Law Commission
Reforming the law

The Sentencing Code
Volume I: Report

HC 1724

Law Com No 382

Law Commission
Reforming the law

(Law Com No 382)

The Sentencing Code

Volume 1: Report

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 22 November 2018

HC 1724

This publication is available at www.gov.uk/government/publications.

Print ISBN 978-1-5286-0881-7

CCS1118988628 11/18

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chairman

Professor Nick Hopkins

Stephen Lewis

Professor David Ormerod QC

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 17 October 2018.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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**), a provision in an Act does not have effect unless it has been brought into force.

Child

The term “child” is used in the Children and Young Person Act 1933 to refer to someone under the age of 14 and is used in this Report to the same effect. The term “children” should be read accordingly.

Clean sweep

The clean sweep is a technical device which has the effect of removing the need to make reference to previous layers of legislation. It does so by extending provisions which have been partially commenced so that they apply to all cases, and completely repealing provisions which have previously been repealed but partially saved. The result is that the most up to date law applies to all cases, irrespective of the date of the offence. This is subject to some limited exceptions needed to protect an offender’s fundamental rights.

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. This 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 time of the publication of this Report.

Draft Sentencing Code

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

Glossing provision

A “glossing provision” operates to amend the meaning of a provision but does so without actually altering the text. Instead, glossing provisions operate to require a provision to be read in a certain way. This is also known as a “non-textual amendment”. For example, section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 requires references to a fine of £5,000 or more on summary conviction to be read as references to a fine of any amount, however the references to fines of £5,000 are not, themselves, amended.

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.

Non-recent offence

Non-recent offences are those where the period of time between commission and conviction is greater than would normally arise. These are sometimes called “historic offences”. Under the current law, the provisions that apply to these offences are likely to be different to those that apply to offences committed more recently due to the effect of transitional provisions.

Non-textual amendment

See **glossing provision** above.

Origins

A table of origins is found accompanying the **draft Sentencing Code** contained in Appendix 4. 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.

Prospective

Legislation is prospective where it applies to things on or after its commencement. For example, a new criminal offence will be prospective in that it applies only to offences committed on or after the date on which it comes into force.

Retrospective

Legislation is retrospective if it has effect in relation to a matter arising before it was enacted or made. Retroactive and retrospective are generally used interchangeably in relation to legislation.

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 rule

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 time

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

Young person

The term "young person" is used in the Children and Young Persons Act 1933 to refer to a person aged 14 or over but under 18 and is used in this Report to the same effect.

Chapter 1: Introduction and summary

INTRODUCTION

1.1 One of the primary functions of a criminal court is sentencing those who have been convicted of, or pleaded guilty to, a criminal offence. Sentencing serves multiple purposes, including the punishment of offenders, protection of the public and an important communicative function to the offender and society that particular behaviour is not acceptable. In the year ending March 2018, 1.19 million offenders were convicted of, or pleaded guilty to, criminal offences and were dealt with by sentencing courts.[1] In 2016-2017, the Court of Appeal (Criminal Division) received 3,708 applications for leave to appeal against sentence, each requiring the attention of a single judge on the papers.[2] 1,183 appeals against sentence were heard before the full court.[3]

1.2 The importance of a smooth-running sentencing system is obvious. Sentencing is important for victims, offenders and the wider public. Timely and efficient sentencing impacts upon public confidence in the system. A system in which delays and unnecessarily incurred costs are prevalent results in other cases being delayed, witnesses and victims having to wait around at court and is a drain on scarce public funds.

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, and in particular the criminal 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 It is simply impossible to describe the current law governing sentencing procedure as clear, transparent, accessible or coherent. Accordingly, over the past four years, we have conducted work to remedy these defects in the law. We have produced a draft Bill containing the law of sentencing procedure in a simple, coherent and accessible form. If enacted it would save money, reduce delay and bring clarity to an important area of the criminal law.

1.5 This introductory chapter serves as a summary of the report and draft Sentencing Code. It sets out the problems stakeholders identified with the current law and traces the history of the project up to this point. It provides an overview of our conclusions

---

1 Ministry of Justice, *Criminal Justice Statistics Quarterly: England and Wales, April 2017 to March 2018 (provisional)* (16 August 2018), 4.

2 Court of Appeal (Criminal Division) Annual Report 2016-17 (21 August 2018) Annex F.

3 Court of Appeal (Criminal Division) Annual Report 2016-17 (21 August 2018) Annex D.

and the draft Bill which has been drafted by parliamentary counsel following our instructions.

PROBLEMS WITH THE CURRENT LAW OF SENTENCING PROCEDURE

1.6 With the assistance of stakeholders, we identified numerous problems with the current law of sentencing procedure. The problems can be grouped into three categories:

(1) the complexity of the law;

(2) the way in which sentencing legislation is amended; and

(3) the frequency with which the legislation is amended.

1.7 The following paragraphs summarise each problem and the effect it has had on the current law.

The complexity of the law

1.8 The law governing sentencing procedure is very complex and technical. At one time, a sentencing court had at its disposal only a small number of sentencing orders. In the 21st century, there are a vast number of orders enabling the court to impose custodial sentences and community sentences. In addition, there has been a proliferation of ancillary orders – orders which are capable of being imposed in addition to another sentencing order. These include behaviour orders targeted at specific types of behaviour – such as anti-social behaviour, sexual offending and substance-abuse – and disqualification orders and financial orders designed to punish, compensate victims and make reparation. Accordingly, the volume of legislative material to which a sentencing court must have regard is larger than ever before.

1.9 As part of our research in this project, 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.[4] But 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 and its effect and operation difficult to decipher. As is explained below, sometimes even the existence of such laws is not readily apparent.

The way in which sentencing legislation is amended

1.10 There are various different methods by which primary legislation can be amended. Amendments to sentencing law have been brought about by various means, with no discernible standard approach. Sometimes changes to the law are effected by amending previous enactments, sometimes they are introduced in their own

---

4 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/.

enactments, and in some cases they are even introduced by modifying the effect of other enactments (without making any actual amendment to the wording of those provisions).

1.11 Additionally, the way in which amendments are brought into force lacks consistency; for example, some amendments are brought into force with retrospective effect, whereas most are prospective only. Where amendments are brought into force prospectively only, there is no single standard approach, for instance by reference to the date of conviction. On the contrary, amendments are commenced by reference to a number of different events, including the date of the conviction, the date of the offence and the date of the start of proceedings.

1.12 The practice of amending the law in this manner means that different versions of the law apply depending on when the offender is convicted, when the offence was committed, and when proceedings are begun (among other events). For those cases where relevant events have occurred prior to the commencement of new provisions, there is a need to preserve previous regimes so that older cases are still catered for. It is frequently unclear when this is the case and, similarly, it is not always apparent which version of the law applies to a particular offence. This creates additional difficulties for both courts and practitioners.

1.13 The result is that the law is amended in numerous different ways, brought into force by reference to a number of different points in time and is located in numerous different Acts. This all creates unnecessary difficulty in locating, understanding and applying the law.

Frequency of amendments

1.14 Over the past 30 years the law governing sentencing procedure has been continually amended, with at least 14 major pieces of primary legislation in 1991, 1993, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014, 2015 and 2018.[5] This legislation has created, amended and repealed sentencing orders and the procedure relating to the sentencing of offenders.

1.15 Parliament is, of course, entitled to amend the law as frequently as it wishes and the law must be able to accommodate frequent amendment to reflect changing societal needs and Parliament's wishes. However, the frequency with which such amendments are made compounds the problems created by the complexity of the law and the way in which amendments are made. The faster such changes are made and the increased volume of such changes, the more difficult it is to locate the law and understand it.

---

5 Criminal Justice Act 1991, Criminal Justice Act 1993, Crime (Sentences) Act 1997, Crime and Disorder Act 1998, Powers of Criminal Courts (Sentencing) Act 2000, Proceeds of Crime Act 2002, Criminal Justice Act 2003, Serious Organised Crime and Police Act 2005, Serious Crime Act 2007, Criminal Justice and Immigration Act 2008, Coroners and Justice Act 2009, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Offender Rehabilitation Act 2014, Criminal Justice and Courts Act 2015 and Assaults on Emergency Workers (Offences) Act 2018.

The result

1.16 The consequence is that the law governing sentencing procedure is complex, difficult to locate, and difficult to understand, even for experienced judges and practitioners. This means that errors are frequently made when the courts impose a sentence.

1.17 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 have been wrongfully passed. Of the sample of 262 cases, 95 involved unlawful sentences.[6] These were not sentences which were considered to be only of inappropriate severity (ie 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 imposed was simply wrong in law.

1.18 A recent example of this can be found in *R v Maxwell*,[7] where Lord Justice Treacy, then Chair of the Sentencing Council, observed:

> The original grounds of appeal were confined to the straightforward assertion that the overall sentence was too long, particularly having regard to totality. After the single Judge had granted leave to appeal on that basis, lawyers in the Criminal Appeal Office identified a large number of matters which had gone wrong below and drew them to the attention of the court and the parties. Much time was expended by the Office and then by the individual members of the court in considering the problems identified. The time taken will have been many times that expended in the Crown Court at the original hearing. Those resources could have been much better deployed in dealing with other cases.[8]

1.19 He noted that such problems are not untypical, and arise from the complexity of modern sentencing legislation, combined with the resourcing pressures placed upon courts.

1.20 Such unlawful sentences should be rectified. Where errors are identified, they may be corrected either by way of the "slip rule"[9] 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. In some cases, the errors may not be noticed at all and therefore go uncorrected.

1.21 The problems do not merely increase the risk of error, however. The difficulty faced by those who need to locate, interpret and apply the law places an unnecessary burden on the criminal justice system. It can result in sentencing hearings taking an

---

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 [solely] to conviction, non-counsel cases and those that were interlocutory etc."

7 [2017] EWCA Crim 1233.

8 [2017] EWCA Crim 1233 at [45].

9 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.

unnecessarily lengthy amount of time, as practitioners and judges spend more time than is necessary in identifying and understanding the applicable law. This causes undue cost and delay in relation to sentencing hearings, and also has a knock-on effect on other hearings.

THE PROJECT AND OUR TERMS OF REFERENCE

1.22 When seen against the background of such systemic problems, it is no surprise that the project has been supported, in the strongest terms, from the outset. The importance of simplifying and clarifying the law of sentencing procedure was recognised by leading figures including the Lord Chief Justice, the Director of Public Prosecutions and the heads of both the solicitors' and barristers' professions.

1.23 The Sentencing Code project is part of the Law Commission's 12th programme of law reform.[10] 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 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

1.24 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, so far as it relates to sentencing procedure, operates as efficiently as possible.

1.25 From the outset, the means by which we have sought to achieve these aims has been to produce a single sentencing statute. We have called this statute the Sentencing

---

[10] Twelfth Programme of Law Reform (2014) Law Com No 354.

Code. The Sentencing Code will bring together 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 the public, the judiciary and practitioners.

A clear framework

1.26 Beyond simply bringing the law of sentencing procedure into one enactment, the project will also introduce a novel approach to dealing with changes to the law, which will substantially simplify the sentencing process in practice. Earlier in this chapter, we referenced the problem of commencing amendments to the law which apply prospectively only, and noted that this can sometimes require the preservation of an old provision to ensure that older cases are still catered for. We explained how this made the task of locating and understanding the law more difficult.

1.27 Accordingly, the Sentencing Code will remove the need to make reference to historic law and transitional provisions[11] and apply the current law to all offenders whose convictions occur after the Sentencing Code has come into force (subject to limited exceptions necessary to respect the fundamental rights of offenders).[12] We are referring to this change as the "clean sweep". 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 Code itself, making clear to which cases they apply. This will avoid 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 think will have a significant impact.

Readily comprehensible and clear law

1.28 The introduction of the Sentencing Code will, for the first time, provide a clear and coherent structure to the law governing sentencing procedure, as well as re-stating the law in a more certain and accessible manner. It will simplify the task of a sentencing judge, making it easier to locate and apply their sentencing powers and duties.

1.29 Another important change made is to modernise the drafting. Some of the legislation governing the law of sentencing procedure is old and uses outdated terminology. Further, much of the legislation refers to "him" and "his" when referring to the offender

---

11 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.

12 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 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. For a full list of the exceptions in the Sentencing Code see Appendix 1.

or the victim. The Sentencing Code will modernise the terms used, so as to make them more relevant and familiar to users of 21st century legislation and is drafted in gender neutral terms.

1.30 The Code will also streamline to law to provide added consistency and clarity, and errors and omissions in the current law will be corrected. We have adopted certainty as our guiding principle while drafting the Sentencing Code itself. On occasion, prioritising certainty has resulted in some provisions being drafted in a longer form than the provision from which they originate, or a single provision has been divided into more than one provision. We regard this as necessary to realise the aims of the project and note that as legislation is increasingly viewed electronically rather than in hard copy, the length of the legislation is less of an issue than it previously would have been.

Public confidence in the law

1.31 Public confidence is harmed when sentencing decisions are routinely unlawful, unduly lenient or otherwise inappropriate because of the incomprehensible nature of the current law. The Sentencing Code would help to reduce these occurrences and thus improve public confidence in the system.

1.32 Similarly, public confidence is diminished when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible. As Alison Saunders, then Director of Public Prosecutions, noted at the launch of the project:

(1) 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.

(2) 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.

(3) 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

1.33 The Sentencing Code will make the law governing sentencing procedure clearer, easier to navigate, and simpler to apply. This will 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. This will, in turn, free up court resource for other hearings and help reduce delays currently present in the system.

1.34 The current best estimate of the net financial benefit of the enactment of the Sentencing Code is a saving of £256.05 million over ten years.[13]

HISTORY OF THE PROJECT

1.35 This Report represents the conclusion of our sentencing procedure project. As noted above, work began in January 2015. We met with stakeholders to gather evidence as to the problems with the current law and set about producing preliminary proposals. During the project we have conducted four formal public consultation exercises:

(1) The consultation on the issue of the transition from the current law to the Sentencing Code (also known as the "clean sweep" issues paper) which ran from 1 July 2015 to 26 August 2015.[14]

(2) The consultation on the "current law document" (which set out our understanding of the current sentencing procedure law in England and Wales) which ran from 9 October 2015 to 9 April 2016.[15]

(3) The "main" consultation paper on the draft Sentencing Code which ran from 27 July 2017 to 26 January 2018.[16]

(4) The further consultation on the disposals only available for children and young persons in the draft Sentencing Code which ran from 23 March 2018 to 27 April 2018.[17]

1.36 During the consultation periods, we held public and private events at which we presented our preliminary proposals and sought the views of the judiciary, practitioners, other criminal justice professionals and members of the public. In particular, we spoke to over 1400 people during the "main" consultation period.[18]

1.37 An analysis of consultation responses followed each consultation exercise which informed our approach to the production of the Sentencing Code and the way in which we recommend that it should be implemented. Throughout the project, we have worked closely with the Office of the Parliamentary Counsel who have been responsible for the drafting of the Sentencing Code and the pre-consolidation amendment clauses.

1.38 We have previously produced two reports during the lifetime of this project:

---

13 For further detail, consult the Impact Assessment which accompanies this Report.

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

15 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/.

16 The Sentencing Code (2017) Law Commission Consultation Paper No 232.

17 The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

18 For more details of the public consultation process, see Chapter 2 of this Report.

(1) a report on transition from the current law to the Sentencing Code (the "clean sweep" paper) (20 May 2016);[19] and

(2) an interim report on the "current law document" (7 October 2016).[20]

1.39 We have now produced this final Report recommending that the Government enact the Sentencing Code as a consolidation Bill. The final report is comprised of:

(1) The Sentencing Code: Report (Volume 1);

(2) The Sentencing Code: Draft Legislation (Volume 2);

1.40 A full consultation analysis (Appendices 5 and 6) are available online, as well as an accompanying impact assessment.

IMPLEMENTATION

1.41 During the lifetime of the project, we were faced with a decision as to the best way to achieve the benefits that a Sentencing Code could provide. Principally, this question concerned the method by which the Sentencing Code would become law. The result of the referendum on exiting the European Union and a general election have left little parliamentary time for large Bills requiring detailed and lengthy debate in parliament. Accordingly, for the project to continue, we had to find a method of implementation which would not burden parliament with lengthy debates at a time when there is more pressure on parliamentary time than perhaps ever before.

1.42 We concluded that this would be best achieved by drafting the Sentencing Code as 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.[21]

1.43 A consolidation Bill 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.[22]

---

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

20 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.

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

22 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 9 November 2018); 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.

This absence of scrutiny is legitimate because, as a consolidation re-enacts law already in force, parliament has already debated the substance of the provisions.

1.44 This procedure means there are limits on the extent of the reforms that can be achieved by the Sentencing Code.[23] 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. In a limited number of cases, where proposed or possible reforms go beyond what can be achieved in this project, we have made recommendations as to the future reform of the law.

1.45 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.[24] This will significantly simplify the sentencing process in practice, resulting in increased efficiency and fewer errors.[25] Further, as noted, the Sentencing Code will make a number of streamlining changes in the interests of clarity and certainty. For example, it will improve the language used throughout the law and for the first time create a coherent structure.

1.46 To achieve this the Sentencing Code will require two paving provisions to be included in a normal Public 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 are limited to minor streamlining and tidying changes that are in the interests of the consolidation of sentencing law. These clauses have been drafted as a stand-alone Bill, but could also be incorporated into any other Public Bill. It is possible they could be introduced through the special procedure for Law Commission Bills.[26]

1.47 The project has therefore produced two pieces of legislation: (1) the pre-consolidation amendment clauses (which could take effect as a stand-alone Bill or as part of another criminal justice Bill); and (2) the Sentencing Code (consolidating the current law of sentencing procedure).[27]

1.48 It is important to note that the neither the Sentencing Code nor the pre-consolidation amendment clauses will 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

---

23 The consolidation process, and the limits it creates in changing the effect of the law are explored in more detail in Chapter 3 below.

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

25 The benefits of the clean sweep are explored in more detail at paragraph 4.25 below.

26 As to which, see paragraph 12.8 below.

27 For discussion of the way in which we recommend the Sentencing Code be implemented, see Chapter 12 of this Report.

foreseen that implementation and application of the Sentencing Code will have any impact on the prison population.

THE SENTENCING CODE

The contents of the Sentencing Code Bill

1.49 The Sentencing Code contains 416 clauses and 28 Schedules. It is broken down into Parts which follow the chronology of a sentencing hearing, with thematic grouping of provisions where possible. The structure adopted is intended to aid navigation and comprehension, while minimising the risk of error through omission or confusion.

1.50 The Sentencing Code is arranged as follows:

(1) First Group of Parts

(a) Part 1 (introductory provisions and overview)

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

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

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

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

(3) Third Group of Parts (Disposals)

(a) Part 5 (Power to impose absolute and conditional discharge)

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

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

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

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

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

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

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

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

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

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

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

The contents of the Sentencing (Pre-consolidation Amendments) Bill

1.51 We have noted that two clauses are needed to enable the Sentencing Code to be implemented as a consolidation Bill. These can either be enacted as a stand-alone Bill or as part of another criminal justice Bill. We have drafted the clauses as a stand-alone Bill, to aid presentation and comprehension, however, although it is not necessary that they be enacted as such.

1.52 The Bill contains five clauses, only two of which are substantive. Clauses 3-5 concern interpretation, power to make regulations and commencement, all of which would be merged with similar provisions if the clauses were to be enacted as part of another criminal justice Bill. Clause 1 effects the "clean sweep" change, removing the need to make reference to historic layers of legislation which are no longer necessary. Clause 2 makes the pre-consolidation amendments which are necessary in order to bring about the consolidation, making streamlining changes and correcting previous drafting errors.

1.53 Pre-consolidation amendments are entirely uncontroversial and a standard device used in consolidation Bills. No substantive policy change may be made and the changes are limited to those which facilitate, or are otherwise desirable in connection with, the consolidation.

THE FUTURE

1.54 Earlier in this chapter, we noted that what had led, in part, to the current problems with the law of sentencing procedure was the frequency and nature of amendments made to it. Parliament has the absolute right to make as many amendments, of whatever nature and in whatever form it wishes, and our report does not seek to undermine that in any way.

1.55 What this report does seek to do, however, is influence the way in which such amendments are made. The Sentencing Code is drafted as, and is intended to be, a "living" document which is capable of amendment. In fact, it is important that when future changes are made to the law relating to sentencing procedure, they are made by amendment to the Sentencing Code. Sentencing law should continue to be found in the Sentencing Code, not in separate enactments.

1.56 We recommend, however, that such amendments are made in a manner that continues to secure the many benefits that the Sentencing Code will bring. In particular, key information relating to the applicability and commencement of any change to sentencing law should be displayed on the face of the relevant provision in

the Sentencing Code, rather than in an obscure provision in the Code or in a piece of secondary legislation.[28]

1.57 Such an approach will ensure that the clarity, simplicity and transparency of the law of sentencing procedure brought about by the Sentencing Code will remain, along with the attendant financial benefits.

1.58 First, however, the Sentencing Code and the Sentencing (Pre-Consolidation Amendments) Bill must be enacted.

Recommendation 1.

1.59 We recommend that the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill be enacted.

FURTHER RECOMMENDATIONS

1.60 Beyond the core recommendation of this report – to enact the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill – this Report also makes a number of further recommendations for the reform of sentencing law.

1.61 These further recommendations for reform have not been reflected in either of the draft Bills and both Bills can be enacted and implemented without the accompanying reforms.

1.62 The principal reasons for not having given effect to these further recommendations in the draft Bills are:

(1) The recommendations would amount to changes to the penalties available to the court, and are therefore outside the terms of reference of this project.

(2) The recommendations are for further consideration by Government, as the potential reforms may require a more careful consideration of the practical or policy impacts, and may need to be accompanied by wider reform.

(3) The recommendations would not be suitable for pre-consolidation amendments and would therefore need separate primary or secondary legislation. That is either because of the extent to which they amount to a substantive change in the law, or because they amend the law in a way that does not affect the consolidation.

1.63 This does not, of course, detract from the merits of these recommendations, all of which have been informed by the extensive consultation we have undertaken in the course of this project. We believe all of them merit careful consideration by the Government and hope that they will be implemented by future primary legislation.

---

[28] For discussion of the way in which the benefits which will be brought about by the enactment of the Sentencing Code, see Chapter 11 of this Report.

ACKNOWLEDGMENTS

1.64 A number of members of staff at the Law Commission have worked on this project during its lifetime: Lyndon Harris (team lawyer); Sebastian Walker (research assistant); Paul Humpherson (team lawyer); Harry O'Sullivan (research assistant); Vincent Scully (research assistant) and Katie Jones (drafting assistant); David Connolly (team manager); Jessica Uguccioni (team manager). We are also particularly grateful to the members of the Office of the Parliamentary Counsel who have been responsible for the drafting of the Bill.

