it increases the scope for error as the modifications to these provisions which have to be applied by the user are ambiguous and can be misunderstood.

2.74 The draft Sentencing Code currently contains signposting provisions which draw the court's attention to its powers in cases where it deals with a mentally ill offender.

2.75 We are proposing to re-draft the provisions empowering the court to impose an absolute discharge in the Criminal Procedure (Insanity) Act 1964. This would remove the need to apply modifications to the power to impose an absolute discharge under the Sentencing Code. This would help to consolidate the disposals available for such verdicts and findings.

2.76 There is an argument that it would instead be preferable to reproduce the following disposals directly in the Sentencing Code:

(1) Hospital and restriction orders under sections 37 and 41 of the Mental Health Act 1983 read with modifying provisions in the Criminal Procedure (Insanity) Act 1964,

(2) Supervision orders under that Act, and

(3) Absolute discharge under section12 PCC(S)A 2000 read with modifying provisions in the Criminal Procedure (Insanity) Act 1964.

2.77 This would leave hospital orders on conviction in the Mental Health Act 1983 and absolute discharges upon conviction in their current place in the Sentencing Code. As a result, courts determining the appropriate disposal on such verdicts or findings would need only to have reference to a single Chapter of the Sentencing Code, and would

[55] Criminal Procedure (Insanity) Act 1964, s 5(2).

remove the need for users of the legislation to apply modifications to the existing provisions.

Consultation Question 6.

We propose that absolute discharges available on a special verdict should be redrafted in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

Consultation Question 7.

We propose to recast provisions relating to hospital orders available on a special verdict in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

Consultation Question 8.

Do consultees agree that those disposals available on a special verdict should all be contained in the Sentencing Code?

Confiscation timetabling and interaction with confiscation

2.78 Our decision not to consolidate the law of confiscation alongside sentencing generally is described at paragraph 2.105 below. However, there is some necessary crossover with the exercise of sentencing. The Sentencing Code therefore includes signposts to the relevant confiscation procedural provisions. These serve to bring to the sentencing court's attention the potential need to set a confiscation timetable or make other confiscation-specific case management directions. These references also make clear that the court's powers with respect to financial orders are limited in a case where confiscation is postponed.

Behaviour orders

2.79 The Sentencing Code includes a number of references to certain ancillary behaviour orders. These have provided an opportunity carefully to test the inclusion policy referred to above. The Sentencing Code will only restate those behaviour orders which are:

(1) available upon conviction, or only on conviction;

(2) available in respect of any offence, or a wide range of offences; and

(3) not currently located within a coherent legislative scheme which would be disrupted by their restatement in the Sentencing Code.

2.80 For this reason, the criminal behaviour order will be repealed and restated in the Sentencing Code itself.

2.81 Other orders are equally available on conviction, such that the sentencing judge would need to be aware of his or her powers to impose them, but for various reasons described above, have not been entirely restated in the Sentencing Code. Some of these are available only on conviction for certain offences; some are currently found with a legislative regime which provides for a civil species of the order, as well as for variation and enforcement. For this reason, a group of orders, such as serious crime prevention orders and football banning orders are referred to by signposting provisions in clause 262.

2.82 A third category of orders have not been included in the Sentencing Code, either substantively or by signposting. Although these may have been described as criminal, many of these did not necessarily arise on conviction, and many require something more, such as an application, for the court to consider their imposition. As such, these properly cannot be described as powers available to the sentencing court. We believe that the omission of, for example, slavery and trafficking risk orders under the Modern Slavery Act 2015 or violent offender orders under Criminal Justice and Immigration Act 2008,[56] is consistent with the policy described above.

2.83 The inclusion of behaviour orders in the Sentencing Code is dealt with in more detail in chapter 10: Further powers relating to sentencing.

Binding over

2.84 The courts' statutory powers to bind offenders over to keep the peace will be referred to in the Sentencing Code.[57] As described at paragraph 2.33 above, these provisions are often used in the disposal of criminal cases. However, they are not exclusively sentencing disposals as they can be imposed on any individual who is before the court, including witnesses giving evidence,[58] and even complainants.[59] The power to bind-over is "exercisable not by reason of any offence having been committed, but as a measure of preventative justice."[60] The powers are frequently used outside the sentencing context. Therefore, although their use as a disposal merits a signpost within the Sentencing Code, to transplant the statutory provisions that provide these powers would be inappropriate.

---

56 Criminal Justice and Immigration Act 2008, s 98. A violent offender order is available in respect of an offender who has previously been convicted of certain serious offences and who has acted in such a way as to give a chief of police reasonable cause to believe that it is necessary for a violent offender order to be made. The order therefore depends on an offender's conduct after the conclusion of previous criminal proceedings.

57 Magistrates' Courts Act 1980, s 115; Justices of the Peace Act 1968, s 1(7); Justices of the Peace Act 1361, s 1. A person who is bound over to keep the peace must enter into a recognizance (a sum of money in recognition of their duty to keep the peace) in an amount specified by the court, which will be forfeited if they fail to keep the peace for a period of time specified.

58 *Sheldon v Bromfield Justices* [1964] 2 WB 573.

59 *Wilkins* [1907] 2 KB 380.

60 *Veater v Glennon* [1981] 1 WLR 567, 574.

Common law

2.85 The decision to enact the Sentencing Code as a consolidation has necessarily restricted our ability to codify certain aspects of sentencing law which are found in the common law, such as the rules in *R v Newton*[61] and *R v Goodyear*.[62] Any codification of the common law could not be achieved as part of any normal pre-consolidation amendment powers and would require a number of specific provisions in a Bill that would go beyond a consolidation.

2.86 Noting that codification of the common law was therefore outside the scope of the project we had initially considered including signposts to these common law rules. Advice from Parliamentary Counsel has indicated that including direct signposts to common law rules will not be possible, for the following reasons:

(1) Unless drafted with vague language, in the form *"the above applies without prejudice to the common law rule in R v …"* a statutory provision referring to a common law rule will have the effect of codifying that rule. This amounts to a substantial change to the law, and as such cannot be readily accommodated within the consolidation procedure we have selected for the Sentencing Code's enactment. A vague or general 'saving' reference would be almost as unhelpful as simply making no reference at all. The user of the Sentencing Code is offered no further information as to the actual content of the common law rule.

(2) Further, codification by signpost may have the effect of slowing or preventing the development of the law. If, for example, the case of *R v Newton* were to be superseded by new authority and the common law rule in that case ceased to be applicable, the signpost reference would need to be updated. There is no mechanism for future drafters to make that update, nor is there a process by which it would be brought to their attention. A common law signpost therefore introduces a risk that the Sentencing Code may fall into obsolescence. This situation is to be contrasted to a signpost to law in another statute. If for example, the Animal Welfare Act 2006 were repealed and substantially replaced by the Animal Welfare Act 2024, the replacing Act would make consequential amendments to update the reference in the Sentencing Code to the new Act. A process exists to bring the need for the consequential amendment, and to make it, in respect of legislation; the same is not true of case law authority.

2.87 For these reasons, we will not be directly referring to common law rules in the Sentencing Code, even by way of nonspecific reference.

2.88 However, we are currently considering the option of including signposting provisions to the Criminal Procedure Rules and Practice Directions. The rules and practice directions are readily updated, and by the Rules Committee and Lord Chief Justice respectively rather than requiring Parliamentary attention. We therefore believe that it will be possible for certain sentencing related aspects of common law to be reflected in the Rules and Practice Directions and for the Sentencing Code to subsequently include signposts to those rules.

---

61 *R v Newton* [1983] Crim LR 198.

62 *R v Goodyear* [2005] EWCA Crim 888.

2.89 The rules have the advantage of stability for the purposes of including a permanent reference in the Sentencing Code, whilst simultaneously being flexible enough to accommodate periodic updates as may be needed from time to time. This flexibility will any signpost included in the Code from slowing future development to the common law. We also hope that the common law reference found within the Rules will be able to offer more useful information to the user than simply a saving reference. As such, this method of common law signposting should allow the user to find and understand the applicable law more easily. In addition, the Rules already provide useful and authoritative guidance on many important common law rules, such as *R v Newton*[63] and *R v Goodyear.*[64]

2.90 The bodies responsible for the Rules are similarly better placed to appreciate a change to the common law position and the consequential need to make an update than future parliaments may be. The Sentencing Code will be the first major overhaul of sentencing legislation since the development of the sentencing guidelines, and since the Criminal Procedure Rules and Practice Directions attained greater practical significance. We believe that it would be useful for the Sentencing Code fully to take account of these sources of guidance.

2.91 Such signposts to the Criminal Procedure Rules and Practice Directions have not yet been included in the draft Sentencing Code; we welcome consultees' views on the approach we are considering for future versions of the Sentencing Code.

Consultation Question 9.

Do consultees approve of the approach we have taken with regard to signposting provisions? Are these useful? Do they make the Sentencing Code more comprehensive?

PROVISIONS NOT CURRENTLY INCLUDED IN THE DRAFT CODE BILL

Specific youth justice system orders

2.92 A review of the youth justice system in England and Wales is currently under consideration by Government. A report on the need for reform ('the Charlie Taylor Review') was published in December 2016.[65] Amongst the recommendations of the report was the following.

> "26. The Government should remove or substantially restrict the availability of short custodial sentences. The minimum amount of time that a child should spend in detention is six months (equivalent to the current 12-month Detention and Training Order). The only exception to this should be those few offences for which Parliament has established mandatory minimum terms."[66]

---

63 Criminal Practice Directions 2015 VII B: Determining the factual basis of sentencing.

64 Criminal Practice Directions 2015 VII C: Indications of sentence: *R v Goodyear*.

65 Review of the Youth Justice System (December 2016).

66 Review of the Youth Justice System (December 2016), p53.

2.93 The Government response to this proposal was as follows:

> "74. The Taylor Review also recommends restricting the availability of short custodial sentences so that when children and young people are sentenced to custody, establishments have enough time to work with them to reduce the risk of them reoffending in the future. While we recognise that a short period in custody can disrupt the life and education of a young person without necessarily giving those running the custodial establishment long enough to make meaningful progress with them, there is a risk of creating perverse incentives. We want to work with the judiciary and youth justice professionals to better understand these risks and to improve the overall effectiveness of the youth sentencing framework. …
>
> 75. We will work with judges, magistrates, YOTs, the YJB and other stakeholders to develop our approach to sentencing reform. In particular we will explore how we can further integrate the Taylor Review's principles into the current framework."[67]

2.94 In light of this, and the potential for reform in the near future, we have opted not to invest resources in consolidation of the provisions governing certain youth specific sentencing powers at this time. We do intend for the final Code to include youth sentencing. By 2018 when we are preparing that final version of the Bill any changes government proposes to the youth sentencing regime will be more likely to be known and can be reflected in the Bill.

2.95 Because of this, the *draft* Sentencing Code will not include those sentencing orders that are available only to offenders aged under 18, and that are therefore exclusive to the youth court jurisdiction. These specific additional powers in respect of youth offenders (under 18) are listed in the table at paragraph 2.49 above.

2.96 Where a power is available in respect of offenders aged under 18 as well as adults, we intend to include the provision in the Sentencing Code at this stage because we do not anticipate that any future reform to youth justice will substantially change the nature or availability of these orders. We also intend to include certain 'youth justice' orders which are properly characterised as variants of a generally available order that applies to under 18s. For example, we intend to include provision for custodial sentences for under 18s other than detention and training orders. The draft Sentencing Code will also include the youth specific procedural legislation that provides, for example, committal powers addressed to the youth court, or powers in respect of youths falling to be dealt with by the Crown Court under the dangerousness provisions.

2.97 Where these specific youth justice orders have been omitted from the draft Sentencing Code, we will be including placeholder headings to indicate where these provisions will, in due course, be found in the Sentencing Code as it will be enacted.

PROVISIONS NOT INCLUDED IN THE SENTENCING CODE

2.98 The following paragraphs describe those areas of the law, which we do not intend to restate in the Sentencing Code, although they are related to sentencing and were in

---

[67] The Government response to Charlie Taylor's Review of the Youth Justice System (2016), pp 20-21.

many cases previously included in the "Legislation currently in force" document. These will remain in the existing legislation.

Specific maximum sentences

2.99 The Sentencing Code will not incorporate provisions which currently prescribe offence-specific maximum sentences. We consider that the appropriate place for such provisions is in the legislation where they are currently found, alongside the offence-creating provisions. There is a current expectation that an offence-creating provision will specify the applicable maximum penalty for that offence. We do not intend to disturb that expectation.

Sentencing Council constitution

2.100 Although the Sentencing Code will incorporate much of the statutory material from the Coroners and Justice Act 2009 which governs the court's duty to have regard to any applicable sentencing guideline, the Sentencing Code will not include the provisions which provide for the existence of the Sentencing Council itself.

2.101 The Sentencing Code is designed to be used at the point of sentencing, by the users of sentencing courts. We do not therefore intend for the Sentencing Code to in any way restate the legislative provisions relating to the constitution and remit of the Sentencing Council. This material will remain in the 2009 Act.

2.102 The Sentencing Code will not replace the guidelines produced by the Sentencing Council. As the first substantial recasting of sentencing legislation since the Sentencing Council was established in 2009, the Sentencing Code is drafted with the existence and functions of the Sentencing Council in mind. We believe that as a result the Sentencing Code will facilitate the important work of the Sentencing Council and enhance the advantages of sentencing guidelines.

Road Traffic Offences

2.103 The Sentencing Code will not seek to restate or replace the legislative material in the Road Traffic Acts. As such, we do not intend for the Sentencing Code to provide the procedural powers and duties, nor the guidance, which applies to a sentencing court when dealing with an offence by way of penalty point endorsement, driving disqualification or other road traffic offence specific orders.

2.104 For the following reasons, we have decided that it would be inappropriate to bring this material within the scope of the Sentencing Code:

(1) We believe that the Road Traffic Offenders Act 1988 is already a self-contained Code governing sentencing in road traffic offences specifically. Courts are accustomed to applying this Code. We do not want to disrupt an established body of law.

(2) The production of the Sentencing Code is time sensitive. The consolidation of the existing law of sentencing procedure has to be completed within a limited time-frame to avoid being overtaken by any new legislation that may be made in the interim. This time constraint has meant that, given limited resources and access to Parliamentary Counsel, a relatively restrictive approach was needed. As such,

inclusion of road traffic specific material did not represent efficient use of resources.

Confiscation

2.105 The Proceeds of Crime Act 2002 provides for confiscation orders and contains a substantial body of law governing making, amending and enforcing such orders. The power to make an order arises on conviction for an offence, but we do not intend for confiscation to be brought into the Sentencing Code. The reasons for this decision are as follows:

(1) Proceedings for confiscation are not properly conceived of as sentencing. Confiscation, although it also necessarily follows conviction, does not respond to an underlying criminal offence, but rather, to the policy of removing any illegitimate benefits obtained from criminal conduct, including the benefits of a presumed "criminal lifestyle". Confiscation is dealt with in separate proceedings from the imposition of sentence, and, in many cases, must take place in a different venue.[68] We think therefore, that the Sentencing Code is not the appropriate location for this legislation.

(2) The Proceeds of Crime Act 2002 currently provides a self-contained Code governing confiscation. We think that users of this legislation will expect to find that material in one place. Removal of some, but not all, aspects of this body of law, to restate them in the Sentencing Code, will disrupt the current position.

2.106 Notwithstanding that the Proceeds of Crime Act 2002 itself will not be brought into the Sentencing Code, we do intend to provide signposting provisions to alert the users of the Sentencing Code to the existence of certain confiscation related powers and duties at the relevant time. In particular, we will signpost the existence of the general power to make confiscation orders, the power to set confiscation timetables, and those provisions which govern the interaction of confiscation with certain other financial orders. The policy on signposting is addressed at paragraph 2.57 above in more detail.

Release and probation arrangements

2.107 Consistent with the inclusion policy outlined above, the Sentencing Code will not include those provisions which govern the release of offenders from custody, probation, or license arrangements, such as those provisions which allow for the determination of the timing of release. For the purposes of the Sentencing Code, we believe that these are details relating to the administration and enforcement of sentences which do not affect the court in the exercise of its powers or duties. The Sentencing Code is designed to be a piece of legislation for use by courts conducting sentencing exercises; it is not intended for the Sentencing Code to provide for post-sentence administrative functions. We believe that this would require a substantial expansion of the scope of the Sentencing Code and our inclusion policy.

2.108 We consider that expanding the scope of the Sentencing Code to include those matters which the sentencing court might find useful to know about, as opposed to those which actively empower or oblige, would have the effect of undermining the otherwise

[68] Because only the Crown Court has jurisdiction to make orders under Proceeds of Crime Act 2002, s 6.

consistent approach taken elsewhere – on which the simplicity of the Sentencing Code depends.

Appeals

2.109 Appeal against sentence is clearly a sentencing related issue, but the provisions which govern the availability of appeal and the procedure to be applied are distinct from those which empower or oblige the sentencing court to take some step. Appeal is by definition a matter which arises after sentence has been declared. As such, we have determined that those provisions governing appeal should be excluded from the Sentencing Code. We also believe that users of the legislation will continue to expect that the procedure governing appeals against sentence, for example, will be found in the Criminal Appeals Act 1968. By contrast, the specific "slip rule" powers in the Powers of Criminal Courts (Sentencing) Act 2000, section 155, which provides for the alteration of Crown Court sentences, will be included in the Sentencing Code.

Consultation Question 10.

Do consultees approve of the decisions we have taken with regard to excluding certain provisions from the Sentencing Code? Is there anything which consultees believe necessarily must form part of a functioning and coherent Code?

STRUCTURE

2.110 A substantial aim of the Sentencing Code project is that it should provide legislation which is easier to understand and apply. It must be easy to use. We hope that the Sentencing Code will be used by the judiciary and practitioners in place of any other reference material on primary legislation governing sentencing. Sentencing will be conducted by reference to the Sentencing Code, the offence creating Act, the Criminal Procedure Rules and Practice Directions and the Sentencing Council Guidelines. As far as possible, the Sentencing Code must be structured logically and according to the needs of its users.

2.111 Users of the Sentencing Code should therefore be able to find the provisions they need to refer to in the expected place, and with the fewest possible steps. We have adopted the view that the provisions of the Sentencing Code that address procedural steps, powers and duties should be arranged in the order which a sentencing court would typically approach them.

2.112 We would like use of the Sentencing Code to minimise the number of times, in typical sentencing hearings, that the court needs to return to an earlier part of the Sentencing Code. It should always be possible to take a simple 'path' through the Sentencing Code's provisions, even though clearly the court will only need a certain number of all the powers available and can therefore skip certain parts.

Organisation of the parts of the Sentencing Code

2.113 The first Group of Parts of the Sentencing Code contains those provisions relating to the applicability of the Sentencing Code and introduces a number of key concepts that appear throughout the Sentencing Code.

2.114 The second Group of Parts of the Sentencing Code allows for the offender, or other person falling to be dealt with in respect of an offence, to be brought before the appropriately empowered court, by virtue of providing powers of committal and remission for sentence. It also describes the procedural steps allowing that court to have before it all the necessary information it requires to consider sentence. The power to defer sentence and duties to comply with certain general principles also arise at this point in proceedings.

2.115 The third Group of Parts of the Sentencing Code describes the available orders which we have characterised as principal sentencing powers. The court must in every case impose at least one order from this category, notwithstanding that it may often impose more than one. This is the Group of Parts contains those provisions which are most typically thought of as sentencing.

2.116 The fourth Group of Parts of the Sentencing Code provides for those further orders relating to sentencing which the court may consider making in addition to the principal applicable disposal of proceedings relating to an offence.

2.117 The fifth Group of Parts of the Sentencing Code provides miscellaneous powers and provision to give effect to the material subsequently located in the schedules to the Sentencing Code. The schedules provide more detailed information about, for example, specific community requirements available as part of a community order and the enforcement of those requirements. As such, this placement is consistent with the chronological approach; reference to these details about the delivery mechanism for the sentence imposed should be found towards the end of the Sentencing Code.

Organisation of the primary sentencing orders

2.118 The category of primary sentencing orders itself also requires an internal organisation; we considered the question whether the individual species of disposals should be arranged in any particular order, according to typical sentencing practice. The order of steps to be considered in a given sentencing exercise will continue to be governed by guidelines issued by the Sentencing Council.

Least serious to most serious

2.119 We think that the most appropriate order for these powers is to start with the least severe punishment and proceed towards the most severe penalty. As such, the Group of Parts starts with discussion of absolute discharge, and moves towards custodial sentences, ending with the provisions governing the most serious life sentences.

2.120 This approach is consistent with the parsimony principle. In all cases the sentencing court should impose the least punishment that can be justified on the facts of the offending and offender before it. Therefore our structural approach suggests to the court that it begins by considering lesser punishments and, if they cannot be justified, it moves to the next least severe penalty. We do not intend however, in any way to imply that

taking such an approach would be mandatory. In the most serious cases, the court could clearly proceed to the part governing custodial sentences.

2.121 This approach reflects that which is taken in the explanatory materials to the magistrates' courts sentencing guidelines, which proceeds from fines and other financial impositions, to community orders and then addresses custodial sentences.[69]

Most serious to least serious

2.122 Another approach might have been to order the powers from most to least serious, and therefore start with the longest mandatory custodial terms. The attraction of this approach would be that the order of available powers would serve as a checklist, notably emphasising dangerousness and other cases in which a mandatory sentence falls to be imposed. Our discussions with Circuit Judges, referred to below, emphasised that, in the most serious cases before the Crown Court, the sentencing judge would frequently consider whether an extended, mandatory or prescribed minimum sentence should be applied before proceeding to consider sentence in the normal way.

2.123 Judges also indicated that they make particular reference to practitioners' texts as guidance for sentencing. *Archbold Criminal Pleading, Evidence and Practice*[70], in Chapter 5, largely arranges material describing the substantive disposals in order from least to most serious, with the exception that financial penalties, disqualifications and other ancillary orders appear last. *Archbold* presents the material describing custodial sentences in order from most to least serious internally, with life sentences foremost, and discretionary custody later.

2.124 Material on sentencing in *Blackstone's Criminal Practice*,[71] found in Part E, is arranged with custodial penalties appearing first, and other sentencing powers later. Fines and other financial impositions are grouped together in that work, which helpfully has the effect of highlighting their relative differences with regard to priority.

2.125 The organisation of both of these texts must be contrasted with the approach of the *Sentencing Referencer*,[72] and *Banks on Sentence*,[73] these works are neutral as to order and instead present information alphabetically.

2.126 While we appreciate that there is certainly merit in the 'most to least serious' approach, particularly for the Sentencing Code's application to the most serious cases, we feel that this approach would represent a departure from the general principle to be applied to all cases, that the lowest justifiable sentence is imposed and nothing more.

2.127 The Sentencing Code will be applicable in all sentencing exercises and accordingly, its usefulness and efficiency is amplified if it is tailored primarily for the most numerous cases, not merely the most serious cases. We recognise that the most serious cases

---

69 MCSG explanatory materials - updated August 2015, pp 144-166. Available here: https://www.sentencingcouncil.org.uk/wp-content/uploads/Sept-2015-MCSG-pdf1.pdf.

70 J Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice 2017*, Chapter 5.

71 D Ormerod and D Perry (eds), *Blackstone's Criminal Practice 2017*, Part E.

72 L Harris (ed), *Thomas' Sentencing Referencer* (2017).

73 R Banks, *Banks on Sentence* (12th 2017).

can involve the most difficult sentencing issues, but we are also aware that those sentencing exercises will be conducted by the most experienced judges, who have the benefit of having more time in which to consider their sentence. Given that a very substantial majority of sentencing exercises concern less serious offending and occur in the magistrates' court,[74] we are convinced that the utility of the Sentencing Code will be clearest to users if it has been structured with these sentences in mind.

Suspended Sentences

2.128 One exception to the policy approach we have taken above of ordering disposals from the least to the most serious concerns the provisions which govern the power to suspend custodial sentences, and to attach community requirements to these (suspended sentence orders). The difficulty here is as follows:

(1) Suspended sentences clearly amount to less serious punishment than custodial sentences, but are also more serious punishment than Community Orders. (Essentially these are community orders, backed by imprisonment for breach or further offending).

(2) Logically, these would be placed after community orders but before custody, consistent with the approach taken above, to place the primary disposals in order from least to most serious.

(3) However, suspended sentences are only available to the court where the court has found that the offending was sufficiently serious to justify the imposition of immediate custody; the custody threshold must be crossed to permit suspension. The court must have an appreciation for the provisions governing custody to both establish whether the custody threshold has been exceeded, and to establish the appropriate custodial term to be specified in the suspended sentence order.

(4) Consistent with our intention stated above that there should always be a simple 'path' through the Sentencing Code, we feel that the only logical placement for suspended sentences is directly after immediate custodial sentences, despite this being a departure from the least to most approach taken elsewhere.

User-testing exercises

2.129 Much of our policy development with respect to the organisation of the Sentencing Code has been influenced by discussions we have had with members of the judiciary during user-testing sessions in late 2016 and spring 2017. Our aim was for the provisions of the Sentencing Code to be organised in a way which was reflective of the chronology of a typical sentencing hearing; we sought the views of the Sentencing Code's prospective users on this approach.

2.130 We are grateful to judges at The Central Criminal Court, Oxford Crown Court, Winchester Crown Court, Manchester Crown Court and district judges from the South

---

[74] Criminal justice statistics quarterly: September 2016, Office of National Statistics. 1,121,357 offenders sentenced by magistrates' courts in year ending September 2016; 84,615 sentenced by the Crown Court in the same period (92% of all sentences were imposed by magistrates' courts).

Eastern Circuit for their valuable assistance in shaping the structure of the draft Sentencing Code.

Consultation Question 11.

Do consultees approve of the way in which the Sentencing Code has been structurally organised? Is it in the most efficient possible layout? Are the available disposal powers correctly ordered?

Chapter 3: The 'Clean Sweep'

THE PROBLEM WITH TRANSITION

General

3.1 There is consensus amongst those working in the criminal justice sector that the law governing sentencing procedure is highly complex, resulting in serious difficulties in practice.

3.2 Sentencing law is subject to frequent change and over the past 30 years in particular the pace of legislative change has been exponential. While the pace of this legislative change can cause problems, even more problematic is the manner in which it is achieved:

(1) new provisions or amendments to existing provisions are frequently enacted but not brought into force for lengthy periods of time;[75]

(2) when provisions are brought into force, this is done in a variety of different ways, including by inserting new provisions into previous enactments,[76] textual substitutions,[77] or deeming provisions which require the courts to read a previously enacted provision in a different way;[78]

(3) some provisions are brought into force only for a certain class of person and so are only partially in force;[79] and

(4) the way in which such changes are commenced frequently varies, with changes to the law variously applying from the date on which proceedings began, the date an element of the offence occurred, the date of the offence, the date the offender was bailed, the date of conviction, the date of sentence and the date of release.[80]

---

75 See for example Criminal Justice and Courts Services Act 2000, s 61 enacted on 30 November 2000 to abolish sentences of detention in a young offender institution, and sentences of custody for life, which has never been brought into force.

76 See for example Criminal Justice Act 2003, s 161A which was introduced by Domestic Violence, Crime and Victims Act 2004, s 14(1).

77 See for example the amendments made to the list of offences in Powers of Criminal Courts (Sentencing) Act 2000, s 91(1) that can receive sentences of detention under that section by the Sexual Offences Act 2003, sch 6 para 43(2).

78 See for example Serious Crime Act 2007, s 63 and sch 6 para 48(1) which required references in the Criminal Justice Act 2003, sch 15 to the common law offence of inciting the commission of another offence to be read as references to the offences under Part 2 of the Serious Crime Act 2007.

79 See for example SI 2016 No 286 which brought Alcohol Abstinence and Monitoring Requirements under the Criminal Justice Act 2003, s212A into force only in relation to London local justice areas.

80 See for example Criminal Justice and Courts Act 2015, s 53(3) (date on which proceedings began); Criminal Justice and Courts Act 2015, s 29(5) (date an element of the offence occurred); (date of the offence); Criminal Justice and Immigration Act 2008, s 21(4) (date offender was bailed); SI 2012 No 2906, art 6 (date of

3.3 The result is that it is often difficult and time-consuming to ascertain whether a particular provision applies to a particular case. In particular, difficulties often arise from the fact that:

(1) legislative provisions that are not yet in force appear in the statute alongside provisions that are;

(2) amendments and substitutions are not always achieved by textual amendment of the legislation;

(3) the class of person to whom a provision applies is not always stated in the provision, but rather in an separate piece of legislation; and

(4) changes to the law are commenced in different ways and in some instances changes to the same provision are commenced in different ways for different purposes, none of which are stated in the text of the legislative provision in question.

The impact of these difficulties

3.4 That these difficulties cause considerable problems in practice will not be a surprise. When we launched the project in January 2015, members of the senior judiciary made particular reference to the problems caused by complex and disparate commencement and transitional provisions. It is extremely difficult even for an experienced judge to identify the correct sentencing procedure applicable to any case. The impact of this is that judges spend more time on researching technical points during the sentencing process than ought to be needed, which adds cost and delay to sentencing determinations and can have knock-on effects on the progress of other pending trials.

3.5 In *R (Noone) v Governor of Drake Hall Prison & another*, Mr Justice Mitting noted that it had taken almost five hours to explain the statutory provisions in question to him, a High Court judge.[81] When the same case reached the Supreme Court on appeal, the President, Lord Phillips, stated simply that:

> Hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions.[82]

3.6 These difficulties do not merely cause delay but can also lead to serious error, as is illustrated by the case of *R v GJD*.[83] In *GJD* the offender received a sentence of imprisonment for public protection ("IPP") under section 225 of the Criminal Justice Act 2003 with a minimum term of six years following a conviction for rape of a child under 13 committed between August 2004 and January 2005. He was sentenced in August 2006, some 20 months after the commencement of section 225. Section 225 was, however, commenced prospectively, applying only to offences committed on or after the commencement date, 4 April 2005. Neither the judge nor counsel had identified that

---

conviction); Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 15 para 3 (date of sentence); Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 15 para 2 (date of release).

81 [2008] EWHC 207 (Admin), [2008] ACD 43 at [1].

82 [2010] UKSC 30, [2010] 1 WLR 1743 at [1].

83 [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin).

the operation of the commencement provisions excluded the offender from being liable to an IPP sentence.

3.7 In February 2015, two years and six months after the expiry of the minimum term, he appealed against sentence and the court had no option but to quash the IPP sentence and replace it with a determinate sentence of 12 years, with an extended licence of 10 years, resulting in his immediate release. The Lord Chief Justice, Lord Thomas commented:

> It is astonishing that the fact that the judge had no power to pass that sentence was not recognised for a considerable period of time.
>
> It was not recognised, for example, when on 22 November 2011 the minimum term expired. The applicant's case was reviewed by the Parole Board on four occasions; the last was in January 2014.[84]

3.8 These problems arise from a systematic failing in the way that commencement of legislation and transition from one regime to another are achieved. Not only are amendments to sentencing law frequently commenced with unnecessary or unnecessarily complex transitional arrangements when they could properly be given retrospective effect, but such transitional arrangements are often hidden in opaque and complex pieces of secondary legislation. The Sentencing Code proposes an innovative approach to these issues.

THE SOLUTION: THE CLEAN SWEEP

3.9 On 1 July 2015 we published an issues paper[85] considering the important policy questions around the transition from the current law to the Sentencing Code and the problems that the current state of the law and its multitude of complex transitional provisions create. The issues paper explored how we could introduce the Sentencing Code in the most effective way possible, to ensure maximum legal certainty and transparency by minimising the use of complex transitional provisions while respecting the fundamental rights of those affected by the sentencing process.

3.10 We provisionally proposed what we described as a "clean sweep" approach to the transition to the Sentencing Code. Our starting point was that after the introduction of the Sentencing Code, all offenders convicted after its commencement would be sentenced by applying the sentencing law and procedure in the Sentencing Code, regardless of when their offence was committed. To this starting point we added important but limited exceptions in the interests of fairness and to protect the rights of the offender. The exceptions were:

(1) cases where the penalty under the Sentencing Code would be more severe than the maximum which could have been imposed at the time of the offence, and

---

84 [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin) at [5].

85 Sentencing Procedure Issues Paper 1: Transition (2015), available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf.

(2) cases where new laws on prescribed minimum sentencing and recidivist premiums[86] have come into force after the commission of the offence for which the offender is being sentenced.

3.11 We considered that these exceptions meant that the Sentencing Code may perfectly properly be given retroactive effect, despite the general common law presumption against retroactivity, and that to do so would accord with human rights protections against retroactive criminalisation and retroactive punishment – in particular those provided by Article 7 of the European Convention on Human Rights (ECHR).[87]

3.12 Respondents on consultation were overwhelmingly and unanimously positive about the "clean sweep" approach.[88] The break from the traditional approach to transition in sentencing law was considered highly desirable by respondents from all parts of the legal profession including academia, practitioners' bodies and the judiciary. Professor Andrew Ashworth QC, a leading academic in the field of sentencing, criminal law and human rights, offered strong support, writing:

> Overall my response is strongly favourable: I think the paper confronts the difficult issue of non-retroactivity in a way that is both practical and compatible with the current understanding of the European Convention on Human Rights.

3.13 His Honour Judge Andrew Goymer, writing on behalf of the Council of HM Circuit Judges, noted the impact the clean sweep could have on the lamentable state of the law, telling us that:

> In general terms we strongly support the proposal. The present state of sentencing law is a disgrace to our jurisprudence. It is totally unacceptable to have so much complexity and uncertainty that result from layer upon layer of statutes that have been brought into effect in a piecemeal fashion or have never been brought into effect at all. We endorse all the comments of the senior judiciary over the years about this deplorable state of affairs.
>
> We agree with the analysis about retrospective effect. This is something deeply ingrained in the common law as well as Article 7. We support the way in which this issue has been addressed.

3.14 All but one consultee further agreed that in order to ensure compliance with the principles and rights against non-retroactive punishment, the clean sweep should not be applied to new laws on prescribed minimum sentencing and recidivist premiums where the index offence[89] was committed before those provisions were commenced.[90]

---

86 The requirement to sentence an offence more harshly due to previous convictions.

87 Sentencing Procedure Issues Paper 1: Transition (2015) parts 3 and 4, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf.

88 A New Sentencing Code for England and Wales (2016) Law Com No 365 paras 3.8-3.11.

89 The offence for which the offender is being sentenced.

90 A New Sentencing Code for England and Wales (2016) Law Com No 365 paras 3.39-3.44.

3.15 These consultation responses fortified our confidence in the principles behind the clean sweep approach and the advantages that it would provide to users of sentencing law. Our report, published on 19 May 2016, thus formally recommended:

(1) That the Sentencing Code should apply to all sentencing exercises in which conviction takes place after the commencement of the Sentencing Code.[91]

(2) That a court sentencing under the Sentencing Code (and an appellate court on appeal) should ask whether the total penalty which it is considering imposing for the offence(s) before it, taken as a whole, would be more severe than the maximum which could have been imposed for the offence(s) at the time of its commission.[92]

(3) That by way of a partial exception to the general "clean sweep" approach, new laws on prescribed minimum sentencing and recidivist premiums be applied only to cases where the index offence post-dates the commencement of the provision.[93]

3.16 We continue to support these recommendations and do not consider that the law in relation to Article 7, and non-retroactivity, has materially changed in a manner that affects our conclusions since the publication of the report.

3.17 While the Supreme Court decision in *Docherty*[94] recognised that Article 7 is now to be read as also embodying the principle of *lex mitior* – the right to retroactive application of subsequent more lenient criminal law – this decision does not have any particular implications for this project.

3.18 First, the Supreme Court considered that while the English law has not previously explicitly identified the concept of *lex mitior,* longstanding common law practice has been to recognise the principle in its ordinary form, sentencing offenders according to the law and practice at the time of sentence, subject to the prohibition on exceeding the limits of the maximum sentence which prevailed at the time of the commission of the offence. There has thus been no substantive change to the English and Welsh position since we consulted on this issue.[95]

3.19 Secondly, as we explained in the issues paper,[96] at the core of the clean sweep approach is that all offenders convicted after the commencement of the Sentencing Code will be sentenced according to current sentencing law as contained in the Sentencing Code, subject to the limited exceptions above. This necessarily means that if changes have been made to the law since the commission of the offence providing for a more lenient penalty that the clean sweep will ensure that they apply to the

---

91 A New Sentencing Code for England and Wales (2016) Law Com No 365 para 4.24.

92 A New Sentencing Code for England and Wales (2016) Law Com No 365 para 4.8.

93 A New Sentencing Code for England and Wales (2016) Law Com No 365 para 4.15.

94 [2016] UKSC 62, [2017] 1 Cr App R (S) 31.

95 [2016] UKSC 62, [2017] 1 Cr App R (S) 31 at [42] to [56].

96 Sentencing Procedure Issues Paper 1: Transition (2015) paras 6.3-6.8, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf.

sentencing of the offender. The clean sweep will in fact go further than the requirements of *lex mitior* as interpreted by the Supreme Court in *Docherty*. In *Docherty* the Supreme Court held that *lex mitior* did not preclude the practice of phased commencement, and thus does not make unlawful the practice of preserving certain disposals for historic cases. The clean sweep will, however, ensure that such disposals, preserved only for historic cases, will no longer apply to the sentencing of any offender convicted after the commencement of the Sentencing Code.

THE EFFECT OF THE CLEAN SWEEP

3.20 From the commencement of the Sentencing Code the clean sweep will ensure that users of sentencing legislation will no longer have to find and interpret inaccessible secondary legislation to ensure that they have the most up to date version of the relevant provision before them. Where a provision has been repealed users will know with confidence that it has been repealed in all cases for offenders convicted after the Sentencing Code's commencement. Where a provision has been introduced or amended then users will no longer have to make reference to inaccessible and opaque transitional and commencement provisions to ascertain the law applicable in the instant case.

3.21 The clean sweep will thus consign to history the layers of historic sentencing procedure, and transitional provisions, which judges and practitioners currently have to refer to, and decipher, to ascertain the law. In doing so it will effect a significant streamlining of sentencing procedure, allowing for a single set of provisions to govern the entirety of sentencing for offenders convicted after the commencement of the Sentencing Code.

3.22 Ensuring the law is clear, certain and accessible is fundamental to the rule of law, which requires that the law is sufficiently clear to enable an individual to understand the potential consequences of their actions, and the scope and nature of the penalty to which they may be liable. As Mr Justice Mitting noted in *R (Noone) v Governor of Drake Hall Prison & another*[97] the current state of sentencing law, and the vexed issue of transitional provisions, often makes it near impossible, for even the most experienced practitioners and judges, to ascertain the scope and nature of potential sentencing penalties. The law of sentencing procedure as it stands simply cannot be described as intelligible or clear. The clean sweep will significantly improve the accessibility of the law for experienced practitioners and members of the public alike by excising the issue of transitional provisions.

3.23 The benefits to the certainty and clarity of the law caused by the clean sweep are not only principled. The current confused state of the law leads to unnecessary errors and delays in the administration of justice: even where practitioners can correctly identify the law applicable to their case it takes significantly longer than necessary. These errors and delays lead to avoidable appeals and slip rule hearings[98] and unnecessarily lengthy

---

97 [2008] EWHC 207 (Admin), [2008] ACD 43 at [2].

98 Slip rule hearings allow the courts to amend sentences to correct mistakes after passing them: Powers of Criminal Courts (Sentencing) Act 2000, s 155 and Magistrates' Courts Act 1980, s 142.

sentencing hearings and appeals that have very real economic costs as well as harming access to justice in practice.[99]

An illustration

3.24 The significant impact, and benefit, that the clean sweep will have is best illustrated by working through its application to a single, fairly typical, set of facts where the offence was committed on 3 different illustrative dates.

Example 1: In November 2020 D, a 40 year old male, is convicted of the offence of assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. The offence was committed some years previously but for various reasons criminal proceedings had not occurred until recently. The offence was motivated by hostility relating to the victim's transgender identity and involved the use of a weapon. At the time of the commission of the offence, D had recently been convicted of a similar offence in Spain but had no previous convictions in the United Kingdom. The guidelines in force at the date of sentence suggest the offence is a Category 2 offence with a starting point of 26 weeks' custody. Because the offender has primary caring responsibilities, the court is minded to impose a suspended sentence. The court notes the need for the offender to address his transphobia.

3.25 Under the current law, the law applicable to the offender and the sentencing options open to the court in this situation would vary significantly depending on the date of the commission of the offence. The clean sweep ensures that the sentencing law and procedure applicable to any offender convicted after the commencement of the Sentencing Code is the same, no matter when their offence was committed. The different powers available to the court under the Sentencing Code are set out below.

What would the current law provide if D's offence was committed on 1 August 2016 but D was convicted today?

3.26 If the offence committed by D had been committed on 1 August 2016 then under the current law all of the current disposals and sentencing procedure would apply.

3.27 The court would be under a duty to "follow any sentencing guidelines which are relevant to the offender's case".[100] The court would also be required to treat as aggravating factors the fact that the offence was motivated by hostility relating to the victim's transgender identity,[101] as well as D's previous conviction for a similar offence in Spain.[102] The court would also be required to state in open court that the fact that the offence was motivated by hostility relating to the victim's transgender identity was being treated as an aggravating factor.[103]

---

99 £225.57 Million net benefit over 10 years.

100 Coroners and Justice Act 2009, s 125.

101 Criminal Justice Act 2003, s 146.

102 Criminal Justice Act 2003, s 143.

103 Criminal Justice Act 2003, s 146.

3.28 A suspended sentence order would be available for the offender[104] and the court could impose a rehabilitation activity requirement, which would require that the offender comply with instructions given by the responsible officer to attend rehabilitative appointments or activities.[105] This would allow the responsible officer to require the offender to participate in an activity to address his transphobia.

What would the current law provide if D's offence had been committed on 1 May 2010 but D was convicted today?

3.29 If the offence committed by D had been committed on 1 May 2010 then under the current law (as at 27 July 2017) the sentencing procedure and law applicable to him would differ.

3.30 While the court would still be under a duty to "follow any sentencing guidelines which are relevant to the offender's case",[106] it would not be under a duty to treat as aggravating factors D's previous conviction in Spain or the fact that the offence was motivated by hostility relating to transgender identity. The requirement to treat as an aggravating factor previous relevant convictions in a European Union Member State other than the United Kingdom was introduced by paragraph 6(2)(a) of schedule 17 to the Coroners and Justice Act 2009 but, by virtue of transitional provisions, the requirement does not apply to the sentencing of any offence committed before the coming into force of that provision on 15 August 2010.[107] Similarly the requirement to treat as an aggravating factor in sentencing the fact that the offence was motivated by hostility relating to transgender identity, and to declare in open court that the court is doing so, was introduced by section 65 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 but by virtue of transitional provisions the requirement does not apply to the sentencing of any offence committed before the coming into force of that provision on 3 December 2012.[108] While the court always has an inherent discretion to treat such factors as aggravating, because D's offence was committed on 1 May 2010, before the introduction of both provisions, they are not under a statutory duty to do so.

3.31 A suspended sentence order would be available for the offender[109] but a rehabilitation activity requirement would not be. Rehabilitation activity requirements were introduced by section 15 of the Offender Rehabilitation Act 2014 which also repealed their predecessors, activity requirements[110] and supervision requirements.[111] However by virtue of transitional provisions the amendments made by section 15 apply only to an offence committed on or after 1 February 2015.[112] This means that the court would instead have to impose a suspended sentence order with the now repealed, but saved

---

104 Criminal Justice Act 2003, s 189.

105 Criminal Justice Act 2003, s 200A.

106 Coroners and Justice Act 2009, s 126.

107 Coroners and Justice Act 2009, sch 22 para 41; SI 2010 No 1858, art 3.

108 SI 2012 No 2906, arts 2 and 3.

109 Criminal Justice Act 2003, s 189.

110 Criminal Justice Act 2003, s 201.

111 Criminal Justice Act 2003, s 213.

112 Offender Rehabilitation Act 2014, sch 7 para 7; SI 2015 No 40 art 2.

for these purposes, activity requirement, which would require that the offender attend such appointments or participate in such activities as the court specifies. This could include a requirement for the offender to participate in an activity to address his transphobia.

What would the current law provide if D's offence had been committed on 2 January 2005 but D was convicted today?

3.32 If the offence committed by D had been committed on 2 January 2005 then under the current law, the sentencing law applicable to this case would be almost entirely preserved historic law.

3.33 First, the court would not have a duty to "follow any sentencing guidelines which are relevant to the offender's case"[113] but rather a lesser duty to "have regard to any guidelines which are relevant to the offender's case".[114] The greater duty – introduced by section 125 of the Coroners and Justice Act 2009 – applies only to offences committed on or after 6 April 2010 with transitional provisions saving the original, lesser, duty contained in section 172 of the Criminal Justice Act 2003 for offences committed before that date.[115]

3.34 The court would also not have any duty to treat as aggravating factors D's previous conviction in Spain or the fact that the offence was motivated by hostility relating to transgender identity for the reasons explained in paragraph 3.30 above.

3.35 The court would not be able to impose any suspended sentence order under section 189 of the Criminal Justice Act 2003, as suspended sentence orders are only available for offences committed on or after 4 April 2005, the date of their commencement.[116] They would instead have to have recourse to the historic sentencing powers under the Powers of Criminal Courts (Sentencing) Act 2000 to impose a suspended sentence.[117] Additionally, under that regime, it was not possible to impose requirements under a suspended sentence. Therefore, the court would be unable to require the offender to participate in an activity to address his transphobia. This requires the court to make significant reference to obsolete and repealed law – which is consequentially difficult to decipher and in conflict with modern practice – simply to ascertain what their powers are in relation to the offender.

What would the position be if D was convicted when the Sentencing Code was in force – irrespective of the date of his offence?

3.36 The effect of the clean sweep is that D, convicted after the commencement of the Sentencing Code, is subject to the same sentencing law and procedure irrespective of when their offence was committed. Regardless of whether the offence was committed on 1 August 2016, 1 May 2010 or 1 January 2005, or indeed any other date, the court would be subject to duties to follow any sentencing guidelines which are relevant to the offender's case; and to treat as aggravating factors D's previous conviction in Spain and

---

113 Coroners and Justice Act 2009, s 125.

114 Criminal Justice Act 2003, s 172.

115 Coroners and Justice Act 2009, sch 22 para 27; SI 2010 No 816, arts 2 and 7(2) and sch 1 para 8.

116 SI 2005 No 950, art 2, sch 1 para 8 and sch 2 para 5.

117 Powers of Criminal Courts (Sentencing) Act 2000, s 118.

that the offence was motivated by hostility in relation to the victim's transgender identity. Additionally, the court would be able to impose the same suspended sentence order, with a rehabilitation activity requirement, for the offence, regardless of when it was committed.

3.37 Therefore, under the clean sweep, courts will no longer have to consider the issue of transition and the date of the commission of the offence, when applying sentencing legislation. The clean sweep will thus bring much needed clarity and transparency to the law of sentencing. This should bring with it a reduced rate of error as well as a significant increase in efficiency, with judges no longer having to spend time identifying and interpreting transitional provisions and complex historic sentencing regimes.

3.38 This is illustrated in the tables below, which summarise the applicability of the current law to offences committed on 1 January 2005, 1 May 2010 and 1 August 2016, before and after the Sentencing Code.

Before the Sentencing Code			
Offence committed	1 January 2005	1 May 2010	1 August 2016
Duty to follow guidelines	N	Y	Y
Duty to treat previous conviction in Spain as aggravating	N	N	Y
Duty to treat offence as aggravated by hostility in relation to the victim's transgender identity	N	N	Y
Suspended Sentence Order available	N	Y	Y
Rehabilitation Activity Requirement available	N	N	N

After the Sentencing Code			
Offence committed	1 January 2005	1 May 2010	1 August 2016
Duty to follow guidelines	Y	Y	Y
Duty to treat previous conviction in Spain as aggravating	Y	Y	Y

After the Sentencing Code			
Duty to treat offence as aggravated by hostility in relation to the victim's transgender identity	Y	Y	Y
Suspended Sentence Order available	Y	Y	Y
Rehabilitation Activity Requirement available	Y	Y	Y

WHERE THE CLEAN SWEEP DOES NOT APPLY

3.39 Even in the limited class of exceptions where the clean sweep does not apply the Sentencing Code will avoid the need for users to make reference to complex and inaccessible transitional provisions. Where the clean sweep does not apply, and thus transitional provisions are preserved in the law, the effect of these transitional provisions will be clearly presented in the provision itself in the Sentencing Code, not hidden in a schedule with transition provisions or a Statutory Instrument.

An illustration

3.40 The best way to illustrate the improvement provided by the Sentencing Code, even in cases where the clean sweep does not apply, is by working through an example of the steps it would be necessary for a judge to take in determining a sentence.

3.41 We have taken as an example the question of whether an offender convicted under section 56 of the Terrorism Act 2000 (directing terrorist organisation) can be subject to detention for life under section 226 of the Criminal Justice Act 2003.

3.42 Section 226 of the Criminal Justice Act 2003 provides for a sentence of detention for life for serious offences committed by those under 18. We have decided not to apply the clean sweep to this provision because of its nature as a prescribed sentencing regime. Where the conditions of section 226 are met the court *must* impose a sentence of detention for life. Applying the clean sweep here could result in an offender being subject to a mandatory sentence of detention for life, even where that sentence was not available at the date of the commission of the offence so they could not have been aware of that risk when committing the offence.

3.43 Section 226 operates so that where a person under 18 is convicted of a *serious offence*:

(1) which was committed after the commencement of the section;

(2) for which the offender is potentially liable to a life sentence;

(3) where the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and

(4) where the court considers that the seriousness of the offence (or offences) justifies the imposition of a life sentence;

then the court must impose a sentence of detention for life.

3.44 A "*serious offence*" by virtue of section 224 of the Criminal Justice Act 2003 is one that is specified in schedule 15 to that Act.

The current law

3.45 Under the current law a judge sentencing an offender for an offence under section 56 would initially be directed by section 226(1)(a) of the Criminal Justice Act 2003 to check whether the offence was committed after the commencement of that section. To determine whether or not this criterion is met, the court would have to find the relevant commencing statutory instrument, SI 2005 No 950, from the 32 potentially relevant commencement orders for the Criminal Justice Act 2003 and the 34 other statutory instruments made under the Criminal Justice Act 2003.

3.46 The judge would then need to ascertain whether the offence under section 56 of the Terrorism Act 2000 constituted a serious offence. There is no indicator in section 226 itself as to this matter so the judge would have to go to the contents of the Act where only the short-title and placement of section 224 (meaning of "specified offence") gives a vague indication that it may define serious offence. The judge would then be able to ascertain that a serious offence is one specified in schedule 15 to the Criminal Justice Act 2003 for which an offender is liable to imprisonment for life or for a determinate period of ten years or more. Section 226 further limits its applicability to those offences for which an offender is liable to detention for life under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge would have to make reference to that section to understand that only offences which are punishable with imprisonment for life in the case of an offender aged 21 or older can attract a sentence of detention for life under section 226.

3.47 The judge would then need to turn to schedule 15 to ascertain whether the offence was a serious offence where they would find the offence listed in paragraph 59B. As neither section 224 nor 226 of the Criminal Justice Act 2003 requires that the offence be listed in schedule 15 at the time of the commission of the offence, there would be no direction in the primary legislation to check the transitional arrangements relating to the inclusion by amendment in schedule 15 of section 56 of the Terrorism Act 2000. The only indicator provided by the current law that such transitional provisions may apply is the paragraph numbering. The offence is found in paragraph 59B and that the numbering of the provision contains a letter indicates that the provision was introduced subsequent to the original enactment of the schedule. A judge would then need to make reference to the provision inserting paragraph 59B into schedule 15, section 138(2) of the Coroners and Justice Act 2009.

3.48 The judge must then check if there are any transitional provision relating to that insertion. Section 177(2) of the Coroners and Justice Act 2009 provides that schedule 22 to that Act contains transitional, transitory and savings provisions. Paragraph 37 of that schedule provides that the amendments made by section 138 of the Act, introducing section 56 of the Terrorism Act 2000 into schedule 15, apply only in relation to offences committed on or after the commencement of that section.

3.49 The judge would then have to check the commencement date of section 138(2) of the Coroners and Justice Act 2009. The commencement date is found in section 182(2) of that Act, as two months after the day on which the Act was passed. The judge must then find out the day on which the Act received Royal Assent and work out the date applicable.

3.50 Only after having completed all of these steps is a court able to determine whether or not a sentence under section 226 is available for an offence under section 56 of the Terrorism Act 2000.

The Sentencing Code

3.51 Section 226 of the Criminal Justice Act 2003 has been re-drafted in the Sentencing Code as clause 173. Subsection (1) of which reads:

> (1) This section applies where—
>
> > (a) a person aged under 18 is convicted of a serious offence (see section 213) which was committed on or after 4 April 2005, […]

3.52 A judge turning to the clause would clearly be directed by subsection (1)(a) of the clause to the fact that the section applies only where the offence "was committed on or after 4 April 2005." There would be no need to make reference to any commencing statutory instrument, the relevant information having been incorporated into the provision.

3.53 Subsection (1) also directly points the reader to the location of the definition of 'serious offence' in clause 222 of the draft Sentencing Code where the definition of serious offence has been split from the definition of specified offence and simplified, so that it means any offence listed in the new schedule 13.

3.54 A judge would then turn to schedule 13 in the draft Sentencing Code where paragraph 37 provides, in the text, that only an offence under section 56 of the Terrorism Act 2000 committed on or after 12 January 2010 is a listed offence – avoiding the need to make reference to any further documents.

Uncommenced provisions

3.55 The practice of leaving sentencing provisions and amendments uncommenced for many months or even years after their enactment causes frequent issues and confusion. Uncommenced provisions frequently sit alongside commenced provisions, indistinguishable except to the trained eye. This practice adds a layer of unnecessary complexity to sentencing legislation and while the clean sweep will not apply here, as no transitional provisions apply, the Sentencing Code takes steps to help distinguish between commenced and uncommenced provisions.

3.56 The Sentencing Code will ensure that the effect of those provisions and amendments that have not been commenced, and are thus not in force, is clearer to users of the legislation. This will be achieved by placing all uncommenced sentencing provisions, such as section 151 of the Criminal Justice Act 2003 (community orders available for previously fined persistent offenders), in a schedule to the draft Sentencing Code. These provisions will remain in this schedule until commenced, at which point the changes, or relevant provisions, will be inserted into the body of the Sentencing Code.

3.57 Users can therefore be confident that all the provisions in the body of the Sentencing Code are in force - clarifying the status of such provisions and avoiding the errors that are caused by commenced and uncommenced provisions sitting alongside each other in the current law.

3.58 After the commencement of the Sentencing Code, on each occasion on which Parliament amends the Sentencing Code, those amendments should be placed into this dedicated schedule before they are commenced, to ensure this practice is maintained and that clarity is retained.

ACHIEVING THE CLEAN SWEEP

3.59 As explained above, at paragraph 2.11 above, as a result of the decision to enact the Sentencing Code as a consolidation, the clean sweep must be achieved by an amendment of the existing law, to come into force before the consolidation comes into force. The clean sweep will therefore be introduced by way of a clause to be included in a Bill which precedes the main consolidation – the "clean sweep clause". The draft clause is reproduced in Appendix 3, within the Draft Pre-Consolidation Amendment Bill. This clause will amend existing sentencing law so as to implement the clean sweep: allowing for a single body of law to apply to all convictions after the commencement of the Sentencing Code with only the limited exceptions discussed above.

3.60 The clean sweep clause operates so that it has effect immediately before the commencement of the Sentencing Code, making amendments to the current law of sentencing. The provisions as amended are then instantaneously consolidated by the Sentencing Code, thereby giving effect to the clean sweep approach. This is standard practice for pre-consolidation amendments – see for example section 76 of the Charities Act 2006 (now repealed) which provided the following:

> (1) The Minister may by order make such amendments of the enactments relating to charities as in his opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or part of those enactments.
>
> (2) An order under this section shall not come into force unless–
>
> (a) a single Act, or
>
> (b) a group of two or more Acts,
>
> is passed consolidating the whole or part of the enactments relating to charities (with or without any other enactments).
>
> (3) If such an Act or group of Acts is passed, the order shall (by virtue of this subsection) come into force immediately before the Act or group of Acts comes into force.
>
> (4) Once an order under this section has come into force, no further order may be made under this section…

3.61 The clean sweep clause effects a universal change to the pre-Sentencing Code law to ensure that no necessary changes are missed. Owing to its nature as a pre-

consolidation amendment, this is particularly critical as all changes must be made before the consolidation occurs: after the consolidation there will be no opportunity to rectify any error without recourse to primary legislation. Ensuring that the clause has universal effect helps ensure that this risk of error is minimised but does mean that the way in which the clean sweep clause operates on the pre-Sentencing Code law is highly technical.

3.62 It is important to bear in mind, however, that the technical operation of the clause will be of no concern to judges, practitioners, or other users of the legislation once the Sentencing Code comes into force. The clause is merely the Parliamentary procedural mechanism for achieving the clean sweep policy change that will then be reflected in the consolidated law. Users of the Sentencing Code will not need to interact with the clause at any stage; they will only experience its effects.

The technical operation of the clean sweep clause

3.63 The clean sweep clause has effect in relation to all enactments that are repealed by the Sentencing Code to be consolidated, to the extent that they are repealed or revoked, and any secondary legislation made under those enactments. The clean sweep operates where the offender is convicted after the commencement of the Sentencing Code and the application of a provision depends on whether certain offence-related "trigger events" have happened before or on or after the commencement, repeal or amendment of that provision.

3.64 A trigger event, in relation to an offence, is an event that governs the applicability of a sentencing provision. These events ordinarily relate to the commission of the offence, including in particular any event connected with, or constituting any part of, the commission of the offence, or an event that is related to the investigation of, or proceedings relating to, the offence.

3.65 The clean sweep clause applies to all provisions that are repealed or revoked by the Sentencing Code, to the extent that they are repealed or revoked. It operates where the applicability of such a provision to an offence, or the manner in which it applies to an offence, depends on whether a trigger event occurred before or after the particular point in time at which commencement, repeal or amendment of the provision occurred (the "transition time"). Where this is so the clean sweep clause ensures that for all cases where the offender is convicted after the commencement of the Sentencing Code the "transition time" is *deemed* to have occurred *before* the trigger event. This has two effects:

(1) For provisions that have been commenced, or amended, only for cases where the trigger event has occurred on or after a "transition time", the effect is to extend the provision (and its amendments) to all cases.

(2) For provisions that have been repealed, subject to a saving where the trigger event occurred before the "transition time", the effect of the clean sweep clause is to ensure the provision applies to no cases.

3.66 The clean sweep does not then repeal the relevant transitional provisions and savings but rather modifies them so they no longer have any meaningful effect for an offender

convicted after the commencement of the Sentencing Code. This allows the consolidation to repeal, and not re-enact them, without changing the effect of the law.

3.67 The reason why the clean sweep does not simply entirely repeal or commence all relevant legislative provisions is that to do so could have significant unintended consequences. The clause would have to avoid commencing those provisions and amendments that have never been commenced despite receiving Royal Assent as well as ensuring that provisions were not repealed or entirely commenced for non-sentencing or offence-related purposes where to make changes would be outside the scope of the project.

3.68 One example of where such potential problems could arise is schedule 15 to the Criminal Justice Act 2003 which for sentencing purposes lists the specified offences that can attract extended sentences of imprisonment or detention under sections 226A and 226B of the Criminal Justice Act 2003 and sentences of imprisonment or detention for life under sections 225 and 226 of the Criminal Justice Act 2003. The schedule is also used however for a wide variety of non-sentencing purposes such as criminal records certificates,[118] reporting restrictions[119] and bail.[120] The schedule has been amended since its commencement with transitional provisions that ensure that the amendments do not apply to offences committed before the date of amendment. A clean sweep clause which indiscriminately extended the commencement of those amendments for non-sentencing purposes could have significant knock-on effects.

3.69 The clause does not deem the offence-related event to have moved in time for similar reasons. While intuitively this may seem preferable, the date of the offence (and other similar events such as the date of remand) is important for other purposes, sentencing and otherwise. By moving only the transition date, the clause targets only the specific problem we want to remove, and ensures that there are no incidental and unforeseen effects in relation to other purposes.

3.70 The clause as drafted achieves the aim of the clean sweep by making as limited a change as is necessary. It targets only the transition times it wishes to remove and thus ensures that the number of exceptions that need to be made are minimal, and only exist where policy dictates we do not want to apply the clean sweep, and not simply to prevent unintended side effects.

Illustration of effect 1: Extending commencement and amendment to all cases

3.71 An illustration of how the clean sweep clause achieves the first effect – extending the Sentencing Code law to all cases – is provided by examining how it operates in relation to the availability of suspended sentence orders.

---

118 Police Act 1997, s 113A. See also the Law Commission publication "Criminal Records Disclosure: Non-Filterable Offences" (2017, LC371) http://www.lawcom.gov.uk/project/criminal-records-disclosure/#criminal-records-disclosure-non-filterable-offences.

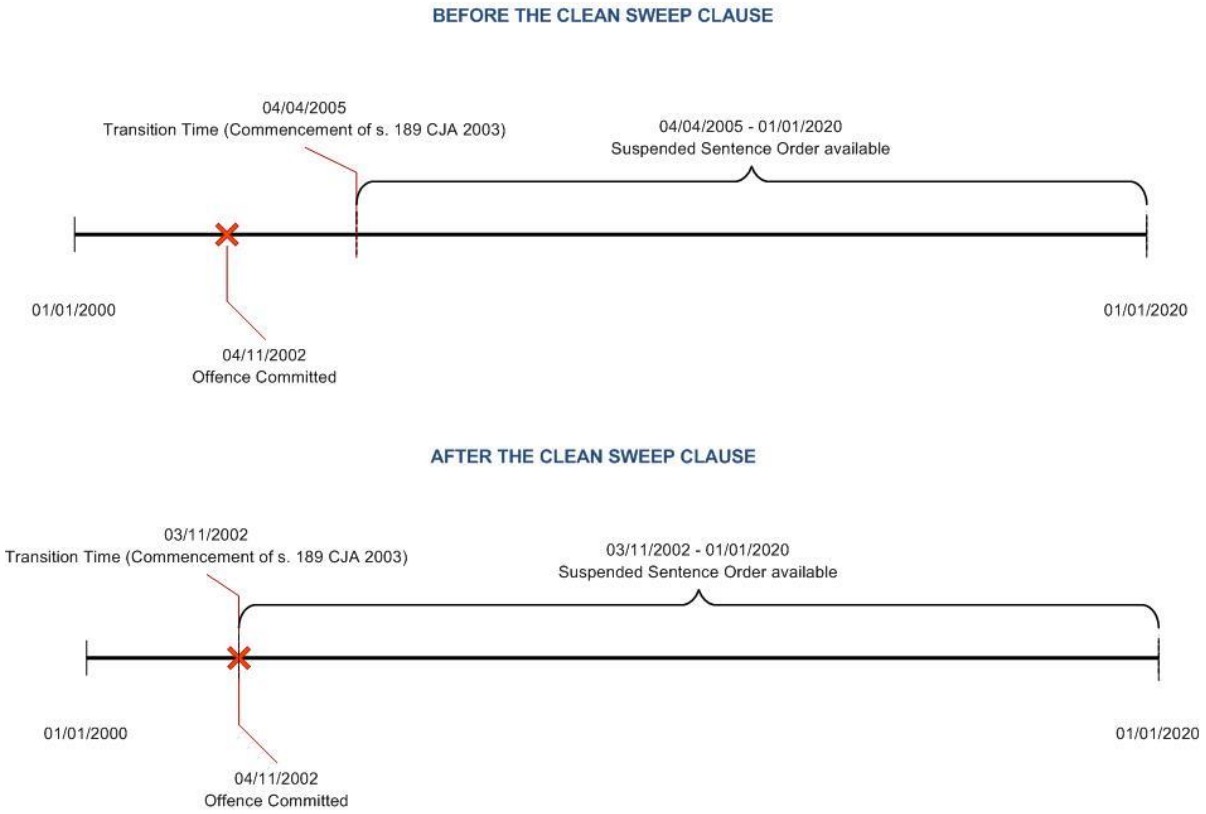
119 Children and Young Persons Act 1933, s 49.

120 Bail Act 1976, s 2.

3.72 Suspended sentence orders under section 189 of the Criminal Justice Act 2003 are only available for offences committed on or after 4 April 2005. That is a result of the manner in which the provision was commenced.[121]

3.73 For offences committed before that date the courts must have recourse to their historic sentencing powers. In such cases, depending on the date of the offence, variations of the power to impose a suspended sentence with community requirements may or may not be available. A suspended sentence order can only be imposed under section 189 of the Criminal Justice Act 2003 where a sentence of imprisonment or detention in a young offender institution is already available. The Sentencing Council's Definitive Guideline, *Imposition of Community and Custodial Sentences,*[122] further provides that a custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately. There can therefore be no breach of Article 7 of the European Convention on Human Rights as any suspended sentence order will always be less severe than the immediate custodial sentence which could have been imposed under the law at the time of the commission of the offence.

3.74 The following diagram shows how the clean sweep clause would work to ensure that for an offence committed on 4 November 2002 a suspended sentence order would be available.



3.75 The clean sweep clause deems the "transition time" between two legal regimes (the time before, or after which, the trigger event must have occurred for the law to apply) to have occurred immediately prior to the relevant trigger event – in this case when the

121 SI 2005 No 950 art 2, sch 1 para 9 and sch 2 para 5.

122 Sentencing Council, *Imposition of Community and Custodial Sentences: Definitive Guideline* (February 2017).

offence was committed. In doing so it ensures that the new regime applies to all offences and effectively repeals the old regime.

3.76 In relation to the above example then of an offender being sentenced under the Sentencing Code for an offence committed on 4 November 2002 the offence would still be taken to have been committed on 4 November 2002. The transition time – the date after which an offence has to be committed for section 189 of the Criminal Justice Act 2003 to apply – would however be changed from 4 April 2005 to, in that offender's case, a point in time before 4 November 2002.

Illustration of effect 2: Complete repeal

3.77 An illustration of how the clean sweep clause achieves the second effect – repealing saved provisions – is provided by examining how it operates in relation to the duty of an offender serving a community order or suspended sentence order to notify their responsible officer of any change of address.

3.78 The duty of an offender serving a community order or suspended sentence order to keep in touch with their responsible officer is governed by section 220 of the Criminal Justice Act 2003 and can be enforced as if it were a requirement imposed by the order.[123] Under section 220(1)(b) there was a duty for an offender serving such an order to notify their responsible officer of any change of address. This was repealed for new offences committed on or after 1 February 2015 by section 18(3) of the Offender Rehabilitation Act 2014 but transitional provisions ensured that the duty would continue to exist for offences committed before the repeal, even where the offender was convicted and sentenced after it.[124] The clean sweep clause operates so that no matter when the offence is committed the duty no longer exists.

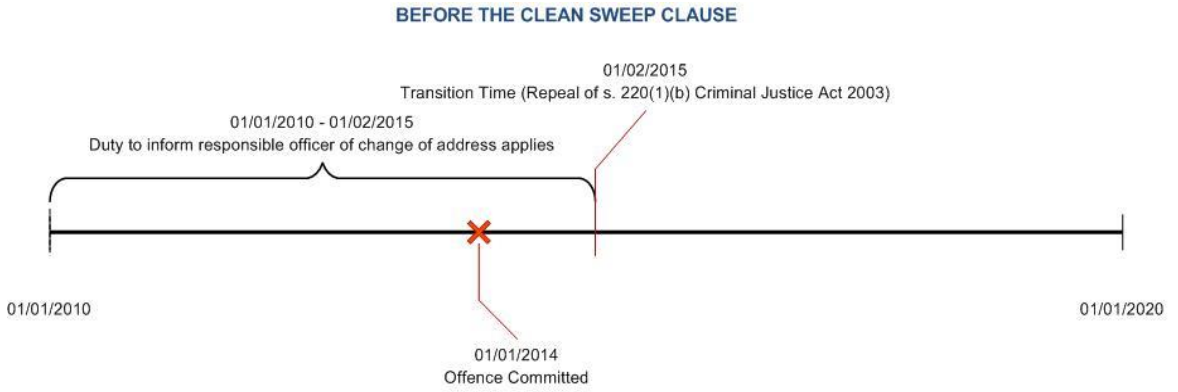
3.79 As explained above it does this by moving the transition time – the date of the repeal – to a moment immediately prior to the relevant trigger event in the offender's case – here when the offence was committed.

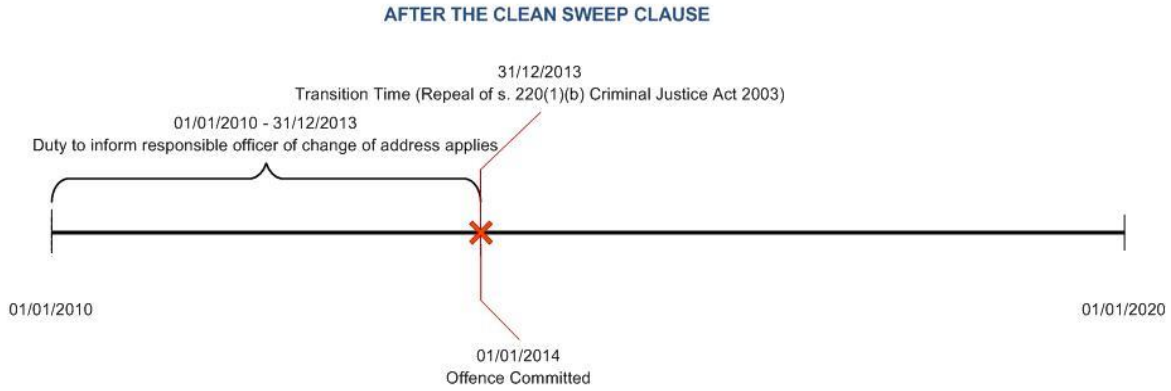
3.80 For an offence then committed on 1 January 2014, to which under the current law the duty to inform the responsible officer would apply, the transition time – the date of the repeal – is deemed to be 31 December 2013. The offence is thus considered to be one that was committed after this amended date and therefore the duty does not apply to it.

---

123 Criminal Justice Act 2003, s 220(2).

124 Offender Rehabilitation Act 2014, sch 7 para 7; SI 2015 No 40, art 2.





3.81 While it appears that the duty would continue to apply to offences committed before that amended date the clean sweep clause operates so that the amended date changes on each and every application of the clause to ensure that in each instance the duty to inform the responsible officer does not apply. As can be seen below the effect of the clean sweep approach is that the current law applies to all cases, and the old law to none. A single application of the clause gives the impression that there remains in theory a set of cases for which the duty will continue to apply. However, the clean sweep clause operates so that no offence, no matter when committed, actually satisfies the conditions to attract the duty. The clause effectively repeals the provision for all cases where conviction is subsequent to the Sentencing Code's commencement.

Offence committed	Condition for the duty to apply as amended by the clean sweep	Does the duty apply?
1 January 2014	Applies to offences committed before 31 December 2013	N
18 March 2010	Applies to offences committed before 17 March 2010	N
5 August 1994	Applies to offences committed before 4 August 1994	N

3.82 It is worth noting that where the trigger event (in this case the commission of the offence) arises after the original statutory transition time (in this case 1 February 2015) the clean sweep clause has no effect. The statutory transition time remains unchanged. This is not problematic. The duty has already been repealed in such cases and moving the transition time to a moment immediately prior to the trigger event in their case would have no effect.

Exceptions to the clean sweep

3.83 The clean sweep clause is designed to operate automatically on all provisions to be repealed and consolidated by the Sentencing Code. Where we do not want the clean sweep to apply, because to do so would result in a greater maximum sentence being available than that which was available at the time of the commission of the offence, or would expose someone to a mandatory sentence or recidivist premium which was not in force at the time they committed their offence, an exception has to be made to ensure the clause does not operate.

3.84 An example of where such an exception has been made is the operation of section 224A of the Criminal Justice Act 2003. Under section 224A of the Criminal Justice Act 2003, where an offender over the age of 18 is convicted of an offence listed in Part 1 of schedule 15B to that Act, and the sentence condition, and the previous offence condition are met, the court must sentence the offender to a sentence of life imprisonment (or custody for life if they are aged 18 to 20). Section 224A of the Criminal Justice Act 2003 currently applies only to offences committed on or after 3 December 2012 (the date of its commencement) by virtue of section 224A(1)(b). To apply the clean sweep to such a case, and thus apply section 224A to offences committed before that date, would result in offenders being subject to a mandatory life sentence where at the time they committed their offence they would not have been subject to such a mandatory sentence.

3.85 The drafting creating these exceptions is very technical and is likely to be fairly opaque to a casual reader, but just as with the clause itself, users of the Sentencing Code will never need to concern themselves with the drafting creating these exceptions: their effect will be reflected in the Sentencing Code without need to have recourse to transitional provisions as was explained at paragraph 3.39 above.

MAINTAINING THE CLEAN SWEEP

3.86 The clean sweep clause does not continue to operate once the Sentencing Code has been commenced. If law is subsequently commenced with transitional arrangements it will not remove them. To maintain the clarity secured by the clean sweep approach, a change in drafting practice will have to be adopted after the Code is enacted. Just as there will need to be parliamentary support to ensure that the Sentencing Code remains the single source of legislative sentencing material, we will need also to ensure that amendments are enacted in a way that retains the benefit of our new approach to transitional arrangements.

3.87 The Sentencing Code will not affect the Government's ability to determine when sentencing legislation should be commenced or for whom and where, neither will it attempt to do so. However, in the interests of preserving the effect of the clean sweep and ensuring that our novel approach to transition is not frustrated, after the publication

of this consultation paper and the draft Sentencing Code we will be engaging with Parliamentary stakeholders, and those responsible for the drafting and commencing of legislation, to do what we can to ensure that amendments to the Sentencing Code are enacted in a way that retains the benefit of our new approach to transitional arrangements.