Chapter 2: Process and Consultation

HOW THE LAW COMMISSION WORKS

2.1 The Law Commission was established by the Law Commissions Act 1965 with the purpose of keeping the law under review with a view to:

> … its systematic development and reform, including in particular, the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law…[29]

2.2 Underpinning the way we work is our objectivity and independence from government. This enables the public to be confident that proposals will be considered impartially, and that we will always seek the best solutions, free from any political views. Accordingly, the types of project that we undertake are typically ones requiring detailed and technical law and policy reform on topics that are fundamentally non-political in nature.

2.3 There are, in the course of a traditional Law Commission project, five stages:

(1) The initiation of the project – during which the scope of the project is defined, in discussion with the government department that has responsibility for the relevant policy area.

(2) Pre-consultation – during which we study the relevant area of law, identify its defects and develop potential reform proposals. We also engage with key stakeholders and specialists in the area; and will potentially produce preliminary scoping and issues papers.

(3) Consultation – a consultation paper is to set out in detail the existing law and its defects, giving the arguments for and against the possible solutions and inviting comments from stakeholders including any interested member of the public.

(4) Policy development – during which responses to the consultation are analysed and considered and the policy further developed.

(5) Report – projects ordinarily conclude in a final report, which is laid in Parliament and presented to the Lord Chancellor and relevant Secretary of State, giving our final recommendations and reasons for making them. It is then for the Government to decide whether to implement the project.

2.4 As a consultative body, the Law Commission places a particular emphasis on public consultation. We consider that effective engagement with stakeholders is the bedrock on which a robust mandate for reform is built.

---

[29] Law Commissions Act 1965 s 3(1).

2.5 Since March 2010 there has been agreed a statutory protocol between the Lord Chancellor and the Law Commission governing how government departments and the Law Commission should work together on law reform projects.[30] This protocol requires that the Law Commission and the relevant government department agree terms of reference for the project (governing its scope and potentially its output) and that the relevant government department gives an undertaking that there is a serious intention to take forward law reform in the relevant area.

BACKGROUND TO THE SENTENCING CODE PROJECT

An overview

2.6 The Sentencing Code project is part of the Law Commission's 12th programme of law reform which was approved by the Lord Chancellor in July 2014.[31] 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 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.

2.7 The project was officially launched in January 2015, where it was endorsed in the strongest of terms 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.[32]

2.8 Over the last three years, we have conducted four separate consultation exercises and published two interim reports as part of this project. We have also produced a draft Sentencing Code Bill, and draft Sentencing (Pre-Consolidation Amendments) Bill. In total we have published:

---

30 Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, accessible at https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/.

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

32 Alistair MacDonald QC, Chairman, Bar Council and Andrew Caplen, President, The Law Society.

(1) an issues paper seeking consultees' views on the transition to the Sentencing Code, published on 1 July 2015;[33]

(2) a consultation on our compilation of the law relating to sentencing in force in England and Wales, published on 1 August 2015;[34]

(3) a report setting out our final recommendations on the transition to the Sentencing Code, published on 20 May 2016;[35]

(4) an interim report on our compilation of the law relating to sentencing in force in England and Wales, published on 7 October 2016;[36]

(5) the "main" consultation paper, and draft Sentencing Code, published on 27 July 2017;[37] and

(6) the further consultation on disposals for children and young persons, and updated draft Sentencing Code ("the consultation on children and young persons"), published on 23 March 2018.[38]

2.9 A legislative consolidation exercise does not, typically, involve any element of public consultation since it makes no change to the law and achieves largely technical reforms. However, we have derived real value from consultees' responses to our work on the Sentencing Code for two primary reasons. First, the Sentencing Code is not merely a consolidation, but also effects significant policy reform in the enactment of the "clean sweep". Secondly, a number of the problems present in the current law of sentencing are, we argue, the result of a failure to adequately consider the needs of the end-user of legislation when drafting. As a principal aim of the Sentencing Code project is to create a single Act that caters for the needs of its users – primarily the judiciary, practitioners and members of the public - we felt it was critical that all stages of the project were informed by those users' views and experiences.

Support for the project

2.10 The project has, throughout its lifetime, received strong support from all stakeholders and the near-universal endorsement of every proposed reform.[39]

2.11 In October 2017 the House of Lords Constitution Committee, called on the Government to ensure the implementation of the Sentencing Code, noting it "would

---

33 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.

34 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/.

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

36 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.

37 The Sentencing Code (2017) Law Commission Consultation Paper No 232.

38 The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

39 A detailed analysis of responses to our two consultations on the Sentencing Code can be found at Appendices 5 and 6.

offer real benefits not only in relation to the clarity and ease of application of the law, but in terms of cost and efficiency savings within the justice system."[40] Similarly, Professor Andrew Burrows QC, in his third Hamlyn Lecture[41] observed that the Sentencing Code "beautifully illustrates the importance of consolidation".

2.12 In the recent case of *R v Thompson*,[42] Sir Brian Leveson (President of the Queen's Bench Division) also noted the importance of the project:

> The complexity of sentencing legislation is such that errors such as those that have been made in these cases are inevitably becoming more frequent as judges and advocates struggle with (and take time to resolve) the multiplicity of disposals and the statutory requirements for each. It is to be hoped that the Sentencing Code proposed by the Law Commission will be adopted by the government and so permit all the relevant legislation to be found in one place, avoiding the correction of costly mistakes and thereby aiding the proper administration of justice.

CONSULTATION THROUGHOUT THE PROJECT

2.13 As noted above, at paragraph 2.8 since the Sentencing Code project began in January 2015 it has been the subject of four formal public consultation exercises. The first two consultations both led to the publication of reports, which summarised consultees' responses and made recommendations based on them.[43] Our provisional proposals received significant and widespread support from stakeholders.

2.14 This report is principally concerned with the third and fourth formal public consultation exercises conducted as part of this project.[44]

Transition paper and report

2.15 A key issue with the current law is the approach adopted to transition in sentencing law. When changes are made to the law of sentencing they are often made prospectively only. Commonly, transitional provisions 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 sentencing provisions came into force, historic versions of the law apply. The position is further complicated by the fact that frequently the effect and existence of these transitional arrangements is difficult to identify even for expert lawyers and judges.

---

40 The Legislative Process: Preparing Legislation for Parliament, Report of the Select Committee on the Constitution (2017-19) HL 27, para 147.

41 15 November 2017, Institute of Advanced Legal Studies, London.

42 [2018] EWCA Crim 639, [2018] 2 Cr App R (S) 19.

43 See, A New Sentencing Code for England and Wales (2016) Law Com No 365; and Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf, respectively.

44 The Sentencing Code (2017) Law Commission Consultation Paper No 232 and The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

2.16 On 1 July 2015 we published an issues paper.[45] 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 conventional approach to transition in sentencing law.

2.17 Following consultation, we published our final recommendations on the transition to the Sentencing Code on 20 May 2016.[46] 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.[47]

(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.

2.18 Consultees were overwhelmingly in favour of these recommendations. In particular, our "clean sweep" approach received universal support. While the "clean sweep" approach is contrary to the normal presumption against retroactivity, for the reasons set out in our issues paper,[48] and following support on consultation, we are confident that it is not only lawful, but highly desirable.

2.19 The "clean sweep" policy, and the commencement of the Sentencing Code are discussed in more detail at Chapters 4, and 5.

Current law and interim report

2.20 On 9 October 2015 we published our compilation of the law relating to sentencing as it was on 1 August 2015.[49] This compilation ran to over 1,300 pages and was the first time, of which we are aware, that a comprehensive, thematic compilation of the current law of sentencing procedure has been published. This compilation was subject to public consultation and scrutiny for six months. We were especially grateful to the Crown Prosecution Service, who provided the current law document to Crown

---

45 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.

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

47 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.

48 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.

49 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/.

Advocates for use when preparing sentencing hearings as well as undertaking a detailed review of the work for errors and omissions. We are also grateful to the Bar Council Law Reform Committee, who provided particularly detailed notes on a significant proportion of the document.

2.21 On 7 October 2016 we published our interim report on our compilation of the legislation currently in force.[50] 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 (i.e. what the Sentencing Code should, and should not, include), then formed the basis of our instructions to Parliamentary Counsel in drafting the Sentencing Code itself.

Drafting the Sentencing Code

2.22 The Sentencing Code has been drafted by Parliamentary Counsel, with support and instructions from the team at the Law Commission. The compilation of the law relating to sentencing, formed the basis of our initial instructions to Parliamentary Counsel, as a reference for the material that needed to be consolidated.

2.23 The instruction process was inevitably very technical, and involved numerous rounds of correspondence. This was to ensure that the drafting was as clear and certain as possible; to ensure that no inadvertent changes had been made to the effect of the law in its re-drafting; and to implement and develop the "clean sweep" policy.

2.24 During this process we have worked with policy officials and lawyers at the Ministry of Justice to ensure that we are aware of the Government's views on issues relevant to the drafting of the Sentencing Code.

The main consultation

2.25 On 27 July 2017 we published a draft of the Code alongside our main consultation paper. The paper represented the culmination of an extensive period of engagement. We participated in or conducted roundtable events with key stakeholders in Government,[51] academia,[52] and with members of the judiciary.[53] We visited a number

---

50 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.

51 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 .

52 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).

53 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.

of Crown Court centres across England and Wales.[54] We regularly participated in meetings with the Sentencing Council, the Law Reform Committee of the Bar Council and the Criminal Law Committee of the Law Society. We discussed 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 received from these meetings was immensely valuable in formulating our approach to the task of drafting the Sentencing Code.

2.26 In particular, our discussions with members of the judiciary were key in informing the initial decisions as to the structure of the Sentencing Code. We were keen to ensure that the Sentencing Code presented the law in a manner that was as intuitive as possible. We invited the judges to whom we spoke to consider whether structuring the Code in the order in which the provisions and parts would usually be relied upon as a case progressed through the various stages of sentencing would be the clearest and most effective approach. This research shaped the way in which we instructed Parliamentary Counsel to draft the Code and has resulted in a structure which we consider to be logical and user-friendly.

2.27 The main consultation paper contained 63 consultation questions and set out our proposed approach to the Sentencing Code. The consultation ran for six months. This unusually long consultation period reflected the volume of the material on which we were inviting views, and our desire to ensure that as wide a range of views as possible were received and reflected in the drafting of the Sentencing Code.

2.28 Additionally, the National Archives kindly hosted the draft Sentencing Code on legislation.gov.uk so that consultees could use the Code as they would if it was an enacted piece of legislation.[55] This allowed consultees to use the Code as if in court, and to interact with it in a manner that is difficult when produced as a pdf. This was the first time that legislation.gov.uk had hosted a draft Bill.

2.29 During the consultation period we attended or organised a number of public consultation events. In total, we spoke to over 1,400 people. These events included:

(1) public presentations and question and answer sessions in every Circuit in England and Wales with academics, practitioners and members of the public;[56]

(2) presentations at the Criminal Bar Association,[57] Criminal Law Review,[58] Bar Council,[59] and Criminal Appeal Lawyers Association[60] annual conferences;

---

54 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).

55 See http://www.legislation.gov.uk/ukdpb/2017/sentencing-bill/contents.

56 Cardiff University (16 October 2017), Bristol University (17 October 2017), No 5 Chambers, Birmingham (30 October 2017), City, University of London (6 November 2017), Manchester University (20 November 2017), Leeds University (21 November 2017). We are grateful to all of these organisations for hosting these events.

57 28 November 2017.

58 13 December 2017.

59 4 November 2017.

60 10 November 2017.

(3) presentations at Middle Temple[61] and Lincoln's Inn;[62]

(4) further meetings with members of the judiciary;[63]

(5) a further academic roundtable;[64] and

(6) further meetings with the Criminal Law Committee of the Law Society, the Crown Prosecution Service, the Criminal Appeal Office, the Bar Council, and individual practitioners.

2.30 During public presentations we set out the purposes and aims of the project, the operation of the clean sweep and examples of some of the particular drafting devices we have employed to bring greater clarity to the law. We highlighted particular consultation questions on which we sought specific input and then invited questions from the audience. Attendees at our public presentations and question and answer sessions in Birmingham, London, Leeds and Manchester also filled out feedback forms providing further information on their views on the current law and the proposed Sentencing Code. The views expressed in the feedback forms and in the question and answer sessions also fed into our consultation response analysis.

2.31 We also asked a number of judges whether, when they had concluded a complex sentencing exercise, they would be willing to re-enact the exercises using the Sentencing Code, and to provide feedback on what was intuitive, what was helpful, and what was not.

2.32 By the end of the consultation period we had received 20 responses from a variety of organisations, including a number from prominent representative bodies, such as Her Majesty's Council of Circuit Judges, the Law Reform Committee of the Bar Council, the Criminal Law Committee of the Law Society, the Magistrates' Association, and the Crown Prosecution Service.

2.33 This report, and the draft Sentencing Code, have both been heavily informed by these discussions, meetings and written responses. The final recommendations in this Report have all been made after detailed consideration of the responses of consultees to the main consultation. Attached also, in Appendix 5, is a fuller analysis of all the consultation responses received to the main consultation.

The consultation on disposals relating to children and young people

2.34 At the time of the publication of the main consultation paper it was unclear whether the Government was planning to introduce new legislation to implement recommendations

---

61 18 November 2017.

62 24 January 2018.

63 Cardiff Crown Court (16 October 2017); judges on numerous Judicial College courses; and the South-Eastern Circuit's quarterly meeting of District Judges on 6 December 2017 at Westminster Magistrates' Court.

64 21 September 2017 attended by Professor Andrew Ashworth QC CBE (All Souls, University of Oxford), Robert Banks (*Banks on Sentence)*, Professor Julian Roberts (Worcester College, University of Oxford), Dr Jonathan Bild (Darwin College, University of Cambridge), Professor Nicola Padfield QC (Fitzwilliam College, University of Cambridge).

from the Charlie Taylor Review of the Youth Justice System in England and Wales.[65] It was, therefore, decided at the time to exclude a limited number of specific provisions from the draft Bill. Specifically, these were the provisions relating to sentencing orders only available for those aged under 18 at conviction (referral orders; reparation orders; parental orders; youth rehabilitation orders; and detention and training orders). This was to avoid time and resource being wasted conducting research into, and drafting, provisions which might be fundamentally changed during the currency of the consultation period.

2.35 Shortly after the publication of the main consultation paper it became apparent that new legislation as a result of that review was not imminent. Accordingly, we published the consultation on children and young persons, a further short consultation paper.[66] We invited views on the re-drafted provisions relating to the sentencing of children and young persons, their structure and place in the Sentencing Code and the decisions taken in their re-drafting. We also asked a small number of consultation questions on specific proposed technical amendments to the provisions.

2.36 The consultation exercise ran between 23 March 2018 and 27 April 2018. This short period recognised the limited material on which we were seeking consultees' views and the limited nature of the policy change in the new drafting. Further, it reflected the need to give Parliamentary Counsel sufficient time to amend the draft Sentencing Code after the conclusion of the consultation prior to the publication of this report so as to ensure sufficient time to reflect the necessary changes arising from consultees' views.

2.37 We received 16 written responses to this consultation. These included responses from numerous consultees with a particular expertise in the area, such as Just for Kids Law, the Howard League, the Judicial Lead on Youth Justice for England and Wales (Mr Justice William Davis), the Legal Committee of Her Majesty's District Judges (Magistrates' Courts), and the Deputy Senior District Judge, Tan Ikram.

2.38 Chapter 7 of this report considers the consultation questions asked in that paper, and makes final recommendations in light of the responses of consultees. Attached in Appendix 6 is a full analysis of all the consultation responses to the consultation on children and young persons.

Ongoing work prior to report

2.39 During the consultation periods we continued to work closely with Parliamentary Counsel to refine the draft Bill, and to make the changes required as a result of consultation responses. We also worked to compile a number of the final Bill products that were not drafted at the time of consultation, such as the Schedule of repeals and the tables of origins and destinations.

---

65 See, https://www.gov.uk/government/publications/review-of-the-youth-justice-system.

66 The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

THIS REPORT

2.40 This report, containing 13 Chapters and 6 Appendices represents the culmination of this project. In this report we explain the history of the project, the process of consultation, the scope of the Sentencing Code, the clean sweep policy, and the commencement of the Sentencing Code. We then address the various parts of the Code, and the key decisions taken in the re-drafting, analysing the responses of consultees and making recommendations for reform. We conclude the report by addressing the way in which the Sentencing Code will be implemented and how the longevity of the benefits brought about by the Code can be secured.

2.41 Appendix 1 contains a table setting out the exceptions to our clean sweep policy and an explanation as to the effect of each exception.

2.42 Appendix 2 contains a table explaining the effect and need for every pre-consolidation amendment included in the Sentencing (Pre-Consolidation Amendments) Bill.

2.43 Appendix 3 contains the Sentencing (Pre-Consolidation Amendments) Bill. This Bill gives effect to the clean sweep, and makes the necessary pre-consolidation amendments to enact the Sentencing Code. That Bill is ready to be introduced and does not require any further drafting.

2.44 Appendix 4 contains the draft Sentencing Code Bill which is comprised of 416 clauses and 28 Schedules. The Bill, as drafted, is ready to be introduced, pending the drafting of consequential amendments – as to which see Chapter 12. Accompanying the Bill are tables of origins and destinations which allow users of the legislation to see where clauses in the Sentencing Code are derived from, and where provisions in the old legislation are now reproduced.

2.45 Appendix 5 contains an analysis of consultation responses to the main consultation exercise.

2.46 Appendix 6 contains an analysis of consultation responses to the disposals relating to children and young person's consultation exercise.

Chapter 3: Scope and Structure of the Sentencing Code

INTRODUCTION

3.1 As identified in Chapter 1, there are significant problems with the law of sentencing procedure. In considering the scope and structure of the Sentencing Code, we were mindful that these problems – principally the lack of clarity, simplicity and structure – would need to be addressed.

3.2 In the early stages of the project, we faced a number of challenges regarding the scope of the proposed Sentencing Code – precisely what should the Code include? There were also related decisions concerning the jurisdictional scope, whether the Code should extend to the armed forces, and how the Code should be commenced. Answering these questions involved weighing up a number of different, often competing, priorities. The issues are often interrelated. We attempted to apply a consistent, principled and practically workable policy to decide what should be included in the Sentencing Code.

3.3 One of the fundamental practical questions which influenced the Code's scope, was how it would be brought into law (or "enacted"). This chapter therefore begins by setting out the options that we considered for implementing a Code before we settled on use of the procedure for consolidation Bills. We then consider the general aims of the project and how its scope is informed by this method of enactment. Finally, we consider the most appropriate structure for the Sentencing Code, and set out, briefly, how we have sought to reflect the suggestions from consultees about approaches which best aid comprehension and navigation.

3.4 Our general starting point was that the Sentencing Code ought to contain all of the procedural law related to sentencing a person convicted of a criminal offence. This led us to ask what other situations ought to be dealt with in a Bill about sentencing procedure. As we explain below, following our initial consultation exercise we decided that the Code should also include provisions where a court deals with a person:

(1) who has been found to be unfit to plead but to have done the act charged;[67]

(2) who has been found to be not guilty by reason of insanity (a "special verdict");[68] and

(3) in extremely limited circumstances, who has been acquitted of an offence (where the court may impose a restraining order).[69]

---

67 Under sections 4 and 4A of the Criminal Procedure (Insanity) Act 1964.

68 Under sections 1 and 4 of the Criminal Procedure (Insanity) Act 1964.

69 Under section 5A of the Protection from Harassment Act 1997.

ENACTMENT OF THE SENTENCING CODE AND THE IMPACT ON ITS SCOPE

Options for enactment

3.5 From the very beginning of the project we have been working towards a single outcome - an enacted statute. This is a project that is intended to bring about change through primary legislation. We were faced with a decision from the outset regarding the method by which a statute might be enacted. The options were a government or Programme Bill; or a consolidation Bill. This section explains the difference between the two and the basis on which we decided between them.

3.6 A consolidation Bill is one which brings together the existing law on a particular topic in (usually) one Act. 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.[70]

3.7 The purpose of a consolidation Bill is to improve the clarity and certainty of the law and generally a consolidation Bill may not alter the law's substance or effect. However, there are three methods by which a consolidation Bill may make minor changes to the substance and effect of the law:

(1) use of the Consolidation of Enactments (Procedure) Act 1949;

(2) consolidation with Law Commission recommendations; and

(3) consolidation with pre-consolidation amendments.

3.8 The procedure under the Consolidation of Enactments (Procedure) Act 1949 allows "corrections and minor improvements" to be made as part of a consolidation Bill.[71] This procedure is generally no longer used as it has been superseded by the user of consolidation with Law Commission recommendations.[72] The degree of substantive change to the existing law permitted in "Law Commission consolidation" is not defined in the standing orders that govern the passage of such Bills through Parliament. It has been suggested that they may be a little wider than the amendments that could be made under the 1949 Act, but must "fall short of significant change of policy or substance".[73] Finally, a consolidation may be accompanied by pre-consolidation amendments. Pre-consolidation amendments are changes which are necessary to facilitate the consolidation but which are of too serious substantive effect to be dealt with by the other methods (which are designed for more minor changes). Pre-

---

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

71 Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.19 to 7.21.

72 Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 7.22 to 7.28.

73 D Greenberg, *Craies on Legislation* (11th ed, 2017) para 1.9.3.

consolidation amendments must be made by legislation that precedes the consolidation Bill.[74]

3.9 A consolidation Bill is not subject to the usual Parliamentary procedure for passing legislation but instead to a special procedure designed to expedite its enactment. 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.[75] This procedure is described in greater detail in Chapter 11. Such a special procedure is justified because a consolidation is a re-enactment of the current law (rather than the creation of wholly new law) and therefore Parliament has already debated its substance when the Acts which are being consolidated were first passed. There is, in principle, no need for the provisions to be debated again.

3.10 However, as the special procedure may only be used by consolidation Bills, such a Bill is limited in the extent of the reform it can achieve. As identified above, there are limits on the extent to which a consolidation Bill can affect changes to substance and effect of the law.

3.11 This can be contrasted with an "ordinary" government Bill (also known as a programme Bill). A programme Bill can introduce any new law Parliament wishes. It is subject to the full scrutiny of both Houses of Parliament. Typically, a programme Bill contains new policy. Within criminal law, this might include a new criminal offence, a new type of sentence which can be imposed on a person convicted of an offence, or an increase to the maximum sentence for an existing offence. These could not be introduced by way of a consolidation.

The decision to draft the Sentencing Code as a consolidation Bill

3.12 We held extensive discussions with Parliamentary Counsel before concluding that a consolidation Bill was the best option for ensuring the enactment of a Sentencing Code. There are three primary reasons for this decision.

3.13 First, even in the early stages of the project there were pressures on parliamentary time which ensured that there would always be a risk that the Sentencing Code would lose out to more politically pressing legislation. The expedited procedure for consolidation Bills vastly reduces this risk. The pressures on Parliamentary time have increased since the referendum on leaving the European Union. This requires, and will continue to require, a large amount of Parliamentary time to be dedicated to debates and legislation relating to our withdrawal from and future relationship with the European Union. A consolidation is, however, achievable.