3.88 Primarily this will involve encouraging a culture where all amendments to the law on sentencing are made to the Sentencing Code itself and all amendments to the Sentencing Code are commenced for all convictions after commencement, except where:

(1) to do so would expose individuals to a greater maximum penalty than they could have received at the time of the offence;

(2) to do so would expose individuals to a recidivist premium or mandatory sentence that pre-dates their index offence; or

(3) there are other legitimate reasons for piloting or commencing the provisions for only a limited class of person.

3.89 Further, where such good reasons for commencing amendments to the Sentencing Code in a partial or phased manner do exist, an understanding must be established that the amendments need to be brought into force in such a way that it is clear from the Sentencing Code to what cases the amendments apply, without needing to rely on information contained in separate commencement provisions. Where it is known at the time of enactment for what group the amendments will come into force, this should be included in the drafting of the provision. Further, section 104 of the Deregulation Act 2015 should be used after commencement to replace references in the legislation to the commencement of a provision with a reference to the actual date on which the provision comes into force. More innovatively, the same effect could also potentially be achieved by the introduction of a power for the Secretary of State to amend the text of the Sentencing Code upon its amendment to reflect the effect of any applicable transitional provisions. We will be exploring the best ways to achieve these ends while the draft Sentencing Code is on consultation.

Chapter 4: Commencement

INTRODUCTION

4.1 In a normal consolidation exercise, commencement is a simple matter. The essential feature of a consolidation is that the law before and after commencement is the same. Accordingly, as the law is merely being restructured and re-stated, transitional provisions can normally ensure that anything done under the old law continues to have effect as if done under the new consolidated law. Therefore, in the course of a typical consolidation the day after the commencement of the consolidation all matters are dealt with under the law as consolidated. The transition between the two regimes is simple and instantaneous.[125]

4.2 However, as discussed in Chapter 3, the Sentencing Code goes beyond mere consolidation by implementing our recommended clean sweep of old sentencing procedure and disposals. Where the clean sweep applies, the Sentencing Code effects changes to the law and as such many things done under the old law will no longer be able to be done under the Sentencing Code. The issue of commencement is accordingly more complex than with an ordinary consolidation.

4.3 We were therefore faced with two questions in relation to how the Sentencing Code should be commenced: (1) in light of the changes to the law made by the clean sweep, to which cases ought the Sentencing Code apply?; and (2) how could the Sentencing Code be commenced in order to maximise the benefits of the clean sweep and the consolidation, without undermining the aim of simplicity and clarity of legislation?

THE STARTING POINT: CONVICTION AFTER COMMENCEMENT

4.4 This matter was considered in our issues paper on transition,[126] where various potential commencement models were considered. Our starting point was naturally that the Sentencing Code should apply to all cases where the sentencing hearing began after the commencement of the Sentencing Code. This would ensure the swiftest possible transition to the Sentencing Code, maximising the benefits of the Sentencing Code and extending those benefits to the widest category of cases. This, however, begged the question of when a sentencing hearing begins. To provide the certainty and clarity that the Sentencing Code seeks, the transition to the Sentencing Code will have to occur by reference to a clear and easily ascertainable stage in the criminal process, and preferably one that is already a matter of official court record. We provisionally considered that the latest stage in the criminal process at which the date could be

---

125 For example, the Powers of Criminal Courts (Sentencing) Act 2000, itself a Law Commission consolidation, applied to all cases sentenced after its commencement. Transitional provisions in schedule 11 to that Act provided that the substitution of the Act for the provisions repealed by it did not affect the continuity of the law and that anything done, or having effect as if done under any repealed provisions were to have effect as if done under the corresponding provisions. That schedule also provided that any transitional provisions or savings capable of having effect in relation to corresponding provisions would continue to have effect.

126 Sentencing Procedure Issues Paper 1: Transition (2015) paras 6.9 to 6.21, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf.

ascertained with the requisite precision was the date of conviction and suggested that the Sentencing Code should apply to all cases in which conviction takes place after commencement.

4.5 Almost all respondents on consultation were in agreement with our conclusions.[127]

4.6 The CPS fully supported our approach:

> The CPS agrees that conviction appears to be the most appropriate stage from which to introduce the Sentencing Code, as the date on which it occurs is readily identifiable, in contrast with the date on which other stages in proceedings occur.
>
> The Issues Paper explains that informal consultation has revealed difficulties with using other stages in proceedings for fixing a definite point in time for transitional purposes: neither arrest nor charge provide a certain and consistent stage of the proceedings to use as a trigger for transition to the Sentencing Code; similarly, it is difficult to identify a reliable and consistent milestone from which it could be said that a sentencing hearing had commenced.
>
> By contrast, conviction occurs on a readily identifiable date: the date of the guilty plea or guilty verdict.

4.7 Such support was echoed by the majority of stakeholders, including Lord Justice Treacy (Chairman of the Sentencing Council), the Law Society, Her Majesty's Council of District Judges and the Council of Her Majesty's Circuit Judges.

4.8 However, the panel responsible for drafting the Bar Council's response was split on the issue. In support of our argument, they noted the benefits if defendants had sentencing law fixed at the point in time that they enter a guilty plea on advice. As against our position they pointed to the potential issues caused when a defendant entered mixed pleas on different counts and/or different defendants in the same case entered pleas and the ensuing need for multiple sentencing exercises.

4.9 The only wholly dissenting response came from Professor Peter Hungerford-Welch, who suggested that the date on which sentence is passed should be used as that is the date when the sentencing powers are actually being exercised.

4.10 We were ultimately unpersuaded by the arguments of this minority. Whilst the date of a particular sentence being handed down is certain, this date could often be too late in the process to use as the determining date for which law applies. It is critical for instance that a judge, and probation services, know what the law applicable at sentencing will be at the earlier stage when ordering a pre-sentence report. Similarly, in a complex sentencing exercise spanning a number of days with a number of different offences and offenders involved, the judge will need to know what law to apply to the whole exercise on day one, even if no sentences are handed down until day five. Further, in the latter example, it is unclear as to when "sentencing" begins as there is no point in time recorded on the court record.

---

[127] A New Sentencing Code for England and Wales (2016) Law Com No 365 paras 3.45 to 3.54.

4.11 In any event, the adoption of conviction as the relevant date for commencement is sufficiently clear and identifiable so as to make the task of determining whether or not the Sentencing Code applies to a particular case during the transition window a very simple task.

4.12 We accordingly recommended that the Sentencing Code should apply to all offences in respect of which the conviction occurs after its commencement.

4.13 As the average time between conviction and sentence is a matter of weeks, the effect will be that very soon after the commencement of the Sentencing Code the overwhelming majority of cases will be dealt with under the Sentencing Code, with the old law confined to history. However, using the date of conviction as the determinant of whether or not the Sentencing Code applies leaves a number of small exceptions in which sentencing judges will need to have recourse to the old law – unlike in other consolidation exercises there will not be an overnight transfer between current sentencing law and the Sentencing Code. These few exceptions are explored in more depth below.

MULTIPLE OFFENCES/MULTIPLE OFFENDERS

4.14 When sentencing an offender for multiple offences for which they were convicted at different times[128] or simultaneously sentencing multiple offenders who were convicted at different times,[129] the Sentencing Code will still apply only to those offences where conviction occurs after its commencement.

4.15 The effect of this is that where a single offender is convicted of multiple offences straddling the commencement of the Sentencing Code, those convictions pre-dating commencement are dealt with under the existing law, and those convictions post-dating commencement are dealt with under the Sentencing Code. Similarly, where in the same case offender A's conviction pre-dates the commencement of the Sentencing Code, but offender B is convicted post-commencement (for instance because A pleads, and B exercises his right to trial, with A's sentencing being adjourned to be dealt with at the conclusion of B's trial) offender A is dealt with under the pre-Sentencing Code law whereas offender B is dealt with under the Sentencing Code. In the yet more complex situation where offender A pleads to offence 1 prior to commencement, and is convicted of offence 2 post-commencement, and offender B pleads to offence 1 pre-dating commencement and is convicted of offence 2 post-commencement, offence 1 is dealt with under the current law for both offenders, and offence 2 is dealt with under the Sentencing Code for both offenders.

4.16 This does mean that for a short time after the commencement of the Sentencing Code there will, in some cases, be a need to have recourse to both the old law, and the Sentencing Code, in the same sentencing exercise. This will, however, only be necessary temporarily, while any ongoing cases that have already had their first hearing

---

[128] For example, because the offender has pleaded guilty to one offence in the magistrates' court, but proceeded to trial in the Crown Court in respect of another.

[129] For example, sentencing offenders in a conspiracy where some have plead guilty prior to trial, and others have been convicted after trial.

in the magistrates' court (and thus an opportunity for an offender to plead guilty) prior to the commencement of the Sentencing Code proceed to the conclusion of trial.

4.17 While this is more complicated in an individual case in which it arises than either applying the Sentencing Code to all, or none, of the relevant convictions, retaining the single point in time from which the application of the Sentencing Code can be ascertained provides significant advantages in terms of certainty, and clarity. The more caveats that are added to the commencement of the Sentencing Code the greater the likelihood that a mistake is made – either by applying the Sentencing Code where it should not apply, or applying the old law where it should not apply. The courts (and any enforcement bodies) will inevitably be aware of the date of conviction for each offence and need only note that information. We therefore continue to favour the "brightest line" approach to commencement – applying the Sentencing Code only to convictions after its commencement.

4.18 Further, it should be noted that the retention of the bright line still provides a much cleaner, and easier, transition than previous changes to the law. Historically, the application of most changes to sentencing law has depended on the date of the commission of the offence. Not only is such information often hard to ascertain with any sort of certainty, but it can also frequently lead to the courts needing to apply multiple sentencing regimes, even where the offender pleads guilty to all of the relevant offences at one time.

OTHER FINDINGS

4.19 As has been discussed at Chapter 2 above, the core scope of the Sentencing Code is the powers and duties of a sentencing court upon conviction. In the interests of ensuring that the Sentencing Code is a comprehensive source of the primary legislation involved in the disposal of a criminal case, we are also concerned however with a small closed list of disposals available otherwise than on conviction:

(1) those disposals available on a special verdict of not guilty by reason of insanity;

(2) those disposals available on a finding that the accused is under a disability and that they did the act or made the omission charged against them;

(3) restraining orders imposed on acquittal; and

(4) the powers to bind over someone before the court to keep the peace.

4.20 The Sentencing Code will therefore also apply to those cases where a special verdict of not guilty by reason of insanity; a finding that the accused is under a disability and that they did the act or made the omission charged against them; or an acquittal is returned after the commencement of the Sentencing Code. It will not apply in relation to any case where such a finding or verdict has been entered before the commencement of the Sentencing Code.

4.21 While the powers available following a special verdict of not guilty by reason of insanity; a finding that the accused is under a disability and that they did the act or made the omission charged against them; and the powers to impose a bind-over will not be directly incorporated into the Sentencing Code, there will be signposts to all applicable

statutory powers, to ensure that the courts are aware of their relevant powers in such situations.[130]

EXISTING SENTENCES

4.22 It was never envisaged that the Sentencing Code would extend to those offenders that had already been sentenced at the date of its commencement. To interfere with an imposed sentence would be significantly outside the scope of the project, the purpose of which is to provide greater clarity and transparency to sentencing procedure and whose policy is not to interfere with the levels or types of sentence to be imposed on an offender. Furthermore, to do so would have significant negative practical consequences.

4.23 For example, if cases in which a pre-Sentencing Code disposal has already been imposed (because conviction pre-dates the Sentencing Code's commencement) were to be dealt with under the Sentencing Code after its commencement,[131] then transitional provisions would be needed to ensure that things done under the pre-Sentencing Code law are treated as done under the corresponding provisions of the Sentencing Code. Where the pre-Sentencing Code and Sentencing Code provisions differed (because the Sentencing Code effects a change in the law through the application of the clean sweep), the transitional provisions would have to provide the necessary adaptation so that the Sentencing Code works satisfactorily for such cases. That is not the function of consolidation, so would have to be done as part of the changes to be embodied in the Sentencing Code.

Example 2: Before commencement of the Sentencing Code a community order with an activity requirement attached is imposed on an offender. Owing to the effects of the 'clean sweep', this type of requirement will no longer be available for any offences where conviction post-dates the Sentencing Code's commencement, irrespective of the offence date. This is an example of the 'clean sweep' policy in action, removing the possibility which exists under the current law for repealed requirements to be imposed in respect of historic offences. The offender breaches his or her order after the commencement of the Sentencing Code, and is returned to court for this breach to be dealt with. Without specific provisions under the Sentencing Code providing for activity requirements to be available under the Sentencing Code his order cannot properly be amended or dealt with under the Sentencing Code: otherwise as soon as the Sentencing Code applied to the order his activity requirement would cease to have any legal effect.

4.24 Extending the Sentencing Code to all previously imposed sentences could be achieved in two ways:

(1) Equivalency: technical provisions, called 'deeming provisions', could treat pre-Sentencing Code provisions directly as post Sentencing Code provisions,

[130] As discussed at para 2.57 above.

[131] The Sentencing Code could potentially apply to offenders that have come back in front of the court for their sentence to be amended, for example because of a breach of a requirement imposed by the sentence.

applying the Sentencing Code law with the necessary modifications. This would be very time consuming, easy to get wrong and produce potentially unclear results. Provisions would have to be drafted for the intricacies of every variation of a previously existing disposal. For an illustration of the complexity and detail required to translate even similar orders from one regime to another, see schedules 9 and 13 of the Criminal Justice Act 2003 which provide for the mechanism by which community orders and suspended sentences may be transferred to Scotland and Northern Ireland. It also runs into problems when there is no equivalency. Sometimes there are good reasons that provisions are removed or added without any equivalent.

(2) Keeping the old law alive. One method would be by restating every iteration of the old law on the face of the Sentencing Code so as to keep old orders alive for these purposes. To do so would significantly negate the advantages of the clean sweep, and be likely to harm the chances of its new approach to transitional provisions being maintained. It would also undermine the Sentencing Code's purpose: retaining substantial volumes of old law to which sentencing judges have to have regard is precisely the situation which the Sentencing Code was designed to remedy. Restating the old law in the Sentencing Code would significantly undermine its clarity and simplicity.

4.25 The scale of the issue that either option would involve should not be understated. If there was a desire for the Sentencing Code to apply to all previous existing orders then equivalency or preservation provisions would need to be drafted for *every* disposal that could have been imposed on an offender in the last ~80 years. Our compilation of the current law in force in sentencing ran to 1300 pages[132] – the resulting Sentencing Code would be likely to be significantly longer.

4.26 Such equivalency or transitional saving provisions would not only need to ensure that certain disposals remain available but also deal with the trickier issues of changes to sentencing procedure and enforcement.

[132] Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from http://www.lawcom.gov.uk/project/sentencing-code/.

Example 3: Take as an example a community order imposed prior to the commencement of the Sentencing Code for an offence committed before 1 February 2015. The order does not just exist, but carries a body of law with it which governs the practical mechanics of providing monitoring and enforcement of the order. As the offence was committed before 1 February 2015 the order will only require an offender to notify their responsible officer of any change in address. Under the Sentencing Code, because of a subsequent change and the effect of the clean sweep provision, all orders will require that the offender obtains permission from either the responsible officer or a court before changing address. Transitional or equivalency provisions will have to decide whether said provision is retained, and make the appropriate provisions, or the clean sweep change should be applied in this respect, and make the appropriate provisions to do so. It is not simply sufficient that the Sentencing Code provides for the order itself to still exist but also that all important procedural aspects governing its monitoring and enforcement can continue to operate properly.

4.27 Taking either option, and extending the Sentencing Code to all existing sentences would allow us to reduce the number of legal regimes or documents that practitioners would need to look to. However, we have concluded that these options create more uncertainty, practical difficulty and risk of error than they avoid. Even putting aside the principled objections to potentially drastically amending the sentence imposed by the courts the pragmatic considerations make such an approach untenable.

4.28 The Sentencing Code seeks certainty, simplicity and clarity above all else. To extend it to all sentencing exercises under either approach would require a significant amount of complex transitional provision for the old law, and create extra uncertainty and the potential for error regarding sentences that have already been properly imposed and are being served under familiar established law. The tax-law rewrite Bills are a rare example of a previous consolidation that has attempted also to make substantive changes to the law, and thus had to grapple with the same issue of commencement. To achieve that aim, and yet achieve as much continuity with the law as possible, section 723 of the Income Tax (Earnings and Pensions) Act 2003, provided for that Act to come into force on 6 April 2003 and to have effect, for income tax purposes, for tax years 2003-04 and subsequent years subject to transitional provisions contained in schedule 7. They did not attempt to ensure complete continuity and apply the new Act to all previous tax years and yet schedule 7 still contained 92 paragraphs of transitional provisions.

4.29 To apply the Sentencing Code to all cases, including those previously sentenced, would also impose significant costs on criminal justice system professionals, such as Her Majesty's Prisons and Probation Services in requiring them to make significant changes to their relevant procedures in a very short time frame, rather than allowing for phased introduction.

THE ISSUE OF RE-SENTENCING

4.30 In our transition report we considered whether the position perhaps ought to be different for those cases where an offender returns to court after the initial sentencing hearing and the court has the power to re-sentence.[133]

4.31 This situation creates an additional level of complexity, as not only is there the potential for the law of sentencing to have changed between the commission of the offence and the initial sentence but also for it to have changed between the initial sentence and the breach of order. In such a case, what powers should be available when the court is considering re-sentencing?

4.32 The same considerations about transitional provisions, and amending old disposals, do not apply to re-sentencing: since re-sentencing is a completely new sentencing exercise, newly imposed disposals do not require any continuity with the law prior to the commencement of the Sentencing Code.

4.33 We considered at the time that our general approach to the Sentencing Code, and desire to sweep in as many cases as possible to ensure that the transition between the Sentencing Code and the old law was as quick as possible, militated in favour of the simplest answer: that the law which should apply should be the law on the date of re-sentencing – the Sentencing Code.

4.34 We have since given the matter further consideration.

Powers to re-sentence

4.35 It is worth setting out first the various different powers of the court to re-sentence an offender who has already been sentenced and the circumstances in which they arise.

4.36 Powers to re-sentence broadly arise in three different contexts:

(1) appeals and 'slip rule' hearings;

(2) reviews of sentence under the Serious Organised Crime and Police Act 2005; and

(3) the enforcement of community-based sentences.

Appeals and slip rule hearings

4.37 Powers to re-sentence upon an appeal or as the result of a slip rule hearing can be grouped for the purposes of this paper. Appeals against sentence are challenges against a decision of the court and such challenges are grounded in the concept that the decision was either wrong in law, or the discretion of the judge was improperly exercised. Appeals by way of case stated to the High Court illustrate this best where challenges can be made only on the grounds that the decision was wrong in law or in excess of jurisdiction.[134] Similarly a court's power to bring back and amend imposed

---

133 A New Sentencing Code for England and Wales (2016) Law Com No 365 paras 5.18 to 5.37.

134 Magistrates' Courts Act 1980, s 111. It has been suggested that if the sentence is "truly astonishing" (*R (Sogbesan) v Inner London Crown Court* [2002] EWHC 1581; [2003] 1 Cr App R (S) 79, [20]) or "so far outside

sentences under the slip rules[135] ought to only be exercised where the judge is persuaded that a material error has been made in the initial sentencing, whether as to fact or the law.[136] The nature of all these hearings is that of a review, not of a new hearing, with the exception of appeals from the magistrates' court to the Crown Court, which constitute a complete rehearing.[137]

4.38 The powers to re-sentence are therefore broadly linked back to the original powers of the court. This is well illustrated by section 11(3) of the Criminal Appeal Act 1968, the powers of the Court of Appeal on an appeal against sentence from the Crown Court:

> (3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such order as they think appropriate for the case *and as the court below had power to pass or make when dealing with him for the offence*;
>
> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below. (Emphasis added)

4.39 Even in the case of appeals from the magistrates' court to the Crown Court, where there is a completely fresh sentencing hearing (and the Crown Court may impose a more severe sentence than was originally imposed) the Crown Court's powers are still limited to awarding such punishment which the magistrates' court whose decision is appealed against might have awarded.[138]

4.40 It is not only outside the scope of this project to make amendments to such powers (as discussed at paragraph 2.109 above, powers to appeal against sentence will not be incorporated into the Sentencing Code) but also potentially contrary to the principle that such appeals are a review of sentence. The purpose of the criminal appeal system is to correct error; to produce what J R Spencer calls the "right result":[139] these powers exist to allow the courts the ability to remedy decisions, but in ascertaining whether a mistake has been made, and whether it can be remedied, the courts must then be applying the same law as was applied at the time of the hearing. There is also a risk that if the re-sentencing powers of the Sentencing Code were extended to such decisions then, particularly in the context of the slip rules, sentences would be varied solely to take advantage of the new disposals gained by the clean sweep. Such actions would clearly

---

the broad area of the [court's] sentencing discretion as to demonstrate an excess of jurisdiction or an error of law" (*Allen v West Yorkshire Probation Service Community Service Organisation* [2001] EWHC Admin 2, [23]) there may be scope for it to be quashed by the High Court even without a technical issue of law arising.

135 Powers of Criminal Courts (Sentencing) Act 2000, s 155 and Magistrates' Courts Act 1980, s 142.

136 *R v Warren* [2017] EWCA Crim 226 at [22].

137 Senior Courts Act 1981, s 79(3).

138 Senior Courts Act 1981, s 48(4).

139 J R Spencer, 'Does our present criminal appeal system make sense?' [2006] *Criminal Law Review* 677, 683.

constitute an improper interference with the original sentencing decision. Further, a majority of the powers to appeal against sentence, or to hold a slip rule hearing, are time limited.[140] Even where these time limits can be extended, there must be an explanation as to why it has not been complied with; the longer the delay, the more convincing and weighty the explanation must be.[141]

4.41 Accordingly, we have decided that the Sentencing Code should not apply to an offender convicted before the commencement of the Sentencing Code when a court is amending a sentence on an appeal or in the course of a 'slip rule' hearing.

Reviews of sentence under the Serious Organised Crime and Police Act 2005

4.42 Section 73 of the Serious Organised Crime and Police Act 2005 provides that where a defendant has pleaded guilty to an offence following a written agreement made with a prosecutor to assist the investigation or prosecution of that or any other offence, the court may take into account the extent and nature of the assistance given or offered and impose a lesser sentence than it otherwise would.

4.43 Section 74 of the Act provides a mechanism by which previously imposed sentences can be reviewed where the sentence is still being served, and:

(1) the offender received a discounted sentence in consequence of his written agreement to assist the investigation or prosecution of an offence but they did not fulfil that agreement;

(2) the offender received a discounted sentence in consequence of his written agreement to assist the investigation or prosecution of an offence, but having given the assistance has subsequently entered into another written agreement to give further assistance; or

(3) the offender had not entered into a written agreement at the time of sentence, and accordingly received no discount, but subsequently has entered such an agreement to assist the prosecution or investigation of an offence.

4.44 Where the offender had failed to comply with their written agreement, section 74(5) allows the court to substitute for the sentence such greater sentence as it thinks appropriate (not exceeding that which it would have passed but for the agreement).

4.45 Where the offender has, since being sentenced, entered into a new written agreement, section 74(6) allows the court to take into account the extent and nature of the assistance given or offered, and substitute for the sentence such lesser sentence as it thinks appropriate.

4.46 While these powers to vary sentences are being incorporated into the Sentencing Code – as sentence-specific provisions – we do not consider that it is appropriate to apply the

---

[140] See the Crown Courts power to amend a sentence under a slip rule hearing which is only exercisable within 56 days (Powers of Criminal Courts (Sentencing) Act 2000, s 155) or the Attorney General's power to refer a sentence as unduly lenient which is only exercisable within 28 days from the date of sentencing (Criminal Justice Act 1988, sch 3 para 1.

[141] *R (on the application of Birmingham City Council) v Birmingham Crown Court* [2009] EWHC 3329 (Admin), [2010] 1 WLR 1287; *R v Bestel and Others* [2013] EWCA Crim 1305, [2014] 1 Cr App R (S) 53.

re-drafted provisions to all cases, rather than simply those sentences where the conviction (or other relevant finding) is after the commencement of the Sentencing Code.

4.47 Initially, we considered that it would be desirable if the re-drafted version of section 74 in the Sentencing Code applied to all cases, noting that those sentences could potentially continue to exist for a much longer period of time than existing community orders, and that the clean sweep militated in favour of as many sentences as possible being dealt with under the new law.

4.48 Further reflection on the matter revealed some of the practical problems that could arise in taking such an approach.

4.49 First, such a change requires additional transitional provisions, contained in a schedule. Their effect would not be immediately apparent in the relevant provisions, as is the case in the rest of the Sentencing Code, providing where the Sentencing Code applies rather than section 74 of the SOCPA 2005. This is to provide certainty in relation to transitional cases such as those that have already been referred to the Crown Court or Court of Appeal under section 74 but not decided before the commencement of the Sentencing Code. This is contrary to the core concept of the clean sweep which is to remove such provisions as far as is possible, and make them as transparent as possible otherwise.

4.50 Secondly, such an approach would be significantly at odds with the rest of the commencement of the Sentencing Code and this could cause confusion and error. If the re-drafted versions of the section 74 review mechanism were extended to all cases, while the Sentencing Code would provide the procedure by which such sentences were reviewed, the rest of the Sentencing Code would not apply if the conviction was before the commencement of the Sentencing Code.[142] Accordingly in such cases courts would still need to make recourse to the pre-Sentencing Code law but while this is apparent from a careful reading of clause 2 it would however seem likely that a court applying the Sentencing Code may simply assume that the Sentencing Code will apply for all purposes, particularly when this is so in all other cases.

4.51 Thirdly, even where no error is made as to the scope of the Sentencing Code, this requires the courts to have reference to both the Sentencing Code, and the old law – creating more documents that need to be referred to, and complicating, rather than simplifying, the sentencing hearing.

4.52 We concluded, accordingly, that in this case the over-arching purpose of the Sentencing Code, to improve legal certainty, would not be best served by extending the re-drafted section 74 provisions to all cases. This means that in those very rare cases where section 74 reviews apply to existing sentences years after their imposition, the courts will have to continue to have recourse to the old law. While this does extend the potential transition period between the old law and the Sentencing Code – the cases in which such discounts are given almost invariably involve significant periods of imprisonment – it is considered that as their prevalence is so rare the advantages that would be gained

[142] For the reasons explained above at para 4.22, it would not be feasible or desirable for the entire Sentencing Code to apply to all previous sentences.

in bringing them into the Sentencing Code simply would not outweigh the potential risk for error.

Re-sentencing community based sentences

4.53 There are a number of powers to re-sentence community-based sentences. The powers to re-sentence community orders are broadly illustrative of the courts' powers in other circumstances and provide a good example of some of the problems involved with re-sentencing.

4.54 The power to re-sentence arises in relation to community orders: upon a failure to comply with community requirements; on conviction of a new offence; where the offender refuses to express willingness to comply with the amendment of certain requirements; or an application is made by the offender or a probation officer for the order to be revoked.[143]

4.55 Powers to re-sentence are often accompanied by powers simply to revoke the sentence, activate the sentence, extend the supervision or operational period, fine the offender, or amend the community requirements of the order. Most commonly the powers are accompanied by a power to amend the community requirements or fine.

4.56 In all cases when the court merely amends a community order, the court can impose those requirements "which the [court] could impose if it were then making the order". The powers as to re-sentencing under the current law are, however, slightly more complicated.

4.57 In some situations the court has the power to:

> "deal with [the offender] for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made."

In others the court may:

> "deal with [the offender], for the offence in respect of which the [order was imposed], in any way in which it could deal with him if he had just been convicted by or before the court of the offence."

The first re-sentencing power restricts the courts to the law in force at the time of the original sentencing, requiring them to make reference to the historic legislation, the second gives them the powers they would have now if the offender was just convicted before them.

Situation	Power of Magistrates' Court	Power of Crown Court
Failure to comply	Any way in which the court could deal with him **if he had just been convicted** before the court	Any way in which the offender **could have been dealt with** by the court which made the order

[143] Respectively, Criminal Justice Act 2003, sch 8 paras 9 and 10; sch 8 paras 21 and 23; sch 8 para 17 and s 211; and sch 8 paras 13 and 14.

Application	Any way in which the court could deal with him **if he had just been convicted** before the court	Any way in which the offender **could have been dealt** with by the court which made the order
Conviction for new offence	Any way in which the offender **could have been dealt with** by the court which made the order	Any way in which the offender **could have been dealt with** by the court which made the order
Failure to express willingness to comply	Any way in which the offender **could have been dealt with** by the court which made the order	Any way in which the offender **could have been dealt with** by the court which made the order

4.58 Under the current law in practice the disparity between these two powers is not as significant as the provisions imply at first reading because of the way in which legislative provisions relating to sentencing, and in particular changes to community requirements, are often commenced. Newly introduced disposals are frequently only available for offences committed after a specified date. A new disposal introduced after the original sentencing exercise, but commenced in this manner, would not have been available for the court at the time they made the order, but similarly would still not be available even if the offender had been convicted after its commencement.

4.59 The clean sweep will however remove these transitional provisions and apply the Sentencing Code law to all cases where the offender is convicted after commencement. With the introduction of the clean sweep, therefore these disparities have a significant impact.

4.60 Where the offender is convicted after the commencement of the Sentencing Code, these disparities in re-sentencing powers will have been removed so that the courts always have recourse to any newly introduced sentencing options. Special pre-consolidation amendments will be made to the law so that in all re-sentencing cases identified above, the courts have the power to deal with the offender in any way in which the court which made the order could now deal with the offender for the offence. This will ensure that for all offenders convicted after the commencement of the Sentencing Code the courts will always have recourse to the Sentencing Code law.[144]

4.61 The potential issue arises in relation to offenders convicted before the commencement of the Sentencing Code, who come back before the court having breached their community sentence after the Sentencing Code has been commenced. The question in policy terms is whether it is more desirable that the re-sentencing of disposals imposed under the old law should be conducted under the Sentencing Code or under the old law. The nature of the current re-sentencing powers is such that, as they stand in some situations, the courts will be sentencing under the law applicable at the date of sentence, and in others, because they are given the powers to sentence as if the offender had just been convicted, they will be re-sentencing under the Sentencing Code. This is clearly not desirable.

[144] Discussed in more detail below at para 7.13.

4.62 As noted at paragraph 4.33 above our initial preference was that as many cases as possible should be dealt with under the Sentencing Code and the re-sentencing of community orders – as the imposition of an entirely new sentence which requires no continuity with the law prior to the commencement of the Sentencing Code – would seem to be the ideal non-problematic example of where other cases could be brought into the Sentencing Code.

4.63 Further reflection has however led us to re-consider this view.

4.64 For the reasons explained at paragraph 4.22 above, a judge who was merely amending a community sentence, or summoning the offender to be returned to the court to be dealt with for a breach of the sentence, would in all situations need to continue to apply the powers under the pre-Sentencing Code law. To attempt to apply the Sentencing Code to previously imposed sentences would have significant negative practical consequences. The question of whether or not the Sentencing Code should extend to cases beyond those where the conviction occurs on or after commencement therefore arises predominantly in relation to breach hearings in respect of community orders.

4.65 We consider that applying the Sentencing Code to such cases would cause additional confusion surrounding the Sentencing Code's commencement and application. The Sentencing Code's overarching purpose is to provide much needed certainty to the law on sentencing and to reduce error. It is this policy that underlies the repeal of historic sentencing regimes by the clean sweep. Extending the Sentencing Code's application (and therefore the clean sweep) further, for example to cases of re-sentencing following a breach of an order, has the potential to cause additional confusion. If it does, it should only be undertaken if additional benefits in terms of certainty of the law outweigh these risks.

4.66 We do not consider that such benefits arise here.

4.67 The amendment of a community order and the revocation of a community order (and subsequent re-sentencing) can be distinguished. The amendment of a community order is the amendment of an existing sentence, and therefore, in line with our conclusion at paragraph 3.22 above, not a matter for the Sentencing Code. Resentencing is a fresh sentencing exercise and therefore potentially a matter for the Sentencing Code. We consider that the way that such matters are dealt with in practice leads to the conclusion that extending the Sentencing Code to re-sentencing exercises (where the original conviction occurred prior to commencement of the Sentencing Code) brings with it more difficulties than benefits.

4.68 To extend the commencement of the Sentencing Code to resentencing hearings involving convictions imposed pre-Sentencing Code would require courts to make reference to multiple legal regimes simultaneously. Where a community order was imposed for a pre-Sentencing Code conviction, and where that order was breached post-commencement of the Sentencing Code, the court would have to look to the pre-Sentencing Code law, to determine its powers of amendment and the Sentencing Code to determine its re-sentencing powers, before it could decide how to deal with the offender. This additional practical difficulty creates a risk of confusion and error.

Example 4: A community order was imposed on 1 September 2018 for an offender convicted on 1 August 2018. The Sentencing Code is commenced on 1 January 2019 and on 1 February 2020, by a new statute, a number of changes are made to the available community requirements – certain requirements are repealed and amended and new ones are commenced. The offender is brought back before the court for breaching their community order on 1 June 2020. The offender's community order contains a requirement that has now been repealed.

The court must have recourse to the pre-Sentencing Code law (Schedule 8 to the Criminal Justice Act 2003) to ascertain its powers to deal with the breach of the order. It has the power to either: amend the order under the old law; re-sentence the offender under the Sentencing Code; or fine the offender for their breach.

To make a decision as to which course of action is appropriate for the case the court will need to understand both options under the old law and the Sentencing Code. It will also need to have a clear understanding of the differences between the two regimes, and ensure that it does not attempt to amend the order to contain a requirement that is only available under the Sentencing Code, or re-sentence the order to include a requirement that is now repealed under the Sentencing Code. The difficulty is that in practice the distinction between amending an existing community order and simply re-sentencing is heavily blurred. Courts rarely note whether they are exercising their power to re-sentence or amend, simply relying on the fact that they have the power to make the changes they wish to under one of them.

4.69 We consider that this is an entirely unsatisfactory position as neither the court nor the offender can be expected to proceed with such a lack of certainty. There is a significant risk of error here if the Sentencing Code was applicable to such a situation. For example, the risk that an order will be amended to include a new disposal, or re-sentenced and the new order include a requirement that is unavailable under the Sentencing Code – would seem to be too great. There is also the risk that orders will frequently be re-sentenced even where there is a high level of successful compliance with an order to allow the courts to impose newly available requirements.

4.70 We note that as of September 2016 there were only 123,598 offenders serving suspended sentences or community orders (those orders that make up the majority of these cases) with 75,680 serving community orders and 47,918 serving suspended sentences.[145] In the context of the 1.2 million sentencing hearings heard by the courts each year[146] the enforcement hearings for such orders are estimated to make up less than 2% of cases annually. Further, this issue is a short term transitional one since in almost all cases a suspended sentence and community order can only be active for 2 years and three years from imposition respectively.[147] After three years there will be

[145] Ministry of Justice "Offender Management Statistics Quarterly: July to September 2016" (26 January 2017) table 4.7.

[146] Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q5.1A.

[147] Criminal Justice Act 2003, s 177 and 189.

almost no pre-Sentencing Code community orders and suspended sentences still in force.[148]

4.71 We believe that in this case our desire to bring as many cases into the Sentencing Code as possible needs to be tempered by the recognition of the need for the brightest possible line between the Sentencing Code and the old law, and the additional certainty that such a bright line creates. The risk of creating confusion is simply too great in comparison to the benefits that it achieves in bringing a small class of cases into the Sentencing Code.

AS IF THE OFFENDER HAD JUST BEEN CONVICTED

4.72 Provisions that provide the court with the power to sentence an offender "as if they had just been convicted" do not only arise in the context of re-sentencing community-based sentences.

4.73 Section 71(2)(b) of the Proceeds of Crime Act 2002 provides that where a defendant is committed to the Crown Court under section 70 of that Act, with a view to a confiscation order being considered, that when sentencing an offender the said Crown Court can deal with the defendant "in any way in which it could deal with him if he had just been convicted of the offence on indictment before it."

4.74 Similarly under section 5 of the Powers of Criminal Courts (Sentencing) Act 2000 where an offender is committed by a magistrates' court for sentence under sections 3, 3A or 4 of that Act the Crown Court may deal with the offender "in any way in which it could deal with him if he had just been convicted of the offence on indictment before the court".

4.75 The effect of these provisions without any amendment to the normal operation of clause 2 or a pre-consolidation amendment to the old law would be for an offender who was convicted before the commencement of the Sentencing Code to be treated as if they had been convicted after it, and thus be sentenced under it.

4.76 We consider that such a result is likely to cause errors, as there is a risk that judges will either not realise that they have been brought into the Sentencing Code by such provisions, having been trained only to have reference to the date of conviction, or lead to judges incorrectly applying the Sentencing Code (believing it to always apply on re-sentence or committal for example) when they ought not to. It would also require the courts to have simultaneous reference to two distinct bodies of law, having ascertained their powers to sentence under the old law, and then being directed to the Sentencing Code to re-ascertain their actual sentencing powers.

4.77 Accordingly, subsections (2) and (3) of clause 2 provide that where, by virtue of any enactment, a person is to be dealt with after the commencement of the Sentencing Code as if they had just been convicted (when in fact they were convicted before the commencement of the Sentencing Code), the old law is to be applied, as it stood immediately before its repeal by the Sentencing Code.

---

[148] The only orders which might continue to exist are those community orders imposing an unpaid work requirement: Criminal Justice Act 2003, s 200(3) – such orders remain in force until the offender has completed the work required to be performed.

CONCLUSIONS

4.78 The Sentencing Code will therefore be commenced so that it, and the clean sweep, apply to all convictions (and other relevant findings) that take place after its commencement, without exception. These findings provide a certain point in time from which users of the Sentencing Code can easily ascertain its applicability, and provide a bright and clear line between the old law and the Sentencing Code.

4.79 The Sentencing Code will not apply to existing sentences or cases in which the conviction predates the commencement of the Sentencing Code but sentence has not yet been imposed. This inevitably means that there will be a transition between the old-law and the Sentencing Code. In the vast majority of the cases, where judges are sentencing offenders on conviction, this transition window will be only a few weeks, the average waiting time for a committal for sentence[149] currently standing at 5.7 weeks.[150]

4.80 In those rare cases where previously imposed sentences return to court, the transition window will be slightly longer. The Sentencing Code does not deal with enforcement proceedings and accordingly would only affect appeals, reviews of sentence and the enforcement of community orders and suspended sentence orders. Breach hearings for community orders and suspended sentence orders are the most frequent such hearing and, as noted above, almost all such sentences will cease to be in force within three years.[151] It is estimated that such cases comprise at most 2% of sentencing hearings annually, and they will become increasingly rare over the three year period in which they may generally be in force.[152] While exceptionally cases may return to the courts after three years – because of an out of time appeal, or a section 74 review of sentence under the Serious Organised Crime and Police Act 2005 – such occasions will be very rare, and it is considered for the reasons expounded upon above that it would not be desirable to attempt to accommodate them within the Sentencing Code.

---

149 Where the magistrates' courts believe that its powers to sentence are insufficient to reflect the seriousness of the offence, or where the offender is being dealt with in the Crown Court in respect of other offences, the magistrates' court can transfer a person's case to be sentenced in the Crown Court using their powers in sections 3 to 4 of the Powers of Criminal Courts (Sentencing) Act 2000. In doing so it must either commit the offender to custody or place them on bail, and the process is called committal for sentence.

150 Ministry of Justice, *Criminal Court Statistics: October to December 2016* (30 March 2017), table C8.

151 The longest period for which a community order may be in force, unless it imposes an unpaid work requirement that has not been complied with, is three years: Criminal Justice Act 2003, ss 177(5)-(5B) and 200(3). The longest period for which a suspended sentence order may be in force is two years: Criminal Justice Act 2003, s 189(3).

152 Estimates derived from the data available on the number of community orders and suspended sentence orders terminated early due to a failure to comply with community requirements or the conviction of a further offence and the annual number of sentencing hearings each year.

Chapter 5: General Provisions

5.1 Part 3 of the Sentencing Code deals with procedure. Part 4 of the Sentencing Code deals with those general sentencing provisions that are of universal application to the exercise of discretion in the sentencing exercise: the purposes of sentencing; the application of sentencing guidelines; information to be taken into account; determining the seriousness of the offence.

STATUTORY SURCHARGE

5.2 Under section 161A of the Criminal Justice Act 2003, the court is required to impose the "statutory surcharge" when dealing with a person for an offence when certain criteria are met, unless it also imposes a compensation order and considers that the offender has insufficient means. Whether or not the surcharge applies depends on when the offence was committed, and what sentence is imposed.

5.3 The value of the order to be imposed is not decided by the sentencing court, but is instead fixed by a statutory instrument.[153] The values vary depending on the severity of the principal sentencing disposal imposed, and when the offence was committed. This is a post-sentence administrative matter, meaning that the applicable surcharge is neither calculated by the judge, nor during the sentencing hearing. The court is, however, required to make at least some declaration that the surcharge applies.

5.4 Following a number of erroneously imposed surcharge orders, the Court of Appeal has endorsed the approach of making a declaration in the following terms: *"If the surcharge applies to this case, the order can be drawn up accordingly in the appropriate amount"*.[154] Failure to impose the surcharge, or imposing it with the incorrect amount specified, can often only be rectified within the 56 day slip rule window.[155] The Court of Appeal will often not be able to rectify the omission of the surcharge declaration because this will produce more severe punishment on appeal than imposed below.[156]

5.5 The judicial duty to make a declaration that the surcharge applies leads to unnecessary errors, with either no surcharge imposed, a surcharge imposed in the wrong amount, or the surcharge imposed when there is no power to do so. We therefore propose that the imposition of the surcharge should be an automatic consequence of conviction. The amount payable would be determined as an administrative matter post-sentencing.

5.6 However, provision in section 161A(3) allows the court a discretion to reduce the surcharge amount according to the offender's available means and in order to prioritise the payment of other financial orders, notably compensation payment. Our proposed

---

153 Amount specified by order by the Secretary of State by virtue of CJA 2003, s 161B(1); SI 2016 No 389 as amended.

154 D Ormerod and D Perry, *Blackstone's Criminal Practice 2017*, para E15.26.

155 *R v Bailey* [2014] 1 Cr App r (S) 376.

156 This is because the addition of or increase to the surcharge would produce an appeal at which the offender is subjected to more severe treatment than at first instance: *R v Stone* [2013] EWCA Crim 723.

solution must therefore accommodate the existing judicial discretion for cases in which the offender's means are insufficient to satisfy both compensation and the surcharge. We propose that the court should have a power to make an order reducing the surcharge amount as appropriate in such cases, but that where the court makes no order, the default surcharge amount is payable.

Consultation Question 12.

Do consultees support our conclusion that the statutory surcharge should be an automatically imposed consequence of conviction? There would be no need for the court to make any reference to the surcharge, save for in those cases where the offender had limited means to satisfy other financial orders.

INTERACTION BETWEEN GENERAL PROVISIONS AND MANDATORY SENTENCE PROVISIONS

5.7 The provisions in this Part are a restatement of the present law subject to a very limited number of changes –- the most significant, and overarching, change that has been made in this Part concerns the application of general principles to mandatory sentence provisions. Under the present law, there are several general provisions in sentencing legislation that are disapplied, or modified, for cases where a mandatory sentence "falls to be imposed". Whenever this is the case, such as in section 142 or 150 of the Criminal Justice Act 2003, the list of such mandatory sentence provisions is set out in full.

5.8 The Sentencing Code replaces the need to re-iterate this list by adopting a new definition. A "mandatory sentence requirement" is defined in clause 273 and a mandatory sentence requirement applies whenever any mandatory sentence falls to be imposed. Wherever the old list appeared in the law it has been replaced with a reference to cases in which a mandatory sentence requirement applies. This approach saves listing in each place all the provisions under which a mandatory sentence falls to be imposed, and helps mitigate the risk that a consequential amendment is missed for such a list if a new mandatory sentence is added. It also avoids the need to define when a sentence "falls to be imposed" – see section 305(4) of the Criminal Justice Act 2003.

5.9 More innovatively, this approach also provides a legislative definition of mandatory sentence, for the first time, and creates a single definitive list to which reference can be made in ascertaining whether a mandatory sentence requirement applies. This ought to reduce the risk of the court omitting to impose a sentence where required. Under the current law the terms "mandatory sentence", "minimum sentence", "required sentence" and "prescribed sentence" are frequently used in both the legislation and case-law without any accompanying statutory definition.

Consultation Question 13.

Do consultees think that the introduction of a definition of mandatory sentence requirements in place of individual lists of such provisions is helpful?

5.10 There was some debate about whether sentences under section 236A of the Criminal Justice Act 2003 – special custodial sentences for offenders of particular concern – ought to be included in this list. We considered that they ought to be on the basis that:

(1) the provision entirely removes judicial discretion as to the nature of the order that must be imposed, even if discretion is retained in respect of the length of the custodial term; and

(2) there is no "escape clause" allowing the court to not impose the sentence because of particular, or exceptional, circumstances.

5.11 Under the current law, however, these sentences are not included in the various lists of mandatory sentences disapplying, or modifying the application of, general sentencing provisions.[157] Consultation with the Ministry of Justice revealed that they did not consider a sentence under section 236A of the Criminal Justice Act 2003 to be a mandatory sentence on the grounds that it was designed so that the judge could, relying on section 166 of the Criminal Justice Act 2003, mitigate the sentence down to a community order if it would otherwise be disproportionate. This is a significant escape clause, the scope of which means that the order cannot properly be considered to be mandatory.

Consultation Question 14.

Do consultees consider that the proposed definition of mandatory sentence requirements is correct? Do they consider that special custodial sentences for offenders of particular concern under section 236A of the Criminal Justice Act 2003 should be included?

The different types of mandatory sentence requirement

5.12 The sentences included in clause 274 represent different types of mandatory sentence, involving varying degrees of discretion and imposing different duties upon the court. It is therefore desirable to differentiate between the various types of mandatory sentence requirement. We have distinguished between those sentences "fixed by law", "required life sentences", requiring the court to impose a particular sentence type, and "mandatory minimum sentences", requiring the imposition of a particular sentence of at least a particular length. The clause leaves open the possibility to add additional mandatory sentences to any of the three categories above, or to create a new mandatory sentence

[157] See for example Criminal Justice Act 2003, ss 142 or 153.

(and with it a new category) taking on a different form than that identified in the three categories above.

5.13 We consider, however, that the continued use of the term "fixed by law" in the legislation is unhelpful: it contributes to confusion and is particularly inaccessible to the public and non-legal professionals. We note in particular that there is currently no statutory definition of the phrase. Other mandatory sentences, such as automatic life sentences for second listed offences under section 224A of the Criminal Justice Act 2003, are required to state explicitly that an offence to which they apply is not to be regarded as an offence for which the sentence is fixed by law.[158]

5.14 We believe that since the abolition of the mandatory death penalty for treason by section 36 of the Crime and Disorder Act 1998 the only offence for which the sentence is "fixed by law" is that of murder. We note however that other offences, like an offence of genocide involving murder contrary to section 51 of the International Criminal Court Act 2001, could potentially be considered offences for which the sentence is "fixed by law" as they are subject to the mandatory life sentence for murder. We believe that they are not offences for which the sentence is "fixed by law" but rather offences that are deemed to be offences of murder for the purposes of punishment – see section 53(5) of the International Criminal Court Act 2001 – and that, accordingly, it is still accurate to describe murder as the only offence for which the sentence is "fixed by law".

5.15 We consider that if the only offence for which the sentence is "fixed by law" is murder then, the term "fixed by law" currently only encompasses the mandatory life sentences for murder.[159] Therefore, we provisionally propose that this term should be replaced by a term that describes the order more accurately, namely "the mandatory life sentence for an offence of murder" (or something similar). While the term "fixed by law" potentially allows for the category of offences where the "sentence is fixed by law" to be easily extended, if the MoJ decides for policy reasons that this is required, such a sentence would require primary legislation in any case and our proposed alternative would not in any way restrict Parliament's ability to introduce such a sentence.

Consultation Question 15.

Do consultees agree that the only offence for which the sentence is "fixed by law" is murder? If so, how would they describe offences like those under section 51 of the International Criminal Court Act 2001?

158 Criminal Justice Act 2003, s 224A(11).

159 While the term mandatory life sentence for murder is frequently used there are in fact three different types of life sentence that can be imposed, depending on the age of the offender. See Powers of Criminal Courts (Sentencing) Act 2000, ss 90 and 93, and Murder (Abolition of Death Penalty) Act 1965, s 1.

Consultation Question 16.

If consultees agree that the only offence for which the sentence is "fixed by law" is murder, do they agree that the term "fixed by law" should be replaced with a description of the order, namely "the mandatory life sentence for an offence of murder" (or something similar)?

The purposes of sentencing

5.16 Chapter 1 of Part 4 deals with the general purposes of sentencing, most notably reproducing section 142 of the Criminal Justice Act 2003, which sets out the purposes of sentencing for adults.

5.17 Under the current law, courts are obliged to disapply section 142 where a mandatory sentence requirement applies. This requirement is currently absolute. The purposes of sentencing do not apply at all in relation to an offence to which mandatory sentence requirements apply. We consider it would accord more fully with practice and principle to go further, and to change the law so that the general principles of sentencing currently found in the Criminal Justice Act 2003 continue to apply, "subject to" the need to impose mandatory sentence requirements.

5.18 For instance, section 153 of the Criminal Justice Act 2003 (the length of discretionary custodial sentences should be kept to the minimum possible) applies "subject to" minimum sentence provisions. Where a court has to determine the appropriate sentence for an offence to which a minimum sentence applies, the court must first calculate the appropriate custodial term by reference to offence seriousness and secondly ensure that the minimum sentence provisions are applied.[160]

5.19 On this view, the minimum sentence provisions operate as a 'backstop' to prevent sentences lower than a certain level being imposed in a particular class of case. They do not operate as mandatory sentences requiring the imposition of a particular sentence length. Accordingly, it is necessary that the general sentencing regime operates to require sentencers to determine the appropriate sentence in the absence of the minimum sentence provision. This is done, as the sentencing regime requires, by reference to offence seriousness. Without such an approach, a court has no articulated principles by which to determine sentence length and, accordingly, the current approach would technically permit a sentence of any length so long as it met or exceeded the required minimum: dis-applying the provision creates a 'vacuum' in which the court has no guiding principles on which to base its determination of sentence.

[160] *R v Silvera* [2013] EWCA Crim 1764.

Consultation Question 17.

Do consultees agree that section 142 of the Criminal Justice Act 2003 (the purposes of sentencing) should be amended so that it applies "subject to" mandatory sentencing requirements, rather than being completely disapplied in such cases?

5.20 This Chapter also introduces clause 55, which is not the product of consolidation, and merely provides the court with a signpost as to the overarching aim of the youth justice system, and the general considerations that any court must have regard to when dealing with a child or young person. Both of these provisions apply broadly and beyond the field of sentencing and therefore we propose to signpost them rather than move them into the Sentencing Code. These provisions attempt to clarify the considerations to which the court must have regard when sentencing youths until the commencement of section 142A of the Criminal Justice Act 2003.

5.21 Section 142A of the Criminal Justice Act 2003 which provides a formal list of purposes of sentencing for offenders under 18 has never been commenced and accordingly will be re-drafted in a schedule to the Sentencing Code specifically drafted to house those schedules which are yet to be brought into force. When the re-drafted section 142A is commenced it will replace this clause: section 142A contains similar signposts as well as providing a formal list of the purposes of youth sentencing.

Consultation Question 18.

Do consultees consider that the signposts provided by clause 55 (the purposes of sentencing in relation youths) are a useful addition?

SENTENCING GUIDELINES

5.22 Since the creation of the Sentencing Council in 2010, in the period up to 1 June 2017, the Sentencing Council has published 15 Definitive Sentencing Guidelines, covering both specific offences and overarching sentencing issues.[161] By 2020, the Sentencing Council anticipates that sentencing guidelines will cover nearly all the major criminal offences[162] and there is now clear instruction from the Court of Appeal that when a relevant guideline is available counsel should no longer attempt to cite similar cases and should make reference solely to the guidelines.[163] Sentencing guidelines are now clearly embedded in our criminal justice system and have provided important consistency, certainty and transparency to the process. As noted at paragraph 2.100 above, the Sentencing Code will not replace or interfere with sentencing guidelines, or

---

161 See for recent examples, Sentencing Council, *Dangerous Dog Offences: Definitive Guideline* (1 July 2016) and Sentencing Council, *Reduction in Sentence for a Guilty Plea*: *Definitive Guideline* (1 June 2017).

162 Justice Committee, *Oral Evidence: The work of the Sentencing Council* (HC 820, 1 March 2016) q12.

163 *R v Thelwall* [2016] EWCA Crim 1755.

the remit or work of the Sentencing Council. Definitive guidelines will continue to form part of the necessary documents to which a sentencing judge must have reference at every sentencing hearing.

5.23 Chapter 2 of Part 4 deals with the courts' duties in relation to sentencing guidelines. The Sentencing Code has only included those clauses that affect courts exercising functions relating to sentencing. Those provisions relating to the establishment and functions of the Sentencing Council, as administrative provisions akin to those establishing the courts generally, have been left in the Coroners and Justice Act 2009.

Consultation Question 19.

Do consultees agree with our decision to leave out of the Sentencing Code those provisions relating to the establishment and role of the Sentencing Council?

5.24 The courts' duties with regard to sentencing guidelines were changed by section 125 of the Coroners and Justice Act 2009 to a duty to "follow" any relevant sentencing guidelines. This replaces the duty under section 172 of the Criminal Justice Act 2003 to "have regard to" any relevant sentencing guidelines, but only for offences committed on or after 6 April 2010. The clean sweep will ensure that, in all cases sentenced under the Sentencing Code, the courts have a duty to "follow" the guidelines, rather than merely "have regard to" them.

5.25 Changes have been made as are necessary for the clarification of the law, and to remove errors in the existing legislation.

5.26 For example, section 125(3) of the Coroners and Justice Act 2009 makes reference to the "sentencing starting point" in relation to the starting points identified in the categories in the guideline. Section 125(4) also refers to the "appropriate starting point" to describe the scenario where the court has determined that no category accurately describes the offence in question and therefore the court has to determine the starting point without assistance. In the recent case of *R v Bush*,[164] the Vice President of the Court of Appeal (Criminal Division) Hallett LJ noted the potential confusion arising from the use of the term "starting point" in relation to the guidelines, with it being used to describe the figure determined by Step 2 of the guideline as well as the figure after account had been taken of aggravating and mitigating features. The draft Sentencing Code therefore makes changes in an attempt to clarify the meanings of such terms and avoid such confusion by using the terms "guideline starting point" and "non-category starting point".

[164] [2017] EWCA Crim 137; [2017] 1 Cr App R (S) 49.

Consultation Question 20.

Do consultees agree that the phrases "guideline category starting point" and "non-category starting point" provide greater clarity than the references to the "sentencing starting point" and "appropriate starting point" contained in section 125 of the Coroners and Justice Act 2009?

5.27 Section 126 of the Coroners and Justice Act 2009 (determination of tariffs etc) applies where the "notional determinate term" is to be decided for the purposes of making a minimum term order under section 82A of the Powers of Criminal Courts Sentencing Act 2000 (life sentences) and for the appropriate custodial term for an extended sentence under sections 226A and 226B of the Criminal Justice Act 2003. As re-drafted in clause 58, a pre-consolidation amendment has been made here to apply this clause also to situations in which the court is determining the notional determinate term for the offence for the purpose of deciding whether section 224A of the Criminal Justice Act 2003 (mandatory life for second listed offence) applies.

5.28 The phrase "notional determinate sentence" has also been changed to "appropriate custodial term" for the purposes of extended sentences. Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and section 224A of the Criminal Justice Act 2003 require the court to imagine the term that they would have passed if they were not going to be passing a life sentence, and "notional determinate term" is therefore appropriate. Sections 226A(6) and 226B(4) of the Criminal Justice Act 2003, however, relate to the courts' determination of the actual custodial term that is to be imposed as part of an extended sentence; there is no determination of a hypothetical "notional determinate term". The phrase "notional determinate term" has therefore been replaced in clause 58 with the phrase "appropriate custodial term" (the language used in those sections). We consider this reflects more effectively and accurately the required determination.

Consultation Question 21.

Do consultees agree with the proposed replacement of the phrase "notional determinate term" with the term "appropriate custodial term" in clause 58?

FORMING OPINIONS

5.29 Chapter 3 of Part 4 deals with the information to be taken into account by a court in forming certain opinions. It reproduces section 156(1) of the Criminal Justice Act 2003 – splitting the duty to obtain and consider pre-sentence reports from the duty to take into account all such information as is available to it about the offence and its circumstances.

5.30 Section 156(1) has been redrafted fairly significantly. Instead of simply including a list of the situations in which it applies in clause 28, as is the current approach, the clause

provides that it applies where a provision states that it does. The result of this is that signposts to the duty now appear in all the provisions where a qualifying opinion must be made – see subsection (6) of clause 159. It is thought that this will make it easier for the courts to identify where the duty applies, and ensure that it is not overlooked.

Consultation Question 22.

Do consultees consider that the replacement of the list of provisions in section 156(1) of the Criminal Justice Act 2003 (duties when forming specific opinions), with signposts to the duty in all the qualifying provisions is helpful?

SERIOUSNESS AND DETERMINING SENTENCE

5.31 Chapter 3 of Part 4 deals with those provisions that govern the court's assessment of the seriousness of the offence and the determination of sentence, in particular those provisions relating to mandatory aggravating factors and reductions in sentence.

Generally

5.32 Clause 60 is not the product of consolidation and is entirely created by the Sentencing Code. The clause clarifies that the following Chapter applies only where a court is considering the seriousness of an offence for the purposes of sentencing, not in other contexts. It is an attempt to streamline the existing provisions and ensure uniform expression throughout the Chapter.

Aggravating factors

5.33 Most statutory provisions relating to the mandatory consideration of certain aggravating factors have been consolidated under this sub-heading. In some circumstances, courts are required to treat particular factors as aggravating the seriousness of offences. As such provisions fall within the category of provisions that a sentencing court needs to be aware of, we initially considered that these should all be brought into the Sentencing Code.

5.34 However, there was some debate as to whether section 29(11) of the Violent Crime Reduction Act 2006 (the use of a person under 18 to look after, hide or transport a weapon) and section 4A of the Misuse of Drugs Act 1971 (supplying controlled drugs within the vicinity of a school or using a courier under the age of 18) should be signposted or included within the Sentencing Code. The arguments put forward for signposting them, rather than including them, were:

(1) that they are offence-specific provisions rather than general sentencing provisions; and

(2) that the effect on the statute book as a whole of moving them would be negative because the elements of the provisions that operate in relation to Scotland and Northern Ireland would have to continue to exist in the Violent Crime Reduction Act 2006 and the Misuse of Drugs Act 1971.

5.35 We accept that, as both provisions relate only to single offences, there is some logic in keeping such provisions next to the offence-creating provisions. However, we consider that, on balance, it is preferable to restate the provisions in the Sentencing Code as they are also provisions that create specific statutory duties during the sentencing process. We consider that users of the Sentencing Code would expect to find them in the Sentencing Code, not with the offence-creating legislation. We believe this is especially true in view of the inclusion of mandatory minimum provisions in the Sentencing Code. An incomplete statement of mandatory sentencing provisions in the Sentencing Code would be no improvement on the current state of the law and would also run contrary to the aim of consolidation. The benefits of a comprehensive list of mandatory sentencing provisions, namely clarity and certainty, in our opinion outweigh the reasons in support of leaving the provisions in the current locations. As currently drafted, aggravating factors including section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971 have not been brought into the Sentencing Code. However, we are seeking consultees' views on this.

Consultation Question 23.

Do consultees think that the scope of the Sentencing Code should include all mandatory aggravating factors including section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971?

5.36 Many mandatory aggravating factors have only been introduced prospectively, requiring the court to treat factors as aggravating only if the offence was committed after their commencement. The clean sweep clause will operate here so that these factors apply to all cases. This will bring the law in this area in line with the approach that has been adopted by the Court of Appeal in relation to historic sentences in the decisions of *H*[165] and *Forbes,*[166] that offenders should be sentenced by reference to modern sentencing guidelines and practice. We note that while currently certain circumstances do not *need* to be considered as aggravating factors by a court if the offence was committed before their commencement, in practice it has always been open to the courts to do so, and that following *H, Forbes* and the guidelines in most cases they ought to do so already. It is also clear that such a change will not give rise to any Article 7 issues as aggravating factors have no effect on maximum sentences, but simply the decision as to what is the appropriate sentence within that range.

5.37 Finally, we note that under the current law an obligation on the court to treat a factor as aggravating where reasonable to do so is always accompanied by an obligation to say that it has done so except in relation to previous convictions under section 143 of the Criminal Justice Act 2003. We are considering making a pre-consolidation amendment here to bring these into line and extend this duty to section 143 of the Criminal Justice Act 2003.

---

165 [2011] EWCA Crim 2753; [2012] 2 Cr App R (S) 21.

166 [2016] EWCA Crim 1388; [2016] 2 Cr App R (S) 44.

Consultation Question 24.

Do consultees believe that the duty to treat previous convictions or the fact that the offender was on bail at the time of the offence, as aggravating factors under section 143 of the Criminal Justice Act 2003 should be amended, in line with the other duties to treat facts as aggravating factors, to include a duty to state in open court that the court has done so?

Reductions to sentences

5.38 Statutory provisions allowing the court to make reductions to sentence have been consolidated under this sub-heading: notably those relating to reductions for guilty pleas and reductions for assistance to the prosecution/investigation of offences.

5.39 Currently under section 144 of the Criminal Justice Act 2003 where a required minimum sentence applies, the court may impose a sentence less than is required as a result of a reduction in sentence in recognition of a guilty plea – provided that if the offender is aged 18 or over the sentence imposed is not less than 80% of that required by the provision. This does not apply, however, to minimum sentences that fall to be imposed under section 51A(2) of the Firearms Act 1968 (the minimum sentence for certain firearms offences) or section 29(4) or (6) of the Violent Crime Reduction Act 2006 (the minimum sentence in certain cases of using someone to mind a weapon).

5.40 It would be outside the scope of this consolidation to make such a significant, and potentially controversial, change and we have accordingly not made any alteration here. We do, however, consider that it would be desirable in principle if these were aligned so that for all minimum sentences a reduction could be granted for guilty plea provided that the sentence imposed is at least 80% of the minimum sentence required if the offender is aged 18 or over.

Consultation Question 25.

Do consultees think that it would be desirable in principle if section 144 of the Criminal Justice Act 2003 was amended so that a reduction for guilty plea could allow a court to impose a sentence less than that required by either section 51A(2) of the Firearms Act 1968 (the minimum sentence for certain firearms offences) or section 29(4) or (6) of the Violent Crime Reduction Act 2006, provided that the sentence imposed was not less than 80% of the required sentence for an offender where the offender is over 18?

We emphasise that this is not a change that we could make as part of this project but it could form part of a package of recommendations in our final report which go beyond the Sentencing Code as initially enacted.

5.41 Section 73 of the Serious Organised Crime and Police Act 2005 has been significantly recast in an attempt to make it far easier to read. Minor streamlining changes have also been made generally to the language of the clauses in this section to promote

consistency throughout the Sentencing Code and to provide clarity to the law, such as changes from the term “defendant” to “offender”.

5.42 The definition of specified prosecutor for the purposes of section 73 of the Serious Organised Crime and Police Act 2005 reductions is currently contained in section 71 of that Act. We considered whether it would be best to simply apply the definition with modifications in the Sentencing Code but ultimately considered that it would be better to set out the definition in a new clause 69.The effect of this is that users of the Sentencing Code will not have to make reference to provisions outside the Sentencing Code for the definition of specified prosecutor but that any specified prosecutors will need to be designated separately for the purposes of section 71 of the Serious Organised Crime and Police Act 2005 and for the purposes of clause 69. The Attorney General will also have to issue guidance under clause 69 separately from the guidance issued under section 75B of the Act.

5.43 There is a potential risk that the need to designate a prosecutor under both will be missed, but we provisionally consider that this risk can be mitigated by drawing this to the attention of all the relevant bodies. Further the benefits to users of the Sentencing Code in not requiring them to make reference to definitions outside the Sentencing Code outweigh these potential risks.

Consultation Question 26.

Do consultees agree that the benefits of restating the definition of specified prosecutor from section 71 of the Serious Organised Crime and Police Act 2005 outweigh the administrative disadvantages and the risk that a prosecutor is not specified under one of the two versions?

EFFECT OF THE SENTENCING CODE ON OTHER POWERS OF THE COURT IN ASSESSING SERIOUSNESS

5.44 This sub-heading contains a number of ‘avoidance of doubt’ provisions clarifying the continuing existence of the courts’ powers to consider mitigating and aggravating factors.

5.45 Clause 70, while subsuming section 143(5) of the Criminal Justice Act 2003 and section 73(6) of the Serious Organised Crime and Police Act 2005, is largely not the product of consolidation and has mostly been created by the Sentencing Code. The clause acts to clarify that the Sentencing Code does not provide an exhaustive list of the matters that can be taken into account in sentencing.

5.46 Similarly clauses 71 and 72 provide savings for the courts’ common law powers to take into account mental disorders or matters relevant to the mitigation of sentence.

Chapter 6: Financial orders and orders relating to property

6.1 Part 7 of the Sentencing Code deals with general sentencing provisions governing financial orders and other orders relating to property: fines, compensation orders and forfeiture orders.

FINES

6.2 Chapter 1 of Part 7 deals with fines. As with the rest of the Sentencing Code, the intention is not to reproduce provisions governing the penalties which apply to particular offences, these should continue to be found in or adjacent to the offence-creating provision. So, just as provisions setting the maximum prison sentence available for a particular offence remain in the statute which creates the offence, so generally do provisions setting the available fine level.

6.3 What the Sentencing Code does contain is general sentencing provisions which cut across all offences where a fine might be imposed.

6.4 This means, for instance, that section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which removes the £5,000 maximum fine-limit in the magistrates' court, has not been moved into the Sentencing Code, though it is referred to (see for example subsection (3) of clause 84). The Ministry of Justice is already implementing plans to amend offence-creating provisions in primary legislation to reflect this change, in order to improve the clarity and transparency of the law in this area.

6.5 We have reproduced the standard scale for summary offences in the Sentencing Code, at clause 84 as we consider this to be helpful, and the standard scale applies across summary offences.

6.6 We have also decided not to move Part 3 of the Magistrates' Courts Act 1980 (Satisfaction and Enforcement) into the Sentencing Code. There are a number of reasons for this. In general in the drafting of the Sentencing Code we have attempted to avoid disturbing other codes or coherent statutory regimes.[167] The Magistrates' Courts Act 1980 is one such coherent regime, governing as it does the majority of processes in that court, and magistrates' courts are of course very familiar with that Act.

6.7 Furthermore, even if Part 3 were consolidated in the Sentencing Code, courts would continue to refer to the rest of the 1980 Act alongside the Sentencing Code for pre-sentencing powers in any event. The provisions of Part 3 are therefore not 'outliers' and there is no pressing need to bring them into a single Code along with other sentencing provisions.

6.8 Many of the provisions in Part 3 of the 1980 Act deal with the civil jurisdiction of the magistrates' courts as well as their criminal jurisdiction, so could not be reproduced in

[167] See Chapter 2 above.

the Sentencing Code in their entirety. To split those provisions and reproduce the criminal aspects in the Sentencing Code, leaving the civil aspects in the 1980 Act, would not be particularly helpful to the courts and would make it likely that the two sets of provisions would diverge in future. It would not be sensible to lift from Part 3 of the 1980 Act only those provisions that deal exclusively with criminal jurisdiction because they cannot easily be separated from the rest of Part 3.

Consultation Question 27.

We welcome consultees' views on the balance that the draft Sentencing Code strikes by including some general provisions on fines, but generally excluding provisions relating to the fine levels and maximum fines for particular offences.

Consultation Question 28.

Do consultees find the table showing the summary fines levels over time in clause 84 helpful? Could it be improved?

Consultation Question 29.

Do consultees find the new clause 80 which sets out the general power of the magistrates' court to impose fines helpful?

COMPENSATION ORDERS

6.9 Chapter 2 of Part 7 deals with compensation orders. Because compensation orders are generally available disposals, the provisions regarding such orders from the Powers of Criminal Courts (Sentencing) Act 2000 have been re-written into the Sentencing Code.

6.10 There have been some changes to compensation orders since they were introduced, such as clarification that compensation orders are available in respect of bereavement and funeral expenses, in addition to loss and injury. The £5000 maximum limit on compensation orders in the magistrates' court was also removed by the Crime and Courts Act 2013. In accordance with the 'clean sweep' policy, the Sentencing Code applies the modern form of the order to all cases to which the Sentencing Code applies, irrespective of offence date.

6.11 This is in recognition of the fact that compensation orders are not punitive in their purpose[168] and that therefore to impose a compensation order that is greater than the

[168] *R v Dorton* (1987) 9 Cr App R (S) 514.

maximum order that was available at the time is not to impose a greater penalty than the maximum available at the time.

6.12 Some changes have also been made to promote improved consistency, such as the consistent use of the term 'offender' to describe the person who is the subject of the order (the previous law used a variety of terms such as 'offender', 'the person' against whom an order is made and 'the accused').

Consultation Question 30.

Do consultees find the new streamlined compensation order provisions more accessible?

Consultation Question 31.

Do consultees agree that the removal of the limit on compensation orders can safely be retrospectively applied to offences which pre-date its commencement, as an example of the 'clean sweep' in operation, given that the purpose of a compensation order is not punitive in its aims and therefore Article 7 is not engaged.

FORFEITURE AND DEPRIVATION OF PROPERTY

6.13 Chapter 3 of Part 7 deals with forfeiture and deprivation of property.

6.14 This Chapter reproduces those provisions relating to section 143 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides the most commonly used general power to order forfeiture of property following criminal conviction.

6.15 It also provides signposts to many of the other powers of forfeiture which might arise for consideration at the sentencing hearing in clause 113 (namely other forfeiture powers on conviction – those many forfeiture powers which arise under the courts' non-criminal jurisdiction, such as those under the Customs and Excise Management Act 1979, are not signposted).

6.16 Unlike the general forfeiture power in section 143, we have not restated these other powers in the Sentencing Code, but rather simply provided a statutory cross reference to them for ease of reference of sentencing tribunals. This is for a number of reasons:

(1) Many other forfeiture powers form part of another coherent Code or regime governing a particular subject area, and make sense situated in there. As part of our general policy to avoid damaging the coherence of other existing frameworks[169] we have provided a reference to such powers without removing them from their existing statutory homes.

[169] See Chapter 2 above.

(2) Certain forfeiture powers arise only in respect of a particular offence or offence group, and again in such cases the obvious place for the power remains in the statute containing the offence creating provisions, although again a reference can be included.

(3) The list of other forfeiture powers which are signposted in clause 113 is not exhaustive. Although we have sought to provide references to all of the forfeiture powers that we can find which can arise on conviction, we cannot state with absolute confidence that the list is exhaustive. We ask below whether consultees have other suggested candidates for addition to the list. In these circumstances, rather than purporting to re-write all existing conviction forfeiture powers into the Sentencing Code, we have instead simply provided what we hope will prove a helpful non-exhaustive list of other powers.

Consultation Question 32.

Do consultees agree that the table in clause 113 providing a non-exhaustive list of signposts to other conviction forfeiture powers is helpful?

Consultation Question 33.

Can consultees offer other suggestions for inclusion in the table in clause 113?

Chapter 7: Community Orders

7.1 The provisions of the Sentencing Code which provide for the operation and imposition of community orders are largely located in Chapter 2 of Part 9, "Community Sentences". The community requirements which the court may make as part of a community order are described by the material in schedule 3. Provisions which relate to the breach or amendment of a suspended sentence order, and the effect of a further conviction during the operational period of a suspended sentence order, are contained in schedule 4. Transfer of community orders to Northern Ireland and Scotland are dealt with by the material in schedule 5.

7.2 This part of the Sentencing Code is largely a simple reproduction of the existing legislation, although we have also made substantial streamlining and consistency changes throughout as well as restructuring the material. These do not, in most cases, affect the legal effect of the provision. We nevertheless believe that they improve the clarity and accessibility of the law. Where more extensive changes have been made, these are discussed in the following paragraphs.

Consultation Question 34.

Do consultees consider that the material relating to community orders in the draft Sentencing Code has been structured appropriately? Could any improvements be made to the layout of this part?

POWER TO IMPOSE COMMUNITY ORDERS

7.3 Clause 130 provides for cases in which community orders may be imposed. It restates the current position that such orders are only available in a case in which the offender was aged 18 or over at the time of conviction for an offence punishable by imprisonment. It also provides that a community order cannot be imposed alongside a suspended sentence order, or a disposal under the Mental Health Act 1983. Finally, it provides that a community order is not available where the court is required to impose a mandatory sentence. The general prohibition on imposing a community order as well as custody is not a statutory rule.[170] For that reason, it is not included in this part of the Sentencing Code.

7.4 Clause 134 states that a community order may only include requirements which are "available". We have developed the concept of an "available requirement" to ensure that a single version of these provisions is able to accommodate the fact that new community requirements may, from time to time, be piloted in specific areas of the country and for different purposes.

[170] *Fontenau v DPP* [2001] 1 Cr App R (S) 15.

Consultation Question 35.

Do consultees agree that the use of the concept of an "available requirement" has improved the clarity of the law?

7.5 Clause 149 is a new provision that defines the period for which a community order may be described as being "in force". This is relevant for the purposes of establishing whether an offender has breached an active order, and whether requirements remain to be complied with. The section incorporates the various parts of previous provisions which prescribe that, for example, an unpaid work requirement is completed once the full number of hours of work have been performed. The use of "in force" allows for streamlining elsewhere in this part of the Sentencing Code.

COMMUNITY REQUIREMENTS

7.6 Clause 129 sets out the available community order requirements in a new user-friendly tabular format. The table describes the requirements in its first column; directs users to the part of the schedule which makes further provision about those requirements in the second column; directs users towards restrictions on the availability of the requirements (that is to say, general classes of case where the requirements are not available) in the third column; and directs users towards the restrictions and obligations in relation to the imposition of the requirements (for example, matters which the courts must be satisfied of before imposing a particular requirement) in the fourth column. We believe that this table shows the range of requirements in a clearer and more accessible format than the legislation it reproduces.