3.14 Secondly, the principal aim of the project is to solve the problems identified with the current law, which have been revealed to be the complexity and inconsistency produced by the multiplicity of sources and frequent amendment. Accordingly, we

---

74 D Greenberg, *Craies on Legislation* (11th ed, 2017) para 1.9.8.

75 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 9 November 2018); 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.

proposed to bring the law into a single Act and to make improvements by way of streamlining and modernising language. Such changes are exactly what a consolidation is designed to achieve. As we shall see, there are limits on the extent of the streamlining that can be achieved, but they are relatively minor. A consolidation best meets the problems we are seeking to resolve.

3.15 Thirdly, while the extent of change to the law that can be achieved within a consolidation Bill is limited, we took the view that substantial improvements and savings to remedy the problems with the current law could nonetheless be achieved.

3.16 For all of these reasons, we considered that when required to choose between a consolidation Bill, which had a reasonable prospect of being enacted and a programme Bill, which had a very poor chance of being enacted, the consolidation Bill was clearly the better option.

Limitations on the changes to sentencing procedure law

3.17 The decision to enact the Sentencing Code as a consolidation places limitations on the extent to which it can change the law. From the very the early stages of consultation, a small number of consultees asked us whether particular changes would be made. The principal matters of concern were:

(1) making alterations to maximum penalties for any offence;

(2) altering (by increasing or decreasing) the severity of penalty an offender will receive for an offence;

(3) introducing or repealing any new type of sentencing order; and

(4) codifying the common law of sentencing procedure.

3.18 The first three of these extend beyond the aims of the project, and were contrary to our terms of reference which stated:

> 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.

3.19 The fourth goes beyond what can be achieved in a consolidation Bill. Although the decision to draft the Sentencing Code as a consolidation bill therefore means that such changes cannot be achieved in this project, we believe that the improvements to the current law that can be achieved are considerable. On balance we considered that these constraints were a price worth paying for the many benefits that a consolidation of sentencing procedure law would bring.

THE JURISDICTIONAL SCOPE OF THE SENTENCING CODE

3.20 The Sentencing Code will form part of the substantive sentencing law of England and Wales but will not have any impact on the substantive sentencing law applicable in Scotland or Northern Ireland, nor the Crown Dependencies.

3.21 To the extent that the Code will extend to Scotland and Northern Ireland, it will do so only where it is necessary: (a) to facilitate the transfer of orders which have been imposed by a sentencing court (such as community orders and youth rehabilitation orders) between England and Wales and Scotland and Northern Ireland where an offender proposes to move from one jurisdiction to another; or (b) to insert signposts to the Sentencing Code for cases in England and Wales.

3.22 We have been in contact with the Ministry of Defence throughout the lifetime of the project and have explored whether or not the Sentencing Code should extend to the service jurisdiction. The Ministry of Defence expressed their support for the project and the clean sweep, as the problems which concern sentencing law are not confined to the civilian jurisdiction.

3.23 The Armed Forces Act 2006 provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice. Much of the sentencing procedure in that Act 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. Changes to criminal procedure in civilian courts are often reflected in parallel changes for service courts. For example, the Armed Forces Act 2006 applies the provisions of the current law (principally from the Criminal Justice Act 2003) to the armed forces by way of modification.

3.24 After extensive discussion with the Ministry of Defence, it was decided that the preferred option in relation to the Sentencing Code would be for it to apply to the service jurisdiction in the same way. Pressure on resourcing has meant that we have been unable to draft the necessary amendments to the Code to apply it to the service jurisdiction within the time frame of this project. This task could, however, be easily achieved if further resource was made available. Alternatively, the application of the Sentencing Code to the service jurisdiction could be achieved by way of the next Armed Forces Act, which must be passed before 2021 to maintain a standing armed service.

3.25 The Sentencing Code can, therefore, accommodate the service jurisdiction with comparatively little additional resource. We note, however, that there is an ongoing review of military justice at present which may well alter this position.

THE GENERAL SCOPE OF THE SENTENCING CODE

General purpose and aims of the Sentencing Code

3.26 The purpose of the Sentencing Code is to bring together the law of sentencing procedure into a single enactment. By ‘sentencing procedure’, we refer to sentencing law which prescribes what happens to an offender who is convicted of, or has pleaded guilty to, a criminal offence. Our guiding principle was that the Sentencing Code should include all procedural provisions which a sentencing court would need to rely upon during the sentencing process. By ‘procedural provisions’ we principally refer to provisions such as those detailing the orders which a sentencing court may impose, the general legislative principles of sentencings, case-management functions such as committals from one court to another, and breaches of existing sentencing orders. As we explained in the main consultation paper, we did not propose to include matters of

which a court may find it useful to be aware but which were not necessary in order for the court to discharge its functions in sentencing.[76]

3.27 We consider that provisions which establish the maximum sentence for a criminal offence are best conceived of as substantive criminal law provisions, and not procedural ones as they form part of the substantive law criminalising particular behaviour. Further, it is now the usual drafting practice for the provision setting the maximum penalty for an offence to be located in, or alongside, the offence creating provision. This allows users to easily locate and understand the consequences of particular criminal behaviour. To remove such provisions and to place them into a Sentencing Code would not, in our opinion, be helpful to users. Examples of this usual drafting practice can be seen in the Sexual Offences Act 2003.

3.28 Our preliminary research suggested that the principal problems with the law stemmed from the complexity of the legislation and its lack of coherence, the fact that the provisions were located across the statute book, and the opaqueness of the language owing to the age of some of the provisions. As a consequence of these issues there is a lack of efficacy (and associated increased costs), a high rate of error in sentencing and the lack of transparency and certainty around the law of sentencing.

What is "sentencing"?

3.29 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.

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

3.31 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 are not 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.[77]

3.32 In the main consultation paper, we asked consultees whether they agreed with the proposed policy as to the inclusion of provisions. Among those consultees who specifically responded to this question, there was broad agreement with the decisions made in relation to the appropriate scope of the Code. The Law Society, the Bar Council, the Registrar of Criminal Appeals, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges all expressed agreement.

3.33 Further, we asked whether consultees approved of the provisions which had been included in the draft Sentencing Code. Of those consultees who specifically

---

[76] The Sentencing Code (2017) Law Commission Consultation Paper No 232, Chapter 2.

[77] Confiscation is addressed further below at paragraph 3.53 and following.

responded to this question, all were supportive of the scope of the Code. Some consultees were supportive of greater inclusion:

3.34 Her Majesty's Council of Circuit Judges summed up this attitude with their statement that

> We welcome the inclusion of as many matters as practically possible in the Code to avoid the requirement of looking elsewhere for answers.

3.35 Other consultees expressed support for the inclusion of specific topics, these are discussed further below.

Sentences imposed otherwise than on conviction

3.36 In most cases, sentencing procedure law applies on conviction, however, there are orders available to courts for reasons other than their conviction which could be considered sentences. These are principally those orders that are available 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. In these cases the court has various powers to make certain orders in disposing of the case.[78] A court will deal with such an individual at the same point in the proceedings as a sentencing hearing in the case of an offender convicted of an offence, ie the conclusion of proceedings. The provisions regulating such cases are currently located in the Powers of Criminal Courts (Sentencing) Act 2000, the Mental Health Act 1983 and the Criminal Procedure (Insanity) Act 1964. We considered whether these provisions should be wholly redrafted in the Sentencing Code and initially concluded that they should be.

3.37 During consultation, we asked consultees whether instead the powers available under section 5A of the Criminal Procedure (Insanity) Act 1964 should be redrafted in the 1964 Act itself (rather than relying upon the modifying provisions of that Act, requiring users to look to that Act and other enactments to ascertain the court's powers, or bringing them into the Sentencing Code). Save for the Law Society, consultees supported the redrafting of the provisions within the 1964 Act.

3.38 Accordingly, we ultimately took the decision to exclude these provisions from the Code. First, this allowed us to retain a clear policy regarding the cases to which the Code applies. Secondly, time and resource were scarce, and it was important to ensure that the provisions relating to sentencing following conviction would be complete and receive the appropriate level of scrutiny before publication. The clarity and accessibility of these provisions could be further improved by bringing them together in the Criminal Procedure (Insanity) Act 1964, thereby creating a single enactment containing the powers of the court upon a special verdict or a finding that the accused has done the act charged.

3.39 As the Code will repeal and re-enact the power to make an absolute discharge, we have been able to redraft the power to make an absolute discharge (as modified by the 1964 Act) in the 1964 Act as removing this glossing provision is an amendment which is desirable in connection with the consolidation. As the Code will not repeal

---

78 See section 5(2) of the Criminal Procedure (Insanity) Act 1964.

and re-enact the power to make a hospital order under the Mental Health Act 1983, the same exercise (to re-draft in the 1964 Act section 37 as modified) would go beyond the scope of this consolidation exercise, and therefore, unfortunately, amounts to a change we cannot make. To make such a change would be to embark on a separate consolidation exercise to produce a self-contained code for disposals following a verdict of not guilty by reason of insanity or a finding that an accused did the act charged following a finding that they are unfit to plead. We do, however, think that such an exercise would be beneficial and are therefore making a recommendation that these amendments should be made so as to produce a clear and coherent statement of the powers available to a court under section 5A of the 1964 Act.

Recommendation 2.

3.40 We recommend that the power to make a hospital order, currently in section 37 of the Mental Health Act 1983 as modified by section 5A of the Criminal Procedure (Insanity) Act 1964 is redrafted (with modifications) into the 1964 Act so that all three powers available to a court under section 5A are contained within the 1964 Act.

3.41 An acquittal is the only other circumstance of any significance in which a criminal court may impose an order upon an individual in consequence of a verdict other than a conviction. Under section 5A of the Protection from Harassment Act 1997, the court has a power to make restraining orders against a person who has been acquitted of any offence, 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 addresses the potential for future harm and offending. The making of the order also occurs at a similar point in criminal proceedings: post-verdict. 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.

3.42 Finally, 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. These powers can be exercised by the courts at any point in criminal proceedings and in respect of any "individuals who are before the court" including witnesses giving evidence and complainants.[79] These powers are sometimes used in the disposal of criminal proceedings, and will therefore be referred to, but not contained within, in the Sentencing Code.

[79] 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.

PROVISIONS NOT INCLUDED IN THE SENTENCING CODE

3.43 We have expressly excluded certain topics from the Code. Although we have explained above our general definition of "sentencing", there are a number of excluded topics which we feel it is necessary to explore in further detail. Although our ambition was to include all provisions which a sentencing court needed to be aware of in order to discharge its duty when sentencing, we acknowledged the arguments for qualifying that in certain circumstances. For instance, where provisions currently form a part of a coherent code we decided that they should not be moved into the Sentencing Code.

3.44 We asked consultees during the main consultation whether they agreed with our policy on the inclusion and exclusion of certain topics. There was general agreement expressed by consultees in response to this question, and in the main a sympathy expressed for the need to balance comprehensiveness with avoiding the Code becoming impossibly ambitious or unwieldy. However, a number of specific comments were made about particular exclusions. These are dealt with below.

Sentencing Council constitution

3.45 The Sentencing Code will incorporate the statutory material from the Coroners and Justice Act 2009 which governs a sentencing court's duty to follow any applicable sentencing guideline. However, it will not include the provisions which provide for the existence and governance of the Sentencing Council itself.

3.46 The Sentencing Code is designed to be used at the point of sentencing, to address the needs of those in sentencing courts. The constitution and remit of the Sentencing Council is irrelevant for those purposes, and will therefore not be reproduced in the Sentencing Code. This material will remain in the 2009 Act.

3.47 It is also important to clarify that the Sentencing Code will not replace the guidelines produced by the Sentencing Council. It will, instead, sit alongside them, complementing their use. As the first substantial re-casting 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.[80]

Road Traffic Offences: Disposals

3.48 The Sentencing Code will not seek to restate or replace the legislative material in the Road Traffic Acts.[81] 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.

---

80 We have maintained regular contact with the Sentencing Council and we are grateful to the Sentencing Council members and staff with whom we have worked throughout the project and thank them for their engagement, assistance and support.

81 The principal Act is the Road Traffic Act 1988 which was heavily amended by the Road Traffic Act 1991.

3.49 The Road Traffic 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 unnecessarily disrupt an established body of law.

3.50 Further, the consolidation of the existing law of sentencing procedure has to be completed within a limited timeframe to avoid being overtaken by any new legislation that may be enacted in the interim. This has meant that, given limited resources and access to Parliamentary Counsel, a relatively restrictive approach was needed. The inclusion of road traffic specific material did not represent an efficient use of resources.

3.51 In relation to this decision, the Senior District Judges said:

> The consultees appreciate the enormous task that the Law Commission has undertaken. With hesitation one of these consultees considers that it would be desirable to include road traffic sentencing even though he appreciates that the sentencing is set out in the legislation. Codification of road traffic sentencing cannot be achieved within the current timescales but perhaps can be looked at later. Costs are also a part of sentencing and it may be useful to signpost these in the Code if they are not to be included within the Code itself.

3.52 We have chosen not to include provisions relating to costs (or a signpost to such provisions). This is because to the provisions which are capable of application following a criminal trial are not exclusively sentencing provisions. Accordingly, in line with our policy on scope, these have not been included.

Confiscation

3.53 The Proceeds of Crime Act 2002 ("POCA 2002") provides for confiscation orders and contains a substantial body of law governing making, amending and enforcing such orders. We asked consultees whether they agreed with our general policy with regard to the inclusion of provisions in the Code. Although there was broad agreement, some consultees noted the need for the reform of the confiscation regime. Professor Ashworth QC said:

> I am a critic of the current law on confiscation, but I did expect it to feature in the Code. My understanding … is that there may be forthcoming developments in the law and that this is a good reason for omitting confiscation from the Code at this stage (for similar reasons to the omission of youth sentencing, therefore). However, I would point out that confiscation is a penalty (*Welch v. United Kingdom*, 1995), with deterrent and preventive aims, and that confiscation has priority over a fine where there are inadequate means to satisfy both, and so would suggest that this is a strong reason for integrating the relevant law into the Code at an appropriate time.

3.54 Although the power to make a confiscation order arises on conviction for an offence, we do not intend for confiscation to be brought into the Sentencing Code. The reasons for this decision are as follows.

3.55 First, proceedings for confiscation are not properly conceived of as 'sentencing'. Confiscation, although it necessarily follows conviction, operates as a means of removing illegitimate benefits obtained from criminal conduct, including (where

appropriate) the benefits of a presumed "criminal lifestyle". This in contrast to a sentencing order which operates to punish, deter or rehabilitate. Confiscation is dealt with in separate proceedings from the imposition of sentence, and, in many cases, must take place in a different court.

3.56 Secondly, POCA 2002 currently provides a self-contained, albeit amended, 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, would be a substantial disruption of the current position.

3.57 Notwithstanding our decision that POCA 2002 itself will not be brought into the Sentencing Code, we do intend to provide signposting provisions in the Code to alert the users to the existence of certain confiscation related powers and duties at the relevant time.

3.58 Thirdly, the Law Commission has now begun a separate review of the confiscation regime under Part 2 of POCA 2002. The confiscation project will necessarily be informed by the streamlined procedure for sentencing adopted in the Code. The project aims to produce a report in 2020.[82]

Release, recall and re-release

3.59 Consistent with the policy on scope 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 when imposing the sentence in the first place. 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. Additionally, there is a strong and consistent line of common law authority which states that release provisions should not generally be considered when sentencing.[83]

3.60 Matters which the sentencing court might it find useful to know about, as opposed to those which actively empower or mandate the court to act in a certain way are not in the scope of the Sentencing Code. To expand the scope of the Code so that the provisions relating to release, recall and re-release were included would undermine the otherwise consistent approach taken elsewhere – on which the simplicity of the Code depends.

Appeals and Attorney General's references

3.61 Appeals against sentence and Attorney General's references are clearly a sentencing related issue. An appeal against sentence from the Crown Court occurs where a

---

82 See https://www.lawcom.gov.uk/confiscation/.

83 See for example *R v Thompson* [2018] EWCA Crim 639, [2018] 2 Cr App R (S) 19 and *R v Dunn* [2009] EWCA Crim 2667, [2010] 2 Cr App R (S) 45.

defendant applies for permission to challenge the sentence (in whole or in part) imposed upon them, arguing that the sentence is too severe and should be reduced. An Attorney General's reference occurs where the Attorney General applies for leave to refer a sentence (or sentences) imposed upon an offender on the basis that it is too lenient and should be increased. These are, however, by definition, matters which arise after sentence has been declared. As such, we have determined that provisions governing appeal should be excluded from the Sentencing Code. The procedure governing appeals against sentence to the Court of Appeal (Criminal Division), for example, will continue to be found in the Criminal Appeals Act 1968.

3.62 By contrast, the specific "slip rule" powers in section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides for the alteration of Crown Court sentences by the sentencing court which imposed the original sentence, will be included in the Sentencing Code. A slip rule hearing is distinct from an appeal as the variation of sentence is carried out (almost without exception) by the judge who impose the original sentence at the same court. An appeal is not heard by the judge who imposed the original sentence; it is instead heard by a more senior court.

Common law rules

3.63 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, even where they are settled law such as the rules in *R v Newton*[84] (concerning the identification of the proper factual basis for sentencing following a guilty plea) and *R v Goodyear*[85] (where the defendant may ask the judge for an indication of sentence on the hypothetical basis that they pleaded guilty). 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.

3.64 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. We set out the reasons for this in our consultation paper[86] and do not repeat them here.

IMPROVEMENTS TO SENTENCING PROCEDURE

3.65 As noted above, consolidation has many benefits in terms of clarity and transparency. The Sentencing Code is not, however, only a consolidation of the law on sentencing. It will go beyond pure consolidation by effecting reforms such as the "clean sweep" of historic sentencing legislation recommended in the transition report.[87]

3.66 The Sentencing Code will also make a number of other changes in the interests of clarity and certainty. It will improve the language used throughout the law, create a

---

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

85 *R v Goodyear* [2005] EWCA Crim 888, [2006] 1 Cr App R (S) 6.

86 See, The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 2.85 to 2.91.

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

coherent structure, and will also make more substantial changes to correct errors and inconsistencies and to streamline inconsistencies.

3.67 It will achieve these changes through two methods:

(1) Drafting changes – in the course of consolidating the law it is inevitable that obvious minor errors or anachronisms in the existing law are identified. An example might be 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. Strictly speaking the inclusion of such changes in the Bill will mean that there is a change being made to the existing law. The consolidation Bill procedure allows for such changes to be made. When the Bill is considered by the Joint Committee in parliament it must be accompanied by a "Note" drawing the attention of the Committee to these changes and explaining how the re-drafted position replicates, in effect, the current position. We refer to these changes below as 'drafting changes'.

(2) Pre-consolidation amendment – where a more substantive change needs to be made to the law, such as where an error has arisen but the intended effect of the law is not sufficiently certain for a Note, this can be achieved by a pre-consolidation amendment of the law. "Pre-consolidation amendments"[88] 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). They are limited to amendments which will facilitate, or are desirable in respect of, a consolidation of the law.

3.68 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.[89] Clause 2 will make a number of pre-consolidation amendments, as well as providing the Secretary of State with the power to make further pre-consolidation amendments by way of secondary legislation.

3.69 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).

3.70 This power will be exercisable by way of a statutory instrument subject to an affirmative resolution[90] and the types of change that can be made under it are very limited. Ordinarily, only minor streamlining and tidying changes can be made to the

---

88 See D Greenberg, *Craies on Legislation* (11th ed, 2017) para 1.9.8.

89 The operation of clause 1 is explained in detail below in Chapter 4.

90 See clause 4 of the Sentencing (Pre-Consolidation Amendments) Bill.

law in the interests of the consolidation: any significant changes of policy are outside the scope of this power. Where there is a need for slightly more significant changes to be effected in order to streamline provisions (such as amendments to ensure that the courts always have their modern sentencing powers, and not their historic), clause 2(3) provides the following:

3.71 (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) forfeiture;

(b) powers of different courts to deal with offenders subject to particular sentences;

(c) powers of different courts to provide for when sentences or particular requirements of sentences are to take effect.

3.72 This clause allows for streamlining changes in those specific areas that would go beyond those normally permitted under a pre-consolidation amendment power. These powers are still limited, however, to streamlining changes, and therefore will not make any significant changes to the law.

Drafting changes: Clearer structure of provisions

3.73 We have introduced a more structured approach to the drafting of provisions which create a power to impose an order. This new approach provides first for an explanation of what the order is (where appropriate) and secondly, any conditions on its availability. This clear and consistent structure makes the provisions easier to navigate and understand. The example below is of the current provision providing for the power to impose an extended determinate sentence in the case of an adult offender, and then the re-drafted provision. It is to be noted that while under the current law, section 226A of the Criminal Justice Act 2003 applies to all offenders convicted over aged 18, in the Code these have been re-drafted in separate provisions, applying to those aged 18 to 20 at conviction, and those aged 21 or over. The example below details only those provisions relating to those aged 21 or over at conviction.

Example 1

The Criminal Justice Act 2003

226A Extended sentence for certain violent or sexual offences: persons 18 or over

(1) This section applies where—

(a) a person aged 18 or over is convicted of a specified offence (whether the offence was committed before or after this section comes into force),

(b) the court considers 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,

(c) the court is not required by section 224A or 225(2) to impose a sentence of imprisonment for life, and

(d) condition A or B is met.

The Sentencing Code

279 Extended sentence of imprisonment for certain violent or sexual offences: persons 21 or over

An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of—

(a) the appropriate custodial term (see section 281), and

(b) a further period (the “extension period”) for which the offender is to be subject to a licence.

280 Extended sentence of imprisonment: availability

(1) An extended sentence of imprisonment is available in respect of an offence where—

(a) the offence is a specified offence (see section 306(1)),

(b) the offender is aged 21 or over when convicted of the offence,

(c) 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 (see section 308),

(d) the court is not required by section 283 or 285 to impose a sentence of imprisonment for life, and

(e) the earlier offence condition or the 4 year term condition is met.

3.74 We consider that the re-drafted provision is clearer and that the introduction of a provision explaining what a particular sentencing order is aids comprehension and makes the law more accessible.

Drafting changes: Cross referential drafting or 'signposting'

3.75 As noted above, the current primary legislation governing sentencing procedure runs to over 1300 pages. During the drafting process we have sought to remove duplication and unnecessary wording, however the Sentencing Code remains substantial, at 416 clauses and 28 Schedules. As might be expected, various provisions interrelate and it is not always apparent, even to a specialist and experienced user of the legislation, that a particular provision applies in a particular case.

3.76 Accordingly, we included 'cross-referential drafting' wherever appropriate in the draft Code to aid comprehension. This device is also known as "signposting". Signposting involves the insertion of a provision which simply alerts the reader of the legislation to the existence of another provision, either located in that legislation, or in another enactment. This has the benefit of drawing to the attention of users the existence and location of provisions which are relevant in particular instances. We have made a point of adding signposts where we are aware that provisions which are going to remain outside the Code are at risk of being overlooked or where one provision within the Code is not located near to another provision to which it relates.

3.77 The use of signposting is not currently standard practice in drafting of legislation as the signposting provisions are not operative provisions. They do not confer a power or a duty upon the court, but merely alert the user to the existence of another provision. They themselves have no legal effect. The general approach to legislative drafting is to avoid words which are not operative. However, we consider that the use of internal signposts is a particularly useful drafting device for the Code, given the size and complexity of the material involved. We discussed this device with consultees during our consultation process and the response was overwhelmingly positive. For example, the London Criminal Courts Solicitors' Association considered that "the signposting provisions appear useful and should be included in the Code." and the Registrar of Criminal Appeals observed that "provision of the signposts should assist the Court (and other stakeholders) in accessing the details of the relevant duties." In the formal responses to the consultation paper, which asked whether consultees approved of our use of signposting, consultees welcomed the use of this device, noting that it simplified the process of using the legislation.

3.78 An example of how we have used a signpost in the Code to alert users to another provision located *within* the Sentencing Code may assist. Below we set out two provisions, the first, clause 30, which deals with the duty to order a pre-sentence report, and the second, clause 179, which deals with the imposition of a youth rehabilitation order. Clause 30 sets out the duty upon a court to order and consider a pre-sentence report in certain circumstances.

3.79 The provision from which clause 30 originates (section 156 of the Criminal Justice Act 2003) contains a subsection which states that when the court is forming an opinion as to the seriousness of the offence and whether or not a youth rehabilitation order is

appropriate, it must obtain and consider a pre-sentence report. The provision from which clause 179 originates, however, does not contain a reference to the requirement to obtain and consider a pre-sentence report. It is therefore possible that this duty might be overlooked by a user considering the provision concerning the imposition of a youth rehabilitation order but who is unaware of, or forgets the existence of, the duty to obtain a pre-sentence report.[91]

3.80 Our proposal to overcome this potential "trap" for users of the legislation is to move the existence of the duty to obtain a pre-sentence report into the youth rehabilitation order provision. We set out the two provisions below; as can be seen in clause 179(4), the signpost alerts the user to the existence and location of the duty contained in clause 30.

Example 2 – Clause 30

30 Pre-sentence report requirements

(1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.

(2) If the offender is 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report.

(3) If the offender is aged under 18, the court must obtain and consider a pre-sentence report before forming the opinion unless—

(a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court considers—

(i) in the circumstances of the case, and

(ii) having had regard to the information contained in that report or, if there is more than one, the most recent report,

that it is unnecessary to obtain a pre-sentence report.

[91] This problem is further exacerbated by the fact that the two provisions are currently contained in different enactments.

Example 2 – Clause 179

179 Exercise of power to make youth rehabilitation order: general considerations

(1) This section applies where a court is dealing with an offender for an offence and a youth rehabilitation order is available.

(2) The court must not make a youth rehabilitation order unless it is of the opinion that—

(a) the offence, or

(b) the combination of the offence and one or more offences associated with it, was serious enough to warrant the making of such an order.

(3) In forming its opinion for the purposes of subsection (2), the court must take into account all the information that is available to it about the circumstances of the offence, or of it and any associated offence or offences, including any aggravating or mitigating factors.

(4) The pre-sentence report requirements (see section 30) apply to the court in relation to forming that opinion.

3.81 This drafting technique has been used many times across the Sentencing Code.

3.82 Signposting in the Sentencing Code is not limited, however, to signposting provisions within the Code. Signposts have also been included to legislative provisions located outside of the Sentencing Code. For example, the power to disqualify an offender from being the director of a company upon conviction is in the Company Directors Disqualification Act 1986. It has not been re-drafted in the Sentencing Code because the 1986 Act relies upon the provision for other purposes which are not relevant to sentencing. Therefore, to repeal the provision and re-draft it in the Code would leave the 1986 Act in an unsatisfactory state. Accordingly, we have drafted a signpost to the provision in the 1986 Act at the relevant location in the Code. The provision as drafted in the Code is set out in Example 3.

Example 3

172 Company directors

See sections 2 and 5 of the Company Directors Disqualification Act 1986 (company director disqualification orders) for provision about orders available in relation to certain offences relating to companies, building societies and other bodies.

Drafting changes: Improvements to language

3.83 We have made numerous changes to the language used in the legislation, without changing its meaning. This includes modernising the language, making it gender neutral and ensuring consistent use of terms and language wherever possible

3.84 For instance, in some older legislation, the offender was referred to as "him"; in the Code we have exclusively used gender neutral language. In this way, the Code is more accessible and more reflective of modern society than the outdated language used in some of the older enactments which are being consolidated. We have also replaced references to old fashioned and out-dated terms such as "plaintiff" with their modern counterpart "claimants".

Pre-consolidation amendments: Drafting errors

3.85 A very simple but important improvement we can make to the legislation through the consolidation is the correction of error. By way of example, section 83 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that an offender may not be sent to custody in circumstances where they do not have legal representation. The provision sets out a number of sentencing orders to which this requirement applies in the cases of children and young offenders. As new sentencing orders are created, the list in section 83 requires updating. We identified an omission from this list – an extended determinate sentence under section 226B of the Criminal Justice Act 2003. We were able to demonstrate this was a missed consequential amendment which ought to have been made at the time when section 226B was inserted into the 2003 Act by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[92] We have therefore inserted a reference to section 226B of the Criminal Justice Act 2003 into the provision of the Code which redrafts section 83 of the Powers of Criminal Courts (Sentencing) Act 2000.

Pre-consolidation amendments: Streamlining

3.86 Another improvement which we have made through the Sentencing Code as a consolidation Bill is to streamline the legislation. This has taken several forms:

(1) omitting certain provisions which are no longer necessary;

(2) removing inconsistencies between provisions which have the same effect but use different language; and

(3) changing the operation of certain provisions to ensure the process is more efficient and less likely to lead to error.

3.87 In the first category (omitting certain provisions which are no longer necessary), we have proposed a repeal without re-enactment of certain clauses. For instance, we have not reproduced references to local probation boards. These were abolished by section 11 of the Offender Management Act 2007 but no consequential amendments

[92] This may be symptomatic of frequent complex amendments made by different enactments in consequence of others. This should be less likely to occur after the commencement of the Code.

were made to omit references to these across the statute book. Therefore, we have omitted references to them in order to make the provisions in the Code simpler.

3.88 The second category concerns provisions which have the same effect but use different language. We have made these provisions consistent so as to avoid any suggestion that there is any intended difference. As an example, we have brought into line the provisions dealing with sentencing orders that require the Secretary of State to have issued a notice confirming that arrangements have been made such that a particular order is available in a particular geographical area. Some provisions included a requirement that the notice had not been withdrawn whereas some did not. In the current law, this was not particularly problematic as each enactment was internally consistent as to the approach it adopted. However, when consolidating, a risk is that by bringing provisions that use different language into the same enactment, one introduces the implication that the provisions operate differently.

3.89 Contrast section 73(6) of the Powers of Criminal Courts (Sentencing) Act 2000 with paragraph 12(3) of Schedule 1 to the Criminal Justice and Immigration Act 2008. In the former, which includes a requirement that the notice has not been withdrawn, it is clear that an order would be available only if the notice had been issued and not been withdrawn. In the latter, which includes no reference to withdrawal, on a natural reading of the statute an order would be available if the notice had been issued (even if there had been a purported withdrawal). While such an interpretation may be hard to sustain, the suggestion of difference where there is none creates a risk of unintended consequences and wasted case preparation and court time. We conducted research into the legislative background to the provisions and were able to ascertain that no such different meaning was intended. We have therefore adopted a uniform approach by drafting all requirements with such a notice requirement in the same manner, requiring the Secretary of State to issue a notice and for that notice to have not been repealed.

3.90 In the third category (changing the operation of certain provisions to ensure the process is smoother and less likely to lead to error) there is a more significant change. Here we have changed, to a limited extent, the operation of a provision. An example of this is the powers to re-sentence upon the breach of a community order. Under the current law, in some instances the court is empowered to deal with the offender as if the offender had just been convicted before it, and in others with the powers of the original sentencing court. This can mean the difference between a requirement being available or unavailable. Further, as a community order can last for a period of up to three years, this can encompass many changes to the available requirements. Below we set out two tables, one showing the position under the current law and the second showing the position as streamlined by the Code.

Under the current law

Situation	Power of magistrates' court	Power of the Crown Court
Failure to comply	Powers as if just convicted	Powers original sentencing court had
Application	Powers as if just convicted	Powers original sentencing court had
Conviction for new offence	Powers original sentencing court had	Powers original sentencing court had
Failure to express willingness to comply	Powers original sentencing court had	Powers original sentencing court had

Under the Sentencing Code

Situation	Power of magistrates' court	Power of the Crown Court
Failure to comply	Powers as if just convicted	Powers original sentencing court would have if just convicted
Application	Powers as if just convicted	Powers original sentencing court would have if just convicted
Conviction for new offence	Powers as if just convicted	Powers original sentencing court would have if just convicted
Failure to express willingness to comply	Powers as if just convicted	Powers original sentencing court would have if just convicted

THE STRUCTURE OF THE SENTENCING CODE

Our approach

3.91 A fundamental aim of the Sentencing Code project is that it should produce legislation which is easier to understand and apply. The Sentencing Code will, we anticipate, be used by the judiciary and practitioners in place of any other reference material on primary legislation governing sentencing. It must be easy to use. 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.

3.92 After extensive consultation with court users, 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. Users of the Sentencing Code should thereby be able to find the provisions they need to refer to in the expected place, and with the fewest possible steps. It should always be possible to take a simple "path" through the Sentencing Code's provisions, even though in any individual case the court will only need a certain number of all the powers available and can therefore "skip" certain parts depending on the facts and circumstances of the case.

User-testing exercises

3.93 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 the spring of 2017. As our aim was for the provisions of the Code to be organised in a way which was reflective of the chronology of a typical sentencing hearing, we sought the views of the those who conduct such hearings.

3.94 We are grateful to judges at the Central Criminal Court, Oxford Crown Court, Winchester Crown Court, Manchester Crown Court and District Judges (Magistrates' Courts) from the South Eastern Circuit for their valuable assistance. It shaped the structure of the draft Sentencing Code early in the life of the project.

Primary/secondary disposals

3.95 In preparing the main consultation, we explored possible approaches to the structure of the Sentencing Code, including the arrangement of those sentencing orders which are available to a court following a conviction. One approach we considered divided the orders into two categories: (1) primary sentencing powers – those orders which are capable of disposing of a case without the need for further orders (e.g. imprisonment, a community order, a fine, conditional discharge); and (2) further sentencing powers – those orders which can only be imposed in addition to a primary sentencing power (e.g. a criminal behaviour order or a sexual harm prevention order). We considered this way of presenting the orders would help users of the legislation and reduce the risk of errors arising from orders being erroneously imposed.

3.96 We asked consultees whether they agreed with a table which categorised the various sentencing disposals as either primary disposals or further powers of sentencing.[93] We explained that this categorisation was designed to assist in ensuring that the Bill is structured in the most effective manner.

3.97 A number of consultees, including The Law Society, the Bar Council, the Registrar of Criminal Appeals, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges, endorsed the categorisation as logical, though many added qualifications or further suggestions.

3.98 Her Majesty's Council of Circuit Judges welcomed the practical nature of the categorisation:

> We imagine this Code on hand as we sentence. We welcome a Code we can navigate in the same way as, for instance, a sentencing guideline.

3.99 The qualifications and further suggestions were considered and resulted in amendments to the drafting of the Code.

3.100 Further, we asked consultees whether they agreed with the overall structure of the Code. Responses were positive, with the Law Society, the Crown Prosecution Service and Lesley Molnar-Pleydell (Langley House Trust) all approving of the chosen structure. The Bar Council made helpful suggestions for the improvement of the Third Group of Parts (as to which see below). Some consultees commented on the decision to structure disposals from least to most severe with the exception of placing suspended sentence orders after custodial sentences.

3.101 The Senior District Judges commented that:

> … what is contained within the Code has been structured well and is both efficient and correctly ordered. We agree with the arrangement of Suspended Sentence Orders after custodial provisions.

3.102 Similarly, the London Criminal Courts Solicitors' Association stated that:

> The disposal options must be ordered from least to most serious. This is the only way to properly reflect the general principle that the lowest justifiable sentence is imposed. To arrange the disposals from most to least serious could have the potential of increasing the level of sentences overall. Whilst not immediately attractive to a defence practitioner, we can see the merit in ordering suspended sentences after custodial sentences in the Code.

---

93 The Sentencing Code (2017) Law Commission Consultation Paper No 232 paras.2.47 to 2.50.

Organisation of the parts of the Sentencing Code

3.103 The Sentencing Code is organised into five "Groups of Parts"[94] and a number of Schedules. We briefly describe their contents below.

3.104 The first Group of Parts provides an overview of the Code and the rules governing its application.

3.105 The second Group of Parts 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.

3.106 The third Group of Parts 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 which contains those provisions which are most typically thought of as sentencing.

3.107 The fourth Group of Parts 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.

3.108 The fifth Group of Parts provides miscellaneous powers and provisions 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, placing these in this part 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.

3.109 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 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 Code to be more concise and navigable.

3.110 The details of each of the parts of the Bill will be explored in subsequent chapters.

---

[94] It is relatively rare for an Act to be grouped into divisions larger than a Part but when structuring large enactments it is not unusual to label "Groups of Parts", see for example, the Insolvency Act 1986.

Chapter 4: The ‘clean sweep’

THE PROBLEM

Changes to sentencing legislation

4.1 The sentencing procedure legislation suffers from a systemic problem in the way it is amended. The criminal law, and in particular, sentencing, will of course never remain static. The law, however, must remain clear, accessible and coherent, no matter how frequently amended.

4.2 The law governing sentencing procedure is complex and disparate. This is in part because it is frequently and heavily amended. It is, of course, an important part of Parliament’s function to enact new legislation creating new provisions concerning sentencing procedure, and to amend existing provisions to give effect to new policy objectives. However, the frequent and substantial amendment to the law governing sentencing procedure which has occurred over the last 30 years is undoubtedly at least partly responsible for the high rate of error seen in sentencing hearings.[95] In that period, there have been major amendments to the sentencing scheme in England and Wales in 1991, 1993, 1997, 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014, 2015 and 2018.[96] There is consensus among those working in the criminal justice system that such frequent and substantial change can cause problems in practice.

4.3 At the launch of the Sentencing Procedure Project in 2015, the Lord Chief Justice, Lord Thomas of Cwmgiedd said

> The law on sentencing is highly complex and contained in a dizzying array of separate but overlapping sources. For that reason, sentencing procedure represents an obvious candidate for consolidation and simplification.

4.4 This combination of complexity, frequency of amendment and the way in which such amendments have been achieved has resulted in the law of sentencing procedure being extremely difficult to locate, interpret and apply, even for an experienced lawyer or judge. This increases the risk that practitioners and judges will make errors, leading to appeals, delay and injustice. It is no exaggeration to suggest that in some cases, it is practically impossible for a lay person to locate and understand the law. This creates an obvious further risk of injustice.

4.5 A key objective of the Sentencing Code is to address the way in which amendments to legislation are made. Consultees identified this as a significant factor which is

---

95 R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii.

96 Criminal Justice Act 1991, Criminal Justice Act 1993, Crime (Sentences) Act 1997, Crime and Disorder Act 1998, Powers of Criminal Courts (Sentencing) Act 2000, Proceeds of Crime Act 2002, Criminal Justice Act 2003, Serious Organised Crime and Police Act 2005, Serious Crime Act 2007, Criminal Justice and Immigration Act 2008, Coroners and Justice Act 2009, Legal Aid, Sentencing and Punishment of Offenders Act 2012, Offender Rehabilitation Act 2014, Criminal Justice and Courts Act 2015 and Assaults on Emergency Workers (Offences) Act 2018.

responsible for a number of the difficulties in locating and interpreting the sentencing legislation in England and Wales:

(1) some changes are made by creating new provisions in a separate Act of Parliament, whereas others are made by amending an existing Act of Parliament;[97]

(2) new provisions or amendments to existing provisions are frequently enacted but either not brought into force for lengthy periods of time or not brought into force at all;[98]

(3) when provisions are brought into force, this is done in a variety of different ways, including by inserting new provisions into previous enactments,[99] textual substitutions,[100] or deeming provisions which require the courts to read a previously enacted provision in a different way;[101]

(4) some provisions are brought into force only for a certain class of person and so are only partially in force;[102] and

(5) 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.[103]

4.6 The result is that it is often difficult and time-consuming to find out whether a particular provision applies to a particular case. Practical difficulties often arise because:

---

97 See, for example, Anti-social Behaviour, Crime and Policing Act 2014, s 22, which created the criminal behaviour order, replacing the anti-social behaviour order available on conviction, and Sexual Offences Act 2003 s 103A which created the sexual harm prevention order, replacing the sexual offences prevention order available on conviction.

98 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.

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

100 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).

101 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.

102 See, for example, SI 2016 No 286 which brought Alcohol Abstinence and Monitoring Requirements under the Criminal Justice Act 2003, s 212A into force only in relation to London local justice areas.

103 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); Criminal Justice and Courts Act 2015, s 3(9) (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 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).

(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;[104]

(3) the class of person to whom a provision applies is not always stated in the provision, but rather in a separate piece of legislation;[105] and

(4) changes to the law are commenced in different ways. 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.[106]

The effect of the current approach

4.7 The effect of the current approach to the amendment and commencement of new sentencing procedure legislation is to create multiple "layers" of sentencing legislation. This is because provisions are repealed but partially saved for certain historical cases. Compounding this problem is the fact that the user of the legislation is not necessarily alerted to the existence of the historic layers and therefore may have to excavate to find what is buried beneath the most recent enactment.

4.8 Problems arise during periods of transition where there may be two conflicting provisions for a judge to consider prior to sentence. For instance, section 118 of the Powers of Criminal Courts (Sentencing) Act 2000 enabled the courts to impose a suspended sentence of imprisonment. This section was repealed on 4 April 2005, but preserved for cases in which the offence was committed before the commencement date of the repeal. Its replacement, section 189 of the Criminal Justice Act 2003 (which also enables the court to impose a suspended sentence of imprisonment), was commenced so that it applies only to cases in which the offence was committed on or after 4 April 2005. The result is that the old provision (section 118 of the Powers of Criminal Courts (Sentencing) Act 2000) continues to apply to offences committed before that date and the new provision (section 189 of the Criminal Justice Act 2003) applies to offences committed on or after that date.[107] The position is further complicated by the fact that offences do not always come before the courts in the

---

104 For example, section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 effectively increased level 5 of the standard scale of fines from £5,000 to an unlimited sum, but did so by a non-textual amendment. The effect is that the standard scale still states that level 5 is £5,000 but is deemed to read "unlimited" by section 85.

105 For example, community orders under s 177 of the Criminal Justice Act 2003 apply only to those aged 18 and over who were convicted of an offence committed on or after 4 April 2005. Although the fact that the order applies only to those aged 18 or over at conviction appears on the face of the provision, the prospective commencement date does not, and instead is contained in secondary legislation SI 2005/950.

106 For example, offences have been added to Schedule 15 to the Criminal Justice Act 2003. Schedule 15 serves multiple purposes, two of which are the list of offences for which an extended determinate sentence and a life sentence are available. Where an offence has been added to the schedule, a different method of commencement applies for the purposes of the life sentence to that which applies to the extended determinate sentence. See for example the Criminal Justice and Courts Act 2015, s 2(8) to (10) and SI 2015/778, art 3 and Sch 1, para 1.

107 See SI 2005/950.

order in which they are committed and therefore some cases involve both provisions and the court must determine which provision applies to which offence(s).

4.9 This approach has been replicated many times across the law of sentencing procedure. The result is that there are multiple sets of provisions which potentially apply to a single case. Users of the legislation must first determine if a particular provision even applies to their case before beginning to consider its effect. With sentencing procedure, this can be particularly complex.

4.10 For instance, the date on which an offence was committed will often determine whether certain sentencing orders are available. The table below provides one such example, in the case of a community order under the Criminal Justice Act 2003.

	Offence committed Pre-4 April 2005	**Offence committed 4 April 2005 - 2 December 2012**	**Offence committed 3 December 2012 - 31 January 2015**	**Offence committed 1 February 2015 - present**
Community order available under CJA 2003	N	Y	Y	Y
Maximum curfew 12 hours	N	Y	N	N
Maximum curfew 16 hours	N	N	Y	Y
Rehabilitation activity requirement available	N	N	N	Y

4.11 As the table demonstrates, even when considering relatively recent offences the court's powers may vary significantly. In this example, the determinative factor is the date of the offence, however, as noted above, the court's powers may also vary depending on the date of conviction, the commencement of proceedings or another point in time during criminal proceedings. The absence of a standard approach to such legislative changes creates an added level of complexity in the sentencing process. This fundamental problem makes it difficult and time-consuming to discover what the applicable law is, what sentencing powers are available and therefore what the appropriate sentencing package for a particular offender might be.

4.12 This complexity inevitably leads to delay as judges and practitioners spend time conducting research to ascertain what the applicable law is and how that impacts

upon any given case. These delays lead to increased costs and impact upon other cases, delaying the progress of trials and inconveniencing witnesses, complainants and defendants.

Examples of errors

4.13 More worrying than the delays caused by these difficulties is that they can lead to significant injustice.[108] For example, in *R v GJD*[109] 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 an offence 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 the operation of the commencement provisions excluded the offender from being liable to an IPP sentence.[110] The prospective commencement – making the order available only for those convicted after a certain date – lead to error.

4.14 In February 2015, two years and six months after the expiry of the minimum term, the offender 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.[111]

4.15 Another example of legal error caused by complex layers of sentencing legislation is that of *Attorney General's Reference (R v JM)*[112] in which the court had to correct an unlawful sentence imposed on an offender who had been convicted of a sexual offence. The judge had imposed a community order which, the Attorney General submitted, was unduly lenient and should be increased by the Court of Appeal (Criminal Division). The court agreed but noted that as the offence was committed before 2005, the regime that applied was not that under which the judge had imposed sentence. The judge had therefore imposed an unlawful sentence which, irrespective of the merits of the Attorney General's application, would have required correction.

---

108 R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii.

109 [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin).

110 The difference between the two sentences is that under a determinate sentence, release is guaranteed at a particular point, whereas under an indeterminate sentence release is never guaranteed and the offender can be detained in custody for life.

111 [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin) at [5].

112 [2017] EWCA Crim 2458.

4.16 These are not isolated examples. As we noted in the main consultation paper, a study of 262 randomly selected Court of Appeal (Criminal Division) cases revealed that there were 95 unlawful sentences.[113]

4.17 As noted, the problems arise from systematic failings in the way that the commencement of legislation and the 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 sensibly be given retrospective effect, but such transitional arrangements are often located in opaque and complex pieces of secondary legislation.