7.7 In the case of each requirement, the table also includes signposts to the parts of schedule 3 which makes provision for that requirement. It also includes signposts to the parts of the Sentencing Code which impose limitations and qualifications upon the availability of those requirements and which specify the way they must be imposed. This table will provide users with an at-a-glance point of reference for all community order requirements, and acts as an embedded index to the detailed provisions in the Sentencing Code which deal with each requirement.

Consultation Question 36.

Do consultees agree that the use of the table showing the available community requirements is an improvement over the current law?

7.8 The available requirements are contained in schedule 3 and are largely reproduced in the Sentencing Code unchanged. The clean sweep has however affected the availability of certain requirements.[171] For example:

[171] The effect of the clean sweep is discussed in more detail in Chapter 3.

(1) Under the Sentencing Code, a rehabilitation activity requirement is available for all community orders, and the activity requirement is available for none. The clean sweep has extended the repeal of activity requirements by section 15(4) of the Offender Rehabilitation Act 2014 to all cases.

(2) The maximum number of hours in a day for which a curfew could be imposed was increased by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 from 12 hours to 16 hours. This increase does not apply to an offence that was committed before 3rd December 2012. The clean sweep extends this amendment to all cases sentenced under the Sentencing Code: no matter when the offence was committed a curfew may be imposed up to a maximum of 16 hours per day in all cases.

DELIVERY AND ENFORCEMENT

7.9 Clause 142 lists the persons to whom the court must provide copies of the community order and related documents. The table at subsection (3) of additional persons to whom a copy should be provided when particular community order requirements are imposed replicates the table originally in schedule 14 to the Criminal Justice Act 2003. The clean sweep has had an impact here by removing reference to activity requirements and attendance centre requirements. These were previously saved for the purposes of orders made in respect of offences committed before 1 February 2015 but the clean sweep has repealed this saving. The old law also referred to a "relevant order" because it was a provision of wider application, as it also applied to suspended sentences in addition to community orders. The Sentencing Code, has re-drafted schedule 14 separately as it relates to community orders and suspended sentence, and accordingly this clause applies only when the court imposes a community order. Another new feature of the Sentencing Code is the reference to an "offender's home local justice area". It is hoped that this change of drafting provides greater clarity as to the effect of the law.

7.10 Clause 146 requires that an offender subject to a community order may not change residence without permission being given by either the responsible officer or a court. The section has application to community orders which do not include a residence requirement. Previously this section applied only to offences committed on or after 1 February 2015 but the clean sweep has extended its application to all cases. Reference to "relevant order" has been changed to "community order" because this section, unlike the old law, relates only to community orders and is not of general application.

BREACH, REVOCATION AND AMENDMENT

7.11 Clause 147 gives effect to schedule 4 which contains provisions about breach, revocation and amendment of community orders.

7.12 Paragraph 15 of schedule 4 provides the Crown Court's power to revoke a community order and re-sentence an offender in a case where the offender has failed to comply with community requirements. Paragraph 25 provides for the equivalent power where the offender has committed further offences during the term of a community order.

7.13 These powers have been amended in the Sentencing Code to give greater consistency to the court's powers to re-sentence a community order. The equivalent material in

schedule 8 to the Criminal Justice Act 2003 provided for resentencing in cases where an offender fails to comply with requirements and where an offender commits further offences. Schedule 8 contained different versions of each power, for both the magistrates' court and Crown Court – in some cases pointing the court back to the powers they had at the original hearing, in some cases giving the court the powers they would have if the offender had just been convicted. We believe that the new drafting in paragraphs 15 (3) (b) (ii) and 25 (2) (b) (ii) solves this inconsistency; "[the court may]... deal with the offender, for the offence in respect of which the order was made, in any way in which the court which made the order could deal with the offender for the offence if it were now dealing with the offender."

7.14 The purpose of this change is to ensure that where an offender serving a community order is re-sentenced under the Sentencing Code the court will have the powers under the Sentencing Code as it then appears at the time of the resentencing (rather than being limited to the powers they had at the time of the original sentencing hearing). Further, the drafting ensures that when a court is resentencing an offender subject to a community order imposed by the Crown Court on appeal from the magistrates' court that the court is limited to magistrates' court powers (as the Crown Court was at the original sentencing hearing).

7.15 Elsewhere in this schedule, the resentencing powers of the magistrates' court allow the court to deal with the offender "[…]in any way in which it could deal with the offender if the offender had just been convicted by the present court of the offence." This has the same legal effect, providing the magistrates' court with their current sentencing powers (and not those they had at the time of the original hearing).

Example 5: Take as an example an offender convicted on 1 January 2020 after the commencement of the Sentencing Code. The offender is sentenced to a community order on 1 February 2020. On 1 July 2020, a new requirement is introduced by statute and is made available for all offences where the conviction occurs on or after the commencement of the Sentencing Code. The offender subsequently appears before the court as a result of breaching his community order on 1 August 2020. As the new requirement has been commenced for all cases convicted after the commencement of the Sentencing Code, it is available if the court simply wishes to amend the order.

However, some of the re-sentencing powers in the current law only allow the court to deal with the offender "in any way in which the [offender] could have been dealt with for that offence by the court which made the order if the order had not been made", giving the court only the powers it would have had at the original sentencing hearing. As the new requirement was not available at the original sentencing hearing (1 February) the court would therefore not be able to re-sentence him to a community order containing such a requirement. The Sentencing Code amends these powers so that in all cases the requirement is available to the court on re-sentence – while still ensuring that where the court is re-sentencing in a case where the original court was subject to magistrates' courts sentencing limits (such as the six month limit on imprisonment) these limitations still apply.

Consultation Question 37.

Do consultees agree that the streamlining changes to the court's powers to revoke and resentence community orders have improved the consistency and clarity of the law?

TRANSFER TO SCOTLAND AND NORTHERN IRELAND

7.16 Clause 148 gives effect to schedule 5 which makes provision relating to transfer of community orders to Scotland or Northern Ireland. The section replicates the effect of the old law and gives effect to the schedule alongside a description of that schedule's functions. The schedule has been substantially restructured and has increased in length. We believe that the new organisation of these parts has, however, increased the clarity and accessibility of these provisions.

Chapter 8: Suspended Sentence Orders

8.1 The provisions relating to the imposition and enforcement of suspended sentence orders are found in various places within the Sentencing Code. Those provisions providing for their operation and imposition are found in Chapters 3 to 5 of Part 10. The available community requirements that can be imposed as part of a suspended sentence order are contained in schedule 3 and discussed above in chapter 7. Those provisions relating to breach or amendment of a suspended sentence order, and the effect of a further conviction during the operational period of a suspended sentence order, are contained in schedule 10 and those provisions relating to the transfer of a suspended sentence order to Scotland or Northern Ireland in schedule 11.

SUSPENDED SENTENCE ORDERS

8.2 Chapter 5 of Part 10 contains those provisions relating to what constitutes a suspended sentence order; the requirements of a suspended sentence order and the availability of particular community requirements; the provisions for review of a suspended sentence order; those duties relating to the making of a suspended sentence order; and the duties of a responsible officer in relation to a suspended sentence order with community requirements. Clause 192 in Chapter 4, and clause 179 in Chapter 3, provide for the availability of a suspended sentence order in relation to adults over 21 and adults under 21 respectively.

8.3 The part is structured so that the provisions dealing with the availability of suspended sentences sits alongside those provisions relating to the availability of imprisonment and detention in a young offender institution. This is for two reasons. First, because this is consistent with the structure of the rest of the custodial provisions, namely that provisions are grouped by reference to age and then by subject. Secondly, that as the power to impose a suspended sentence order is parasitic on the power to impose imprisonment, the most user-friendly way in which to present the material was to place suspended sentence orders next to imprisonment.

8.4 There is substantial overlap between those provisions relating to community orders and suspended sentence orders. One option we considered was re-drafting the provisions so that the same provisions applied to both community orders and suspended sentence orders. We rejected this option on the basis that it could lead to error. We also concluded that keeping the provisions separate better reflected the different nature of a suspended sentence order. Where provisions are similar however efforts have been made to streamline them so that they operate in the same way for community orders and suspended sentence orders where possible. Finally, those provisions relating to the community requirements themselves have not been duplicated, and are found in schedule 3 in both cases.

Consultation Question 38.

Do consultees believe that the material relating to suspended sentence orders in the Draft Code is appropriately structured? Can they suggest any ways in which it might be improved?

8.5 There has been significant re-structuring of provisions in this Chapter in an effort to increase the clarity and accessibility of the law. Clauses 204 and 205 are largely not the product of consolidation and are substantially created by the Sentencing Code. These clauses consolidate and clarify when various community requirements are available, in line with the Sentencing Code's general approach. Clause 201, in a manner similar to clause 129 in relation to community orders, has been significantly redrafted into a table providing signposts to where further information is available in relation to a community requirement, the restrictions on availability and the restrictions or obligations in relation to imposing the requirement. Minor streamlining and language changes have also been made throughout Chapter 5.

Consultation Question 39.

Do consultees consider that the table in clause 201 setting out the restrictions and obligations in relation to the imposition and availability of community requirements is helpful?

8.6 Finally, suspended sentence orders are currently not available for offences committed before 4 April 2005 by virtue of transitional provisions. As with community orders, certain community requirements are available, or unavailable, depending on when the offence was committed. The clean sweep will operate so that in all cases where conviction postdates the commencement of the Sentencing Code, suspended sentence orders are available, and the current community requirements can be imposed, irrespective of the date of the commission of the offence.

THE ENFORCEMENT OF SUSPENDED SENTENCE ORDERS

8.7 Schedule 10 contains those provisions relating to the enforcement of imposed suspended sentence orders, including the procedure in relation to the breach of a community requirement, or a conviction of further offence, and the amendment of suspended sentence orders.

8.8 Where provisions in schedule 12 to the Criminal Justice Act 2003 correspond to material in schedule 8 to that Act that has been rearranged in schedule 4; corresponding changes have been made in schedule 10.

8.9 Paragraphs 8 to 12 of schedule 12 to the Criminal Justice Act 2003 have been substantially rearranged in *paragraphs 10 to 21* of schedule 10. The rearrangement aims to provide greater clarity in relation to the powers of the magistrates' courts and Crown Courts where an offender is before them.

Consultation Question 40.

Do consultees believe that the substantial rearrangement of paragraphs 8 to 12 of schedule 12 to the Criminal Justice Act 2003 in paragraphs 10 to 21 of schedule 10 clarifies the powers of the magistrates' courts and Crown Courts where an offender serving a suspended sentence order is before them?

8.10 Various minor linguistic changes have been made throughout this schedule to improve the clarity and accessibility of the law and ensure consistency in the Sentencing Code. This includes the introduction of the term "breach" into the legislation to reflect the practical understanding of a failure to comply with a community requirement. Signposts have also been introduced where it is considered that provisions may otherwise be missed such as the courts' powers to commit for sentence and the criminal courts charge duty.

8.11 The clean sweep will operate in this schedule so that no matter when the offence was committed the same procedure applies to amendments by reason of change of residence. There are only limited powers to re-sentence in relation to a suspended order, and they currently already provide the court with those powers they would have if the offender had just been convicted before them. Accordingly there was no need to make special pre-consolidation amendments such as were made in relation to community orders here (discussed at 7.13 above).

TRANSFERRING A SUSPENDED SENTENCE ORDER TO SCOTLAND OR NORTHERN IRELAND

8.12 Schedule 11 contains those provisions relating to the transfer of a suspended sentence order from England and Wales to Scotland or Northern Ireland.

8.13 The material here has been significantly reordered in an attempt to simplify this schedule. While this reordering has substantially increased the size of the schedule it is considered that the benefits in terms of clarity are significant. At present the legislation applicable to transfers is found in schedule 13 to the Criminal Justice Act; the schedule currently provides for schedule 12 to be read with modifications. In the Sentencing Code, Part 6 of the schedule re-states the relevant parts of schedule 12 to the Criminal Justice Act 2003 with the modifications applied so that the applicable legislation may be read independently. We consider that this is more useful than the existing legislation.

8.14 Further, attempts have been made to avoid repetition where it is not considered useful, see for example, Part 4 of the schedule that largely consolidates provisions that previously existed in both paragraphs 1 to 5 and 6 to 9 of schedule 13 to the Criminal Justice Act 2003.

Consultation Question 41.

Do consultees think that the re-ordering of schedule 13 to the Criminal Justice Act 2003 in schedule 11 improves the clarity and accessibility of the law?

8.15 The acronyms SSSO and NISSO have been adopted for suspended sentence orders that have been transferred to Scotland or Northern Ireland by being made or amended under paragraph 1 or 6 of schedule 13 to the Criminal Justice Act 2003. They are defined in paragraph 1 of schedule 11. It is hoped that these terms have helped to aid the accessibility of the law here.

Consultation Question 42.

Do consultees agree that the introduction of the phrases SSSO and NISSO in schedule 11 is useful?

Chapter 9: Custodial Sentences

9.1 Part 10 of the Sentencing Code deals with provisions governing the imposition of the various custodial sentences that may be available to a sentencing court. As explained above in chapter 2, this Part does not currently include the law governing those types of custodial sentences that are available only for under 18s – namely detention and training orders imposed under sections 100 to 107 of the Powers of Criminal Courts (Sentencing) Act 2000.

9.2 This decision not to include those provisions was made in light of the recent Taylor Review of the youth justice system[172] which made a number of significant recommendations with regard to youth sentencing, including restricting the availability of detention and training orders. Because those recommendations make it possible that legislative change in this area may be imminent we have taken the decision to not draft those provisions relating to detention and training orders in the draft Sentencing Code. These provisions will however be included in the final Sentencing Code, and a placeholder has been left for them. Those custodial sentences for which a variant exists for under 18s, such as extended sentences of detention under section 226B of the Criminal Justice Act 2003 and sentences of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 have been included in this part of the draft Sentencing Code.

STRUCTURE

9.3 The current law differentiates between offenders aged under 18, those aged 18 to 20 and those aged 21 or above at conviction, with different sentencing orders available for each age category. However, much of the current law is structured to differentiate only between adults and youths, namely under 18 and 18 and above. For example, to impose an extended sentence, the court must refer to section 226A of the Criminal Justice Act 2003 in relation to those aged 18 or over at conviction, or section 226B in relation to those aged under 18 at conviction. Section 226A is sub-divided into two, requiring that where the offender is aged 18 to 20 at conviction, the sentence to be imposed is one of detention in a young offender institution, whereas if the offender is aged 21 or over, the sentence to be imposed is one of imprisonment.[173] This distinction has sometimes been overlooked in practice, resulting in errors. Such errors lead to avoidable appeals or lengthened appeal hearings.

9.4 In determining the structure of the Sentencing Code, we considered whether or not the Sentencing Code could reflect the differences between those aged 18 to 20 and 21 or over more effectively so as to minimise error and make sentencing in such cases easier. The Sentencing Code therefore divides the provisions relating to specific custodial sentencing orders into the three age groups identified by the current law - under 18, 18

---

172 Charlie Taylor, 'Review of the Youth Justice System in England and Wales' (December 2016).

173 This stems from the prohibition on imposing imprisonment upon an offender aged under 21 contained within s 89 of the Powers of Criminal Courts (Sentencing) Act 2000. The Criminal Justice and Courts Services Act 2000 s 61 removes the distinction between those aged 18 to 20 and those 21and older, however this provision has not been commenced.

to 20 and 21 and over - and lists the clauses for each group together. While this increases the length of this Part of the Sentencing Code, we decided that the simplicity and clarity brought by this approach was worth the slightly lengthier drafting. This represents a move away from the current approach to structuring sentencing provisions because it groups the provisions by availability as opposed to disposal type. As an example, in the Sentencing Code provisions such as section 226A of the Criminal Justice Act 2003, which provides for the imposition of extended sentences of imprisonment in relation to those 21 and over, and extended sentences of detention in a young offender institution in relation to those aged 18 to 20, have been re-written twice in separate places, once for those aged 21 and over, and once for those aged 18 to 20.

Consultation Question 43.

Do consultees agree that it is desirable to split the provisions relating to specific custodial sentences into three age groups, under 18, 18 to 20 and 21 and over, and to group the clauses for each age group together?

9.5 In the draft Sentencing Code the different variations of custodial sentence are currently arranged in ascending order of severity. This approach mirrors the general structure of the third Group of Parts in the Sentencing Code, which lists absolute and conditional discharges first in Part 5 before moving to fines in Part 7 and community sentences in Part 9. It reflects the general requirements of section 152 of the Criminal Justice Act 2003 that the court must not pass a custodial sentence unless it is of the opinion that the offence was so serious that neither a fine alone nor a community sentence can be justified for the offence and the principle espoused in section 153 of that Act that the custodial sentence imposed should be the least punitive sentence commensurate with the seriousness of the offence.

9.6 It should be noted, however, that this does not work particularly well in relation to suspended sentences of imprisonment, and detention in a young offender institution. This is because logically the substantive sentence must be explained before the law relating to suspending that sentence can be covered.

9.7 An argument can be made that these provisions should be arranged in descending order of severity, from the most serious to the least. Not only would this allow the severity of suspended sentences to be reflected properly, but it could be argued that it would reflect the approach the courts take to such sentences, checking whether they have a duty to impose any of the most severe mandatory sentences before then considering the other options available to them.

Consultation Question 44.

Do consultees consider that the provisions relating to the different variations of custodial sentence should be arranged in ascending, or descending, order of severity?

TERMS USED TO DESCRIBE CUSTODIAL SENTENCES

9.8 The current law uses a variety of terms to describe the various determinate and indeterminate sentences of custody, depending on whether the offender is aged under 18, 18 to 20 or 21 and over. For example, the mandatory life sentence for murder is a sentence of imprisonment for life for those aged 21 or over when convicted and 18 or over at the time of the offence, custody for life for those aged 18 to 20 when convicted and aged 18 or over at the time of the offence and detention during Her Majesty's pleasure for those aged under 18 at the time of the offence, no matter what age they are when convicted. This can cause confusion and results in errors which need to be remedied under the slip rule or on appeal against sentence. This is notwithstanding the fact that when a judge makes a lawful order but uses the wrong 'label' to describe the form the sentence will take, the sentence is not invalidated. This is true of all sentences of custody, for example an ordinary determinate sentence of custody is either a sentence of imprisonment, detention in a young offender institution or detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 depending on the offender's age.

9.9 In the recent case of *Jones*[174] the Court of Appeal misunderstood the distinction in circumstances where the judge had imposed a sentence of imprisonment on an offender who was aged 20 at the date of the offence but aged over 21 at conviction and sentence. The court stated that the sentence should have been one of detention in a young offender institution. In fact, the relevant date for this determination is the date of conviction, not the date of the offence and so the sentencing judge's original order was correct. This, we consider, demonstrates the unnecessary complexity of the current law. There are various solutions which could be implemented to resolve this issue.

9.10 One option would be to retain the distinctions as between those aged under 18, 18 to 20 and 21 or over, but to employ a deeming provision which provides that where a defined general term to describe a custodial sentence is used, the term is to be deemed to refer to the appropriate type of custodial sentence for the offenders aged. For example, the provision could define a term of "custody" as, in the case of an offender aged under 18, a sentence of detention under section 91, in the case of an offender aged 18 to 20 a sentence of detention in a young offender institution and for an offender aged 21 or over a sentence of imprisonment. This would relieve the court from the need to concern itself with selecting the correct 'label' in each case. It would of course remain the responsibility of the court to ensure that in each case the court was aware of the offender's age and that any statutory test for the imposition of a particular order was satisfied. It would also not alter the effect of any of the relevant sentences, including the place in which they ought to be served, and the mechanisms for release which would all continue to be determined in accordance with the offender's age.

9.11 Another option would be to remove the distinction between sentences for those aged 18 to 20 and 21 or over (sentences of detention in a young offender institution and imprisonment respectively). This could be achieved either by using a new term such as 'custody', or by bringing into force section 61 of, and paragraph 180 of schedule 7 to, the Criminal Justice and Court Services Act 2000 which abolishes the sentence of detention in a young offender institution and amends limitation on imposing sentences

[174] [2017] EWCA Crim 317.

of imprisonment on those aged under 21, thus extending 'imprisonment' to those aged 18 and older. This ultimately will depend on whether or not the repeal is brought into force and if it is, how so.

9.12 The mechanisms for ensuring under 18s, 18 to 20 and 21 or over serve sentences in different institutions would be untouched, thereby not making a substantive change to the effect of the law, but merely simplifying matters procedurally in order to avoid the errors caused by judges making reference to the wrong variation of custodial sentence for the offender's age. Such a change would, however, go beyond the initial scope of the Sentencing Code project.

Consultation Question 45.

Do consultees believe that either a "catch-all term" to cover all custodial sentences, or removing the distinction between a sentence of imprisonment or detention in a young offender institution, with the one sentence simply being served in a different place depending on age, might be desirable?

GENERAL PROVISIONS

9.13 Chapter 1 of Part 10 contains those provisions governing what is meant by the term "custodial sentence" in the Sentencing Code; the general availability of custodial sentences; the general limits on powers to impose imprisonment and custodial sentences; and the principles that apply when considering the availability of a custodial sentence. Minor changes have been made to the current law in the re-drafting in this Chapter, by correcting error and making slight linguistic variations with the aim of promoting consistency and streamlining.

9.14 Clause 152 is not the product of consolidation and entirely created by the Sentencing Code. The clause clarifies when a custodial sentence is not an available disposal for a court. It is hoped that this will help ensure that custodial sentences are not improperly imposed when they are not available.

9.15 Section 132 of the Magistrates' Courts Act 1980 provides that a magistrates' court shall not impose imprisonment for less than 5 days, and section 133 of that Act provides the limits on the magistrates' courts' powers to impose consecutive sentences of imprisonment (and detention in a young offender institution). A magistrates' court in imposing a custodial sentence clearly needs to be aware of them and have reference to them, and our initial preference was accordingly to re-draft them into the Sentencing Code. However, both section 132 and 133 of the Magistrates' Courts Act 1980 apply in contexts other than criminal sentencing, creating limits on the magistrates' courts' powers to impose imprisonment in its civil jurisdiction.

9.16 Not only would it be particularly difficult to split sections 132 and 133, so that the propositions so far as they relate to sentencing appear in the Sentencing Code, and the rest of them remains in the Magistrates' Courts Act 1980, but it could also be considered that this would not be particularly helpful to the courts. The separation of the powers between the civil and criminal context may result in their future divergence which could

lead to confusion and error. In prioritising our work in drafting we have therefore currently not re-drafted these provisions in the draft Sentencing Code but instead signposted them in clause 154.

Consultation Question 46.

Do consultees consider that the benefits of re-drafting sections 132 and 133 of the Magistrates' Courts Act 1980 into the Sentencing Code outweighs the potential disadvantages?

9.17 Under the current law, sections 152 and 153 of the Criminal Justice Act 2003, which provide the threshold which must be passed before a custodial sentence may be imposed, and the requirement that any custodial sentence must be for the shortest term commensurate with the seriousness of the offence, apply only to offences committed on or after 4 April 2005. For offences committed prior to that date the predecessors of those sections apply. In the Sentencing Code the clean sweep ensures that these provisions as re-written apply to all offenders convicted after the commencement of the Sentencing Code, regardless of when their offence was committed.

9.18 In clause 71, subsection (5) is not the product of consolidation and has been entirely created by the Sentencing Code. Read alongside subsection (2), subsection *(5)* signposts those situations in which the court does not have to impose a custodial sentence, even where the threshold is met. This subsection makes the law regarding the custodial threshold clearer, and ensures that none of these provisions modifying the custody threshold are missed in practice.

CUSTODIAL SENTENCES

9.19 Chapters 2 to 5 of part 10 contain those provisions relating to the availability and effect of the various custodial sentences that can, or must, be imposed by a sentencing court. As noted above, the provisions are split into those relating to those aged under 18, 18 to 20, and 21 and over. Those provisions in these Chapters relating to suspended sentence orders are discussed above in chapter 8.

9.20 Sentences of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 have been substantially re-drafted in the Sentencing Code in a way that we believe makes the provision much clearer. It has been replaced with clauses 168, 170, 171 and schedule 6 which split the provision into its availability, and the rules governing its imposition where a mandatory minimum applies, and where one does not.

Consultation Question 47.

Do consultees agree that the re-drafting of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 makes the provision easier to follow and apply?

9.21 Minor streamlining and linguistic changes have also been made throughout these Chapters.

The clean sweep

9.22 As noted above in chapter 3, the clean sweep does not apply where it would result in an offender being subject to a minimum sentencing provision, or a recidivist premium, that was not in force at the time they committed their index offence. Accordingly, the clean sweep has not been applied to sections 224A of the Criminal Justice Act 2003 (life sentence for second listed offence) or to schedules 21 and 22 to the Criminal Justice Act 2003, and the subsequent amendments that have been made to it. For instance, the introduction of paragraph 5A and the 25-year starting point where the offender took a weapon to the scene with intent in a murder committed after 2 March 2010.

9.23 In the current draft Bill the clean sweep has also not been applied to sections 225 or 226 (life sentence where serious offence committed and offender considered to be "dangerous") of the Criminal Justice Act 2003 as they have been re-drafted. Under sections 225 or 226 of the Criminal Justice Act 2003 a court must impose a life sentence where a person is convicted of a serious offence[175] where:

(1) the offence was committed after the commencement of those sections;

(2) the offence is one for which the offender is potentially liable to a custodial life sentence;

(3) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and

(4) the court considers that the seriousness of the offence (or offences) justifies the imposition of a life sentence.

9.24 Accordingly we have considered that the sentence is a mandatory sentence, and as such the clean sweep should not apply. However, while the court must impose a custodial life sentence once all the conditions are satisfied, the court in imposing a sentence under sections 225 or 226 of the Criminal Justice Act 2003 has significant discretion as to whether they believe the conditions are satisfied and it can therefore be argued that this sentence is not mandatory. In particular it can be argued that the sentence is not truly a mandatory life sentence as it requires that the court considers that the imposition of a life sentence is justified by the seriousness of the offence (and would therefore most likely impose a life sentence regardless) – rather than requiring the imposition of a life sentence unless there are exceptional or particular circumstances.

[175] As defined by section 224 of, and schedule 15 to, the Criminal Justice Act 2003.

Consultation Question 48.

Do consultees agree that the clean sweep should not apply to sections 225 or 226 of the Criminal Justice Act 2003?

9.25 Where the clean sweep has not been applied, the dates on or after which the offence must have been committed have been made clear in the text of the relevant provisions. This represents a key drafting change in pursuit of a policy of clear and simple legislation designed to be easy to use, understand and apply. We consider this will assist in the reduction of error as a result of complex commencement provisions detailing commencement information in secondary, as opposed to primary, legislation.

9.26 Extended sentences under sections 226A and 226B of the Criminal Justice Act 2003 may, under the current law, be imposed for offences committed before or after the commencement of those sections. However, the provisions are contingent upon the application of schedules 15 (specified offences) and (in the case of those aged 18 or over) 15B (conviction of previous offence) to the Criminal Justice Act 2003. Amendments to these schedules have sometimes contained transitional provisions, ensuring that they only apply to offences committed on or after a certain date. One such example is the amendment of schedule 15 by section 138 of the Coroners and Justice Act 2009 which inserts into schedule 15 paragraphs 59A to 59D, 60A to 60C and 63B to 63F and which, by virtue of paragraph 37 of schedule 22 to that Act, has no effect in relation to offences committed before section 138 was commenced.

9.27 The effect of the clean sweep here is to make sure that those amendments to schedule 15 and 15B apply to all offences, no matter when they were committed for the purposes of the re-drafted versions of section 226A and 226B of the Criminal Justice Act 2003. This enables an extended sentence to be imposed for an offence which, at the time of the commission of the offence, was not listed in schedule 15 to the CJA 2003. It also enables a previous conviction to satisfy the "earlier offence condition" even where the offence in question was added to schedule 15B after the commission of the offence, so long as it was added to the schedule before the offence giving rise to the current proceedings. This is compliant with article 7 of the European Convention on Human Rights as extended sentences must be within the statutory maximum for the offence in question, as well as our general approach to recidivist premiums in that an extended sentence is still only available where the previous conviction was added to schedule 15B before the commission of the index offence.

9.28 However, schedules 15 and 15B to the Criminal Justice Act 2003 serve multiple purposes apart from those relating to the imposition of extended sentences. Schedule 15B is used not only for identifying the relevant previous offences under sections 226A and 226B of the Criminal Justice Act 2003 but also for identifying both the index offence and the previous offence for the purposes of required life sentences for second listed offences under section 224A of the Criminal Justice Act 2003. Schedule 15 is similarly also used to provide the list of "serious offences" for which an offender may be subject to a required life sentence under sections 225 or 226 of the Act, as well as in a number of other sentencing and non-sentencing contexts: powers to commit for sentence under sections 3A and 3C of the Powers of Criminal Courts (Sentencing) Act 2000, criminal

record certificates by virtue of section 113A of the Police Act 1997 and reporting restrictions by virtue of section 49 of the Children and Young Persons Act 1933 among others.

9.29 While we do want the clean sweep to apply for the purposes of committal under sections 3A and 3C of the Powers of Criminal Courts (Sentencing) Act 2000 (as they relate only to committal for sentence in relation to the dangerousness provisions of the CJA 2003) as noted above we have chosen not to apply the clean sweep to sentences under sections 224A, 225 or 226 of the Criminal Justice Act 2003. Further, in relation to schedule 15 it would be outside the scope of the project to alter the law for non-sentencing purposes and as such the transitional arrangements need to be preserved for those purposes.

9.30 To achieve these aims and to ensure the Sentencing Code is as clear and as simple as possible, the re-drafted versions of schedules 15 and 15B have been split for different purposes.

9.31 Schedule 15B has been redrafted into two different schedules: schedule 8 and schedule *9:*

(1) Schedule 8 provides the list of offences that will satisfy the previous offence condition for the imposition of an extended sentence under the re-drafted versions of section 226A of the Criminal Justice Act 2003. The clean sweep has been applied to this schedule, and it applies to all offenders to whom the Sentencing Code applies, no matter when their offence was committed.

(2) Schedule 9 provides the list of offences for the purposes of identifying whether their index offence was a qualifying offence, and whether the previous offence condition has been met, for the purposes of the re-drafted versions of section 224A of the Criminal Justice Act 2003 (life sentence for second-listed offence).The clean sweep has not been applied to this schedule as to do so would potentially mean that offenders were liable to recidivist premiums (and life sentences) that they could not have been aware of when they committed their index offence, as their index offence was only listed in schedule 15B subsequent to the commission of their offence – in contravention of both Article 7 of the European Convention on Human Rights and our policy in relation to recidivist premiums.

9.32 The relevant transition times have, however, been replicated in column 2 of the schedule, and are no longer contained in obscure amending or commencing provisions. Subsections (5) of clauses 188 and 198 both provide that the schedule is to be read as if Part 1 did not include any offence for which the date in column 2 post-dates the date of the offence. It is hoped that this will make it far clearer to which cases the re-drafted versions of section 224A of the Criminal Justice Act 2003 apply to, and help avoid errors and mistakes. The re-drafted version of the schedule also allows for it to be amended easily – provided the same approach is taken in future as has been taken in the past of amending the schedule only for offences committed on or after that date.

Consultation Question 49.

Do consultees agree that the approach taken in the re-drafted version of schedule 9 of listing the cut-off date for the offence in column 2 is useful?

9.33 Schedule 15 has been split into three different versions. The Sentencing Code will not repeal schedule 15 to the Criminal Justice Act 2003 but rather disapply it for sentencing purposes – schedule 15 to the Criminal Justice Act 2003 will continue to be applied for non-sentencing purposes after the commencement of the Sentencing Code.

9.34 Schedule 15 has also been restated in the Sentencing Code twice for sentencing purposes.

(1) Schedule 12 restates schedule 15 for the purposes of extended sentences (including committal for sentence) and other references to specified offences within the Sentencing Code. The clean sweep has been applied to this version of the schedule and it applies equally to all offenders convicted after the commencement of the Sentencing Code, regardless of when their offence was committed.

(2) Schedule 13 restates schedule 15 without the clean sweep changes for the purposes of life sentences under the re-drafted versions of sections 225 and 226 of the Criminal Justice Act 2003. This re-drafted version (similarly to the re-drafted version of schedule 15B of the Criminal Justice Act 2003 for the purposes of the re-drafted section 224A automatic life sentence) also replicates the relevant transition times, making it unnecessary to have reference to obscure amending or commencement provisions.

(3) As, however, there are far fewer transition times that need to be replicated in this schedule, a different approach has been taken than that employed in schedules 9 to 13, simply includes the relevant limitations in the prose of the paragraph where they apply. See, for example, paragraph 39 of that schedule:

> An offence under section 47 of the Anti-terrorism, Crime and Security Act 2001 (use etc. of nuclear weapons) committed on or after 12 January 2010.

Consultation Question 50.

Do consultees agree with the approach taken in splitting up schedule 15 to the Criminal Justice Act 2003 into three schedules: one for non-sentencing purposes, one for the purposes of references to specified offences and one for the purposes of life sentences under the re-drafted versions of sections 225 and 226 of the Criminal Justice Act 2003?

DANGEROUSNESS PROVISIONS

9.35 Chapter 6 of Part 9 contains the provisions relating to the definitions of specified, and serious, offences, and the assessment of dangerousness. As in the current law, these provisions are located separately from those provisions applying them, namely those provisions relating to extended sentences and life sentences for serious offences.

9.36 Two notable changes have been made here. First, the definitions of specified and serious offence have been split into clauses 221 and 222 as a result of the decision to split schedule 15 to the Criminal Justice Act 2003 in the redrafting. As noted above, Schedule 13 applies only for the purposes of life sentences under the re-drafted versions of sections 225 and 226 of the Criminal Justice Act 2003. This means the restated version of the schedule need only contain "serious offences" – currently defined in section 224 of the Criminal Justice Act 2003 as specified offences for which the maximum sentence on indictment is ten years or more. But the term "serious offence" is currently used only in sections 225 and 226 of the Criminal Justice Act 2003, which themselves also require that the maximum sentence for the offence is life imprisonment. Accordingly, the definition of "serious offence" has been further simplified in the Sentencing Code, by limiting the restatement of Schedule 13 to only those offences for which the maximum sentence is life imprisonment.

9.37 Secondly, signposts have been included to the various definitions, and the provisions relating to the assessment of dangerousness, wherever they are to be applied. See for example *subsection (1) of clause 195.* It is hoped that these will aid navigation, and ensure that users apply these provisions correctly.

Consultation Question 51.

Do consultees find the signposts to the definitions of "specified offence" and "serious offence", as well as the test of dangerousness, helpful?

MINIMUM SENTENCES

9.38 Chapter 7 of Part 10 contains those provisions relating to minimum sentences, that is to say, provisions which require a custodial sentence of a particular length to be imposed. The Sentencing Code will not include any offence-specific provisions, such as maximum sentences.[176] Although minimum sentences relate to specific offences, we have considered them to be within the scope of the project as they are procedural in nature, affecting the exercise of the court's discretion in the sentencing hearing.

9.39 The clean sweep has not, and will not, be applied to minimum sentence provisions in line with our recommendation in the transition report.[177] Minimum sentences will continue to apply only to those offences committed after their commencement.

---

176 See above in chapter 2.

177 A New Sentencing Code for England and Wales (2016) Law Com No 365 para 4.15.

9.40 The draft Sentencing Code currently reproduces the following minimum sentence provisions:

(1) section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 (minimum sentence for third Class A drug trafficking offence);

(2) section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (minimum sentence for third domestic burglary offence)

(3) section 1 of the Prevention of Crime Act 1953 (minimum sentence for repeat offences involving offensive weapon);

(4) section 139 of the Criminal Justice Act 1988 (minimum sentence for possession of article with blade or point in public place); and

(5) section 139A of the Criminal Justice Act 1988 (minimum sentence for possession of article with blade or point, or offensive weapon, on school premises).

9.41 The draft Code currently provides a signpost to, rather than reproducing, the following minimum sentence provisions:

(1) section 51A of the Firearms Act 1968 (minimum sentence for certain firearms offence);

(2) section 29(4) and (6) of the Violent Crime Reduction Act 2006 (minimum sentence for using someone to mind a weapon);

(3) section 1A of the Prevention of Crime Act 1953 (minimum sentence for threatening with an offensive weapon in public); and

(4) section 139AA of the Criminal Justice Act 1988 (minimum sentence for threatening with article with blade or point, or offensive weapon, in a public place or on school premises).

9.42 While moving a provision that forms part of one scheme into a wholly different scheme has benefits, it also has drawbacks. For instance, there is added complexity regarding provisions such as section 51A of the Firearms Act 1968, which extends to Scotland as well as England and Wales. The Sentencing Code will extend only to England and Wales, and would therefore only repeal section 51A of the Firearms Act 1968 as it applied to England and Wales. The continued existence of the section in relation to Scotland could suggest to readers of the legislation that the minimum sentence has been repealed for England and Wales, rather than it being simply moved to the Sentencing Code. Additionally, some of those provisions currently signposted in the Sentencing Code rely on numerous definitions which would need to be imported into the Sentencing Code either expressly or by reference; if this were to be done expressly, a risk of divergence would be created. Importing them by reference ensures that users still need to have reference to the original legislation regardless, negating much of the advantage of re-writing the provisions rather than signposting them.