4.18 The problems identified in this section run contrary to rule of law ideals of transparency, certainty, clarity and accessibility of the law. The Sentencing Code proposes an innovative approach to commencement and transition, so as to combat the substantial difficulties created by the current system.

THE SOLUTION

The "clean sweep" proposal

4.19 On 1 July 2015 we published an issues paper[114] 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 bring the Sentencing Code into force in the most effective way, 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.

4.20 We provisionally proposed a technical fix to the problems we identified earlier in this chapter. We described this as the "clean sweep", so called because, if adopted, it would remove the need to make reference to the historical layers of legislation: it would in effect "sweep away" the layers of historic legislation which are no longer needed. This would leave the Sentencing Code as the single regime which users had to consult when considering sentencing procedure. We explain the effect of the clean sweep in more detail below.

4.21 Our starting point was that after the enactment of the Sentencing Code, all offenders convicted after its commencement should 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

---

113 See, R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii.

114 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[115] have come into force after the commission of the offence for which the offender is being sentenced.[116]

4.22 We considered that with these exceptions in place, the Sentencing Code could perfectly properly be given retroactive effect. We concluded that the clean sweep would not fall foul of the general common law presumption against retroactivity, and 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").[117] It is important to remember here that the Sentencing Code is concerned with sentencing procedure and does not aim to alter the severity of the penalty imposed upon an offender. It makes no changes to any maximum sentences nor does it alter any definitive sentencing guidelines,[118] or any sentencing authorities from the Court of Appeal (Criminal Division) as to the appropriate sentence level for any offence. The Code merely seeks to streamline the process by which sentencing courts impose sentences, reducing costs and errors and increasing transparency and accessibility.

4.23 Respondents to the issues paper were unanimously positive about our proposals.[119] The policy enjoyed strong support from Professor Andrew Ashworth QC (a leading academic in the field of sentencing and human rights), the Council of HM Circuit Judges, Lord Justice Treacy (the then Chair of the Sentencing Council) and the Law Society, among others. We set out the responses to the consultation paper on the clean sweep in more detail in our report on transition published in 2016.[120]

4.24 In that report, we recommended:

(1) A court sentencing under the Sentencing Code (and an appellate court on appeal) should ask whether the total penalty which it is minded to impose 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 commission.

(2) New laws on prescribed minimum sentencing and recidivist premiums[121] should be applied only to cases where the offence for which the person is being sentenced was committed after the change in the law.

---

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

116 For example, section 110 of the Powers of Criminal Courts (Sentencing) Act 2000.

117 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, paras 3.1 to 4.29.

118 Whether issued by the Sentencing Council or its predecessor the Sentencing Guidelines Council.

119 A New Sentencing Code for England and Wales (2017) Law Commission Consultation Paper No 232, paras 3.16 to 3.19.

120 A New Sentencing Code for England and Wales: Transition – Final Report and Recommendations (2016) Law Comm No 365, paras.3.1 to 3.54.

121 A recidivist premium is a provision which requires an offender to be treated more severely upon conviction for a repeat offence. For instance, where a minimum sentence provision applies by virtue of the existence of a previous conviction for a similar offence.

(3) The Sentencing Code should apply to all sentencing exercises in which conviction takes place after commencement of the Code or that version of it.[122]

THE EFFECT OF THE CLEAN SWEEP

4.25 The clean sweep will have two primary effects:

(1) to repeal in their entirety provisions concerning sentencing procedure which have been repealed but partially saved for discrete classes of historical case; and

(2) to commence, for all cases where the conviction occurs after the commencement of the Code, provisions which have been commenced prospectively only, irrespective of the date of the offence.

4.26 This means that users will no longer need to locate and interpret multiple historical versions of sentencing law, nor will they need to locate and interpret provisions which have been repealed but saved for a narrow class of case.

4.27 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, in order to ascertain the law. In doing so it will bring about a significant streamlining of sentencing procedure, allowing for a single set of provisions to govern the whole process of sentencing for offenders convicted after the commencement of the Sentencing Code.

4.28 The clean sweep will bring certainty and clarity to the law. Its benefits extend beyond these significant principled improvements, however. As noted above, the current position leads to unnecessary errors and delays, since even where practitioners can correctly identify the law applicable to their case, it can take significantly longer than necessary to resolve a case. These errors and delays lead to avoidable appeals and slip rule hearings[123] and unnecessarily lengthy sentencing hearings and appeals. By making the law simpler, clearer, more accessible and intelligible, the clean sweep will contribute to significant financial savings. Ministry of Justice economists estimate that these savings will be in the order of £256 million over the next ten years.[124]

An illustration

4.29 The effect of the clean sweep is best illustrated by working through its application to a simple factual scenario. We have selected three different dates on which the hypothetical offence was committed, to illustrate the simplification brought about by the clean sweep in contrast to the confusion created by the current law. In each case the offence is the same and the maximum penalty for the offence has remained the same.

---

122 A New Sentencing Code for England and Wales: Transition - Final Report and Recommendations (2016) Law Comm No 365, paras 6.1 to 6.3.

123 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.

124 £256.05 million net benefit over 10 years. See the Impact Assessment published alongside this Report.

Example 4

A 25 year old man pleads guilty to an offence of domestic burglary contrary to section 9 of the Theft Act 1968. The offender had had a dispute with a neighbour whom he believed was transgender. The offender had gained entry to a house by forcing open a downstairs window. He spray painted a transphobic slogan on the wall of the lounge. There was limited damage to the property and nothing was stolen. The offender had committed the offence impulsively after an argument with the neighbour one evening.

Applying the sentencing guidelines for burglary offences, the offence appears to fall within Category 2, which has a range of a high-level community order to 2 years' custody. The offender has a previous conviction for burglary in France in 2004.

4.30 Under the current law (in 2018), the statutory provisions 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.

What would the current law provide if D's offence was committed on 1 November 2018 but D was convicted on 1 December 2018?

4.31 If D committed the offence on 1 November 2018 then all of the current disposals and sentencing procedure would apply.

4.32 The court would be under a duty to "follow any sentencing guidelines which are relevant to the offender's case".[125] 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,[126] as well as the offender's previous conviction for a similar offence in France.[127] 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.[128]

4.33 A suspended sentence order would be available for the offender[129] 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

[125] Coroners and Justice Act 2009, s 125.

[126] Criminal Justice Act 2003, s 146.

[127] Criminal Justice Act 2003, s 143.

[128] Criminal Justice Act 2003, s 146.

[129] Criminal Justice Act 2003, s 189.

rehabilitative appointments or activities.[130] 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 on 1 December 2018?

4.34 If D committed the offence on 1 May 2010 then under the current law (in November 2018) the law applicable to him would be different.

4.35 While the court would still be under a duty to "follow any sentencing guidelines which are relevant to the offender's case",[131] it would not be under a duty to treat as aggravating factors his previous conviction in France or the fact that the present offence was motivated by hostility relating to transgender identity. The requirement to treat relevant previous convictions in a European Union Member State other than the United Kingdom as an aggravating factor was introduced by paragraph 6(2)(a) of schedule 17 to the Coroners and Justice Act 2009. However, by virtue of transitional provisions, this requirement does not apply to the sentencing of any offence committed before the coming into force of that provision on 15 August 2010.[132] 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. Again, by virtue of transitional provisions the requirement does not apply to the sentencing of any offence committed before 3 December 2012.[133] While the court has an inherent discretion to treat such factors as aggravating, because D's offence was committed before the introduction of both provisions, the court is not under a statutory duty to do so.

4.36 A suspended sentence order would be available for the offender[134] 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 the predecessor types of order – activity requirements[135] and supervision requirements.[136] However because of the way the transitional provisions operate, the amendments made by section 15 apply only to an offence committed on or after 1 February 2015.[137] This means that the court would have to impose a suspended sentence order with the activity requirement (now repealed, but saved for these purposes), 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.

---

130 Criminal Justice Act 2003, s 200A.

131 Coroners and Justice Act 2009, s 126.

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

133 SI 2012 No 2906, arts 2 and 3.

134 Criminal Justice Act 2003, s 189.

135 Criminal Justice Act 2003, s 201.

136 Criminal Justice Act 2003, s 213.

137 Offender Rehabilitation Act 2014, Sch 7, para 7; SI 2015 No 40, art 2.

What would the current law provide if D's offence had been committed on 1 January 2005 but D was convicted on 1 December 2018?

4.37 If D committed the offence on 1 January 2005 then under the current law, the sentencing law applicable to this case would be almost entirely preserved historic law.

4.38 First, the court would not have a duty to "follow any sentencing guidelines which are relevant to the offender's case"[138] but rather a lesser duty to "have regard to any guidelines which are relevant to the offender's case".[139] 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.[140]

4.39 The court would also not have any duty to treat as aggravating factors D's previous conviction in France or the fact that the offence was motivated by hostility relating to transgender identity for the reasons explained in paragraph 4.35 above. While the court has an inherent discretion to treat such factors as aggravating, because D's offence was committed before the introduction of both provisions, the court is not under a statutory duty to do so.

4.40 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 commencement of that section).[141] The court 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.[142] 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 sentencing exercise requires the court to make significant reference to obsolete and repealed law – which is 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?

4.41 The effect of the clean sweep is that if D is convicted after the commencement of the Sentencing Code, he is subject to the same sentencing law and procedure irrespective of when his offence was committed. Regardless of whether the offence was committed on 1 November 2018, 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 France and that the offence was motivated by hostility in relation to the victim's transgender identity. Additionally, the court would be able to

---

138 Coroners and Justice Act 2009, s 125.

139 Criminal Justice Act 2003, s 172.

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

141 SI 2005 No 950, art 2, Sch 1, para 8 and Sch 2, para 5.

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

impose the same suspended sentence order, with a rehabilitation activity requirement, for the offence, regardless of when it was committed.

4.42 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.

4.43 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 November 2018, before and after the Sentencing Code.

Before the Sentencing Code			
Offence committed	1 January 2005	1 May 2010	1 November 2018
Duty to follow guidelines	N	Y	Y
Duty to treat previous conviction in France 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 November 2018
Duty to follow guidelines	Y	Y	Y
Duty to treat previous conviction in France 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

THE TECHNICAL OPERATION OF THE CLEAN SWEEP

4.44 As explained 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 "clean sweep clause" to be included in a Bill which precedes the main consolidation. This Bill – the Sentencing (Pre-Consolidation Amendments) Bill – can be found at Appendix 3. Clause 1 of the Bill effects the clean sweep policy. The clause is a technical one which, once enacted, will not need to be considered by users of the Sentencing Code. It will operate on the current law once – immediately before the Sentencing Code Bill is enacted – effecting the necessary changes to achieve the clean sweep policy, after which it will not need to be considered. It will not have effect for any legislative changes made after the enactment of the Sentencing Code. The clean sweep clause is merely a technical drafting device to achieve the clean sweep policy. It may be possible to draw an analogy with a mathematical formula; an algorithm performs an important function and produces a desired result with certainty, however the precise operation of the algorithm is unimportant to users.

4.45 The following section explains the way in which the clean sweep clause operates. As the clause will have its effect prior to the enactment of the Sentencing Code, it will not be necessary for practitioners, judges or members of the public to look at, understand and apply the clause. Some readers may therefore wish to move on to paragraph 4.70 below, avoiding the technical and complicated explanation of the way in which the clean sweep operates.

How the clean sweep clause operates

4.46 The clean sweep 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 by the Sentencing Code, 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.

Trigger event

4.47 A trigger event, in relation to an offence, is an event that governs the applicability of a sentencing provision. This is commonly 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.

> **Example 5**
>
> Under a community order or suspended sentence order, a court can impose various requirements. The requirements in the current law include a requirement called the rehabilitation activity requirement (section 200A of the Criminal Justice Act 2003).
>
> Under the current law, this is available only for offences committed on or after the commencement date.[143]
>
> For the purposes of the availability of the rehabilitation activity requirement, the 'trigger event' is therefore the commission of the offence.

Transition time

4.48 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 only. 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").

> **Example 6**
>
> Continuing with the example used in example 5 above concerning the rehabilitation activity requirement, it is necessary to identify the transition time.
>
> In example 5, we identified that the rehabilitation activity requirement is available only for offences committed on or after the commencement date, which is 1 February 2015. Therefore, the transition time – the commencement of the provision – is 1 February 2015.

4.49 Where the application of a relevant provision depends on whether or not the trigger event occurred before or after the transition time (as in examples 1 and 2) the clean sweep 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:

---

[143] Offender Rehabilitation Act 2014, s 21 and Sch 7, para 7.

(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; and

(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.

4.50 The clean sweep retrospectively changes the commencement for the purposes of the individual offence and offender, to a point in time before the commencement date. The change made by the clean sweep is therefore not a "global" change to all commencement dates, but an individual change in each instance to which it applies. This is best illustrated by an example.

Example 7

Continuing with the example used in examples 5 and 6 above, the availability of the rehabilitation activity requirement depends on whether the trigger event (the date of the commission of the offence) occurred before or after the transition time (the date of commencement, 1 February 2015). If it occurred before, the requirement is not available whereas if it occurred on or after, it is available.

The clean sweep therefore deems the transition time to have occurred before the trigger event so that the requirement is available in all cases.

Preventing unintended consequences

4.51 Although we have described the effect of the clean sweep as effectively fully commencing partially commenced provisions for all cases in which the conviction occurs after the commencement of the Code; and fully repealing provisions which have been repealed but partially saved for historical cases, the clean sweep does not in fact repeal the relevant transitional provisions and savings. Instead, it 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.

4.52 The reason why the clean sweep does not simply entirely repeal or commence all relevant legislative provisions itself 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 those 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. The method of achieving the clean sweep policy that we have chosen is therefore a more accurate and efficient way of producing the intended result and nothing more.

4.53 An example of where potential problems of unintended consequences in the application of the clean sweep could arise is Schedule 15 to the Criminal Justice Act 2003. Schedule 15, for sentencing purposes, lists the specified offences that can

attract extended sentences of imprisonment or detention under sections 226A and 226B of the 2003 Act and sentences of imprisonment or detention for life under sections 225 and 226. The Schedule is also used for a wide variety of non-sentencing purposes, however. These include criminal records certificates,[144] reporting restrictions[145] and bail.[146] 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. If the clean sweep clause were to repeal the savings and transitional provisions concerning Schedule 15, with the effect of extending the commencement of those amendments for non-sentencing purposes, this would alter the law in other areas for which Schedule 15 is used, such as bail, which is neither our intention nor within the remit of the project.

4.54 It is important to note that 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 commission of the offence (and other similar events such as the date of remand) is important for a number of other purposes. By moving only the transition time, the clause targets only the specific problem we want to address, and ensures that there are no incidental and unforeseen effects in relation to other purposes.

Example of effect 1: extending commencement and amendment to all cases

4.55 It may be easier to understand the operation of the clean sweep clause by reference to a hypothetical scenario. This first example demonstrates the way in which the clean sweep achieves its first effect – extending the law in the Sentencing Code to all cases. The example we have chosen is the availability of suspended sentence orders.

4.56 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.[147] For offences committed before that date, courts must have recourse to their historic sentencing powers. In such cases the availability of the various powers to impose a suspended sentence depends on the date of commission of the offence.

4.57 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,*[148] 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 the common law principle against retroactivity or 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

144 Police Act 1997, s 113A. See also Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371.

145 Children and Young Persons Act 1933, s 49.

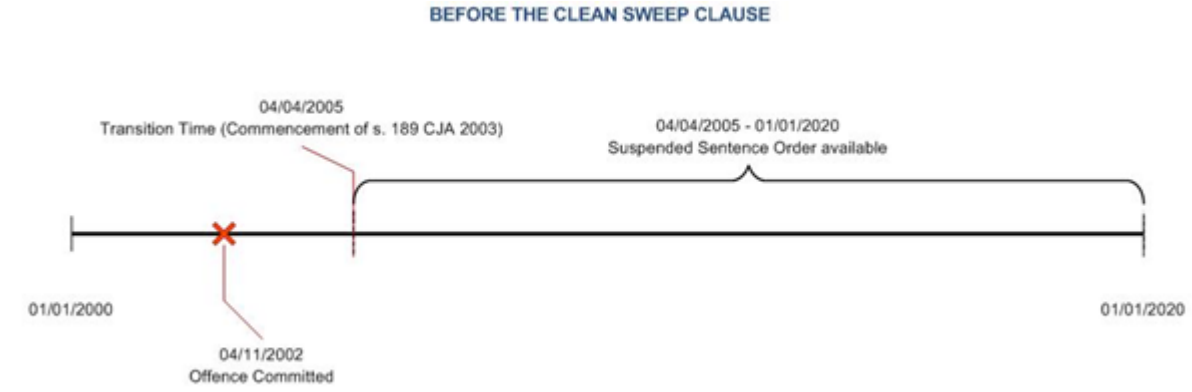
146 Bail Act 1976, s 2.

147 SI 2005 No 950 art 2, Sch 1, para 9 and Sch 2, para 5.

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

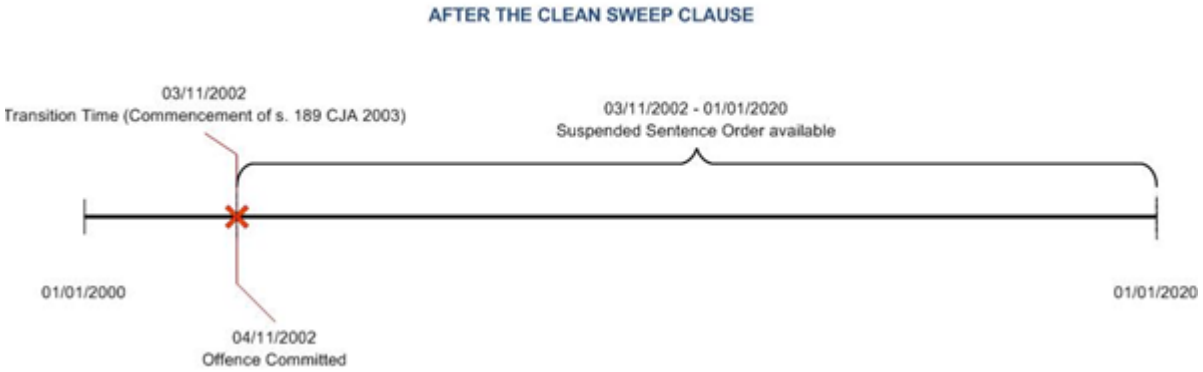
time of the commission of the offence. This conclusion is reinforced by a recent five-judge decision of the Court of Appeal (Criminal Division) in *R v Thompson.*[149]

4.58 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.



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

4.60 In relation to the above example 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 in that offender's case from 4 April 2005 to a point in time before 4 November 2002.



[149] [2018] EWCA Crim 639, [2018] 2 Cr App R (S) 19.

Example of effect 2: complete repeal

4.61 The second effect of the clean sweep – repealing saved provisions – can be demonstrated by considering the duty of an offender serving a community order or suspended sentence order to notify their responsible officer of any change of address.

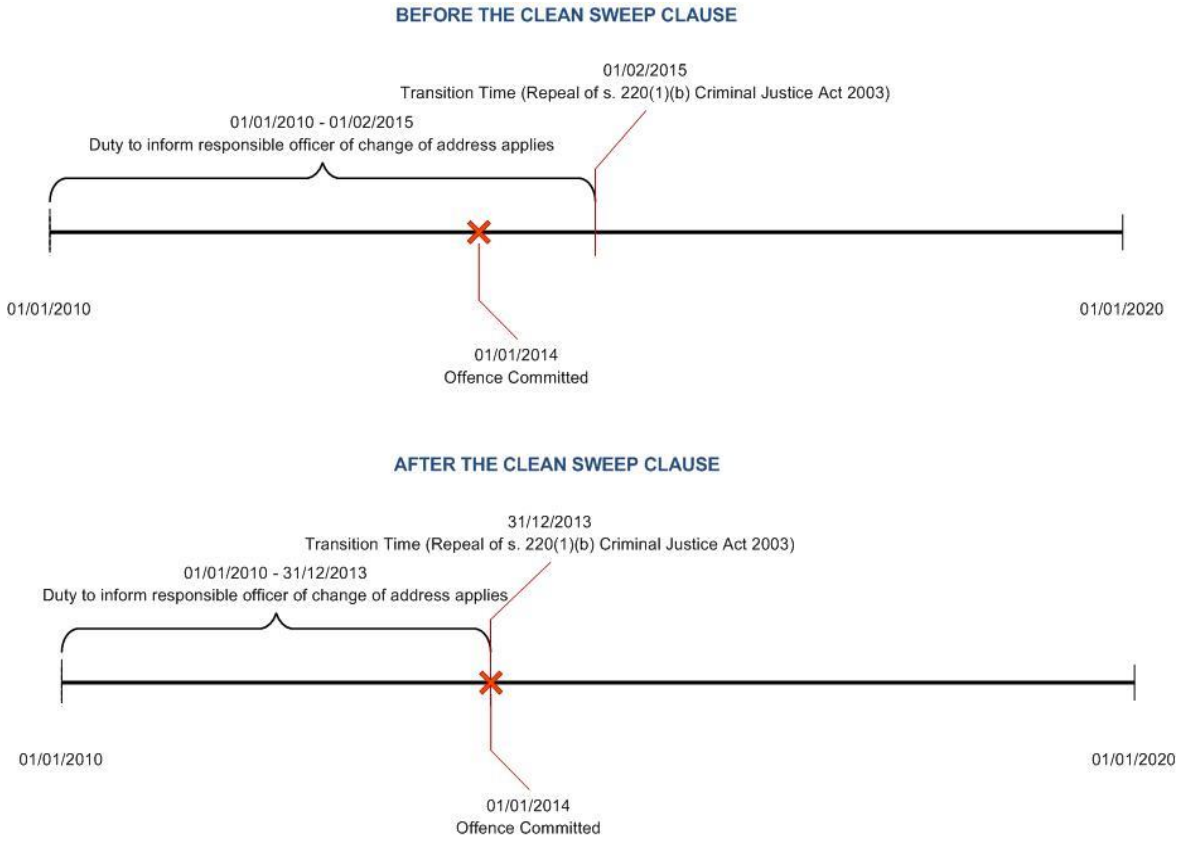
4.62 The duty of an offender serving a community order or suspended sentence order to keep in touch with their responsible officer is governed by section 220 of the Criminal Justice Act 2003 and can be enforced as if it were a requirement imposed by the order.[150] Under section 220(1)(b) there was a 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. 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.[151] The clean sweep clause operates so that no matter when the offence is committed the duty no longer exists.