9.43 However, we recognise the arguments for bringing all minimum sentence provisions listed at paragraph 9.41 into the Sentencing Code. These include:

(1) having all minimum sentence provisions in one place in the Sentencing Code, avoiding the need to go to a second statute to view a complete list of such provisions;

(2) providing the opportunity to re-draft all minimum sentence provisions, update and simplify the drafting; and

(3) some of the minimum sentence provisions (particularly those relating to knives and offensive weapons) apply to more than merely a single offence.

9.44 As such, we seek consultees' views on the approach taken in the draft Sentencing Code.

Consultation Question 52.

Do consultees think that all minimum sentence provisions listed in paragraph 9.41 should be re-drafted in the Sentencing Code?

Consultation Question 53.

If not, which provisions should be re-drafted in the Sentencing Code, and which ought to be left in their current locations?

THE EFFECT OF LIFE SENTENCES

9.45 Chapter 8 of Part 10 contains those provisions relating to the setting of a minimum term or whole life orders once a life sentence has been imposed: the procedure to be followed, the factors that must be considered and the declarations that must be made are set out in this Chapter.

SENTENCE ADMINISTRATION

9.46 As was noted above in chapter 2, provisions relating to the administration of sentence, and release, have not generally been included within the Sentencing Code. The exceptions are those provisions where the court may (or must), at the sentencing hearing, make a direction or recommendation; these provisions have been restated in Chapter 9 of Part 10. This includes section 240A (crediting of time remanded on bail to count as time served) and section 243 (crediting of time spent in custody awaiting extradition) of the Criminal Justice Act 2003 which have been redrafted in the Sentencing Code only as far as is necessary to understand the court's duty to make a relevant direction. Section 238 of the Criminal Justice Act 2003, the power of the court to recommend licence conditions for certain prisoners, has also been included.

Consultation Question 54.

Do consultees agree that we have included all the provisions relating to the administration of sentence that a court needs to be aware of when sentencing to properly exercise its functions?

Chapter 10: Further powers relating to sentencing

10.1 The fourth and fifth Groups of Parts within the Sentencing Code deal with further powers relating to sentencing which are not themselves free-standing sentences and which would be imposed by a court alone in disposing of a case (examples of which are contained within the third Group of Parts). Much of what is dealt with in the fourth Group of Parts concerns what are often referred to in practice as ancillary orders, though this Group of Parts also contains a restatement of provisions regarding review of sentences under the Serious Organised Crime and Police Act 2005, and a provision regarding forfeiture of recognizances.[178]

ANCILLARY ORDERS

10.2 Ancillary orders in a sentencing exercise tend to be those which are imposed alongside a primary sentence to serve some forward-looking crime prevention purpose. For example, a sexual harm prevention order (the ancillary order) may be imposed alongside a sentence of imprisonment (the primary sentence). The sentence of imprisonment serves a primary punitive function and the sexual harm prevention order is imposed to protect the public from further sexual offences committed by the offender. As foreshadowed in Chapter 2, our intention is for the Sentencing Code to contain reference to all those powers and duties which the sentencing judge needs to be aware of to conduct a criminal sentencing exercise.

10.3 There are certain orders which are available on an application to the magistrates' court which do not require a criminal conviction.[179] These orders typically require the applicant (often a chief officer of police) to demonstrate the need for the order based on past behaviour. Although such orders may often be relevant when seeking to regulate an individual's behaviour, the Sentencing Code will neither repeal and re-write, nor signpost, these orders as they are civil in nature and do not fall within our definition of provisions which a sentencing judge needs to be aware of in order to exercise their functions. The orders included in the Sentencing Code are therefore those resulting from a conviction, an acquittal, or a relevant finding under the Criminal Procedure (Insanity) Act 1964 sections 4 and 4A (see the discussion at paragraph 2.69 above). The decision to draw the line in this way is a recognition of the need to place some coherent limits around the scope of the project and is also motivated by a desire to maintain the distinction between the courts' civil and criminal jurisdictions.

10.4 Further, where an order is available only on conviction, but exists specifically for a limited class of offences (and appears in the same Act as the provisions dealing with those offences) or otherwise forms part of a separate coherent legislative regime, we

---

178 "At common law a recognisance is an obligation or bond acknowledged before some court of record or magistrate duly authorised, or before special commissioners appointed by the Crown, and afterwards entered of record, that is, enrolled in some court of record…The object of a recognisance is to secure the performance of some act by the conusor, such as to appear before the Crown Court (Courts Act 1971 s.13(1)), to keep the peace, to pay a debt, to pay costs, etc." Jowitt's Dictionary of English Law (4th ed 2015).

179 An example is the sexual risk order contained in sections 122A to 122K of the Sexual Offences Act 2003.

have decided to signpost (see discussion above in chapter 2) such orders in clause 262. This clause is designed to assist the court by giving notice of the existence of these orders which might arise in the context of sentencing, but without disturbing the legislation which currently provides for the imposition of those orders.

10.5 Applying these guiding principles, we have come to the conclusion that only the following ancillary orders should be moved into the Sentencing Code:

(1) The Criminal Behaviour Order under the Anti-Social Behaviour Crime and Policing Act 2014 (the successor to the Anti-Social Behaviour Order on conviction), which is available after conviction for any criminal offence where the offender has engaged in behaviour likely to cause harassment, alarm or distress and the court determines an order will help prevent such behaviour reoccurring.

(2) Driving disqualification orders under the Powers of Criminal Courts (Sentencing) Act 2000 (generally available for all offences, not to be confused with driving disqualification under the Road Traffic Offenders Act 1988 regime, which we are not disturbing).

(3) Restraining orders under the Protection from Harassment Act 1997 (both on conviction and on acquittal – although the latter is not a sentencing matter per se we determined that the Sentencing Code was the most sensible place for this provision).

10.6 In addition to these substantive provisions, ancillary orders relating to animals are signposted in clause 125 and there is a table of signposts to other ancillary orders available on conviction in clause 262. We welcome consultees' input on whether clause 262 includes all the ancillary orders that a sentencing judge would need to be aware of.

Consultation Question 55.

Do consultees agree that the orders included in clause 262 are those which a sentencing judge needs to be aware of? Are there some which ought to have been included which are not, or some which are included which should be omitted?

10.7 Sexual Harm Prevention Orders under the Sexual Offences Act 2003 as amended (the successor to the Sexual Offences Prevention Order) have not currently been restated in the draft Sentencing Code. These orders are frequently used, and are available in respect of offences listed in schedules 3 and 5 to the Sexual Offences Act 2003. Such orders are however available not only on conviction (and findings of not guilty by reason of insanity, or that the offender is under a disability and has done the act or made the omission charged) but may also be made on application where an offender has merely been cautioned in respect of an offence listed in schedules 3 and 5 to the Sexual Offences Act 2003. It would be outside the scope of the Sentencing Code to include this variation of a Sexual Harm Prevention Order, and it would be difficult, and potentially counter-productive, to divorce the two variations.

10.8 Further, Sexual Harm Prevention Orders are also closely tied to the provisions in Part 2 of the Sexual Offences Act 2003 relating to notification requirements. The notification regime under that Act is not itself a sentencing issue in the narrow sense outlined in chapter 2 above, in that the notification requirements flow as an automatic consequence of conviction and do not form part of the active powers and duties on the sentencing court. Its inclusion in the Sentencing Code would therefore be inappropriate.

10.9 The provisions relating to notification requirements depend upon schedule 3 to the Sexual Offences Act 2003 (which would need to be re-stated in the Sentencing Code were we to incorporate Sexual Harm Prevention Orders, in any event). As such leaving notification provisions in the Sexual Offences Act 2003 would risk the two schedules – and therefore the two regimes – diverging.

10.10 We therefore propose only to signpost Sexual Harm Prevention Orders in the Sentencing Code. Beyond the difficulties in splitting the variations available on application, and to a sentencing court, we consider that as the Sexual Harm Prevention Order and notification regimes currently work in tandem,[180] they ought to be kept together and rely upon the same scheduled list of 'trigger' offences.

10.11 If we were to re-draft the provisions we consider that one way of doing so would be to split the schedules as they apply to notification and Sexual Harm Prevention Orders, restating the schedule only as it applies to Sexual Harm Prevention Orders in the Sentencing Code. While both notification and Sexual Harm Prevention Orders rely on schedule 3 to the Sexual Offences Act 2003, the application of schedule 3 in relation to Sexual Harm Prevention Orders is modified slightly by section 103B(9) which states:

> In construing any reference to an offence listed in schedule 3, any condition subject to which an offence is so listed that relates—
>
> (a) to the way in which the defendant is dealt with in respect of an offence so listed or a relevant finding (as defined by section 132(9)), or
>
> (b) to the age of any person,
>
> is to be disregarded.

10.12 In the recent case of *R v JB*,[181] the Court of Appeal failed to notice the effect of this subsection and therefore incorrectly felt compelled to quash a legally made Sexual Harm Prevention Order. Restating schedule 3 for the purpose of Sexual Harm Prevention Orders in the Sentencing Code would allow for the effect of section 103B(9) to be directly reflected in the schedule and help improve the clarity of the law.

10.13 We welcome consultees' views on whether signposting the Sexual Harm Prevention Order and leaving the Sexual Offences Act 2003 intact strikes the correct balance, or whether it would be significantly more desirable to repeal and re-state the provisions relating to Sexual Harm Prevention Orders, and schedule 3 to the Sexual Offences Act

---

180 See for example *R v Smith* [2011] EWCA Crim 1772; [2012] 1 WLR 1316 at [9].

181 [2017] EWCA Crim 568.

2003 for that purpose, in the Sentencing Code, leaving notification requirements and schedule 3 for that purpose in the Sexual Offences Act 2003.

Consultation Question 56.

Do consultees agree that restraining orders on acquittal belong in the Sentencing Code?

Consultation Question 57.

Do consultees agree with the decision to signpost, but not to re-draft, Sexual Harm Prevention Orders? If the view is that they should be re-drafted into the Sentencing Code, do consultees consider that this justifies splitting the versions available on application and the variations available to a sentencing court and splitting schedule 3, re-drafting it in the Sentencing Code for the purpose of Sexual Harm Prevention Orders and leaving in the Sexual Offences Act 2003 for the purpose of notification?

Consultation Question 58.

Do consultees think that the format of the table of signposts in clause 262 is helpful? Could it be improved?

REVIEW OF SENTENCE

10.14 Part 11 within the fifth Group of Parts restates sections 74 and 75 of the Serious Organised Crime and Police Act 2005 which deal with review of sentence for assistance to the prosecution. These clauses have been separated from the re-write of section 73 of that Act in clauses 68 and 69 which sit with general provisions about reduction of sentence in Part 4 (within the second Group of Parts), and have been discussed at paragraph 5.38 above.

10.15 Section 74 of the Serious Crime and Police Act 2005 deals with three separate issues, which have been split into three separate clauses in the Sentencing Code.

10.16 The first is where a person has received a sentence which has been discounted because of an agreement to provide assistance but has subsequently failed to provide the agreed assistance – see clause 265.

10.17 The second allows a court to reduce a sentence already imposed where the offender provides or agrees to provide assistance, provided the offender is still serving that sentence – see clause 266.

10.18 The third concerns rights to appeal against decisions of the court under section 74 – see clause 267.

10.19 In addition to improvements in the transparency and consistency of the language (for instance the consistent use of "offender" to describe the subject of the review), this re-write has clearly separated out the existing provisions into more clauses, organised by theme, in an attempt to improve the accessibility and clarity of the drafting. Whilst this decision adds to the length of the provisions as re-written, other parts of the original drafting have been omitted where they appeared unnecessary. We would welcome consultees' views on whether this re-write constitutes an improvement on the existing law, whilst preserving its effect.

10.20 Sections 75 and 75A[182] of the Serious Organised Crime and Police Act 2005 deal with certain procedural issues relating to review proceedings, and have been re-written in clauses 268 and 269.

COMMENCEMENT AND AMENDMENT OF CROWN COURT SENTENCE

10.21 Chapter 1 of Part 12 restates sections 154 and 155 of the Powers of Criminal Courts (Sentencing) Act 2000 which deal with when sentences imposed by the Crown Court take effect and the Crown Courts ability to vary imposed sentences under the slip rule.

10.22 Section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a sentence imposed by the Crown Court shall take effect from the beginning of the day on which it is imposed unless the court otherwise directs.

10.23 There is no corresponding provision for sentences imposed by the magistrates' courts. The Magistrates' Courts Sentencing Guidelines 2008,[183] in relation to custodial sentences, notes that imposed custodial sentences should take immediate effect and we believe that this reflects the current operation of the law: that sentences imposed by the magistrates' court take immediate effect. We consider that the extension of section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 to the magistrates' courts would be desirable in this respect, to provide this understanding with a statutory basis. We believe the lack of any statutory provision creates a question as to whether this is the position and think that such an amendment would provide greater clarity and certainty to the law.

---

182 As inserted by Police and Justice Act 2006, sch 14 para 62.

183 Sentencing Council, *Magistrates' Courts Sentencing Guidelines,* p 165, para 2.

Consultation Question 59.

Do consultees agree that sentences imposed by the magistrates' courts take effect from the beginning of the day on which they are imposed (unless otherwise directed), and that section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended to them to make this clear?

10.24 There is some ambiguity about the extent to which section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 confers the power to impose a sentence that begins other than the day on which it is imposed.

10.25 Section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 finds it origins in section 11(1) of the Courts Act 1971. This Act abolished Courts of Assize and Courts of Quarter Sessions, establishing the Crown Court as a superior Court of Record. Section 11(1) of the Courts Act 1971 read:

> (1) A sentence imposed, or other order made, by the Crown Court when dealing with an offender shall take effect from the beginning of the day on which it is imposed, unless the court otherwise directs.

10.26 Its effect was considered in *R v Gilbert*[184] where it was argued that the section conferred on the Crown Court the power to order that a sentence shall commence at a date after the day on which it is pronounced or at an earlier date. The Court of Appeal held that the words "unless the court otherwise directs" were necessary in order to preserve the common law power to the Court to impose a sentence, or make an order, taking effect in the future and did not confer any further power.

10.27 Section 11(1) of the Courts Act 1971 was subsequently re-enacted, without modification, as section 47(1) of the Senior Courts Act 1981 (the Supreme Courts Act 1981 at the time of enactment). Section 47(1) was however subsequently amended by paragraph 47 of schedule 8 to the Crime and Disorder Act 1998 which inserted subsection (1A) into section 47(1) of the Senior Courts Act 1981. Subsection (1A) read:

> (1A) The power to give a direction under subsection (1) above has effect subject to section 102 of the Crime and Disorder Act 1998.

10.28 This subsection, which is now replicated in section 154(2) of the Powers of Criminal Courts (Sentencing) Act 2000, was clearly predicated on the grounds that the power to direct that a sentence should take place otherwise than immediately came from subsection (1) of the Senior Courts Act 1981, rather than being a common law power.

10.29 There have been conflicting decisions as to the source of this power.

---

184 (1974) 60 Cr App R 220.

10.30 The Court of Appeal in *Salmon*[185] seem to continue to have considered that the power arose from the common law, stating at [11]:

> Those words "unless the court otherwise directs" are apparently wide. Nevertheless, it has been decided in *Gilbert* (1974) 60 Cr.App.R. 220 that the predecessor of that section did not allow the court to antedate a sentence. There is also the authority of [*Gregory and Mills* (1969) 53 Cr.App.R. 294] to which we have referred. We therefore are inclined to consider that, although there is power under the common law, which appears originally to have developed the concept of a consecutive sentence, to order a consecutive sentence to begin to take effect at some time in the future at the end of either an existing sentence or another sentence imposed upon the same day as the consecutive sentence, there is no power either to antedate a sentence (*Gilbert*), or to make a sentence begin at some uncertain time in the future otherwise than on the expiry of another sentence. We therefore consider that this was an unlawful sentence and should be quashed.

10.31 In contrast the Court of Appeal in *R v Hills,*[186] interpreted section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 as conferring the power to impose a sentence to commence at a point of time in the future, noting at [10] that it "seems to us to give to the court the power to direct that a sentence should or could commence at a different date." In doing so they interpreted it as conferring the power to order that a sentence of imprisonment run consecutively to the minimum term of an indeterminate sentence.

10.32 A similar view was adopted in *R v Taylor,*[187] where Lord Justice Moses, considering the operation of section 154 of the Powers of Criminal Courts (Sentencing) Act 2000, and section 265 of the Criminal Justice Act 2003 (restrictions on consecutive sentences), held that:

> The power to order consecutive sentences is conferred by s.154 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides:
>
> > "(1) A sentence imposed … by the Crown Court when dealing with an offender shall take effect from the beginning of the day on which it is imposed, unless the court otherwise directs.
> >
> > (2) The power to give a direction under subsection (1) above has effect subject to section 265 of the Criminal Justice Act 2003 (restriction on consecutive sentences for released prisoners)."
>
> Section 265, under the rubric "Restriction on consecutive sentences for released prisoners" provides:
>
> > "(1) A court sentencing a person to a term of imprisonment may not order or direct that the term is to commence on the expiry of any other sentence of imprisonment from which he has been released —

---

185 [2003] 1 Cr App R (S) 85.

186 [2008] EWCA Crim 1871, [2009] 1 Cr App R (S) 75.

187 [2011] EWCA Crim 2236, [2012] 1 Cr App R (S) 75.

(a) under this Chapter; or

(b) under Part 2 of the Criminal Justice Act 1991 ."

Thus, the power to order a consecutive sentence is restricted only by s.265. Section 265 has no application to cases other than those where a person has been sentenced but has been released on licence from that sentence.

At first blush, therefore, the court in this case had a statutory power to impose a determinate sentence and to order that that sentence should commence at the expiry of the appellant's minimum term.[188]

10.33 The position as to the Crown Court's power to defer the effect of a sentence is therefore uncertain. If, before 1998, "unless the court otherwise directs" in section 47(1) of the Senior Courts Act 1981 simply preserved the common law power to give a direction, the insertion of subsection (1A) by the Crime and Disorder Act 1998 should not have converted it into a statutory power to make a direction. But since then the courts do seem to have treated it as a statutory power, albeit one whose exercise is limited by common law.

10.34 The result seems to be that a Crown Court sentence takes effect at the beginning of the day on which it is passed, so in the case of a sentence of imprisonment that day is the first day of the term. However, the Crown Court can direct that it can take effect later (and it is uncertain whether this is a common law or statutory power), though the power is limited by both section 265 of the Criminal Justice Act 2003 and common law. It can be exercised so that a sentence takes effect on the expiry of an existing sentence from which a person has not yet been released, or on the expiry of a minimum term of an indeterminate sentence, but cannot be exercised so that it takes effect at some other future time (such as part of the way through another sentence). The only example of a case that we have found where the court has delayed the imposition of a sentence other than by imposing it consecutively is *R v Kaplan*[189] where the court delayed the imposition of a driving disqualification order by ordering that it should only be drawn up (and therefore formally made) the next morning.

10.35 We consider it would be desirable to codify formally the Crown Court position in the interests of certainty. We note that this would go beyond the scope of ordinary consolidation but that it may be possible for us take a specific pre-consolidation power to achieve this.

---

188 *R v Taylor* [2011] EWCA Crim 2236, [2012] 1 Cr App R (S) 75 at [7] to [8].

189 [1978] RTR 119.

Consultation Question 60.

Do consultees agree that the Crown Court can only direct that a sentence takes effect other than on the day it is imposed by imposing it consecutively on the expiry of another sentence, or minimum term, from which the offender has not already been released?

If so, do consultees consider that it would be desirable to formally codify this position?

10.36 The Crown Court's power to alter a previously imposed sentence under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 is reproduced in clause 264. Under the current law, this gives the Crown Court the ability to alter a previously imposed sentence within a period of 56 days, beginning on the day on which the sentence was imposed. The alteration must be performed by the judge who imposed the sentence.

10.37 Alterations typically arise where an error of law has been made, or where a judge reconsiders the sentence imposed due to the receipt of new information. Where an alteration is desired (in the case of a legal error), the case must be relisted before the same judge who originally imposed the sentence and the alteration made within the 56 day period.

10.38 Where a judge is unavailable and the case is not able to be re-listed and heard, or the error is not identified prior to the expiry of the 56 day period, any amendment is likely to require the intervention of the Court of Appeal.[190] We consider that this is undesirable, requiring a significant amount of unnecessary resource for minor corrections to be fixed and that the time limit should be extended.

10.39 Accordingly, we seek consultees' views on whether the slip rule should be amended to allow for the alteration of sentences outside the 56 day period. In this respect we also seek consultees' views on whether the extended time limit should only be applicable in cases where amendment is sought is to correct errors of law according to the information available at the time of the original sentencing exercise.

10.40 Similarly we seek views as to whether the requirement that the alteration be made by the judge who imposed the order should be relaxed to enable a senior judge to make an alteration where the original judge is unavailable in the 56 day period.

10.41 It would be outside the scope of this consolidation to make such changes and accordingly the draft Sentencing Code does not reflect these amendments. Such changes could form the basis of recommendations in our final report.

---

190 There is common law authority to the effect that an alteration of form outside the 56 day period is permitted and within the Court's inherent jurisdiction, but an alteration of substance is not, see *R v Saville* [1981] QB 12. However, in *R v D* [2015] 1 Cr App R (S) 23 the court held that a judge had not been entitled to alter a sentence to correct a defect arising from the way in which the sentence had been articulated, notwithstanding the fact that the defendant was not adversely affected by the alteration.

Consultation Question 61.

Do consultees agree that the 56 day limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended? How long should any limit be?

Consultation Question 62.

Should the time limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 be longer for the correction of errors of law than for the amendment of sentence for other reasons?

Consultation Question 63.

Do consultees agree that the requirement that the alteration of sentence must be conducted by the same judge who imposed the original sentence should be removed, in favour of a provision which allowed the resident judge of the Crown Court centre in question to make the alteration in circumstances where it is not reasonably practicable for the original judge to sit inside the 56 day period?

Chapter 11: Consultation Questions

Questions in this consultation paper are listed below:

Consultation Question 1

Does the draft Sentencing Code reflect the current law on sentencing, bearing in mind those pre-consolidation amendments that have been proposed, and the effect of the clean sweep?

Consultation Question 2

Do consultees approve of the policy we have adopted with regard to the inclusion of provisions in the Sentencing Code?

Consultation Question 3

Do consultees agree with the above categorisation of sentencing powers? This categorisation is designed to assist in ensuring that the Bill is structured in the most effective manner. It will dictate whether provisions are placed in the third Group of Parts "primary sentencing powers" or the fourth Group of Parts "further powers relating to sentencing".

Consultation Question 4

Further to the above proposal, do consultees believe that it would be useful to include provision directing the court that in every case in which it deals with an offender for an offence, it must always make at least one "primary sentencing powers" order, and may make appropriate additionally orders from the "further powers relating to sentencing"?

Consultation Question 5

Do consultees approve of those matters which we have included within the Sentencing Code? Do all of them belong in the Sentencing Code?

Consultation Question 6

We propose that absolute discharges available on a special verdict should be redrafted in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

Consultation Question 7

We propose to recast provisions relating to hospital orders available on a special verdict in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

Consultation Question 8

Do consultees agree that those disposals available on a special verdict should all be contained in the Sentencing Code?

Consultation Question 9

Do consultees approve of the approach we have taken with regard to signposting provisions? Are these useful? Do they make the Sentencing Code more comprehensive?

Consultation Question 10

Do consultees approve of the decisions we have taken with regard to excluding certain provisions from the Sentencing Code? Is there anything which consultees believe necessarily must form part of a functioning and coherent Code?

Consultation Question 11

Do consultees approve of the way in which the Sentencing Code has been structurally organised? Is it in the most efficient possible layout? Are the available disposal powers correctly ordered?

Consultation Question 12

Do consultees support our conclusion that the statutory surcharge should be an automatically imposed consequence of conviction? There would be no need for the court to make any reference to the surcharge, save for in those cases where the offender had limited means to satisfy other financial orders.

Consultation Question 13

Do consultees think that the introduction of a definition of mandatory sentence requirements in place of individual lists of such provisions is helpful?

Consultation Question 14

Do consultees consider that the proposed definition of mandatory sentence requirements is correct? Do they consider that special custodial sentences for offenders of particular concern under section 236A of the Criminal Justice Act 2003 should be included?

Consultation Question 15

Do consultees agree that the only offence for which the sentence is "fixed by law" is murder? If so, how would they describe offences like those under section 51 of the International Criminal Court Act 2001?

Consultation Question 16

If consultees agree that the only offence for which the sentence is "fixed by law" is murder, do they agree that the term "fixed by law" should be replaced with a description of the order, namely "the mandatory life sentence for an offence of murder" (or something similar)?

Consultation Question 17

Do consultees agree that section 142 of the Criminal Justice Act 2003 (the purposes of sentencing) should be amended so that it applies "subject to" mandatory sentencing requirements, rather than being completely disapplied in such cases?

Consultation Question 18

Do consultees consider that the signposts provided by clause 55 (the purposes of sentencing in relation youths) are a useful addition?

Consultation Question 19

Do consultees agree with our decision to leave out of the Sentencing Code those provisions relating to the establishment and role of the Sentencing Council?

Consultation Question 20

Do consultees agree that the phrases "guideline category starting point" and "non-category starting point" provide greater clarity than the references to the "sentencing starting point" and "appropriate starting point" contained in section 125 of the Coroners and Justice Act 2009?

Consultation Question 21

Do consultees agree with the proposed replacement of the phrase "notional determinate term" with the term "appropriate custodial term" in clause 58?

Consultation Question 22

Do consultees consider that the replacement of the list of provisions in section 156(1) of the Criminal Justice Act 2003 (duties when forming specific opinions), with signposts to the duty in all the qualifying provisions is helpful?

Consultation Question 23

Do consultees think that the scope of the Sentencing Code should include all mandatory aggravating factors including section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971?

Consultation Question 24

Do consultees believe that the duty to treat previous convictions or the fact that the offender was on bail at the time of the offence, as aggravating factors under section 143 of the Criminal Justice Act 2003 should be amended, in line with the other duties to treat facts as aggravating factors, to include a duty to state in open court that the court has done so?

Consultation Question 25

Do consultees think that it would be desirable in principle if section 144 of the Criminal Justice Act 2003 was amended so that a reduction for guilty plea could allow a court to impose a sentence less than that required by either section 51A(2) of the Firearms Act 1968 (the minimum sentence for certain firearms offences) or section 29(4) or (6) of the Violent Crime Reduction Act 2006, provided that the sentence imposed was not less than 80% of the required sentence for an offender where the offender is over 18?

We emphasise that this is not a change that we could make as part of this project but it could form part of a package of recommendations in our final report which go beyond the Sentencing Code as initially enacted.

Consultation Question 26

Do consultees agree that the benefits of restating the definition of specified prosecutor from section 71 of the Serious Organised Crime and Police Act 2005 outweigh the administrative disadvantages and the risk that a prosecutor is not specified under one of the two versions?

Consultation Question 27

We welcome consultees' views on the balance that the draft Sentencing Code strikes by including some general provisions on fines, but generally excluding provisions relating to the fine levels and maximum fines for particular offences.

Consultation Question 28

Do consultees find the table showing the summary fines levels over time in clause 84 helpful? Could it be improved?

Consultation Question 29

Do consultees find the new clause 80 which sets out the general power of the magistrates' court to impose fines helpful?

Consultation Question 30

Do consultees find the new streamlined compensation order provisions more accessible?

Consultation Question 31

Do consultees agree that the removal of the limit on compensation orders can safely be retrospectively applied to offences which pre-date its commencement, as an example of the 'clean sweep' in operation, given that the purpose of a compensation order is not punitive in its aims and therefore Article 7 is not engaged.

Consultation Question 32

Do consultees agree that the table in clause 113 providing a non-exhaustive list of signposts to other conviction forfeiture powers is helpful?

Consultation Question 33

Can consultees offer other suggestions for inclusion in the table in clause 113?

Consultation Question 34

Do consultees consider that the material relating to community orders in the draft Sentencing Code has been structured appropriately? Could any improvements be made to the layout of this part?

Consultation Question 35

Do consultees agree that the use of the concept of an "available requirement" has improved the clarity of the law?

Consultation Question 36

Do consultees agree that the use of the table showing the available community requirements is an improvement over the current law?

Consultation Question 37

Do consultees agree that the streamlining changes to the court's powers to revoke and resentence community orders have improved the consistency and clarity of the law?

Consultation Question 38

Do consultees believe that the material relating to suspended sentence orders in the Draft Code is appropriately structured? Can they suggest any ways in which it might be improved?

Consultation Question 39

Do consultees consider that the table in clause 201 setting out the restrictions and obligations in relation to the imposition and availability of community requirements is helpful?

Consultation Question 40

Do consultees believe that the substantial rearrangement of paragraphs 8 to 12 of schedule 12 to the Criminal Justice Act 2003 in paragraphs 10 to 21 of schedule 10 clarifies the powers of the magistrates' courts and Crown Courts where an offender serving a suspended sentence order is before them?

Consultation Question 41

Do consultees think that the re-ordering of schedule 13 to the Criminal Justice Act 2003 in schedule 11 improves the clarity and accessibility of the law?

Consultation Question 42

Do consultees agree that the introduction of the phrases SSSO and NISSO in schedule 11 is useful?

Consultation Question 43

Do consultees agree that it is desirable to split the provisions relating to specific custodial sentences into three age groups, under 18, 18 to 20 and 21 and over, and to group the clauses for each age group together?

Consultation Question 44

Do consultees consider that the provisions relating to the different variations of custodial sentence should be arranged in ascending, or descending, order of severity?

Consultation Question 45

Do consultees believe that either a “catch-all term” to cover all custodial sentences, or removing the distinction between a sentence of imprisonment or detention in a young offender institution, with the one sentence simply being served in a different place depending on age, might be desirable?

Consultation Question 46

Do consultees consider that the benefits of re-drafting sections 132 and 133 of the Magistrates’ Courts Act 1980 into the Sentencing Code outweighs the potential disadvantages?

Consultation Question 47

Do consultees agree that the re-drafting of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 makes the provision easier to follow and apply?

Consultation Question 48

Do consultees agree that the clean sweep should not apply to sections 225 or 226 of the Criminal Justice Act 2003?

Consultation Question 49

Do consultees agree that the approach taken in the re-drafted version of schedule 9 of listing the cut-off date for the offence in column 2 is useful?

Consultation Question 50

Do consultees agree with the approach taken in splitting up schedule 15 to the Criminal Justice Act 2003 into three schedules: one for non-sentencing purposes, one for the purposes of references to specified offences and one for the purposes of life sentences under the re-drafted versions of sections 225 and 226 of the Criminal Justice Act 2003?

Consultation Question 51

Do consultees find the signposts to the definitions of "specified offence" and "serious offence", as well as the test of dangerousness, helpful?

Consultation Question 52

Do consultees think that all minimum sentence provisions listed in paragraph **9.41** should be re-drafted in the Sentencing Code?

Consultation Question 53

If not, which provisions should be re-drafted in the Sentencing Code, and which ought to be left in their current locations?

Consultation Question 54

Do consultees agree that we have included all the provisions relating to the administration of sentence that a court needs to be aware of when sentencing to properly exercise its functions?

Consultation Question 55

Do consultees agree that the orders included in clause 262 are those which a sentencing judge needs to be aware of? Are there some which ought to have been included which are not, or some which are included which should be omitted?

Consultation Question 56

Do consultees agree that restraining orders on acquittal belong in the Sentencing Code?

Consultation Question 57

Do consultees agree with the decision to signpost, but not to re-draft, Sexual Harm Prevention Orders? If the view is that they should be re-drafted into the Sentencing Code, do consultees consider that this justifies splitting the versions available on application and the variations available to a sentencing court and splitting schedule 3, re-drafting it in the Sentencing Code for the purpose of Sexual Harm Prevention Orders and leaving in the Sexual Offences Act 2003 for the purpose of notification?

Consultation Question 58

Do consultees think that the format of the table of signposts in clause 262 is helpful? Could it be improved?

Consultation Question 59

Do consultees agree that sentences imposed by the magistrates' courts take effect from the beginning of the day on which they are imposed (unless otherwise directed), and that section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended to them to make this clear?

Consultation Question 60

Do consultees agree that the Crown Court can only direct that a sentence takes effect other than on the day it is imposed by imposing it consecutively on the expiry of another sentence, or minimum term, from which the offender has not already been released?

If so, do consultees consider that it would be desirable to formally codify this position?

Consultation Question 61

Do consultees agree that the 56 day limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended? How long should any limit be?

Consultation Question 62

Should the time limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 be longer for the correction of errors of law than for the amendment of sentence for other reasons?

Consultation Question 63

Do consultees agree that the requirement that the alteration of sentence must be conducted by the same judge who imposed the original sentence should be removed, in favour of a provision which allowed the resident judge of the Crown Court centre in question to make the alteration in circumstances where it is not reasonably practicable for the original judge to sit inside the 56-day period?

Appendix 1: List of pre-consolidation amendments

The below table describes the pre-consolidation amendments which are proposed. The following amendments will apply to provisions of the existing law prior to their consolidation within the Sentencing Code.

Clause	Origin	Before	After	Reason
12(3)	PCC(S)A 2000, s 1D		In relation to a deferment order made by a magistrates' court, any reference in this Chapter to the court which made the order includes a reference to any magistrates' court acting in the same local justice area as that court.	New addition makes clear that any magistrates' court in that local justice area may exercise the powers of the specific magistrates' court which made the order in the same area.
13(1)(b)	PCC(S)A 2000, s 3(2)(a)	If the court **is of the opinion**— (a) that the offence or the combination of the offence and one or more offences associated with it was so serious that [the Crown Court should, **in the court's opinion**, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment]	the court **is of the opinion** that— (i) the offence, or (ii) the combination of the offence and one or more offences associated with it, was so serious that the Crown Court should have the power to deal with the offender in any way it could deal with the offender if the offender had been convicted on indictment.	Removal of repetition of "in the court's opinion".

Clause	Origin	Before	After	Reason
14(5)	PCC(S)A 2000 s 3A(4)	In **reaching any decision under or taking any step contemplated by this section—** (b) **nothing the court does under** this section may be challenged or be the subject of any appeal in any court on the ground that it is not consistent with an indication of sentence.	Nothing the court does under this section may be challenged or be the subject of any appeal in any court on the ground that it is not consistent with an indication of sentence.	The chapeau provided in the first line of (4) only applies to the provision in (4)(a) and not (4)(b). The pre-consolidation amendment therefore turns section 3A(4)(b) into section 3A(4A).
14(6)	PCC(S)A 2000 s 3A(5)	Nothing in this section shall prevent the court from committing an offender convicted of a specified offence to the Crown Court for sentence **under section 3** above if the provisions of that section are satisfied.	Nothing in this section prevents the court from committing an offender convicted of a specified offence to the Crown Court for sentence **under section 13 or 17** if the provisions of that section are satisfied.	Reference to committal under section 4 of the Powers of Criminal Courts (Sentencing) Act 2000 is added to ensure that an offender can be committed under section 4 where committal under section 3A would otherwise be mandatory – as section 4(4)(b) recognises may occur.
16(1)(b)	PCC(S)A 2000 s 3C(2)	If, in relation to the offence, **it appears to the court** that the criteria for the imposition of a sentence under section 226B of the Criminal Justice Act 2003 2 would be met…	**the court is of the opinion** that an extended sentence of detention under section 164 would be available in relation to the offence.	This change has been made for consistency with the rest of the provisions relating to committal in the Code.

Clause	Origin	Before	After	Reason
16(4)	PCC(S)A 2000 s 3C(4)	Nothing in this section shall prevent the court from **committing a specified offence** to the Crown Court for sentence under **section 3B above** if the provisions of that section are satisfied.	Nothing in this section prevents the court from **committing a person convicted of a specified offence** to the Crown Court for sentence under **section 15 or 18** if the provisions of that section are satisfied.	A person is committed in respect of an offence, the law previously gave a power to commit the offence to the Crown Court. After the reference to section 3B reference to 4A has also been inserted to ensure that an offender can be committed under section 4A where committal under section 3C would otherwise be mandatory – as section 4A(4)(b) recognises may occur.
17(9)	PCC(S)A 2000 s 4(8)	In **reaching any decision under or taking any step contemplated by this section—** (b) **nothing the court does under** this section may be challenged or be the subject of any appeal in any court on the ground that it is not consistent with an indication of sentence.	Nothing the court does under this section may be challenged or be the subject of any appeal in any court on the ground that it is inconsistent with an indication of sentence.	The chapeau provided in the first line of (8) only applies to the provision in (8)(a) and not (8)(b). The pre-consolidation amendment therefore turns section 4(8)(b) into section 4(9).

Clause	Origin	Before	After	Reason
18(5)(a)	PCC(S)A 2000 s 4A(1)(a)	a person aged under 18 **appears or brought** before a magistrates' court…	The person **appears or is brought** before a magistrates' court ("the court") on an information charging the person with the offence,	Corrects a missing "is" in the original.
24(2)	PCC(S)A 2000 s 8(2)	The court may and, if it is not a youth court, shall unless satisfied that it would be undesirable to do so, **remit the case—**	If the convicting court is the Crown Court, it **must remit the offender** to a youth court acting for the place where the sending court sat…	The offender is remitted, not the case.
24(2)	PCC(S)A 2000 s 8(2)(a)	if the offender was sent to the Crown Court for trial under section 51 or 51A of the Crime and Disorder Act 1998, **to a youth court acting for the place where he was sent to the Crown Court for trial;**	If the convicting court is the Crown Court, it must remit the **offender to a youth court acting for the place where the sending court sat**…	This change confirms that the place referred to is the one where the court who sent him for trial sat, not where the court who received him sat.
24(3)	PCC(S)A 2000 s 8(2)	The court may and, if it is not a youth court, shall unless satisfied that it would be undesirable to do so, **remit the case—**	If the convicting court is a youth court, it may **remit the offender** to another youth court.	The offender is remitted, not the case.

Clause	Origin	Before	After	Reason
24(4)	PCC(S)A 2000 s 8(2) and (6)	The court may and, if it is not a youth court, shall unless satisfied that it would be undesirable to do so, **remit the case—** … Without prejudice to the power to **remit any case** to a youth court which is conferred on a magistrates' court other than a youth court by subsections (1) and (2) above, where such a magistrates' court convicts a child or young person of an offence it must exercise that power unless the case falls within subsection (7) or (8) below.	If the convicting court is a magistrates' court other than a youth court— (a) where subsection (10) or (11) applies, it may **remit the offender** to a youth court, and (b) otherwise, it must **remit the offender** to a youth court.	The offender is remitted, not the case.
24(5)	PCC(S)A 2000 s 8(2)	… **remit the case**	**Any remission of a offender** under subsection (3) or (4) must be to a youth court acting for— (a) the same place as the remitting court, or (b) the place where the offender habitually resides.	The offender is remitted, not the case.

Clause	Origin	Before	After	Reason
24(6)	PCC(S)A 2000 s 8(3)	Where **a case is remitted** under subsection (2) above, the offender shall be brought before a youth court accordingly, and that court may deal with him in any way in which it might have dealt with him if he had been tried and convicted by that court.	**Where an offender is remitted to a youth court under this section—** …	The offender is remitted, not the case.
24(7)	PCC(S)A 2000 s 8(4)(a)	A court by which an order **remitting a case** to a youth court is made under subsection (2) above… (a) may, subject to section 25 of the Criminal Justice and Public Order Act 1994 (restrictions on granting bail), give such directions as appear to be necessary with respect to the custody of the offender or for his release on bail until he can be brought before the youth court; and	Where the **Crown Court remits an offender** to a youth court under this section…	The offender is remitted, not the case. Paragraph (a) has been restricted to the Crown Court in recognition of the introduction of subsection (4A) by pre-consolidation amendment for magistrates' courts – this allows the streamlining of the references to adjournment and remand for magistrates' courts in the sections relating to remittal in section 27.

Clause	Origin	Before	After	Reason
24(8)	PCC(S)A 2000 s 8(4)(b)	shall **cause to be transmitted** to the designated officer for the youth court a certificate setting out the nature of the offence and stating— (i) that the offender has been convicted of the offence; and (ii) **that the case** has been remitted for the purpose of being dealt with under the preceding provisions of this section.	A court which remits an offender to a youth court under this section must **provide** to the designated officer for the youth court a certificate which— (a) sets out the nature of the offence, and (b) states— (i) that the offender has been convicted of the offence, and (ii) **that the offender** has been remitted for the purpose of being dealt with under subsection (6).	"Cause to be transmitted" has been replaced with "provide" to ensure consistency and modern language throughout the Sentencing Code. Further, the offender is remitted, not the case.
24(9)	PCC(S)A 2000 s 8(5)	(5) Where **a case is remitted** under subsection (2) above, the offender shall have no right of appeal against the order of remission, but shall have the same right of appeal against **any order** of the court to which **the case is remitted** as if he had been convicted by that court.	**An offender who is remitted** under this section— (a) has no right of appeal against the order of remission, but (b) has the same right of appeal against **an order** of the court to which **the offender is remitted** as if convicted by that court.	The offender is remitted, not the case. "Any" has been replaced with "an" for consistency with sections 25(5) and 26(7).
24(10)	PCC(S)A 2000 s 8(7)	(7) The case falls within this subsection if the court would, were it not so to **remit the case**, be required by section 16(2) below to refer the offender to a youth offender panel (in which event the court may, but need not, so **remit the case**).	This subsection applies if the court would be required by section 16(2) of the Powers of Criminal Courts (Sentencing) Act 2000 to refer the offender to a youth offender panel **if it did not remit the offender** to the youth court.	The offender is remitted, not the case.

Clause	Origin	Before	After	Reason
26(7)	PCC(S)A 2000 s 10(6)	The offender, if remitted under this section, shall have no right of appeal against the order of remission (but without prejudice to any right of appeal against **any other order** made in respect of the instant offence by the court to which he is remitted).	This is without prejudice to any right of appeal against **an order** made in respect of the present offence by the other court.	Consistency within the Sentencing Code.
27(1)(a)	PCC(S)A 2000 s 10(3)	Where the convicting court remits the offender to the other court under this section, **it shall adjourn the trial of the information charging him with the instant offence**, and—	the remitting court must **adjourn proceedings in relation to the offence,** and	Adjustment of wording to enable streamlining with section 9(2) of the Powers of Criminal Courts (Sentencing) Act 2000. Also reflects insertion of subsection (4A) into section 8 Powers of Criminal Courts (Sentencing) Act 2000 to allow streamlining of the powers of magistrates' courts to adjourn and remand when remitting an offender to another magistrates' court.

Clause	Origin	Before	After	Reason
27(2)			In this section, “remand enactment” means section 128 of the Magistrates’ Courts Act 1980 (remand in custody or on bail) or any other enactment, whenever passed or made, relating to remand or the granting of bail in criminal proceedings; and for this purpose— (a) “enactment” includes an enactment contained in any order, regulation or other instrument having effect by virtue of an Act, and (b) “bail in criminal proceedings” has the same meaning as in the Bail Act 1976.	Insertion of subsection (4A) into section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 to allow streamlining of the powers of magistrates’ courts to adjourn and remand when remitting an offender to another magistrates’ court.
41(6)	DVCVA sch 12 para 7		For the purposes of subsection (1), where an offence is found to have been committed over a period of 2 or more days, or at some time during a period of 2 or more days, it must be taken to have been committed on the last of those days.	Ensures that where an offence is committed over multiple days it is taken to have been committed on the last of those days for the purpose of paragraph 7 of Schedule 2 to the Domestic Violence, Crime and Victims Act 2004 so as to avoid any potential uncertainty as to whether the surcharge applies.

Clause	Origin	Before	After	Reason
45(4)	CJCA 2015 s 54(5)		For the purposes of subsection (1)(b), where an offence is found to have been committed over a period of 2 or more days, or at some time during a period of 2 or more days, it must be taken to have been committed on the last of those days.	Ensures that where an offence is committed over multiple days it is taken to have been committed on the last of those days for the purpose of section 54(5) of the Criminal Justice and Courts Act 2015 so as to avoid any potential uncertainty as to whether the criminal courts charge applies.
57(1)(a)	CJA 2009 s 125(2)(a)	a court is deciding what sentence to impose on **a person ("P") who is guilty of** an offence, and	a court is deciding what sentence to impose on **an offender** for an offence, and	Reference to a person who is guilty of an offence replaced with reference to an offender for consistency throughout the Sentencing Code.

Clause	Origin	Before	After	Reason
58(2)	CJA 2009 s 126(1)	Section 125(3) (except as applied by virtue of subsection (3) below) is subject to any power a court has to impose— (c) an extended sentence of imprisonment by virtue of **section 226A of the Criminal Justice Act 2003**; (d) an extended sentence of detention by virtue of **section 226B of that Act**.	In determining the appropriate custodial term for the purposes of **section 166(2), 183(2) or 196(2) (extended sentence for certain violent or sexual offences**), section 57 applies to the court as it applies to a court in determining the sentence for an offence.	The amendment glosses the reference to imprisonment in paragraph (c) of section 126(1) of the Coroners and Justice Act 2009 so that it also refers to an extended sentence of detention in a young offender institution by virtue of section 226A of the Criminal Justice Act 2003.
58(3)	CJA 2009 s 126(2)		Subsection (4) applies where a court is considering whether to impose a sentence under 188 or 198 (life sentence for second listed offence) for an offence.	Inserts reference to ascertaining whether the sentence condition in section 224A(3) of the Criminal Justice Act 2003 is met clarifying that guidelines apply when determining whether said condition is met.

Clause	Origin	Before	After	Reason
58(4)	CJA 2009 s 126(3) and (4)		In determining, for the purpose of deciding whether the sentence condition in section 188(3) or 198(3) is met, the sentence that it would have passed as mentioned in that condition, section 57 applies to the court as it applies to a court in determining the sentence for an offence.	Inserts reference to ascertaining whether the sentence condition in section 224A(3) of the Criminal Justice Act 2003 is met clarifying that guidelines apply when determining whether said condition is met.
64(6)	CJA 2003 s 146		"presumed" means presumed by the offender.	Reference to the meaning of presumed is inserted into section 146 of the Criminal Justice Act 2003 to align it with the definition used in relation to religious and racial aggravation in section 28 of the Crime and Disorder Act 1998.
68(1)	SOCPA 2005 s 73(2)	In determining what sentence to pass on **the defendant** …	This section applies where the Crown Court is determining what sentence to pass in respect of an offence **on an offender** who—	Replaces reference to defendant with reference to offender for consistency throughout the Sentencing Code.

Clause	Origin	Before	After	Reason
68(4)(c)	SOCPA 2005 s 73(7)	If subsection (3) above does not apply by virtue of subsection (4) above, **sections 174(1)(a)** and 270 **of the Criminal Justice Act 2003** (requirement to explain reasons for sentence or other order) do not apply to the extent that the explanation will disclose that a sentence has been discounted in pursuance of this section.	**sections 50(2)** and 235(4) (requirement to explain reasons for sentence or other order) do not apply to the extent that the explanation will disclose that a sentence has been discounted by virtue of this section.	Reference to section 174(1)(a) of the Criminal Justice Act 2003 is corrected to reference to section 174(2) of that Act.

Clause	Origin	Before	After	Reason
68(5)	SOCPA 2005 s 73(5)	Nothing in any enactment which— (a) requires that **a minimum sentence is passed in respect of any offence or an offence of any description or by reference to the circumstances of any offender (whether or not the enactment also permits the court to pass a lesser sentence in particular circumstances),** or (b) in the case of a sentence which is fixed by law, requires the court to take into account certain matters for the purposes of making an order which determines or has the effect of determining the minimum period of imprisonment which the offender must serve (whether or not the enactment also permits the court to fix a lesser period in particular circumstances), affects the power of a court to act under subsection (2).	Nothing in— (a) **any of the provisions listed in section 274(1)(b) or (c) (minimum sentences in certain circumstances),** or (b) section 234 (and Schedule 14) (determination of minimum term in relation to mandatory life sentence), affects the Crown Court's power under subsection (2).	Reference to minimum sentences vaguely have been defined by reference to the minimum sentences listed in section 274(1)(b) and (c).

Clause	Origin	Before	After	Reason
74(5)	PCC(S)A 2000 s 12(1)(b)	(b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years **from the date of the order**, as may be specified in the order.	The period of conditional discharge specified in an order for conditional discharge must be a period of not more than 3 years **beginning with the day on which the order** is made.	The use of "from" means the day after. The intention must be that a conditional discharge can run for 3 years, not 3 years and a day and this amendment reflects this.
89(3)	CJA 2003 s 165(3)	Where under this section the court remits the whole or part of a fine **after a term of imprisonment has been fixed** under section 139 of the Sentencing Act (powers of Crown Court in relation to fines) or section 82(5) of the Magistrates' Courts Act 1980 (magistrates' powers in relation to default) it must reduce the term by the corresponding proportion.	Where under this section the court remits the whole or part of a fine after a **term of imprisonment, or detention under section 108 of the Powers of Criminal Courts (Sentencing) Act 2000, has been fixed** under— (a) section 91, or (b) section 82(5) of the Magistrates' Courts Act 1980 (magistrates' powers in relation to default), it must reduce the term by the corresponding proportion.	Reference to the power to fix a term of detention under section 108 of the Powers of Criminal Courts (Sentencing) Act 2000 in a case of an offender aged 18 to 20 has been added to ensure that this section applies to such cases as it does to terms of imprisonment fixed in default.

Clause	Origin	Before	After	Reason
92(6)	PCC(S)A 2000 s 140(6)	Any fine or other sum the payment of which is enforceable by a magistrates' court by virtue of this section shall be treated for the purposes **of the Justices of the Peace Act 1997 and, in particular, section 60 of that Act (application of fines and fees)** as having been imposed by a magistrates' court, or as being due under a recognizance forfeited by such a court.	Where payment of a fine is enforceable by a magistrates' court by virtue of this section, the fine is to be treated for the purposes **of section 38 of the Courts Act 2003 (application of receipts of designated officers)** as having been imposed by a magistrates' court.	This amendment corrects a missed consequential amendment, changing the reference to the now repealed Justices of the Peace Act 1997 to references to its replacement.

95	PCC(S)A 2000 s 130(1)-(2A)	(1) A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as a "compensation order") requiring him— (a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or (b) to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road; but this is subject to the following provisions of this section and to section 131 below. (2) Where the person is convicted of an offence the sentence for which is fixed by law or falls to be imposed under a provision mentioned in subsection (2ZA), subsection (1) above shall have effect as if the words "instead of or" were omitted.	(1) A compensation order is available for a court by or before which an offender is convicted of an offence. This is subject to section 97 (road accidents). (2) Where a compensation order is available, the court may make such an order whether or not it also deals with the offender for the offence in any other way.	The reference to minimum sentences is unnecessary because of the way in which this provision has been restructured so that a compensation order is simply available whether or not the court deals with the offender for the offence in any other way. It is also unnecessary to have explicit provision requiring the court to consider making an order as this is an implicit duty as a result of the order being available to them.

Clause	Origin	Before	After	Reason
		(2ZA) The provisions referred to in subsection (2) are— (a) section 1(2B) or 1A(5) of the Prevention of Crime Act 1953; (b) section 51A(2) of the Firearms Act 1968; (c) section 139(6B) , 139A(5B) or 139AA(7) of the Criminal Justice Act 1988; (d) section 110(2) or 111(2) of this Act; (e) section 224A , 225(2) or 226(2) of the Criminal Justice Act 2003; (f) section 29(4) or (6) of the Violent Crime Reduction Act 2006. (2A) A court must consider making a compensation order in any case where this section empowers it to do so.		

Clause	Origin	Before	After	Reason
100(4)	PCC(S)A 2000 s 131		For this purpose, "the compensation" in respect of a main offence or a TIC offence means the amounts to be paid under any compensation order or compensation orders made in respect of that offence.	This amendment has been made to clarify that compensation in this section refers also to any amount awarded in respect of bereavement or funeral expenses.
101(1)	PCC(S)A 2000 s 132(1)	A person in whose favour a compensation order is made shall not be entitled to receive the amount due to him until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility **of an appeal on which the order could be varied or set aside**.	A person in whose favour a compensation order is made is not entitled to receive the amount due to the person until there is no further possibility **of the order being varied or set aside on appeal** (disregarding any power to grant leave to appeal out of time).	This amendment is to ensure consistency throughout the Sentencing Code with other references to orders being set aside on appeal.
101(2)	PCC(S)A 2000 s 132(2)	Criminal Procedure Rules may make provision regarding the way in which the magistrates' court for the time being having functions (by virtue of section 41(1) of the Administration of Justice Act 1970) in relation to the enforcement of a compensation order is to deal with money paid in satisfaction of the order **where the entitlement of the person in whose favour it was made is suspended.**	Criminal Procedure Rules may make provision regarding the way in which the appropriate court is to deal with money paid in satisfaction of a compensation order **where the entitlement of the person in whose favour it was made is suspended under subsection (1).**	This amendment is to clarify that the reference to suspension is reference to the power to suspend under subsection (1) of section 132 of the Powers of Criminal Courts (Sentencing) Act 2000.

Clause	Origin	Before	After	Reason
102(1)(b)	PCC(S)A 2000 s 133(2)(a)	at a time when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility **of an appeal on which the compensation order could be varied or set aside**; and	there is no further possibility of **the compensation order being varied or set aside on appeal** (disregarding any power to grant leave to appeal out of time), and	This amendment is to ensure consistency throughout the Sentencing Code with other references to orders being set aside on appeal.
111(3)	PCC(S)A 2000 s 144(3) and (5)	(3) The regulations may not provide for the vesting in the **relevant authority of property** in relation to which an order has been made under section 145 below (court order as to application of proceeds of forfeited property). (5) In this section **"relevant authority**" has the meaning given by section 2(2B) of the Police (Property) Act 1897.	Regulations made by virtue of this section may not provide for **the local policing body** to become the owner of property which is the subject of an order under section 112 (court order as to application of property subject to deprivation order).	Reference to "relevant authority" has been replaced with reference to the "relevant body" now found in section 2(2B) of the Police Property Act 1897 as a result of amendment by the Police Reform and Social Responsibility Act 2011.

Clause	Origin	Before	After	Reason
133(3)(b)	SI 2012/2906 art 7(2)(h) and (3)	(2) The following provisions of Schedule 12 to the Act are of no effect in relation to proceedings in which a child is subject to a pre-commencement remand— (h) paragraphs 33 to 58. (3) A pre-commencement remand is a remand which— (a) commenced before 3rd December 2012; and (b) is a remand— …	also includes a reference to being remanded **or committed** before 3 December 2012 to local authority accommodation under section 23 of the Children and Young Persons Act 1969 and—	The words "or committed" appear to have been omitted by error in the drafting of these transitional provisions. This amendment corrects the position.
135(4)	CJA 2003 s 177(1)(l)	(l) in a case where the offender **is aged under 25**, an attendance centre requirement (as defined by section 214).	An attendance centre requirement is not an available requirement unless the offender **was aged under 25 at the time of conviction** of the offence.	The addition of "at the time of conviction" makes the point in relation to which the offender's age should be assessed explicit, and brings it into line with the rest of the provisions assessing age for the purposes of sentencing.

Clause	Origin	Before	After	Reason
136(12)(a)	CJA 2003 s 217(1)(a)	any conflict with the offender's religious beliefs or with the requirements **of any other relevant order** to which he may be subject; and	any conflict with the requirements of— (i) **any other community order or any youth rehabilitation order**, or (ii) **any suspended sentence order**, to which the offender may be subject, and	Inserts reference to any other youth rehabilitation order to which the offender may be subject, as well as any other community order or suspended sentence order – ensuring that the court must ensure that the requirements imposed under a community order do not conflict with such orders.
142(1)	CJA 2003 s 219		This section applies when a court makes a community order.	New subsection makes clear that section 219 (as it applies to community orders) applies only on the court's making of community orders.

Clause	Origin	Before	After	Reason
142(2)	CJA 2003 s 219(1)	The **court by which any relevant order is made** must **forthwith** provide copies of the order— (a) to the offender, (b) to the responsible officer, (c) to an officer who is acting at the court and is an officer of a provider of probation services that is a public sector provider, and (d) where the court specifies a local justice area in which the court making the order does not act, to a provider of probation services that is a public sector provider and is **acting** in that area.	The **proper officer** of the court must provide copies of the order— (a) to the offender, (b) to the responsible officer, (c) to an officer of a provider of probation services that is a public sector provider who is acting at the court, and (d) if the court does not act in the offender's home local justice area, to a provider of probation services that is a public sector provider and is **operating** in that area.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court. Forthwith is omitted and "acting" is replaced with "operating" to ensure consistency and modern language in the Sentencing Code.

Clause	Origin	Before	After	Reason
142(3)	CJA 2003 s 219(2)	Where a relevant order imposes any requirement specified in the first column of Schedule 14, the **court by which the order is made must also forthwith provide** the person specified in relation to that requirement in the second column of that Schedule with a copy of so much of the order as relates to that requirement.	If the order imposes any requirement specified in column 1 of the following table, **the proper officer of the court** must also provide the person specified in the corresponding entry in column 2 with a copy of so much of the order as relates to the requirement.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court. Reference to "forthwith" is omitted as part of the move to modern language in the Sentencing Code.

Clause	Origin	Before	After	Reason
142(4)	CJA 2003 s 219(3)	Where a relevant order specifies a local justice area in which the court making the order does not act, **the court making the order must provid**e to the magistrates' court acting in that area — (a) a copy of the order, and (b) such documents and information relating to the case as **it** considers likely to be of assistance to a court acting in that area in the exercise of its functions in relation to the order.	If the court does not act in the offender's home local justice area, **the proper officer must provide to** the magistrates' court acting in that area— (a) a copy of the order, and (b) such documents and information relating to the case **as the proper officer** considers likely to be of assistance to a court acting in that area in the exercise of its functions in relation to the order.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court.

Clause	Origin	Before	After	Reason
142(5)	CJA 2003 s 219		In this section, “proper officer” means— (a) in relation to a magistrates’ court, the designated officer for the court, and (b) in relation to the Crown Court, the appropriate officer.	The officer who is acting for the court has been defined in line with the definitions in the accompanying provisions in paragraphs 27 of Schedule 8 and paragraph 22 of Schedule 12 to the Criminal Justice Act 2003 dealing with the amendment of community orders and suspended sentence orders.
144(1)	CJA 2003 s 198(1)	Where a relevant order **has effect**, it is the duty of the responsible officer—	This section applies where a community order **is in force**.	The term “in effect” has been replaced with the term “in force” to ensure consistency throughout the Code.

Clause	Origin	Before	After	Reason
144(5)	CJA 2003 s 217(1) and (2)	(1) The court must ensure, as far as practicable, that any requirement imposed by a relevant order is such as to avoid— (a) any conflict with the offender's religious beliefs or with the **requirements of any other relevant order** to which he may be subject; and (b) any interference with the times, if any, at which he normally works or attends any educational establishment. (2) The responsible officer in relation to an offender to whom a relevant order relates must ensure, as far as practicable, that any instruction given or requirement imposed by him in pursuance of the order is such as to avoid the conflict or interference mentioned in subsection (1).	The responsible officer must also ensure, as far as practicable, that any instruction given or requirement imposed by the responsible officer is such as to avoid— (a) any conflict with the requirements of— (i) **any other community order or any youth rehabilitation order**, or (ii) **any suspended sentence order**, to which the offender may be subject, and (b) any interference with the times, if any, at which the offender normally— (i) works, or (ii) attends any educational establishment.	Inserts reference to any other youth rehabilitation order to which the offender may be subject, as well as any other community order or suspended sentence order – ensuring that the responsible officer must ensure that the requirements imposed under a community order do not conflict with such orders.

Clause	Origin	Before	After	Reason
146(7)	CJA 2003 s 220A		The responsible officer must refuse an application for permission if— (a) the offender's present residence is in England or Wales, and (b) the offender's proposed residence is outside England and Wales.	This provision has been added as paragraphs 2 and 4 of Schedule 9 to the Criminal Justice Act 2003 provide that section 220A otherwise continues to apply when orders are being transferred. The clear intention of the Schedule is however that the court should deal with such transfers, not the responsible officer.
149(1)			A community order is in force for the period— **(a) beginning when the order is made,** and (b) ending— (i) with the end date (see section 138), or (ii) if later, when the offender has completed any unpaid work requirement imposed by the order.	An amendment has been made to clarify that a community order is in force as soon as it is made.

Clause	Origin	Before	After	Reason
156(4)	PCC(S)A 2000 s 83(5)	For the purposes of subsection (1)(b) above a previous sentence of imprisonment which has been suspended and which has not taken effect under section 119 below or under section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 shall be disregarded.	For the purposes of subsection (3) a previous sentence of imprisonment which has been suspended and which has not taken effect under— (a) paragraph 8 of Schedule 10, (b) paragraph 8 of Schedule 12 to the Criminal Justice Act 2003, (c) section 119 of the Powers of Criminal Courts (Sentencing) Act 2000, or (d) section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 is to be disregarded.	An amendment has been made so that previous suspended sentences imposed under the Criminal Justice Act 2003 that have not yet taken effect are to be disregarded.
156(5)	PCC(S)A 2000 s 83(6)	In this section "sentence of imprisonment" does not include a committal for contempt of court or any kindred offence.	For those purposes, "sentence of imprisonment" does not include a committal for contempt of court or any kindred offence (and "sentenced to imprisonment" is to be read accordingly).	Clarification that the definition of "sentence of imprisonment" also extends to the phrase "sentenced to imprisonment"

Clause	Origin	Before	After	Reason
171(1) and (2)	PCC(S)A 2000 s 91(5)	Where — (a) subsection (2) of section 51A of the Firearms Act 1968, or (b) subsection (6) of section 29 of the Violent Crime Reduction Act 2006, requires the imposition of a sentence of detention under this section for a term of at least the term provided for in that section, the court shall sentence the offender to be detained for such period, of at least the term so provided for but **not exceeding the maximum term of imprisonment with which the offence is punishable in the case of a person aged 18 or ove**r, as may be specified in the sentence.	(1) This section applies where the court imposes a sentence of detention under section 168 under— (a) section 170, (b) section 51A(2) of the Firearms Act 1968, or (c) section 29(6) of the Violent Crime Reduction Act 2006. (2) The period of detention specified in the sentence must not exceed— (a) **the maximum term of imprisonment with which the offence is punishable in the case of a person aged 21 or over**, or (b) life, **if the offence is punishable with imprisonment for life in the case of a person aged 21 or over**.	Reference to the maximum period of imprisonment with which the offence is punishable in the case of a person aged 18 or over has been replaced with reference to “a person aged 21 or over” until the commencement of section 61 of the Criminal Justice and Courts Services Act 2000.

Clause	Origin	Before	After	Reason
184(2)	PCC(S)A 2000 s 97(5)	(5) Subject to **section 84 above** (restriction on consecutive sentences for released prisoners), where an offender who— (a) is serving a sentence of detention in a young offender institution, and (b) is aged 21 or over, is convicted of one or more further offences for which he is liable to imprisonment, the court shall have the power to pass one or more sentences of imprisonment to run consecutively upon the sentence of detention in a young offender institution.	(2) Where an offender who— (a) is serving a sentence of detention in a young offender institution, and (b) is aged 21 or over, is convicted of one or more further offences for which the offender is liable to imprisonment, the court has the power to pass one or more sentences of imprisonment to run consecutively upon the sentence of detention in a young offender institution. This is **subject to section 155** (restriction on consecutive sentences for released prisoners).	Reference to the now repealed section 84 of the Powers of Criminal Courts (Sentencing) Act 2000 has been replaced with reference to its successor – section 265 of the Criminal Justice Act 2003 as redrafted.

Clause	Origin	Before	After	Reason
189(3)	CJA 2003 s 225(2)	(2) If— (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life **or in the case of a person aged at least 18 but under 21, a sentence of custody for life.**	(3) If the court considers that the seriousness of— (a) the offence, or (b) the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of custody for life, **the court must impose a sentence of custody for life under section 187**.	It has been clarified that a sentence of custody for life is one under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000.
205(4)	CJA 2003 s 190(1)(l)	in a case **where the offender is aged under 25**, an attendance centre requirement (as defined by section 214).	An attendance centre requirement is not an available requirement unless **the offender is aged under 25 at the time of conviction of the offence**.	The addition of “at the time of conviction” makes the point in relation to which the offender’s age should be assessed explicit, and brings it into line with the rest of the provisions assessing age for the purposes of sentencing.

Clause	Origin	Before	After	Reason
206(4)(a)	CJA 2003 s 217(1)(a)	The court must ensure, as far as practicable, that any requirement imposed by a relevant order is such as to avoid— (a) any conflict with the offender's religious beliefs or with the requirements **of any other relevant order** to which he may be subject; and	The court must also ensure, so far as practicable, that any community requirement imposed by a suspended sentence order is such as to avoid— (a) any conflict with— (i) the requirements of **any community order or youth rehabilitation order**, or (ii) any community requirement of **any other suspended sentence order**, to which the offender may be subject, and	Inserts reference to any other youth rehabilitation order to which the offender may be subject, as well as any other community order or suspended sentence order – ensuring that the court must ensure that the requirements imposed under a suspended sentence order do not conflict with such orders.
208(3)	CJA 2003 s 191(2)	**Subsection (1) does not apply in the case of an order imposing a drug rehabilitation requirement** (provision for such a requirement to be subject to review being made by section 210).	**If the suspended sentence order—** **(a) imposes a drug rehabilitation requirement, and** **(b) contains provision for review under this section,** **the provision for review must not include provision relating to that requirement** (but see paragraph 22 of Schedule 3 for separate provision about review of such a requirement).	Amends section 191 so that a court that imposes a suspended sentence order with a drug rehabilitation requirement subject to review can still ensure that the other requirements in that order are subject to review.

Clause	Origin	Before	After	Reason
208(5)	CJA 2003 s 191(4)	Where the area specified in a suspended sentence order made by a magistrates' court is not the **area for which** the court acts, the court may, **if it thinks fit, include in the order provision specifying** for the purpose of subsection (3) a magistrates' court which acts **for the area** specified in the order.	Where— (a) a suspended sentence order is made by a magistrates' court, (b) the offender's home local justice area is not the **area in which** the court acts, the order may **specify** that the responsible court is to be a magistrates' court which **acts in the offender's home local justice area.**	Minor changes have been made here replacing "area for which" with "area in which"; ", if it thinks fit, include in the order provision specifying" with "specify"; "for the area" with "in the offender's home local justice area" to provide greater clarity to this section.
213(1)	CJA 2003 s 219		This section applies on the making by a court of a suspended sentence order which imposes one or more community requirements.	New subsection makes clear that section 219 (as it applies to suspended sentence orders) applies only on the court's making of suspended sentence orders.

Clause	Origin	Before	After	Reason
213(2)	CJA 2003 s 219(1)	The **court by which any relevant order is made** must **forthwith** provide copies of the order— (a) to the offender, (b) to the responsible officer, (c) to an officer who is acting at the court and is an officer of a provider of probation services that is a public sector provider, and (d) where the court specifies a local justice area in which the court making the order does not act, to a provider of probation services that is a public sector provider and is **acting** in that area.	The **proper officer of the court** must provide copies of the order— (a) to the offender, (b) to the responsible officer, (c) to an officer of a provider of probation services that is a public sector provider who is acting at the court, and (d) if the court does not act in the offender's home local justice area, to a provider of probation services that is a public sector provider and is **operating** in that area.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court. Forthwith is omitted and "acting" is replaced with "operating" to ensure consistency and modern language in the Sentencing Code.

Clause	Origin	Before	After	Reason
213(3)	CJA 2003 s 219(2)	Where a relevant order imposes any requirement specified in the first column of Schedule 14, the **court by which the order is made must also forthwith provide** the person specified in relation to that requirement in the second column of that Schedule with a copy of so much of the order as relates to that requirement.	If the order imposes any requirement specified in column 1 of the following table **the proper officer of the court** must also forthwith provide the person specified in the corresponding entry in column 2 with a copy of so much of the order as relates to the requirement.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court. Reference to "forthwith" is omitted as part of the move to modern language in the Sentencing Code.

Clause	Origin	Before	After	Reason
213(4)	CJA 2003 s 219(3)	Where a relevant order specifies a local justice area in which the court making the order does not act, **the court making the order must provid**e to the magistrates' court acting in that area — (a) a copy of the order, and (b) such documents and information relating to the case as **it** considers likely to be of assistance to a court acting in that area in the exercise of its functions in relation to the order.	If the court does not act in the offender's home local justice area, **the proper officer of the court** must provide to the magistrates' court acting in that area— (a) a copy of the order, and (b) such documents and information relating to the case as **the proper officer** considers likely to be of assistance to a court acting in that area in the exercise of its functions in relation to the order.	Amendment requires the proper officer of the court to provide copies of the order, rather than the placing the duty on the court itself. This brings this provision into line with the duties imposed by paragraphs 27 of Schedule 8 and 22 of Schedule 12 to the Criminal Justice Act 2003 which are imposed on the proper officer of the court.

Clause	Origin	Before	After	Reason
213(5)	CJA 2003 s 219		In this section “proper officer” means— (a) in relation to a magistrates’ court, the designated officer for the court, and (b) in relation to the Crown Court, the appropriate officer.	The officer who is acting for the court has been defined in line with the definitions in the accompanying provisions in paragraphs 27 of Schedule 8 and paragraph 22 of Schedule 12 to the Criminal Justice Act 2003 dealing with the amendment of community orders and suspended sentence orders.
215(1)	CJA 2003 s 198(1)	Where a relevant order **has effect**, it is the duty of the responsible officer—	This section applies during while a suspended sentence order which imposes any community requirement is in force.	The term “in effect” has been replaced with the term “in force” to ensure consistency throughout the Code.

Clause	Origin	Before	After	Reason
215(5)(a)	CJA 2003 s 217(1) and (2)	(1) The court must ensure, as far as practicable, that any requirement imposed by a relevant order is such as to avoid— (a) any conflict with the offender's religious beliefs or with the **requirements of any other relevant order** to which he may be subject; and (b) any interference with the times, if any, at which he normally works or attends any educational establishment. (2) The responsible officer in relation to an offender to whom a relevant order relates must ensure, as far as practicable, that any instruction given or requirement imposed by him in pursuance of the order is such as to avoid the conflict or interference mentioned in subsection (1).	The responsible officer must also ensure, as far as practicable, that any instruction given or requirement imposed by the responsible officer is such as to avoid— (a) any conflict with the requirements of— (i) any **community order or any youth rehabilitation order**, or (ii) any **community requirement of any other suspended sentence order,** to which the offender may be subject, and	Inserts reference to any other youth rehabilitation order to which the offender may be subject, as well as any other community order or suspended sentence order – ensuring that the responsible officer must ensure that the requirements imposed under a suspended sentence order do not conflict with such orders.

Clause	Origin	Before	After	Reason
217(7)	CJA 2003 s 220A		The responsible officer must refuse an application for permission if— (a) the offender's present residence is in England or Wales, and (b) the offender's proposed residence is outside England and Wales.	This provision has been added as paragraphs 4 and 9 of Schedule 13 to the Criminal Justice Act 2003 provide that section 220A otherwise continues to apply when orders are being transferred. The clear intention of the Schedule is however that the court should deal with such transfers, not the responsible officer.
223(2)(b)	CJA 2003 s 229(2)(aa)	(aa) may take into account **all such information** as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,	(b) may take into account **any information** that is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,	"all such information" has been replaced with "any information" to streamline the provision with subsections (b) and (c) of section 229(2) of the Criminal Justice Act 2003.

Clause	Origin	Before	After	Reason
226(6)(b)	PCC(S)A 2000 s 110(6)(b)	in relation to a person who is under 21 at that time, a sentence of detention in a young offender institution.	in relation to an offender who is under 21 when convicted of the index offence, a sentence of detention in a young offender institution **under section 177 (and includes, if the index offence is an offence for which a person aged 21 or over would be liable to imprisonment for life, a sentence of custody for life under section 187).**	Reference has been made to clarify that detention is imposed under section 96 of the Powers of Criminal Courts (Sentencing) Act 2000, and that a life sentence remains available for applicable offences.
227(6)(b)	PCC(S)A 2000 s 111(6)(b)	in relation to a person who is under 21 at that time, a sentence of detention in a young offender institution.	in relation to an offender who is under 21 when convicted of the index offence, a sentence of detention in a young offender institution **under section 177.**	Reference has been made to clarify that detention is imposed under section 96 of the Powers of Criminal Courts (Sentencing) Act 2000.

Clause	Origin	Before	After	Reason
230(3)	PCC(S)A 2000 s 113(1)(c)	that court **subsequently certifies** that fact,	A certificate is given in accordance with this subsection if it is— (a) given— (i) by the court by or before which the offender was convicted of the offence, and (ii) in the case of a court in the United Kingdom, after the court has stated in open court **the facts certified by it, and** **(b) signed by the proper officer of the court**.	Requires that certificates under section 113 of the Powers of Criminal Courts (Sentencing) Act 2000 are certified by the signature of the proper officer of the court – aligning the provisions with certificates issued under section 232 of the Criminal Justice Act 2003.
241(2)	CJA 2003 s 238(1)	A court which sentences an offender to a term of imprisonment or detention in a young offender institution of twelve months or more in respect of any offence may, when passing sentence, recommend to the Secretary of State particular conditions which in its view should be included in any licence granted to the offender under this Chapter on his **release from prison**.	The court may, when passing sentence, recommend to the Secretary of State particular conditions which in its view should be included in any licence granted to the offender under Chapter 6 of Part 12 of the CJA 2003 on the offender's **release from prison or detention.**	"or detention" has been added to the end of section 238(1) of the Criminal Justice Act 2003 to reflect the fact that the section applies to an offender who is serving detention in a young offender institution, and therefore will not be being released from prison but instead detention in a young offender institution.