4.63 As explained above, the clean sweep achieves 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.

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

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

151 Offender Rehabilitation Act 2014, Sch 7, para 7; SI 2015 No 40, art 2.



4.65 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 every application of the clause. This ensures that in every instance the duty to inform the responsible officer does not apply. The effect of the clean sweep is therefore that the current – most up to date – law applies to all cases, and the old law to none. A single application of the clause may give the impression that there remains in theory a set of cases for which the duty will continue to apply, however, the clean sweep operates so that no offence, no matter when committed, satisfies the conditions to attract the duty. The clause therefore entirely nullifies the continuing effect of the provision, and therefore the provision can be repealed for all cases where conviction is after 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

4.66 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. The clean sweep clause therefore achieves the desired effect.

Re-sentencing: Changes not achieved by the clean sweep

4.67 One example of where the clean sweep policy is not achieved through the clean sweep clause is in the case of provisions giving a court the power to re-sentence. Often (though not always) these are drafted as follows:

> the court may […] 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

4.68 The drafting of the current law seems to be overly focused on the jurisdictional element of re-sentencing powers and it appears that the temporal element was not fully appreciated. The result of the words above is to give the court the powers that the original sentencing court had – both in terms of its jurisdiction (important if the original court was a magistrates' court which has more limited sentencing powers) and the point in time at which the powers are to be sourced. The way in which such provisions are drafted in respect of the temporal element – i.e. the point in time at which the sentencing powers are to be sourced – could mean the difference between an order being available or unavailable. Take, for example, a community requirement capable of being imposed under a community order. If the community requirement was repealed between the date of sentencing and the breach hearing at which the offender was being re-sentenced, where the re-sentencing provision was drafted in terms similar to that above at paragraph 4.67, the requirement would be available for that offence, even though it is no longer available for new offences.

4.69 This would, we determined, be in contrast to the clean sweep policy which seeks to ensure that (wherever possible) the sentencing court relies upon the modern – i.e. most up to date – powers. The clean sweep clause does not operate on this type of provision and therefore this is a change we have had to make through the pre-consolidation amendment clause in the Sentencing (Pre-Consolidation Amendment) Bill. Our approach to re-sentencing is discussed in more detail in Chapter 5.

EXCEPTIONS TO THE CLEAN SWEEP

4.70 Earlier in this chapter, we mentioned that we had identified two instances in which we proposed to exclude from the application of the clean sweep. These were cases:

(1) 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

(2) where new laws on prescribed minimum sentencing and recidivist premiums[152] have come into force after the commission of the offence for which the offender is being sentenced.

4.71 We took this decision for two reasons. First, where the clean sweep would result in the offender being exposed to a more severe penalty than that which could have been imposed at the time of the commission of the offence its application would be prohibited by article 7 of the ECHR and the common law principle against retroactive punishment. In those circumstances it would be unlawful to apply the clean sweep and accordingly we have excluded those provisions from its application.

4.72 Secondly, where the application of the clean sweep would result in an offender being exposed to a minimum sentence or recidivist premium which did not apply at the time they committed their offence, we have chosen to exclude those provisions from its application. In our view it would be unfair – though permissible under article 7 of the ECHR and the common law principle against retroactivity – to apply provisions which would impose a minimum level of punishment (often higher than would otherwise have been imposed) on an offender in circumstances where that minimum sentence did not exist at the time they committed their offence.

4.73 These decisions were unanimously supported by stakeholders. For example, Professor Andrew Ashworth QC (Hon) stated:

> 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.

4.74 The Crown Prosecution Service also supported our proposals, commenting:

> The [Crown Prosecution Service] agrees that this approach would appear to be in accordance with domestic law and the Strasbourg Court, in its application of Article 7 ECHR, as set out in detail in the Issues Paper.

4.75 However, even in the limited class of exceptions where the clean sweep does not apply the Sentencing Code will still avoid the need for users to have to make reference to complex and inaccessible transitional provisions. Where transitional provisions are preserved in the law, their effect will be clearly presented on the face of the Sentencing Code, not hidden in a Schedule or a Statutory Instrument.

Example of a necessary exception to the clean sweep

4.76 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.

---

[152] The statutory requirement to impose a sentence of at least a particular length due to the existence of previous convictions for the same or similar offences.

4.77 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.[153]

4.78 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) 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;

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

4.79 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

4.80 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.

4.81 To determine whether or not this requirement is met, the court would then have to find the relevant statutory instrument[154] in which this information was located. There are 32 commencement orders for the Criminal Justice Act 2003 and while commercial providers may provide this information in one form or another, the general point remains: the law should be accessible.

4.82 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 Criminal Justice Act 2003 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

---

153 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. They could not have been aware of that risk when committing the offence.

154 Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005 No 950.

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 then have to make reference to section 91 of the 2000 Act 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.

4.83 The judge would then need to turn to Schedule 15 to 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. That the numbering of the provision (paragraph 59B) 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.

4.84 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.

4.85 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.

4.86 Only after having completed all of these steps is a court able to determine whether or not a sentence under section 226 of the Criminal Justice Act 2003 is available for an offence under section 56 of the Terrorism Act 2000.

The Sentencing Code

4.87 Section 226 of the Criminal Justice Act 2003 has been re-drafted in the Sentencing Code as clause 258. Subsection (1) of which reads:

> (1) This section applies where—
>
> > (a) a person aged under 18 is convicted of a Schedule 19 offence which was committed on or after 4 April 2005, […]

4.88 A judge turning to the clause would clearly be directed to the fact that it applies only where the offence “was committed on or after 4 April 2005.” There would be no need to make reference to any commencement order, the relevant information having been incorporated into the provision.

4.89 Subsection (1) also points the reader to the location of the definition of "Schedule 19 offence" in clause 307 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 19.

4.90 A judge would then turn to Schedule 19 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.

ACHIEVING THE EXCEPTIONS TO THE CLEAN SWEEP

4.91 The following section explains the manner in which the Sentencing Code will achieve the various exceptions to the clean sweep so as to preserve the position under the current law, in line with the policy explained above. It is important to appreciate that the way in which this is achieved does not need to be understood by users of the legislation. When using the Sentencing Code its effect will be made clear in each relevant provision. Users will not need to concern themselves with how that effect was achieved although the technically minded may find the explanation interesting.

The Sentencing (Pre-Consolidation Amendments) Bill

4.92 As explained above, the clean sweep is a clause which must have effect immediately before the commencement of the Sentencing Code. The provisions amended by the Sentencing (Pre-Consolidation Amendments) Bill will then instantaneously be consolidated by the Sentencing Code, thereby giving effect to the clean sweep.[155]

4.93 Clause 1 of the Sentencing (Pre-Consolidation Amendments) Bill is the "clean sweep clause". As discussed earlier in this chapter, it is drafted to apply to all provisions which are to be repealed or revoked by the Sentencing Code. At paragraphs 4.70 above, we explained the need to disapply the clean sweep provision to certain repealed provisions. By virtue of clause 1(5), a list of 36 exceptions to the clean sweep are given effect in Schedule 1 to the Sentencing (Pre-Consolidation Amendments) Bill (found at Appendix 3). A table providing a brief explanation of each exception, and the reason for disapplying the clean sweep can be found at Appendix 1.

Implementing the Sentencing (Pre-Consolidation Amendments) Bill

4.94 The provisions of the Sentencing (Pre-Consolidation Amendments) Bill must be enacted prior to the Sentencing Code. For presentational reasons, we have drafted it as a stand-alone Bill but the necessary clauses could be easily incorporated into an existing Bill with the relevant scope.

4.95 These clauses will need to be enacted as an ordinary Public Bill. It is possible that they could be introduced through the special procedure for Law Commission Bills.[156] The Bill contains a clause which limits the commencement of the pre-consolidation amendments and the amendments effected by the clean sweep; they only come into

---

[155] This process is standard practice for pre-consolidation amendments – see for example section 76 of the Charities Act 2006 (now repealed).

[156] As to which, see paragraph 12.8 below.

effect immediately before the consolidation occurs.[157] That is to say, once the Sentencing Code Bill is enacted and brought into force.

4.96 As noted above, it is important to bear in mind, 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.

MAINTAINING THE CLEAN SWEEP

4.97 The clean sweep clause does not continue to operate once the Sentencing Code has been commenced. When new provisions on sentencing procedure are enacted and commenced with transitional arrangements, the clean sweep will not alter their effect. 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. This point is expanded upon in Chapter 12.

UNCOMMENCED PROVISIONS

4.98 The practice of leaving sentencing provisions and amendments uncommenced for months or even years after their enactment causes 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.

4.99 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 is 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: Schedule 23 in the 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.

4.100 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.

4.101 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

[157] See clause 5 of the Sentencing (Pre-Consolidation Amendments) Bill.

maintained and that clarity is retained. We deal with this point – and related issues – in more detail in Chapter 12.

Chapter 5: Commencement

INTRODUCTION

5.1 In this chapter, we explore the appropriate method of commencing the Sentencing Code, in the light of the effect of the clean sweep and the general aims underpinning the project, namely to bring clarity and simplicity to the law of sentencing procedure. In the main consultation, we summarised our proposed approach to commencement of the Sentencing Code, which had been informed by our earlier consultation paper. We did not seek views on the conclusions on which we had previously reported. This chapter summarises that approach so that readers are aware of the decisions taken earlier in this project.

5.2 The way in which an ordinary consolidation Act is commenced is simple. 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, the day after the commencement of a typical consolidation Act all matters are dealt with under the law as consolidated. The transition between the two regimes is instantaneous.[158]

5.3 However, as explored in Chapter 4, the Sentencing Code goes beyond mere consolidation. The clean sweep policy will remove the effect of old sentencing procedure law, this means that certain 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.

5.4 This chapter explains how we have approached the issue of commencement. We have aimed to ensure that the effects of the clean sweep are maximised and that complex transitional arrangements do not undermine the overarching aim of ensuring greater simplicity and transparency in sentencing law.

THE CASES TO WHICH THE CODE WILL APPLY

5.5 In thinking about the commencement of the Code, we have had to consider which cases it should apply to. Only those where the sentencing hearing commences after the Code is brought into force? Those where there was a conviction after that date? Or, where the offence occurred after that date? Should there be different approaches for different provisions, as under the current law?

5.6 In furtherance of the general aims of simplicity, transparency and clarity of the law, we decided to adopt a common commencement policy across the Sentencing Code. As

---

158 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.

explored in our earlier issues paper on transition,[159] we considered various commencement models. We provisionally considered that the most suitable approach would be to commence the Sentencing Code so that it had effect in relation to all convictions on or after the commencement date. On consultation, almost all respondents agreed, including the Crown Prosecution Service, the Law Society, Her Majesty's Council of District Judges, Her Majesty's Council of Circuit Judges, Professor Andrew Ashworth QC, and the then Chair of the Sentencing Council, Lord Justice Treacy.[160]

5.7 Professor Peter Hungerford-Welch suggested that the date on which sentencing occurs should be used, as that is the date when the sentencing powers are being exercised. We considered that the date of sentencing was too uncertain a concept to rely upon for a commencement policy as it was unclear when "the sentencing process" begins. This could be interpreted as the moment of conviction, the ordering of any pre-sentence reports, the beginning of the hearing in which sentence was imposed, or even the imposition of sentence itself. We therefore determined that the date of conviction would be the most appropriate point of reference for commencement. Conviction is a point in the criminal trial process that it is easy to identify in all cases, and therefore provides the necessary certainty.

5.8 The Bar Council raised an important question. They wondered how this policy would operate in cases where the court is sentencing an offender for multiple offences of which they were convicted at different times[161] or simultaneously sentencing multiple offenders who were convicted at different times.[162] In these cases, the dates of conviction could straddle the commencement date. The Bar Council suggested this would bring a degree of complexity to the commencement and that this was perhaps cause to reconsider the proposed policy.

5.9 Having considered the alternatives, we concluded that adopting the point of conviction remained the clearest and simplest commencement policy. We arrived at this conclusion for two principal reasons. First, that the point of conviction is sufficiently certain to provide clarity when determining whether or not the Code applies to a particular offence. Secondly, that owing to the limited number of cases in which this issue would arise, the benefits of clarity outweighed any additional complexity.[163] Therefore, for a short period (anticipated to be a matter of weeks in most cases) there may be cause to refer to both the Sentencing Code and the law in force prior to its enactment. However, after this short period of time the Sentencing Code will become the sole legislative source of sentencing procedure law.

---

159 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.

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

161 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.

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

163 The Sentencing Code (2017) Law Commission Consultation Paper No 232, Chapter 4 and A New Sentencing Code for England and Wales (2016) Law Com No 365, paras 3.45 to 3.54

5.10 As noted in Chapter 3, the Code will also apply to acquittals (in the case of a restraining order under the Protection from Harassment Act 1997). In these circumstances, it is the date of the acquittal which applies for the determination of whether the Code applies. Again, we considered that this was a sufficiently certain point in the trial process so as to further our aim of clarity and simplicity.

5.11 We decided to exclude special verdicts and findings that the accused had done the act charged under the Criminal Procedure (Insanity) Act 1964 from the scope of the Code (as to which see paragraphs 3.36 and 3.40 above). We have included the power to bind over to keep the peace by signpost only. As a result of these decisions, the commencement policy remains clear and simple. The Sentencing Code will apply to all cases where conviction (or acquittal for the purposes of a restraining order) occurs on or after the commencement of the Code.

Re-sentencing

5.12 In our transition report we considered whether the position ought to be different for cases where an offender returns to court after the initial sentencing hearing and the court has the power to re-sentence.[164]

5.13 In the main consultation paper, we set out the various situations in which this issue could arise. These were:

(1) appeals and "slip rule" hearings;

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

(3) breaches of community-based sentences; and

(4) other instances where the court has the power to deal with an offender "as if the offender had just been convicted".

5.14 In the following paragraphs, we briefly describe our conclusions on these matters. For further discussion reference should be made to the main consultation paper.[165]

Appeals and slip rule hearings

5.15 Powers to re-sentence upon an appeal or as the result of a slip rule hearing[166] can be considered together for the purposes of the approach to commencement. In both appeals and slip rule hearings, the court is considering whether or not an error has been made when the sentence was imposed. Accordingly, these take the form of a review rather than a fresh sentencing hearing.[167] When considering whether a mistake has been made, and whether it can be remedied, the courts must apply the same law as was applied at the time of the decision which is under review.

---

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

165 The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 4.30 to 4.71.

166 This term refers to the power to vary a sentence in the period of 56 days following conviction. Usually this power is exercised when an error has been identified.

167 The one exception to this is an appeal from the magistrates' court to the Crown Court which takes the course of a full rehearing.

5.16 Consistent with our aim to adopt the simplest approach to commencement of the Code, we concluded that the Code should not apply to the re-sentencing of offenders in the case of appeals and slip rule hearings where the conviction pre-dates the commencement of the Code. The Sentencing Code will, however, apply to appeals and slip rule hearings originally sentenced under the Code: ie where the offender was convicted on or after the date of commencement of the Code. This consistent and simple approach brings greater clarity and simplicity to the law as it ensures that in all cases, only a single regime is used.

5.17 Take the example of an offender convicted on 1 December 2019, where the Sentencing Code is commenced on 1 January 2020. If that offender's appeal against sentence was heard on 1 February 2020 and the offender re-sentenced, the court would apply the law as it applied on 1 December 2019, not the Sentencing Code. If the offender had, in contrast, been convicted on 2 January 2020 the court would have applied the Sentencing Code. The average waiting time between an application and a hearing for an appeal against sentence to the Court of Appeal (Criminal Division) appeal is approximately 6.3 months.[168] Therefore, within a short period of time, other than for the most exceptional cases, the existing law will cease to be relevant.

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

5.18 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. 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 or her 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 or her 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 into such an agreement to assist the prosecution or investigation of an offence.

5.19 Where the offender has 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).

5.20 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

[168] Court of Appeal (Criminal Division) Annual Report 2016-17 (21 August 2018) Annex B.

the assistance given or offered, and substitute for the sentence such lesser sentence as it thinks appropriate.

5.21 These powers to vary sentences are both being incorporated into the Sentencing Code. Further, we have concluded that the common commencement policy should apply in these cases. The provisions as re-drafted in the Sentencing Code will only apply where the offender was convicted after the date of the commencement of the Code. This maintains a clear and simple approach to commencement, thereby bringing additional clarity to the application of the Sentencing Code. Further, early exploratory work identified practical problems which might arise if we sought to adopt a different commencement policy, such as applying the Code to all future hearings under section 74 where the conviction pre-dated the commencement of the Code.[169]

Breaches of community-based orders

5.22 Additionally, there are a number of powers to resentence an offender who has been sentenced to a community-based sentence and who has subsequently breached it. In cases where the conviction has occurred after the commencement of the Code, the Sentencing Code will apply. The question was how, if it at all, the Code should apply to offenders who are convicted and sentenced to a community-based sentence before the commencement of the Code and subsequently fall to be dealt with for the breach of their order after its commencement. Should the Code apply to these offenders, or not?

5.23 Here we concluded that the desire to apply the Code to as many cases as possible must be tempered by the need for a clear and certain transition between the Sentencing Code and the old law.[170] We therefore decided to apply the general commencement policy to these cases. Irrespective of when an offender falls to be re-sentenced following a breach of a community based sentence, the determining factor as to whether or not the Sentencing Code applies will be the date of the conviction. Take, for example, an offender who is convicted on 1 November 2019, and receives a community order under the Criminal Justice Act 2003. If the Sentencing Code was commenced on 1 January 2020, and the offender brought back before the court on 1 February 2020 for breaching that order, the offender would still be dealt with under the Criminal Justice Act 2003, not the Sentencing Code. The Sentencing Code will only apply to orders made under the Code, and therefore only to offenders convicted on or after the day it is commenced. Such cases will be relatively rare, we estimate that they make up less than 2% of sentencing cases annually, and due to the maximum length of community based sentences within three years of the commencement of the Code there will be almost no such cases still extant.[171]

5.24 As will be seen in later chapters, we have streamlined the provisions detailing the powers of the court to re-sentence offenders who were convicted after the commencement of the Code to ensure that the court has the current – ie the most up

---

169 For a detailed discussion of the issues arising in this context, and our reasons for concluding that the Code ought to apply only to convictions on or after commencement in this context, see The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 4.41 to 4.52.

170 For a detailed discussion of the reasons for this conclusion, see The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 4.53 to 4.71.

171 As to which see, The Sentencing Code (2017) Law Commission Consultation Paper No 232, para 4.70.

to date – sentencing powers. This change is consistent with the clean sweep policy of avoiding the need to refer to unnecessary layers of repealed, but partially saved, provisions. One exception is that in the case of children and young offenders, the re-sentencing policy could have the effect of inadvertently increasing the court's powers where the offender crosses a relevant age threshold during the period between conviction and the breach hearing. Here, we have added a clause to ensure that children and young offenders are re-sentenced as if they were the same age as they were when convicted of the original offence. This is explored in more detail in Chapter 7 of this Report.

"As if the offender had just been convicted"

5.25 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 breaches of certain sentencing orders. In our main consultation paper, we identified other instances which used this form of words to provide the powers of the court to sentence.[172]

5.26 The effect of provisions using those words would ordinarily result in an offender who was convicted before the commencement of the Sentencing Code being treated as if they had been convicted after it, and thus being sentenced under the Code. An illustration of this is as follows.

Example 8

In October 2018, an offender is convicted of an offence of assault occasioning actual bodily harm and receives a community order. In July 2019, the Sentencing Code comes into force. In November 2019, the offender breaches the order by failing to comply with its requirements. In December 2019, the offender is brought back to court. The ordinary commencement policy – of the Code applying to cases in which the conviction was obtained after the commencement of the Code – applies. As such it appears as though the Sentencing Code does not apply to this case. However, when the offender is re-sentenced for the breach of the order, the words "as if the offender had just been convicted" means the offender is treated as though they were convicted at the date of the re-sentencing hearing, i.e. after the commencement of the Code. Therefore, the offender would be re-sentenced under the law contained in the Code.

5.27 We consider that such a result would be likely to cause errors. There is a risk that practitioners and judges might not realise that these offenders have been brought into the Sentencing Code by such provisions (because the central message will be only to have reference to the date of conviction). There is also a risk that practitioners and judges will apply the Code when they ought not to, for example, because they believe it to always apply on re-sentence or committal. It would also require the courts to have simultaneous reference to two distinct bodies of law, having ascertained what the

[172] See, for example, sections 5 and 5A of the Powers of Criminal Courts (Sentencing) Act 2000 (power of the Crown Court on committal) and section 71 of the Proceeds of Crime Act 2002 (power of the Crown Court on a committal for consideration of a confiscation order).

powers to sentence are under the old law, and then being directed to the Sentencing Code to identify the substance of those powers. Accordingly clause 2(2) and (3) ensures that in such cases the Sentencing Code does not apply, and that the courts ought instead to have reference to the old law as it stood immediately before its repeal by the Sentencing Code.

Example 9

In October 2018, an offender is convicted of an offence of assault occasioning actual bodily harm and receives a community order. In July 2019, the Sentencing Code comes into force. In November 2019, the offender breaches the order by failing to comply with its requirements. In December 2019, the offender is brought back to court. The offender will be re-sentenced by reference to the current law, not the Sentencing Code because the conviction was obtained prior to the commencement of the Code.

Existing sentences

5.28 More generally, we have carefully considered how the Code should apply to existing sentences: should the Code apply to those sentences which are already being served at the time when the Sentencing Code is commenced? There were two issues with applying the Code to such offenders:

(1) the need for transitional provisions to ensure that old sentencing orders are treated as new sentencing orders under the Code; and

(2) the problem of equivalence as between provisions which have been effectively repealed by the clean sweep.

5.29 In relation to the need for transitional provisions, applying the Code to orders made under the current law (prior to commencement of the Code) would require provisions to effectively convert an "old" order into an order under the Code, so that the Code applies to both equally. For example, a community order imposed on a date before the commencement of the Code could be for a duration that extends beyond the date on which the commencement of the Code occurs. If the offender was subject to a change of circumstances and therefore needed to apply to have the order amended, say because of a change in employment, the order could not be amended under the provisions of the Code, without a provision ensuring that the Code applies to orders made under the Code as well as under the current law. The order would instead have to be amended under the current law, as preserved for cases where the offender was convicted before the commencement of the Code.

5.30 In relation to the issue of equivalence following the operation of the clean sweep, problems arise when, for example, the clean sweep has effectively repealed a particular sentence, or a particular requirement capable of being imposed under a community based order. By making provision to ensure that the 'old' order can be dealt with under the Code, the court amending an order in those circumstances would be faced with a question of identifying an equivalent sentence under the Code to that imposed under the current law. To ensure consistency, the Code would have to

provide for a long and detailed list of equivalence, and provide complex transitional arrangements to ensure that old orders could appropriately be dealt with under the Code, effectively negating the effects of the clean sweep.

5.31 The transitional arrangements necessary and in particular the problem of equivalency would complicate matters for users of the legislation and undermine the Code's aims. The Sentencing Code is intended to bring certainty, simplicity and clarity above all else. To extend it to existing sentences would require a significant amount of complex transitional provision and create extra uncertainty and the potential for error regarding sentences that have been properly imposed and are being served under familiar established law.