Clause	Origin	Before	After	Reason
244(3)	ABCPA 2014 s 22(6)	The court may make a criminal behaviour order against the offender only if **it is made in addition to—** **(a) a sentence imposed in respect of the offence, or** **(b) an order discharging the offender conditionally.**	But the court may make a criminal behaviour order only if it— **(a) does so in addition to dealing with the offender for the offence, and** **(b) does not make an order for absolute discharge under section 73 in respect of the offence.**	Substitutes the words from "only if" so that it is clear that a criminal behaviour order cannot be made stand-alone nor on the making of an absolute discharge.
244(6)	ABCPA 2014 s 22(10)	In this section "local youth offending team" means— (a) the youth offending team in whose area it appears to the prosecution that the offender lives**, or** **(b) if it appears to the prosecution that the offender lives in more than one such area, whichever one or more of the relevant youth offending teams the prosecution thinks appropriate.**	In this section "local youth offending team" means the youth offending team in whose area it appears to the prosecution that the offender lives.	Paragraph (b) of this subsection has been omitted as it is unnecessary.

Clause	Origin	Before	After	Reason
246(5)	ABCPA 2014 s 24(5)	In subsection (4)(c) "the appropriate chief officer of police" means— (a) the chief officer of police for the police area in which it appears to the person specified under subsection (1) that the offender lives**, or** **(b) if it appears to that person that the offender lives in more than one police area, whichever of the relevant chief officers of police that person thinks it most appropriate to inform.**	In subsection (4)(c) "the appropriate chief officer of police" means the chief officer of police for the police area in which it appears to the person specified under subsection (1) that the offender lives.	Paragraph (b) of this subsection has been omitted as it is unnecessary
257(1)	PHA 1997 s 5A(1)	A court **before which** a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.	This section applies where a person ("the defendant") is acquitted of an offence **by or before a court.**	Inserts reference to a person being acquitted before a court, to clarify that a Crown Court can make a restraining order on acquittal.
259(1)	PHA 1997 s 5(3A)	In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.	This section applies to proceedings— (a) under section 256 or 257 for the making of a restraining order, or (b) under section 258 or 260(6) for the variation or discharge of a restraining order.	This change has been made to clarify that the civil rules of evidence do not apply to the prosecution of an offence under section 5(5) of the Protection from Harassment Act 1997.

Clause	Origin	Before	After	Reason
266(2)(a)	SOCPA 2005 s 74(2)(b)	he receives a **discounted sentence in consequence of his having offered** in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence	**the sentence was discounted** and the offender has not given the assistance offered in accordance with the written agreement by virtue of which it was discounted, or	This section was amended so that the reference to receiving a discounted sentence as a consequence of offering assistance also covered situations in which a discounted sentence was received for having given assistance.

Clause	Origin	Before	After	Reason
266(6)	SOCPA 2005 s 73(5)	Nothing in any enactment which— (**a) requires that a minimum sentence is passed in respect of any offence or an offence of any description or by reference to the circumstances of any offender (whether or not the enactment also permits the court to pass a lesser sentence in particular circumstances), or** **(b) in the case of a sentence which is fixed by law, requires the court to take into account certain matters for the purposes of making an order which determines or has the effect of determining the minimum period of imprisonment which the offender must serve (whether or not the enactment also permits the court to fix a lesser period in particular circumstances),** affects the power of a court to act under subsection (2).	Nothing in— **(a) any of the provisions listed in section 274(1)(b) or (c) (minimum sentences in certain circumstances), or** **(b) section 234 (and Schedule 14) (determination of minimum term in relation to mandatory life sentence),** affects the Crown Court's power under subsection (5).	Reference to minimum sentences vaguely have been defined by reference to the minimum sentences listed in section 274(1)(b) and (c).

Clause	Origin	Before	After	Reason
266(8)	SOCPA 2005 s 74(14)	Section 174(1)(a) or 270 of the Criminal Justice Act 2003 (c. 44) (as the case may be) **applies to a sentence substituted under subsection (5)** above unless the court thinks that it is not in the public interest to disclose that the person falls within subsection (2)(a) above.	Section 50(2) or, as the case may be, 235(4) (requirement to explain reasons for sentence or other order) **applies where a sentence is imposed under subsection (5).** But this is subject to subsection (9).	Extends the application of subsection (14) of section 74 of the Serious Organised Crime and Police Act 2005 to cases where the sentence is substituted under subsection (6) of that Act.
268(2)	SOCPA 2005 s 75(2)	The court in which the proceedings will be or are being heard may make such order **as it thinks appropriate—** (a) to exclude from the proceedings any person who does not fall within subsection (4); (b) **to give such directions as it thinks appropriate prohibiting** the publication of any matter relating to the proceedings (including the fact that the reference has been made).	The court in which the proceedings will be or are being heard may make such order **as it considers appropriate—** (a) to exclude from the proceedings any person who does not fall within subsection (4); (b) **to prohibit** the publication of any matter relating to the proceedings (including the fact that the reference has been made).	The phrase "to give such directions as it thinks appropriate prohibiting" has been replaced with "to prohibit". The exercise of the power to make an order is already limited to making such order as the court thinks appropriate, and the repetition is therefore unnecessary.

Clause	Origin	Before	After	Reason
268(3)	SOCPA 2005 s 75(3)	An order under subsection (2) **may be made only to the extent that the court thinks—** (a) that it is necessary to do so to protect the safety of any person, and (b) that it is in the interests of justice.	The court may make an order under subsection (2) **only if the court considers that the order is—** (a) necessary to protect the safety of any person, and (b) in the interests of justice.	A court cannot partly make an order, though it can exercise a power only to a limited extent, so the provision has been re-drafted to reflect this.
270(2)	SOCPA 2005 s 74(10)	A discounted sentence is a sentence passed in pursuance of section 73 or subsection (6) above.	A discounted sentence is a sentence passed in pursuance of**—** (a) section 68, or (b) section 266, **(and includes a sentence imposed under section 265(4) which is less than the original maximum (within the meaning of that section)).**	Amends the definition of discounted sentence to clarify that a sentence which is substituted under section 74(5) of the Serious Organised Crime and Police Act 2005 in recognition of a failure to give assistance but is still discounted is deemed discounted.

Clause	Origin	Before	After	Reason
Para 4(2) of Sch 3	CJA 2003 s 202A(2)	A relevant order imposing a rehabilitation activity requirement must specify the maximum number of days **for which** the offender may be instructed to participate in activities.	The maximum number of days **on which** the offender may be instructed to participate in activities must be specified in the relevant order.	The number of days "for" which the offender may be instructed to participate in activities has been replaced with the numbers of day "on" which the offender may be instructed to participate: providing more clarity that the limit is the days on which an offender must participate in such activities, not the number of hours of which the offender may be instructed to participate in activities.
Para 16 (4)(b) of Sch 3	CJA 2003 s 207(2)(a)	treatment as a **resident patient** in a care home within the meaning of the Care Standards Act 2000, an independent hospital or a hospital within the meaning of the Mental Health Act 1983, but not in hospital premises where high security psychiatric services within the meaning of that Act are provided;	if the relevant mental health treatment is to be in-patient treatment**, the care home or hospital at which it is to be provided**;	The term "in-patient treatment" has been introduced and defined to aid the understanding of the legislation, explicitly requiring the order to specify the care home or hospital at which treatment is.

Clause	Origin	Before	After	Reason
Para 17(4) of Sch 3	CJA 2003 s 207(3)(c)	the offender has expressed his willingness to comply **with such a requirement**.	The consent condition is that the offender has expressed willingness to comply **with the requirement.**	Reference to "such a requirement" has been replaced with reference to the specific requirement the court proposes to include.
Para 19(6) of Sch 3	CJA 2003 s 209(1)(b)	for the purpose of ascertaining whether he has any drug in his body during that period, must provide samples of such description **as may be so determined, at such times or in such circumstances as may (subject to the provisions of the order) be determined by the responsible officer or by the person specified as the person by or under whose direction the treatment is to be provided.**	**The power for the responsible officer or treatment director to give directions by virtue of sub-paragraph (1)(b) about the provision of samples—** **(a) is a power to give directions as to—** **(i) the type of samples to be provided, and** **(ii) the times at which, or circumstances in which, they are to be provided,** **(b) is subject to any provision made by the order, and** (c) is to be exercised in accordance with guidance given from time to time by the Secretary of State.	This amendment aims to clarify the powers of the responsible officer under section 209(1)(b) of the Criminal Justice Act 2003.

Clause	Origin	Before	After	Reason
Para 22(4)(b) of Sch 3	CJA 2003 s 211(3)(b)	deal with him, for the offence in respect of which the order was made, **in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.**	deal with the offender, for the offence in respect of which the relevant order was made, **in any way in which the court which made the order could deal with the offender if the offender had just been convicted by or before it.**	A pre-consolidation amendment has been made to give the court the sentencing powers they would have if the offender had just been convicted – in line with the clean sweep policy.
Para 22(4) of Sch 3	CJA 2003 s 210(4)	Where a community order or suspended sentence order imposing a drug rehabilitation requirement has been made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, **for the purposes of subsection (2)(b)** it shall be taken to have been made by the Crown Court.	If the offender fails to express willingness to comply with the drug rehabilitation requirement as proposed to be amended by the court, the court may— (a) revoke the community order, or the suspended sentence order and the suspended sentence to which it relates, and (b) deal with the offender, for the offence in respect of which the relevant order was made, in any way in which the court which made the order could deal with the offender if the offender had just been convicted by or before it. **For the purposes of paragraph (b), if the order was made on an appeal from the Crown Court or from the criminal division of the Court of Appeal, it is to be taken to have been made by the Crown Court.**	Amendment extends section 210(4) of the Criminal Justice Act 2003 – that an order imposing a drug rehabilitation requirement on appeal from the Crown Court or Court of Appeal (Criminal Division) shall be taken to have been made by the Crown Court – to the identification of the appropriate courts sentencing powers in section 211(3)(b) of the Criminal Justice Act 2003.

Clause	Origin	Before	After	Reason
Para 8(3)(a) of Sch 4	CJA 2003 Sch 8 para 7(3)(a)	in the case of a community order imposing a drug rehabilitation requirement which is subject to review, **before the magistrates' court responsible for the order**, or	in the case of a community order imposing a drug rehabilitation requirement which is subject to review, **if a magistrates' court is responsible for the order, before that court,** or	Amendment made to reflect that not all community orders imposing a drug rehabilitation requirement are subject to review by a magistrates' court.

Clause	Origin	Before	After	Reason
Para 11(2)(c) and (3) of Sch 4	CJA 2003 Sch 8 para 10(1)(b)	(b) by dealing with him, for the offence in respect of which the order was made, **in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made;**	(c) by dealing with the offender, for the offence in respect of which the order was made— (i) **in any way in which it could deal with the offender if the offender had just been convicted before it of the offence, unless sub-paragraph (3) applies;** **(ii) if sub-paragraph (3) applies, in any way in which a magistrates' court could deal with the offender if it had just convicted the offender of the offence.** **(3) This sub-paragraph applies where the community order was made by the Crown Court—** **(a) on an appeal from the magistrates' court, or** **(b) where its powers to deal with the offender for the offence were those (however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence.**	Amends the Crown Courts powers to re-sentence where an offender breaches the requirements of their community order so that in all cases it has current sentencing powers (in line with the clean sweep approach), but that when the order was made by a court limited to magistrates court sentencing powers it is similarly limited.

Clause	Origin	Before	After	Reason
Para 13(5) of Sch 4	CJA 2003 Sch 8 para 26	Paragraphs 9(1)(a) , 10(1)(a) and 17(1)(b) **have effect subject to the provisions mentioned in subsection (2) of section 177, and to subsections (3) and (6) of that section.**	Paragraphs 10(5)(a) and 11(2)(a) (power to impose more onerous requirements) **have effect subject to any provision that applies to the court in making a community order as if the court were imposing the requirements on making the order**.	An amendment has been made to make the relevant provisions subject to any provision that applies to the court in making a community order as if the court were making the order instead of specifying provisions that require this. This makes the intent of the list of sections clearer.

Clause	Origin	Before	After	Reason
Para 15(3)(b)(ii) and (4) of Sch 4	CJA 2003 Sch 8 para 14(2)(b)(ii)	deal with the offender, for the offence in respect of which the order was made, **in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.**	(ii) deal with the offender, for the offence in respect of which the order was made, **in any way in which it could deal with the offender if the offender had just been convicted before it of the offence (but this is subject to sub-paragraph (4)).** **(4) If the community order was made by the Crown Court—** **(a) on an appeal from the magistrates' court, or** **(b) where its powers to deal with the offender for the offence were those (however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence,** **the power of the Crown Court under sub-paragraph (3)(b)(ii) is power to deal with the offender in any way in which a magistrates' court could deal with the offender if it had just convicted the offender of the offence.**	Amends the Crown Courts powers to re-sentence where the offender or office of a provider of probation services applies for the order to be revoked so that in all cases it has current sentencing powers (in line with the clean sweep approach), but that when the order was made by a court limited to magistrates court sentencing powers it is similarly limited.

Clause	Origin	Before	After	Reason
Para 18(6) of Sch 4	CJA 2003 Sch 8 para 26	Paragraphs 9(1)(a) , 10(1)(a) and 17(1)(b) **have effect subject to the provisions mentioned in subsection (2) of section 177 , and to subsections (3) and (6) of that section.**	Sub-paragraph (1)(b) **has effect subject to any provision that applies to the court in making a community order as if the court were imposing the requirements on making the order.**	An amendment has been made to make the relevant provisions subject to any provision that applies to the court in making a community order as if the court were making the order instead of specifying provisions that require this. This makes the intent of the list of sections clearer.

Clause	Origin	Before	After	Reason
Para 18(8)(b) and (9) of Sch 4	CJA 2003 Sch 8 para 17(3)(b)	deal with him, for the offence in respect of which the order was made, **in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.**	(b) deal with the offender, for the offence in respect of which the order was made, **in any way in which the court which made the order could deal with the offender if the offender had just been convicted by or before it of the offence (but this is subject to sub-paragraph (9)).** **(9) Where the order was made by the Crown Court—** **(a) on an appeal from the magistrates' court, or** **(b) where its powers to deal with the offender for the offence were those(however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence,** **the power conferred by sub-paragraph (8)(b) is power to deal with the offender in any way in which a magistrates' court could deal with the offender if it had just convicted the offender of the offence.**	Amends the courts powers when an offender fails to express willingness to comply with an amendment of a mental health treatment, requirement, drug rehabilitation requirement, or alcohol treatment requirement proposed by the court so that when the order was made by a court limited to magistrate's court sentencing powers it is similarly limited.
Para 19(3) of Sch 4	CJA 2003 Sch 8 para 18(1)	… he must make a report in writing to that effect to the responsible officer and that officer must cause an application to be made under paragraph 17 to the appropriate court **for the variation or cancellation of the requirement**.	The responsible officer must cause an application to be made under paragraph 18 to the appropriate court **for the replacement or cancellation of the requirement**.	The order is also now replaced rather than varied. This change has been made in the interests of streamlining.

Clause	Origin	Before	After	Reason
Para 19(4) of Sch 4	CJA 2003 Sch 8 para 18		In this paragraph, "the treatment practitioner", in relation to a treatment requirement, means— (a) the medical practitioner or other person specified in the community order as the person by whom, or under whose direction, the offender is being treated in pursuance of the requirement, or (b) in the case of a mental health treatment requirement, if no such person is specified, the person by whom, or under whose direction, the offender is being treated in pursuance of the requirement.	The term "medical practitioner or other person by whom or under whose direction an offender is" has been replaced by the term "treatment practitioner" and an accompanying definition provided.
Para 20(5) of Sch 4	CJA 2003 Sch 8 para 24(1)	No application may be **made under paragraph 13 , 17 or 20**, while an appeal against the community order is pending.	(5) No application may be **made under this paragraph** while an appeal against the community order is pending.	This extends paragraph 24 of Schedule 8 to the Criminal Justice Act 2003 so that neither the offender or an officer of a provider of probation services can apply for the community order to be extended while an appeal is pending against the order. This brings the position for such extensions into line with other similar extensions under the Schedule.

Clause	Origin	Before	After	Reason
Para 23(2)(b)(ii) of Sch 4	CJA 2003 Sch 8 para 21(1)(b)(ii)	(ii) deal with the offender, for the offence in respect of which the order was made, **in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.**	(ii) deal with the offender, for the offence in respect of which the order was made, **in any way in which it could deal with the offender if it had just been convicted the offender of the offence.**	Amends the magistrates' courts powers to re-sentence on conviction of a further offence while a community order is in force so that in all cases it has current sentencing powers (in line with the clean sweep approach).
Para 23(3) of Sch 4	CJA 2003 Sch 8 para 25	(1) Subject to sub-paragraph (2), where a court proposes to exercise its powers under Part 4 or 5 of this Schedule, otherwise than on the application of the offender, the court— (a) must summon him to appear before the court, and (b) if he does not appear in answer to the summons, may issue a warrant for his arrest.	Unless the offender is before it, the present court may not deal with the offender under sub-paragraph (2)(b) unless it summons the offender to appear before it.	Amends this paragraph so it only applies to this paragraph when the offender is not already before the court – avoiding the need to summon the offender when they are in front of the court.

Clause	Origin	Before	After	Reason
Para 24(3) of Sch 4	CJA 2003 Sch 8 para 25	(1) Subject to sub-paragraph (2), where a court proposes to exercise its powers under Part 4 or 5 of this Schedule, otherwise than on the application of the offender, the court— (a) must summon him to appear before the court, and (b) if he does not appear in answer to the summons, may issue a warrant for his arrest.	Unless the offender is before it, the present court may not deal with the offender under this paragraph unless it summons the offender to appear before it.	Amends this paragraph so it only applies to this paragraph when the offender is not already before the court – avoiding the need to summon the offender when they are in front of the court.

Clause	Origin	Before	After	Reason
Para 25(2)(b)(ii) and (3) of Sch 4	CJA 2003 Sch 8 para 23(2)(b)(ii)	deal with the offender, for the offence in respect of which the order was made, in any way in **which he could have been dealt with for that offence by the court which made the order if the order had not been made.**	(ii) deal with the offender, for the offence in respect of which the order was made, **in any way in which it could deal with the offender if the offender had just been convicted by or before it of the offence (but this is subject to sub-paragraph (3)).** **(3) Where the community order was made by the Crown Court—** **(a) on an appeal from the magistrates' court, or** **(b) where its powers to deal with the offender for the offence were those (however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence,** **the power of the Crown Court under sub-paragraph (2)(b)(ii) is power to deal with the offender in any way in which a magistrates' court could deal with the offender if it had just convicted the offender of the offence.**	Amends the Crown Courts powers to re-sentence on conviction of a further offence while a community order in force so that in all cases it has current sentencing powers (in line with the clean sweep approach), but that when the order was made by a court limited to magistrates court sentencing powers it is similarly limited.

Clause	Origin	Before	After	Reason
Para 25(4) of Sch 4	CJA 2003 Sch 8 para 25(1)	Subject to sub-paragraph (2), where a court proposes to exercise its powers under Part 4 or 5 of this Schedule, otherwise than on the application of the offender, the court— (a) must summon him to appear before the court, and (b) if he does not appear in answer to the summons, may issue a warrant for his arrest.	Unless the offender is before it, the Crown Court may not deal with the offender under sub-paragraph (2)(b) unless it summons the offender to appear before it.	Amends this paragraph so it only applies to this paragraph when the offender is not already before the court – avoiding the need to summon the offender when they are in front of the court.
Para 27(6) of Sch 4	CJA 2003 Sch 8 para 27(2)	Where under sub-paragraph (1)(b) the proper officer of the court provides a copy of an amending order to a magistrates' court acting in a different area, the officer must also provide to that court **such documents and information relating to the case as it considers likely to be of assistance** to a court acting in that area in the exercise of its functions in relation to the order.	Where under sub-paragraph (3) the proper officer of the court provides a copy of an amending order to a magistrates' court acting in a different area, **t**he officer must also provide to that court **such documents and information relating to the case as the proper officer considers likely to be of assistance** to a court acting in that area in the exercise of its functions in relation to the order.	The "it" in "it considers likely to be of assistance" has been replaced with "the proper officer" to clarify that it is the proper officer who must consider the information is likely to be of assistance, rather than the court who is receiving the information.

Clause	Origin	Before	After	Reason
Para 13(1)(a) of Sch 5	CJA 2003 Sch 9 para 3(1)(a)	in the case of an order imposing a requirement mentioned in sub-paragraph (2), that arrangements exist for persons to comply with such a requirement **in the petty sessions district in Northern Ireland** in which the offender resides, or will be residing when the order comes into force, and that provision can be made for him to comply with the requirement under those arrangements, and	arrangements exist for persons to comply with such a requirement **in the administrative court division in Northern Ireland** in which the offender resides, or will be residing at the relevant time, and	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.
Para 16 of Sch 5	CJA 2003 Sch 9 para 9	Before making or amending a community order in those circumstances the court must explain to the offender in ordinary language— (a) the requirements of the legislation relating to corresponding orders which has effect in the part of the United Kingdom in which he resides or will be residing at the relevant time, (b) the powers of the home court under that legislation, as modified by this Part of this Schedule, and (c) its own powers under this Part of this Schedule.	Before making or amending the community order, the court must explain to the offender in ordinary language— **(a) the effect of paragraph 21 (order to be treated as corresponding order),** (b) the requirements of the legislation relating to corresponding orders which has effect in Scotland or Northern Ireland (as the case may be), (c) the powers of the home court under that legislation, as modified by Part 4 of this Schedule, and (d) its own powers in relation to the community order (see Part 4 of this Schedule).	Adds the duty for the court to explain in ordinary language the effect of paragraph 8 of Schedule 9 to the Criminal Justice Act 2003 that an order is to be treated as a corresponding order.

Clause	Origin	Before	After	Reason
Para 17(1)(b) of Sch 5	CJA 2003 Sch 9 para 3(5)	A community order made or amended in accordance with this paragraph must specify **the petty sessions district in Northern Ireland** in which the offender resides or will be residing when the order or amendment comes into force; and section 216 (local justice area to be specified) does not apply in relation to an order so made or amended.	**the administrative court division in Northern Ireland,**	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.
Para 17(5) of Sch 5	CJA 2003 Sch 9 para 1(6)(c)	specify as the appropriate court **for the purposes of sections 227A to 227ZK of the Criminal Procedure (Scotland) Act 1995** a court of summary jurisdiction (which, in the case of an offender convicted on indictment, must be the sheriff court) having jurisdiction in the locality specified under paragraph (a);	**A Scottish community order which specifies as the corresponding order a community payback order within the meaning of section 227A of the Criminal Procedure (Scotland) Act 1995** must also specify the appropriate court for the purposes of sections 227A to 227ZK of that Act 1995.	Clarifies that paragraph 1(6)(c) of Schedule 9 to the Criminal Justice Act 2003 only applies when the corresponding order is a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995.

Clause	Origin	Before	After	Reason
Para 22(6) of Sch 5	CJA 2003 Sch 9 para 10(c) and (d)	(c) in the case of a community order imposing an unpaid work requirement, any power to vary the order by substituting for the number of hours of work specified in it any greater number than the court **which made the order could have specified**, and (d) in the case of a community order imposing a curfew requirement, any power to vary the order by substituting for the period specified in it any longer period than the **court which made the order could have specified**.	The home court may not vary the order— (a) if the order imposes an unpaid work requirement, so as to extend the specified number of hours to more than the maximum number of hours **for the time being specified in paragraph 2(1)(b)(ii) of Schedule 3**; (b) if the order imposes a curfew requirement, so as to specify any curfew periods **(within the meaning of paragraph 9 of Schedule 3) that fall after the end of the 12 month period specified in subparagraph (5) of that paragraph.**	Amended the power to vary the order so that the court has their current powers in relation to unpaid work and curfew requirements, rather than those the court had when the order was made.
Para 23(2)(b) of Sch 5	CJA 2003 Sch 9 para 11(a)(ii)	if that court is in Northern Ireland, **upon a complaint being made to a justice of the peace acting for the petty sessions district for the time being specified in the order**,	upon a complaint being made **to a justice of the peace,** if the home court is in Northern Ireland.	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.

Clause	Origin	Before	After	Reason
Para 24(2) of Sch 5	CJA 2003 Sch 9 para 15(b)	a certificate purporting to be signed by the clerk of the home court is admissible as evidence of the failure **before the court which made the order.**	A certificate under sub-paragraph (1)(a) which purports to be signed by the clerk of the home court is admissible **as evidence of the breach before the court in England and Wales**.	The phrase "court which made the order" has been replaced with "the court in England and Wales" as the court in England and Wales which receives the order is not necessarily that which made the order.
Para 26 of Sch 5	CJA 2003 Sch 9 para 5	"home court" means— (a) if the offender resides in Scotland, or will be residing there at the relevant time, the sheriff court having jurisdiction in the locality in which he resides or proposes to reside, and (b) if he resides in Northern Ireland, or will be residing there at the relevant time, **the court of summary jurisdiction acting for the petty sessions district in which he resides or proposes to reside**;	**"administrative court division" means an administrative court division specified under section 2 of the Justice Act (Northern Ireland) 2015 (c. 9 (N.I.));** … "home court" means— (a) if the offender resides in Scotland, or will be residing there at the relevant time, the sheriff court having jurisdiction in the locality in which the offender resides or proposes to reside, and (b) if the offender resides in Northern Ireland, or will be residing there at the relevant time, **a court of summary jurisdiction;**	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.

Clause	Origin	Before	After	Reason
Para 10(3) of Sch 10	CJA 2003 Sch 12 para 8(2)	**The court must consider his case and deal** with him in one of the following ways—	**If the suspended sentence order was made by the Crown Court, the present court must—** (a) deal with the case under paragraph 13, or (b) commit the offender to custody or release the offender on bail until the offender can be brought or appear before the Crown Court.	Amendment has been made to omit the duty to "consider the case", it being considered that this is superfluous wording, as the court will always consider the case of the offender.
Para 10(3) of Sch 10	CJA 2003 Sch 12 para 8(6)	Where a suspended sentence order was made by the Crown Court and a magistrates' court would (apart from this sub-paragraph) be required to deal with the offender under **sub-paragraph (2)(a), (b), (ba) or (c)** it may instead commit him to custody or release him on bail until he can be brought or appear before the Crown Court.	If the suspended sentence order was made by the Crown Court, the present court must— (a) deal with the case under **paragraph 13**, or (b) commit the offender to custody or release the offender on bail until the offender can be brought or appear before the Crown Court.	An amendment has been made to also include reference to the courts power under paragraph 8(2)(d) of Schedule 12 to the Criminal Justice Act 2003.

Clause	Origin	Before	After	Reason
Para 12 of Sch 10	CJA 2003 Sch 12 para 8(1)(a)	This paragraph applies where— (a) it is proved to the satisfaction of a court before which an offender appears **or is brought under paragraph 6 or 7 or by virtue of section 192(6)** that he has failed without reasonable excuse to comply with any of the community requirements of the suspended sentence order, or (b) an offender is convicted of an offence committed during the operational period of a **suspended sentence (other than one which has already taken effect) and either—**	(2) This sub-paragraph applies where— (a) the offender is before the Crown Court in relation to the order by virtue of— **(i) paragraph 9 (summons or warrant for breach of community requirement),** **(ii) section 209(5) (review of order), or** **(iii) paragraph 10(3)(b) (committal from magistrates' court), and** (b) it is proved to the satisfaction of the court that the offender has breached a community requirement of the order without reasonable excuse. (3) This sub-paragraph applies where the offender has been convicted of an offence committed during the operational period (**and no activation order relating to the suspended sentence has been made**).	Reference to the possibility that an offender may appear before the Crown Court by being committed under paragraph 8(6) of Schedule 12 (committal to crown court to deal with suspended order) has been added. Reference to suspended sentence in (b) has been amended to clarify that it only relates to suspended sentences that haven't yet taken effect.

Clause	Origin	Before	After	Reason
Para 15(2) of Sch 10	CJA 2003 Sch 12 para 1(b)	may order that the sentence is to take effect immediately or that the term of that sentence is to commence on the expiry of another term of imprisonment passed on the offender by that or another court.	The activation order may provide for— (a) the sentence to take effect immediately, or (b) the term of the sentence to begin on the expiry **of another custodial sentence passed on the offender.** This is subject to section 155 (restriction on consecutive sentences for released prisoners).	This amendment ensures that references to imprisonment also cover references to any other custodial sentences (such as detention in a young offender institution) that may have been passed on the offender.
Para 16(2) of Sch 10	CJA 2003 Sch 12 para 21	Paragraphs 8(2)(c) and 15(1)(b) have effect **subject to the provisions mentioned in subsection (2) of section 190, and to subsections (3) and (5) of that section.**	Paragraph 13(1)(d) (power to impose more onerous requirements or extend periods**) is subject to any provision that applies to the court in making a suspended sentence order as if the court were making the order.**	An amendment has been made to make the relevant provisions subject to any provision that applies to the court in making a suspended sentence order as if the court were making the order instead of specifying provisions that require this. This makes the intent of the list of sections clearer.

Clause	Origin	Before	After	Reason
Para 25(3) of Sch 10	CJA 2003 Sch 12 para 21	Paragraphs 8(2)(c) and 15(1)(b) have effect **subject to the provisions mentioned in subsection (2) of section 190, and to subsections (3) and (5) of that section.**	Sub-paragraph (1)(b) is subject to **any provision that applies to the court in making a suspended sentence order as if the court were making the order.**	An amendment has been made to make the relevant provisions subject to any provision that applies to the court in making a suspended sentence order as if the court were making the order instead of specifying provisions that require this. This makes the intent of the list of sections clearer.

Clause	Origin	Before	After	Reason
Para 25(8)(b) and (9) of Sch 10	CJA 2003 Sch 12 para 15(4)(b)	deal with him, for the offence in respect of which the suspended sentence was imposed, **in any way in which it could deal with him if he had just been convicted by or before the court of the offence.**	(b) deal with the offender, for the offence in respect of which the suspended sentence was imposed, **in any way in which it could deal with the offender if the offender had just been convicted by or before the court of the offence (but this is subject to sub-paragraph (9)).** **(9) Where the order was made by the Crown Court—** **(a) on an appeal from the magistrates' court, or** **(b) where its powers to deal with the offender for the offence were those (however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence,** **the power conferred by sub-paragraph (8)(b) is power to deal with the offender in any way in which a magistrates' court could deal with the offender if it had just convicted the offender of the offence.**	The courts powers to re-sentence have been amended to reflect the fact that if the order was one made by a Crown Court with magistrates' court sentencing powers that the powers to sentence should still be limited by the powers the magistrates' courts have.

Clause	Origin	Before	After	Reason
Para 29 of Sch 10	CJA 2003 Sch 8 para 25A			A pre-consolidation amendment has been made extending the power of a magistrates' court to adjourn a hearing relating to a proceeding under paragraph 25A of Schedule 8 of the CJA 2003 to proceedings under Schedule 12 of the CJA 2003.
Para 30(5) of Sch 10	CJA 2003 Sch 12 para 22(1)(d)	where the court acts in a local justice area other than the one specified in the order prior to the **revocation or amendment**, provide a copy of the **revoking or amending** order to a magistrates' court acts in a local justice area so specified.	Where the court acts in a local justice area other than the offender's home local justice area specified in the order prior to **the amendmen**t ("the former home area"), the proper officer of the court must provide a copy of **the amending order** to a magistrates' court acting in the former home area.	Reference to orders revoking the suspended sentence order have been omitted as this paragraph applies only to amendment.

Clause	Origin	Before	After	Reason
Para 30(6) of Sch 10	CJA 2003 Sch 12 para 22(2)	Where under sub-paragraph (1)(b) the proper officer of the court provides a copy of an amending order to a magistrates' court acting in a different area, the officer must also provide to that court such documents and information relating to the case **as it considers likely to be of assistance** to a court acting in that area in the exercise of its functions in relation to the order.	Where under sub-paragraph (3) the proper officer of the court provides a copy of an amending order to a magistrates' court acting in a different area, the officer must also provide to that court such documents and information relating to the case **as the proper officer considers likely to be of assistance** to a court acting in that area in the exercise of its functions in relation to the order.	The "it" in "it considers likely to be of assistance" has been replaced with "the proper officer" to clarify that it is the proper officer who must consider the information is likely to be of assistance, rather than the court who is receiving the information.
Para 1(1) of Sch 11	CJA 2003 Sch 13 para 11	"home court" means— (a) if the offender resides in Scotland, or will be residing there at the relevant time, the sheriff court having jurisdiction in the locality in which the offender resides or proposes to reside, and (b) if he resides in Northern Ireland, or will be residing there at the relevant time, **the court of summary jurisdiction acting for the petty sessions district in which he resides or proposes to reside;**	"home court" means— (a) in the case of an SSSO, the sheriff court having jurisdiction in the locality in which the offender resides or proposes to reside, and (b) in the case of an NISSO, **a court of summary jurisdiction;**	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.

Clause	Origin	Before	After	Reason
Para 4(2) of Sch 11	CJA 2003 Sch 13 para 1(6)	The court may not provide for an order **made in accordance with this paragraph** to be subject to review under section 191 or 210; and where an order which is subject to review under either of those sections is amended in accordance with this paragraph, the order shall cease to be so subject.	If the court **amends a relevant suspended sentence order in accordance with paragraph 3**, it may not provide for it to be subject to review.	The phrase "made" has been replaced with "amended" to reflect that the powers being exercised are powers to amend existing orders, not to create new ones.
Para 5(3) of Sch 11	CJA 2003 Sch 13 para 1(6)	The court may not provide for an order **made in accordance with this paragraph** to be subject to review under section 191 or 210; and where an order which is subject to review under either of those sections is amended in accordance with this paragraph, the order shall cease to be so subject.	If the court **amends a relevant suspended sentence order in accordance with this paragraph,** it may not provide for it to be subject to review.	The phrase "made" has been replaced with "amended" to reflect that the powers being exercised are powers to amend existing orders, not to create new ones.
Para 8(2) of Sch 11	CJA 2003 Sch 13 para 6(5)	The court may not provide **for an order made in accordance with this paragraph** to be subject to review under section 191 or 210; and where an order which is subject to review under either of those sections is amended in accordance with this paragraph, the order shall cease to be so subject.	**If the court amends a relevant suspended sentence order in accordance with paragraph 7**, it may not provide for it to be subject to review.	The phrase "made" has been replaced with "amended" to reflect that the powers being exercised are powers to amend existing orders, not to create new ones.

Clause	Origin	Before	After	Reason
Para 9(3) of Sch 11	CJA 2003 Sch 13 para 6(5)	The court may not provide **for an order made in accordance with this paragraph** to be subject to review under section 191 or 210; and where an order which is subject to review under either of those sections is amended in accordance with this paragraph, the order shall cease to be so subject.	**If the court amends a relevant suspended sentence order in accordance with this paragraph**, it may not provide for it to be subject to review.	The phrase "made" has been replaced with "amended" to reflect that the powers being exercised are powers to amend existing orders, not to create new ones.
Para 13(1)(a)(ii) of Sch 11	CJA 2003 Sch 13 para 6(1)(a)	in the case of an order imposing a requirement mentioned in subparagraph (2), that arrangements exist for persons to comply with such a requirement **in the petty sessions district in Northern Ireland in which the offender resides, or will be residing when the order comes into force**, and that provision can be made for him to comply with the requirement under those arrangements, and	(ii) **the administrative court division specified under section 2 of the Justice Act (Northern Ireland) 2015 (c. 9 (N.I.)) in which the offender resides, or will be residing at the relevant time, in the case of an NISSO**, and	Amendment reflects abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015 and their replacement with administrative court divisions.

Clause	Origin	Before	After	Reason
Para 23(3) of Sch 11	CJA 2003 Sch 13 para 12			Modifies this paragraph so that references to an enforcement officer are omitted when applying Schedule 12 for these purposes – as the intention of paragraph 12(5) of Schedule 13 to the CJA 2003 is that enforcement is achieved by providing information to the relevant courts.
Para 23(6) of Sch 11	CJA 2003 Sch 13 para 12		For the purposes of sub-paragraph (2), a relevant warning is a warning under— (a) this paragraph, or (b) paragraph 6 of Schedule 10 (corresponding provision for order not transferred to Scotland or Northern Ireland).	Inserts reference to paragraph 6 of Schedule 10 to ensure that if an offender has been warned under that schedule but not this one a relevant warning is considered to have been given. This is a result of re-writing Schedule 12 CJA 2003 for transfer.
Para 39(2) of Sch 11	CJA 2003 Sch 13 para 20(5)	The suspended sentence order as amended must specify the **petty sessions area** in which the offender resides or proposes to reside.	The relevant suspended sentence order as amended must specify the **local justice area** in which the offender resides or proposes to reside (“the new local justice area”).	Removing reference to “petty sessions area” which were abolished by the Courts Act 2003.

Appendix 2: Draft Sentencing Code Bill

The draft Sentencing Code Bill can be found in Volume 2 of this consultation paper, or on the project's page on the Law Commission website:

http://www.lawcom.gov.uk/project/sentencing-code/.

Appendix 3: Draft Pre-Consolidation Amendment Bill

The draft pre-consolidation amendment Bill can be found in Volume 2 of this consultation paper, or on the project's page on the Law Commission website:

http://www.lawcom.gov.uk/project/sentencing-code/.