5.32 We therefore concluded that in both of the circumstances described above, the additional complications involved in the use of such transitional provisions outweighed the potential benefits of applying the Code to this class of case. Further discussion of these issues can be found in the main consultation paper.[173]

CONCLUSIONS

5.33 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 on or after the date of commencement, without exception. This commencement policy provides a clear, and certain point in time from which the Sentencing Code applies. It allows users of the Sentencing Code to easily ascertain its applicability, and provides a bright and clear line between the current law and the Sentencing Code.

[173] The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 4.22 to 4.29.

Chapter 6: General Provisions

INTRODUCTION

6.1 Parts 1 to 4 of the Sentencing Code contain provisions which are of general application to sentencing courts. In particular, those parts include powers and duties which are exercisable before a sentence is imposed and to the assessment of seriousness for the purposes of imposing sentence.

INTRODUCTORY PROVISIONS AND OVERVIEW

6.2 Part 1 of the Code contains two clauses. These provisions set out the structure of the Code, with a brief description of each part, and the application of the Code. Principally, clause 2 describes the class of persons to whom the Code applies, in furtherance of our commencement policy as explored in Chapter 5.

6.3 Clause 2(1) provides for the general commencement policy, that the Code does not apply where a person is convicted of an offence before the date of commencement. Subsection (4) operates as an exception to the commencement policy, to the effect that clause 361 (restraining orders on acquittal), and Chapter 3 of part 11 as it applies for that section, do not apply where the acquittal occurred before the commencement date.[174]

6.4 Subsection (2) provides that where the court is dealing with an offender convicted before the commencement of the Sentencing Code in respect of that offence, or a previously imposed sentence, the law applicable before the commencement of the Code (the "current law") continues to apply. Subsection (3) ensures that where, under a provision outside the Sentencing Code, the court is granted the powers they would have if "the offender had just been convicted" (for example, where re-sentencing an offender, or where an offender has been committed for sentence), and the offender was not actually convicted on or after the commencement of the Sentencing Code, the Sentencing Code still does not apply. Instead, the court should continue to apply the current law as it stood immediately before its repeal.

POWERS EXERCISABLE BEFORE PASSING SENTENCE

Deferment of sentence

6.5 Part 2 of the Code contains three chapters dealing with powers which may be exercised prior to the imposition of sentence.

6.6 Chapter 1 of Part 2 of the Code concerns the ability of the court to defer the imposition of sentence on an offender and require compliance with certain requirements for a specified period not exceeding 6 months. These sections have been redrafted to follow the general approach of powers and duties contained in the Sentencing Code, namely to begin with an explanation of the power (clause 3), followed by the

---

[174] This is because the power to impose a restraining order on an acquittal cannot refer to a conviction, as none exists, and therefore the acquittal provides the reference point for commencement.

circumstances where it is available (clause 4 and then the conditions which must be satisfied prior to its imposition (clause 5). We have resolved an ambiguity regarding the deferral of sentence. In the current law, the provisions speak of the power to "defer passing sentence" and a "deferment". We have introduced the concept of a "deferment order" and clarified that such an order must specify the offences to which it applies – and that an order of deferment does not automatically defer sentence on all offences before the court. Clauses 6 to 8 deal with the effect of a deferment order and the requirements which may be imposed as a part of the order. Clauses 9 and 10 deal with a failure to comply with a requirement imposed in relation to a deferment order and conviction for an offence during the period of deferment. Clause 11 sets out the powers of the court to deal with an offender following a deferment order.

Committal and remission for sentence

6.7 Chapter 2 of Part 2 of the Code makes provision for the committal and remission of offenders between the magistrates' court and the Crown Court. The re-drafting of these provisions in many respects follows the approach taken by the current law, with clauses 14 to 19 providing for the powers to commit from the magistrates' court to the Crown Court in the case of:

(1) an adult offender or a corporate offender who has been convicted of an either way offence (clause 14);

(2) an adult offender who has been convicted of a specified offence and the court is of the opinion that an extended determinate sentence would be available (clause 15);

(3) a child or young offender who has been convicted of:

(a) an offence punishable in the case of an adult by a sentence of 14 years' imprisonment or more, or

(b) certain sexual offences,

where the court is of the opinion that the Crown Court should have the power to deal with the individual by imposing a sentence of detention under clause 249 (formerly section 91 of the Powers of Criminal Courts (Sentencing) Act 2000) (clause 16);

(4) a child or young person who has been convicted of an offence specified in Schedule 18 (previously Schedule 15 of the Criminal Justice Act 2003), and the court is of the opinion that an extended determinate sentence would be available (clause 17);

(5) an adult offender who has indicated that a guilty plea would be entered to a triable either way offence where the magistrates' court has sent the offender to the Crown Court for trial in respect of one or more related offences (clause 18);

(6) a child or young person who has been convicted following an indication of a guilty plea and who has been sent to the Crown Court in respect of one or more related offences (clause 19); and

(7) an offender who has been committed to the Crown Court:

(a) under the powers set out at (1) to (6) above,

(b) where the offender has committed an offence during the currency of a conditional discharge, community order or suspended sentence order, or

(c) under provisions of the Bail Act 1976, the Vagrancy Act 1824 or the Mental Health Act 1983,

in respect of an indictable offence and the court has the power to deal with the offender in respect of another offence.

6.8 These provisions have been slightly streamlined, simplified and reordered so as to accord without our approach to structuring the Code to reflect the chronology of the sentencing exercise. This amended structure groups together all provisions providing a power to commit to the Crown Court.

6.9 Following the clauses detailing the powers to commit to the Crown Court are those providing the Crown Court's power to deal with an offender following committal (clauses 21 to 23).

6.10 Clause 21(2) reproduces part of section 5 of the Powers of Criminal Courts (Sentencing) Act 2000 but omits the word "just" (when prescribing the court's power to sentence). The committal powers in the current law operate to provide the court with the powers it would have if it had "just" convicted the offender. The court is, as a result, provided with the most up-to-date powers at the date on which it comes to sentence – ie those which apply on the date of sentence rather than any point in the past, such as at the date of the offender's conviction.

6.11 In the case of children and young offenders, however, there is a tension between the current statutory wording and the common law. Where a person who was convicted as a child or young person crosses a relevant age threshold between committal and sentence, does the court apply the sentencing powers applicable to a person of the age of the offender at the date of that sentencing exercise? This can make a significant practical difference. For example, a person aged 14 is convicted and committed to Crown Court. He falls to be sentenced aged 15. He would, on the basis of the current law, seemingly fall to be sentenced as a 15-year-old. This would mean that, for example, a detention and training order would become available where ordinarily, for a person convicted aged 14, it is not. In *R v Robson*[175] it was held that the effect of the statute was not to treat the offender as if they had been convicted at the age at which they were sentenced (rather than the age at which they were in fact convicted). While the decision in *Robson* is in line with the general policy of ensuring that offenders are sentenced by reference to their age at conviction, and not their age at sentence,[176] its reasoning is questionable, and at the very least means the wording of the current law is misleading. Accordingly, we have made a change in respect of these provisions to remove this ambiguity and to make clear that children and young

---

175 [2006] EWCA Crim 1414, [2007] 1 Cr App R (S) 54.

176 See, *R v Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 84.

persons are sentenced according to the law that applied to them at the date of their conviction, and not at the date of sentence.

6.12 Clause 20 reproduces what was section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. This clause operates so that when the court has committed the offender to be sentenced in the Crown Court it may also commit additional offences to be dealt with at the same time. This allows all relevant matters to be dealt with at once, by the same court. This is not only administratively easier, but also helps to ensure that the resulting sentence is consistent with the principles of totality, and that the discretion of the Crown Court is not fettered by a sentence imposed by the magistrates' court. The clause only applies where the offender has been committed to the Crown Court under committal powers listed in that clause.

6.13 Under the current law there are some notable omissions from this list, including: section 6(6) or 9(3) of the Bail Act 1976 (committal for offences of absconding by person released on bail or agreeing to indemnify sureties in criminal proceedings); section 43 of the Mental Health Act 1983 (power of magistrates' courts to commit for restriction order); and paragraph 22(1) of Schedule 8 to the Criminal Justice Act 2003 (committal for commission of a further offence while community order is in force). These omissions cause practical problems. In *R v De Brito*[177] having committed an offender under paragraph 22(1) of Schedule 8 to the Criminal Justice Act 2003 to the Crown Court the magistrates' court also purported to commit him to that court for the further offence under section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. They did not, however, have that power and therefore the sentence ultimately imposed by the Crown Court was unlawful.

6.14 In the Sentencing Code this clause has been amended so that all of these provisions are now included in the listed in clause 20. This will allow for these offences to all be dealt with in a single sentencing hearing, helping to save money and time, and to ensure appropriate sentences are imposed.

6.15 Clause 24(1) contains a signpost setting out the location of other powers to commit for sentence along with a brief description of the relevant provisions. Subsection (2) of the clause is included for the avoidance of doubt, so as to ensure that subsection (1) is not read as an exhaustive list.

6.16 Chapter 3 of Part 2 of the Code contains the provisions which allow a court to remit a case of a child or young offender to a youth court or other magistrates' court. Clause 25 reproduces section 8 of the Powers of Criminal Courts (Sentencing) Act 2000. Clauses 26 contains a power to remit a child or young offender from the Crown Court to a youth court. Clause 27 contains a power of the youth court to remit a child or young person who has subsequently attained the age of 18 to a magistrates' court other than a youth court. Clause 28 contains a power enabling a magistrates' court to remit an adult to another magistrates' court to enable the other court to deal with the offender in respect of more than one offence. Clause 29 provides additional provision in relation to remission by a magistrates' court, including provision about adjournment, remand and appeals. A number of minor pre-consolidation amendments have been

177 [2013] EWCA Crim 1134, [2014] 1 Cr App R (S) 38.

made to these clauses to ensure consistency of language and approach and to allow for the streamlining of certain provisions.

PROCEDURE

6.17 Part 3 is entitled "Procedure" and concerns general provisions applicable to the stages prior to the imposition of sentence and general provisions which apply in the case of all sentencing hearings.

Information and reports

6.18 Chapter 1 of Part 3 of the Code concerns pre-sentence reports, medical reports and orders for statements of an offender's financial circumstances. We have introduced the concept of "pre-sentence report requirements" which makes for simpler drafting in the provisions which follow. The provisions concerning pre-sentence reports have been rearranged slightly after consultation with members of the judiciary, resulting in a more logical structure.

6.19 Section 156 of the Criminal Justice Act 2003 imposes a duty to obtain a pre-sentence report where certain provisions apply ("relevant provisions"). Subsection (1) lists the scenarios to which this applies, however, there is no indication in the relevant provisions that the duty in section 156 exists or applies. We asked consultees whether they supported our proposal to redraft the list of provisions in section 156(1) of the Criminal Justice Act 2003 in the provisions to which the duty applies. We suggested that this should serve as a reminder to users that the duty exists and avoid someone mistakenly overlooking the duty. There was near unanimous support for this proposal on consultation, with only one consultee feeling that this re-drafting was not useful. Accordingly, the requirement to obtain a pre-sentence report has been inserted into the provisions to which the duty applies, with a signpost in clause 31 to the duty in those provisions. This should ensure that the duty is not overlooked by a user as its existence is apparent in both places where it is relevant.

6.20 Clause 35 sets out the power of a court to make a financial circumstances order. This is currently contained in the Criminal Justice Act 2003. There are, however, provisions in the Powers of Criminal Courts (Sentencing) Act 2000 which enable the court to make such an order in respect of a parent or guardian where a child or young person is convicted of an offence and the court is considering whether to make an order for payment of compensation, costs or the surcharge.[178] We have brought these powers together so that the user no longer needs to be aware of two sets of provisions in relation to the making of a financial circumstances order.

6.21 Clause 37 operates as a signpost to other powers of the court to order reports or seek information and alerts users to the existence of other provisions which might previously have been overlooked.

---

[178] The surcharge is contained in section 161A of the Criminal Justice Act 2003 in the current law and is a mandatory financial order imposed upon an offender convicted of an offence, the amount of which is determined by the nature and severity of the sentence imposed.

Derogatory assertion orders

6.22 Chapter 2 of Part 3 of the Code concerns the power to make a derogatory assertion order. This is an order prohibiting the publication of an assertion which is considered by the court to be derogatory to a person's character and which is false or irrelevant to sentence. We have applied the clean sweep to the power to make an order under clause 39 which was previously available only for cases in which the offence was committed on or after the commencement day, 4 July 1996. In line with our clean sweep policy, as there is no risk of exposing an offender to a graver penalty than that which applied at the time of the commission of the offence, the power should be available in all cases, irrespective of the date of the commission of the offence.

Surcharge orders

6.23 Chapter 3 of Part 3 of the Code contains the provisions imposing a duty to impose a surcharge order in consequence of a conviction. We have disapplied the clean sweep in respect of these provisions as the retrospective application of the surcharge could expose an offender to a more severe penalty than that which applied at the time of the commission of the offence. For example, consider the situation where an offender committed an offence in 1990 which carried a maximum sentence of five years' imprisonment and was prosecuted and convicted in 2020, after the Code had been brought into force. If the Sentencing Code retroactively imposed the surcharge – which did not exist at the time of the offence – the offender would be liable to five years' imprisonment and a financial payment.

6.24 Accordingly, the surcharge order only applies where the offence (or offences) was committed on or after 1 April 2007, the date on which it was brought into force.

6.25 As was identified earlier, much of the complexity and therefore risk of error in sentencing hearings has stemmed from the disparate nature of commencement information relating to statutory provisions. Commencement and transitional provisions are often difficult to find and sometimes difficult to interpret. Accordingly, we decided that where the clean sweep would be disapplied, and the provision would not therefore apply to all offenders convicted on or after the commencement of the Sentencing Code, that this should be made explicit in the relevant provision. Clause 42 therefore states clearly that it applies only to offenders who committed their offence(s) on or after 1 April 2007. This drafting technique should reduce the risk of surcharges being imposed in cases to which they do not apply.

6.26 Currently, the surcharge provision places a duty on the court to impose the order in certain cases. We had identified that this duty is often overlooked and explored ways of avoiding this happening in future. We asked consultees whether we should redraft the surcharge provision so that it would apply as an automatic consequence of conviction, thereby relieving the court of the burden of imposing a surcharge in certain cases. This would mean that courts would not need to remember to impose the surcharge at the end of a sentencing hearing but instead, in the same way that time spent on remand is deducted administratively, the surcharge would apply automatically, without the court having to make an order. Responses were mixed; while the Crown Prosecution Service, the Registrar of Criminal Appeals and Her Majesty's Council of Circuit Judges were supportive of this proposal, the Law Society, the Bar Council and Graham Skippen (Solicitor, Fison and Co.) were against it. In light

of these divided views, the proposal appeared to be more controversial than is suitable for a consolidation exercise. We have therefore decided not to make this change to the legislation. The surcharge provisions will continue to operate by imposing a duty upon sentencing courts.

Criminal courts charge

6.27 Chapter 4 of Part 3 of the Code contains provisions concerning the criminal courts charge. This is a financial order the imposition of which is mandatory in certain circumstances. The levels of charge to be paid were set out in a piece of secondary legislation. However, as we noted in the main consultation paper,[179] the criminal courts charge had effectively been repealed by the removal of any specified sums from the secondary legislation.

6.28 Although the practical effect is that a court no longer imposes the charge, the technical operation of the law is that the court should impose the charge but in a zero sum. As a consolidation must faithfully reproduce the current law, and the charge is still a feature of the current law, it has had to be reproduced in the Code.

Duty to give reasons for sentence

6.29 Chapter 5 of Part 3 of the Code contains the provisions imposing a duty upon the court to give reasons for its decision or to explain the effect of the sentence imposed. In addition to the main provision which is contained in clause 52, this chapter includes other provisions which create duties in relation to specific circumstances. This includes, for example, specific duties to give reasons where the court has not made a compensation order where one was available,[180] or where the court has not made a reparation order where one was available.[181] This chapter also includes a signposting provision which lists other duties to give reasons which, in accordance with our policy on scope, were not incorporated into the Code (clause 56). This provides, for the first time, a comprehensive list of all statutory duties placed upon a sentencing court to explain the effect of the sentence (or to explain why the court has not made a particular order when it had power to do so).

EXERCISE OF COURT'S DISCRETION

Purposes of sentencing

6.30 Part 4 of the Code contains provisions relating to the exercise of the court's discretion. Chapter 1 of Part 4 contains provisions concerning the statutory purposes of sentencing. Clause 58 is a newly introduced clause which clarifies that the duties under section 37 of the Crime and Disorder Act 1998 (aim of the youth justice system is to prevent reoffending by those under 18) and section 44 of the Children and Young Persons Act 1933 (courts dealing with a child must have regard to their welfare) are unaffected by the Code. It operates both as a signpost to the existence of those provisions and as an 'avoidance of doubt' provision.

---

179 The Sentencing Code (2017) Law Comm Consultation Paper No 232, paras 2.43 to 2.45.

180 See clause 55 of the draft Sentencing Code.

181 See clause 54 of the draft Sentencing Code.

6.31 Section 142A of the Criminal Justice Act 2003 prescribes the purposes of sentencing for children and young offenders (punishment, reform and rehabilitation, public protection and reparation). This section has not been brought into force and so, in line with our policy of keeping the body of the Sentencing Code as simple and 'clean' as possible, uncommenced provisions are kept in a schedule at the back of the Bill. They are inserted into the main body of the Code if and when they are brought into force. Accordingly, this provision has been re-drafted in Schedule 22 of the draft Sentencing Code.

6.32 In the main consultation, we provisionally proposed that section 142 of the Criminal Justice Act 2003 (purposes of sentencing for adults) should be amended. Currently, the provision is disapplied in the case of certain mandatory sentencing requirements (such as the minimum sentence for a third domestic burglary or the minimum sentence for certain firearms offences); we suggested that, in fact, the better approach is to make the purposes of sentencing "subject to" the mandatory sentencing requirements. This would make it clear that the purposes do apply, but that where there is any conflict, the mandatory sentence requirement takes precedence. In the main consultation we sought consultees' views as to whether they agreed with this proposal. Consultees were supportive, with HM's Council of Circuit Judges commenting that it would "achieve clarity" and "fill the vacuum created by the piecemeal approach adopted to sentencing legislation". The Ministry of Justice, however, in its response, expressed concern that this would amount to a substantive change in the law. We have therefore chosen not to carry forward this change as a consolidation is generally not the appropriate vehicle through which to make substantive changes to the law.

Sentencing Guidelines

6.33 Chapter 2 of Part 4 of the Code contains provisions detailing the courts' duty to follow sentencing guidelines. We have applied the clean sweep[182] to the duty of the courts, thereby removing the previous duty to "have regard to" sentencing guidelines (in relation to offences committed before 6 April 2010). Accordingly, we have extended the current duty to "follow" sentencing guidelines to all convictions which follow the enactment of the Code. In this instance, there is no need to disapply the clean sweep as we are making no change to the maximum sentence available for any offence. Therefore, this change is procedural only and will not result in an offender being at risk of receiving a more severe penalty than that which could have been imposed at the time of the offence.

6.34 Subsection (2) of clause 59 lists all of the provisions in the Code to which the duty to follow a sentencing guideline is subject. Clause 61 deals with the determination of custodial terms in relation to extended determinate sentences and non-mandatory life sentences. We have made a number of pre-consolidation amendments to these provisions to correct errors. These include the omission of references to sentences of detention in a young offender institution and the application of section 126(3) of the Coroners and Justice Act 2009 to the determination of the notional determinate term in the calculation of a life sentence under section 224A of the Criminal Justice Act 2003 (now redrafted in the Code as clauses 283 and 273).

---

[182] Our clean sweep policy and the justification for it is described in more detail in Chapter 4 of this Report.

6.35 In line with our general policy,[183] the provisions relating to the constitution and creation of the Sentencing Council have been omitted from the Sentencing Code. In the main consultation we asked consultees whether they agreed that this was the appropriate approach. All those who responded directly to this question agreed that it was. In particular, the Registrar of Criminal Appeals noted that "…it is accepted that such provisions are largely administrative in nature and therefore would be of minimal use to a sentencing court." These provisions will therefore remain in the Coroners and Justice Act 2009.

6.36 We also asked questions relating to the language used in these provisions. In particular, we proposed replacing: (a) the terms "sentencing starting point" and "appropriate starting point" used in the current law with "guideline category starting point" and "non-category starting point" on the basis that the former were unclear; and (b) "notional determinate term" with "appropriate custodial term" on the basis that the former was an inappropriate label to use in the case of both indeterminate and determinate sentences.

6.37 In relation to the former, the Sentencing Council noted that making such a change in the Sentencing Code, while also leaving the provisions dealing with the Sentencing Council's role and remit in the Coroners and Justice Act 2009, would result in inconsistent language across the two statutes. This would undermine the clarity the proposed amendment might bring. Accordingly, we are not proposing to make this change.

6.38 In relation to the latter, the majority of consultees were supportive of this change, with the only dissent coming from the Ministry of Justice, Graham Skippen (Solicitor, Fison and Co.) and the London Criminal Courts Solicitors' Association. The latter provided the caveat that while they preferred the existing wording their views on the point were "not very strong". We have therefore made this change in the Sentencing Code.

Seriousness and determining sentence

6.39 Chapter 3 of Part 4 of the Code concerns the court's duty to assess the seriousness of an offence in the process of sentencing. The chapter begins with the general provisions setting out the approach to determining seriousness, including those provisions which prescribe the duty to consider the culpability of the offender and the harm caused, intended to be caused or which might foreseeably have been caused. We have restructured these provisions and, in particular, have brought together the various mandatory aggravating factors which currently exist in numerous different enactments. This chapter therefore provides a comprehensive statement of the court's duties in assessing the seriousness of an offence and should limit the risk of a user failing to identify that a relevant provision applies in a particular case. In the main consultation, we had excluded certain mandatory aggravating factors[184] from the Sentencing Code on the basis that they were: (a) offence-specific rather than provisions concerning general sentencing procedure; and (b) moving the provisions into the Code would be, on balance, negative because the current law extends to Scotland and Northern Ireland (and therefore ensuring the effect of the law did not

[183] See Chapter 3 of this Report.

[184] Those under section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971.

change would be complex). Consultees were in favour of these provisions being re-drafted in the Code, however, and the Sentencing Code now therefore contains all the statutory mandatory aggravating factors.

6.40 This chapter of the Code also contains the duties to treat as aggravating factors relevant previous convictions and the fact that an offence was committed on bail. We asked consultees whether these requirements should be subject to a duty to state in open court that a sentence has been aggravated for these reasons. This would bring these provisions into line with other provisions requiring a court to treat certain factors as aggravating the seriousness of the offence. Consultees were supportive of this change. The Ministry of Justice felt that this duty was already created by section 174 of the Criminal Justice Act 2003. Given the support of consultees, and the opinion of the Ministry of Justice that this would not amount to a change in the law, we have accordingly made this change in clauses 64 and 65 to ensure consistency in the Sentencing Code.

6.41 There are also numerous changes to these provisions. In the main consultation paper, we proposed that the clean sweep would operate here to remove the limited application of certain mandatory aggravating factors; instead, the Code would apply these factors to all cases. This change is justifiable on the basis that it has always been, as a matter of general discretion, open to the court to take account of any factor it deems to be relevant. As this does not expose the offender to a sentence that is more severe than that which could have applied at the time of the offence there is no need to disapply the clean sweep here.

6.42 This chapter also includes reductions in sentence for guilty pleas and reductions in sentence for assistance given to the prosecution. Again, bringing these provisions of general application together will aid comprehension and reduce the risk of error or omission. There are various pre-consolidation amendments made to these provisions, correcting references to other provisions, bringing consistency of language and clarifying which minimum sentences can be negated by virtue of a reduction in sentence for assistance given to the prosecution.

6.43 We asked consultees whether it would be desirable in principle if section 144 of the Criminal Justice Act 2003 was amended so as to make its application to the minimum sentence provisions consistent. Currently, no reduction for a guilty plea which would reduce a sentence beneath the minimum prescribed by 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 is permitted. The other minimum sentences permit a reduction to be made for a guilty plea to the extent that the sentence is reduced to 80% of the prescribed term. We emphasised that because such a change would amount to a substantial change in policy, it could not be made through the Sentencing Code as a consolidation. We noted, however, that the benefits associated with guilty pleas (as opposed to trials), such as the avoidance of victims and witnesses having to attend court and give evidence and the cost savings, applied equally to the firearms offences and that there was a principled reason for making this change. Consultees were broadly in support of this change, with some consultees suggesting that this was a matter for parliament to consider.

Recommendation 3.

6.44 We recommend that the minimum sentence provisions contained in section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 are amended so as to allow a reduction for a guilty plea to the extent that the final sentence is no less than 80% of the prescribed minimum term, so as to bring them into line with the minimum sentence provisions contained in the Powers of Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 1988 and the Prevention of Crime Act 1953.

6.45 In the main consultation, we asked consultees a free-standing question regarding the definition of 'specified prosecutor' in section 71 of the Serious Organised Crime and Police Act 2005, and whether the benefits of restating that definition in the Code outweigh the administrative disadvantages and the risk that a prosecutor is not specified under one of the two versions.

6.46 On the one hand, the benefit of restating the definition in the Code avoids users having to refer to sources other than the Sentencing Code for this point and to it enables the provision to be simplified. Against that consideration, any change to the definition would require two amendments to be made (one to the Code and one to the remaining definition in section 71), and could potentially lead to unintended divergence. This was a narrow point, and not all consultees had a view. Of those who did (the Bar Council, the Registrar of Criminal Appeals, the Crown Prosecution Service and Lesley Molnar-Pleydell (Langley House Trust)) all agreed that the benefits outweighed the burdens. We have accordingly restated this definition in the Code.

Chapter 7: Disposals relating to children and young people

BACKGROUND

7.1 The main consultation did not contain provisions dealing with disposals for children and young people. It was not possible to include the provisions in the main consultation at the time it was published, because there was an ongoing review of the youth justice system in England and Wales (the Charlie Taylor Review). It would have made no sense to consolidate an area of law that was likely to be revised in the immediate future. However, it subsequently became clear that no immediate legislative action would follow from the Charlie Taylor Review. This meant that we were able to re-draft the provisions relating to the small number of disposals and consult on these in a later consultation ("the children and young person's consultation").[185] The provisions that were the subject of this consultation can be broadly grouped as relating to:

(1) referral orders;

(2) reparation orders;

(3) youth rehabilitation orders;

(4) detention and training orders; and

(5) orders in relation to parents and guardians of children and young persons.[186]

7.2 Additionally, in the main consultation,[187] we published a small number of draft provisions regarding types of sentence available only for children and young persons, namely:

(1) detention under section 91; and

(2) extended determinate sentences of detention.

7.3 Both consultations discussed the way in which the various provisions had been re-drafted and structured, and asked a number of consultation questions.

---

185 The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234.

186 For a more detailed list of the provisions consulted on, see The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234, para 2.2.

187 The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 9.19 to 9.24.

ACCURACY AND STRUCTURE

7.4 In both consultations, we sought consultees' views on the proposed structure of the re-drafted provisions, and their accuracy.

7.5 In particular, we sought consultees' views on whether the re-drafted provisions reflected the current law in relation to sentencing orders concerning the sentencing of children and young persons, bearing in mind any changes that would result from the proposed pre-consolidation amendments and the clean sweep.

7.6 Consultees, including the Bar Council, Her Majesty's Council of Circuit Judges, the Crown Prosecution Service, the Law Society and Mr Justice William Davis (the Judicial Lead on Youth Justice for England and Wales) unanimously agreed that the consolidation of these provisions was both comprehensive and accurate. The Crown Prosecution Service endorsed the consolidation and clarification of the law that this represents.

7.7 Similarly, in general terms, consultees welcomed the re-structuring of the provisions. A small number of specific suggestions were made, all of which have been considered in drafting this report and producing the final draft of the Sentencing Code Bill.

RE-SENTENCING

7.8 As was explained in more detail in the children and young person's consultation,[188] under the current law, when a court is re-sentencing in relation to an order imposed on a child or young person, it is given the powers of the original sentencing court. This has two key effects: (1) the law that applies is the law as it stood on the date of the original sentencing exercise (rather than the law as it stands on the date of re-sentencing); and (2) the child or young person is re-sentenced as if they were still the age they were when originally convicted.[189]

7.9 To give effect to the clean sweep policy, all powers to re-sentence an offender (or amend the order applying to them) have been amended in the Sentencing Code so that the re-sentencing court's powers are those the court would have if the offender had just been convicted before the re-sentencing court (rather than the powers of the original sentencing court). If unqualified, however, this would have the effect of ensuring that these offenders are sentenced by reference to their age at re-sentencing rather than the age at which they were originally convicted. For adults, the impact of this is minor, and is already the case for a number of the re-sentencing provisions. It affects only the availability of certain custodial sentences (whether an offender receives a sentence of detention in a young offender institution or imprisonment)[190] and attendance centre requirements.[191]

---

188 See The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234, paras 2.5 to 2.25.

189 See *R v Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 84.

190 The practical effects of which are in essence the same for an offender who has reached age 21.

191 Which are very rarely used, and arguably ill-suited to adults aged over 25 regardless.

7.10 For those persons convicted as children and young people this approach could, however, have a significant impact. As the availability of sentencing orders is dependent upon the age of a child or young person, sentencing a person by reference to their age at re-sentence (rather than their age at conviction) could change the type of sentence available and potentially could increase the maximum sentence available for the offence. Take, for example, a child or young person convicted of an offence under section 20 of the Offences against the Person Act 1861. Under this provision the maximum sentence in the case of an offender convicted as an adult is five years' imprisonment; and the maximum sentence available for a child or young person is a detention and training order of 24 months. The effect of being re-sentenced at age 18 by reference to the offender's age at the re-sentencing hearing, rather than their age at conviction, could be to expose a person convicted as a child or young person to a custodial sentence three years longer than would have originally been available.

7.11 Therefore, almost all the provisions conferring a power to re-sentence a child or young person have, in the current law, been drafted to provide the court re-sentencing with the powers of the original court. This, however, requires the court to refer to old law. In the Sentencing Code all these re-sentencing powers have been amended so that the re-sentencing court has the powers it would have if the offender had just been convicted by or before that court (but with the offender being the same age as when originally convicted). This gives effect to the clean sweep policy by ensuring that courts refer to the new law, and not the old, but also ensures that those offenders convicted as children or young people are still re-sentenced by reference to their age at conviction. This avoids any unintended change in sentencing powers.

WARRANTS, REMAND AND ADJOURNMENT

7.12 As detailed in the children and young person's consultation,[192] in the current law there is an undesirable variation and ambiguity in the provisions relating to warrants for the arrest of children and young people issued in connection with a sentence imposed upon them. There is a similar problem regarding the place to which children and young people are remanded when a hearing relating to a sentence imposed upon them is adjourned.

7.13 These variations and ambiguities do not just create undesirable inconsistency but can also potentially have particularly problematic results: in some cases, they seem to allow children and young persons to be detained or remanded in prison, or other places inappropriate for their age. One particularly significant issue stems from the application of section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPOA 2012"). Section 91 provides that ordinarily, where a court is dealing with a child or young person in relation to an offence, and that child or young person is not released on bail, they will be remanded to local authority accommodation. If certain conditions are met, however, the child offender may instead be remanded to youth detention accommodation. Such a remand is made only where necessary to protect the public from death or serious personal injury occasioned by

[192] See The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234, paras 2.26 to 2.41.

further offences committed by the child or young person, or to prevent the commission of imprisonable offences by that person.

7.14 As was noted in the children and young person's consultation, there is (at the least) significant doubt and ambiguity as to whether section 91 of that Act applies to the remand of children and young persons upon the adjournment of a hearing relating to a failure to comply with a previously imposed sentence. The potential result is that children and young persons might be remanded to custody rather than to local authority accommodation. Alternatively, a child or young person who poses a significant risk might avoid being remanded to youth detention accommodation where that is appropriate. This is inconsistent with the general policy underpinning section 91.

7.15 In the children and young person's consultation, we explained our view of the effect of the current law as follows:

Order	Provision for place of safety on arrest	Remand where cannot be brought before relevant court	Remand on adjournment
Youth Rehabilitation Order	Yes[193]	Remand to local authority accommodation only[194]	Remand in custody (Young Offender Institution; Secure Training College; and Secure College) only[195]

193 Paragraph 21(2)(a) of Schedule 2 to the Criminal Justice and Immigration Act 2008.

194 Paragraph 21(7)(a)(ii) and (9)(a) of Schedule 2 to the Criminal Justice and Immigration Act 2008 (upon which section 128 of the Magistrates' Courts Act 1980 operates to provide a power to remand on bail also).

195 Paragraph 22(2)(b) of Schedule 2 to the Criminal Justice and Immigration Act 2008 (upon which section 128 of the Magistrates' Courts Act 1980 operates to provide a power to remand in custody – custody is defined for youths in section 43 of the Prison Act 1952).

Referral Order	Yes[196]	Remand to local authority accommodation, or custody (Young Offender Institution; Secure Training College; and Secure College)[197]	Remand in custody (Young Offender Institution; Secure Training College; and Secure College) only[198]
Reparation Order	Yes[199]	Remand to local authority accommodation only[200]	Remand in custody (Young Offender Institution; Secure Training College; and Secure College) only[201]
Conditional Discharge	No	No power provided for remand	No power provided to remand or adjourn
Detention and Training Order	No	No power provided for remand	No power provided to remand or adjourn

7.16 Accordingly, we proposed significant amendments to the provisions relating to the remand of children and young persons, and the provisions relating to places of safety on arrest. We proposed to provide explicitly for the ability to detain a child or young person in a place of safety when arrested as a result of a warrant issued in relation to a sentence previously imposed upon them; and to apply section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 explicitly to remands in relation to such cases. We noted that such an approach also gave us scope to undertake significant streamlining of these provisions. We explained the effect of these amendments as follows:

196 Paragraph 4(1) of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.

197 Paragraph 4(3) to (5) of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (applying section 128 of the Magistrates' Courts Act 1980 which provides a power to remand in custody – custody is defined for youths in section 43 of the Prison Act 1952).

198 Paragraph 9ZA(2)(b) of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (upon which section 128 of the Magistrates' Courts Act 1980 operates to provide a power to remand in custody – custody is defined for youths in section 43 of the Prison Act 1952).

199 Paragraph 6(4)(a) of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000.

200 Paragraph 6(5)(b) of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000.

201 Paragraph 6A(2)(b) of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000 (upon which section 128 of the Magistrates' Courts Act 1980 operates to provide a power to remand in custody – custody is defined for youths in section 43 of the Prison Act 1952).

Order	Provision for place of safety on arrest	Remand where cannot be brought before relevant court	Remand on adjournment
Youth Rehabilitation Order	Yes	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances
Referral Order	Yes	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances
Reparation Order	Yes	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances
Conditional Discharge	Yes	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances
Detention and Training Order	Yes	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances	S. 91 LASPOA 2012 applies: remand to local authority accommodation, but youth detention accommodation in exceptional circumstances

7.17 We proposed three draft clauses to give effect to these proposals. They would ensure that in all cases where a child or young person is arrested under a warrant issued in respect of a previously imposed sentence, they may be detained in a place of safety if

they cannot be immediately brought before the court. They would also provide a streamlined procedure for the adjournment of hearings relating to any previously imposed sentences for both adult offenders and those convicted as children and young persons. Further, they would ensure that section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 applies to the remand of children and young persons when such hearings are adjourned. We noted they would replace a number of provisions currently found in Schedules 1 and 8 to the Powers of Criminal Courts (Sentencing) Act 2000, Schedules 8 and 12 to the Criminal Justice Act 2003 and Schedule 2 to the Criminal Justice and Immigration Act 2008.

7.18 The Bar Council strongly endorsed this proposal, commenting that they:

> … take the view that the significant benefits that will accrue from the proposed amendment – not least in terms of compliance with the general policy on managing young offenders in the criminal justice system – fully justify such a change.

7.19 Similarly, the Magistrates' Association commented that these amendments were a

> … much needed provision to ensure that children and young people are remanded to the appropriate place regardless of the situation involved …

7.20 The Law Society noted that in their experience practitioners and courts had interpreted section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as applying to remands resulting from further proceedings in relation to a previously imposed sentence. They felt the additional clarification that the Code would provide would, however, do no harm.

7.21 The Ministry of Justice, however, disagreed with these proposals. While they recognised there were potential ambiguities in the law, they did not agree with our analysis that in some cases children and young persons could only be remanded to custody or that there was no power to remand them at all. They were concerned that extending section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 would result in children and young person's being able to be remanded to youth detention accommodation where it would be inappropriate for their offence/sentence. They noted this was particularly true where children and young persons were simply being remanded for a breach of their sentence and not the commission of a further offence. They therefore felt that an extension of section 91 was not the proper way to resolve these issues or at the very least required more significant consideration than could be given to this issue.

7.22 They noted beyond the impact on children and young person's there was also a need to carefully consider whether there would be unintended consequences for those on the ground, including the local authorities concerned. They further noted that as part of their current Post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 they are reviewing youth remand in detail, and requested that the implementation of this work be folded into that review. It has, unfortunately, not been possible for this work to be completed before the publication of this report.

7.23 Given the Ministry of Justice's ongoing work in this area, and that we agree that this area would benefit from more general consideration than can be achieved in this

consolidation, we have decided not to implement the changes to remand in the draft Sentencing Code.

7.24 However, we continue to believe that such reforms are both necessary and appropriate to ensure that remands for children and young people are appropriately dealt with.

7.25 We also consider that the Ministry of Justice's review should consider the related issues of warrants and adjournment, although recognise that this work is not itself connected to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There is an undesirable general inconsistency in the drafting of these provisions which cannot be resolved without a careful consideration of the underlying policy in this area and the practical impacts of any reform. For example, in some contexts it is for a magistrates' court to issue a warrant to appear,[202] whereas in others it is for a justice of the peace.[203] There is also a general inconsistency about whether a court has express power to arrest an offender who fails to appear for a hearing, and whether provision should be made about taking an offender to a place of safety on arrest if they are aged 18 or over but cannot yet be brought before the right court. Much of the existing piecemeal approach can be explained by the fact that the general provisions in the Magistrates' Courts Act 1980 apply only to trial and sentence, and not to proceedings for sentences previously imposed. The Sentencing Code could potentially implement general provisions allowing for the streamlining of such matters if the policy in this area was clearer.

Recommendation 4.

7.26 The Government should include warrants and adjournments for previously imposed orders with a particular focus on the places to which a child or young person may be remanded or held, in its ongoing review of the provisions regarding remand.

7.27 Once that review is complete the Government should consider amending the Sentencing Code to include general provisions which ensure a consistent approach in these areas.

"CHILDREN AND YOUNG PERSONS"

7.28 The Howard League for Penal Reform and Just for Kids Law/the Youth Justice Legal Centre submitted a joint response to the consultation on children and young persons. Their response raised questions about whether the distinction between "children" and "young persons" in the Children and Young Persons Act 1933 continued to be useful or relevant, and the suitability of the word "offender" in relation to persons convicted under the age of 18.

7.29 They argued that since the abolition by section 38 of the Crime and Disorder Act 1998 of *doli incapax* (the rebuttable presumption that children between the ages of 10 and

---

202 See, for example, the Powers of Criminal Courts (Sentencing) Act 2000, Sch 8, para 6(2) and (3).

203 See, for example, the Criminal Justice and Immigration Act 2008, Sch 2, para 5(1).

14 were incapable of committing a criminal offence) that there has been no special legal significance attached to turning 14. They also argued that the term "child" should be extended to apply to all those aged under 18: in line with the definitions adopted in family law generally[204] and the United Nations Convention on the Rights of the Child 1989. They strongly urged that we use the term child to refer to all people under aged 18 rather than to "reinforce the outdated distinction between children and young people".

7.30 The idea is a persuasive one. We agree that the legal distinction between a "child" and a "young person" in a criminal law context is generally outdated. In particular, it does not provide a useful and clear divide in the sentencing context – the availability of sentences differs variously depending on whether a person is convicted at age 10, 12, 14, 15, 16 or 18 and not simply whether they are under 14 or aged 14 or over. We have accordingly not used this distinction in the Sentencing Code. There are no references to a "young person" in the Sentencing Code except where summarising the title of a section in another Act and wherever the Code refers to children, it means those under the age of 18.

7.31 The Howard League for Penal Reform and Just for Kids Law/the Youth Justice Legal Centre also raised concerns about the use of the word "offender" in the Sentencing Code to refer to those convicted under the age of 18. They argued that this language serves only to "encourage the stigmatisation and criminalisation of children" and "reinforces a feeling of exclusion and discourages positive re-integration into society". They felt that the use of the term offender is both unnecessary and unhelpful.

7.32 We recognise the force of this argument. Preventing offending by those under the age of 18 is the principal aim of the youth justice system,[205] and all courts dealing with a person under the age of 18 must have regard to their welfare.[206] As the Sentencing Council's guideline on sentencing children and young persons' recognises, it is important to avoid "criminalising" those under the age of 18 unnecessarily and to avoid undue penalisation or stigma.[207]

7.33 The criminal justice system takes a number of steps to achieve this in relation to the sentencing of those under the age of 18. Most such sentencing takes place in the youth court where convictions are referred to as "findings of guilt" and a more informal procedure is adopted. We do not dispute the merits of this approach. It is worth noting, however, that such an approach is not adopted in relation to convictions on indictment where the language of "offender" and "conviction" is frequently used, although the same general principles underpin the sentencing of those convicted under the age of 18.

7.34 Despite the force of the arguments advanced by the Howard League and Just for Kids Law it has not been possible in the Code to replace all references to those convicted under the age of 18 with references to "child" or an analogous phrase. Although

---

204 See, the Children Act 1989, s 105(1).

205 Crime and Disorder Act 1998, s.37.

206 Children and Young Persons Act 1933, s.44.

207 Sentencing Council, Sentencing Children and Young People: Definitive Guideline (June 2017), paras 1.4 to 1.6.

superficially straightforward, such an approach throws up a number of technical drafting difficulties, including:

(1) whether to adopt a definition of "child" that encompasses offenders who were convicted when under the age of 18, but who may be aged 19 or 20 when the relevant law applies.[208] This could be a confusing and even misleading phrase;

(2) the need to refer to both a "child convicted of an offence" and "an offender" where provisions apply to all those convicted of an offence of whatever age;

(3) whether a better approach would be to re-draft the entire Code to replace references to an "offender" with references to "a person convicted of an offence". This would add considerable length to the relevant provisions, and require careful amendment.

7.35 These issues would need to be resolved, and the potential length and complexity introduced by such a change would need to be weighed against its merits.

7.36 The core aim of the Sentencing Code is to bring clarity, simplicity and transparency to the law of sentencing. We agree with Howard League and Just for Kids Law that the use of the word "child" to refer to those convicted while under 18 is desirable in principle. However, to be confident that the entire Code was redrafted to accommodate that policy, and to not accidentally effect change, would require considerable time and expert attention. Importantly, the Sentencing Code as drafted would work effectively as a consolidation without this change. Given the limited resources available to this project, we have chosen to prioritise other drafting which is essential to ensure a comprehensive consolidation of the current law.

7.37 If time and resource allow, however, we recommend that the Government consider whether the Sentencing Code could be amended prior to its introduction to use the word "child" or an analogous phrase when referring to persons convicted under the age of 18. Similarly, we would recommend that the Government consider the merits of such an approach generally when passing future legislation.

Recommendation 5.

7.38 We recommend that the Government consider whether the word "child" or an analogous phrase should be used when referring to persons convicted under the age of 18 in future legislation, and whether the Sentencing Code should be amended to adopt such language.

[208] A person who was convicted at the age of 17 and sentenced to a youth rehabilitation order could come back in front of the court to be dealt with for the breach of that order up to 3 years later, when aged 19 or 20 (see the Criminal Justice and Immigration Act 2008, Sch 1, para 32). Similarly, a person who was convicted at the age of 17 may not in fact be sentenced until the age of 18, but will still be sentenced as if 17.

REFERRAL ORDERS

7.39 Chapter 1 of Part 6 of the Sentencing Code contains those provisions relating to the availability, effect, and making of, referral orders. Schedule 3 contains those provisions relating to the terms of a programme of behaviour agreed between a child or young person and a youth offender panel as part of a referral order, and the requirements such programmes may include. Schedule 4 contains those provisions relating to further court proceedings in relation to a referral order. Chapter 1 of Part 6, and Schedules 3 and 4, reproduce those provisions currently found in sections 16 to 32 of the Powers of Criminal Courts (Sentencing) Act 2000 and Schedule 1 to that Act.

7.40 A number of minor changes have been made to the language and structure of these provisions to provide greater clarity as to the effect of the law, and to ensure consistency throughout the Sentencing Code. Notably, what were Parts 1 and 1ZA of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 have been merged in the re-drafting into a single Part in Schedule 4 to the Code. The provisions in Part 1A of Schedule 1 to Powers of Criminal Courts (Sentencing) Act 2000 (which confer the power to make a parenting order), have been distributed across Chapter 1 of Part 6 of the Code (see *clause 93*), and Chapter 3 of Part 11 of the Code (which contains the other provisions relating to parenting orders).

7.41 In the children and young person's consultation we sought consultees' views on whether they agreed with the proposed re-structuring of these clauses. All consultees who expressed a view on the re-structuring of the provisions welcomed them.

7.42 A small number of consultees expressed views on the current law. For example, the Magistrates' Association expressed concern that the use of certain out of court disposals can affect the availability of a referral order, and conversely that in some cases the court is required to impose a referral order where more intensive support or supervision may be necessary. Similarly, the Youth Justice Legal Centre felt that the compulsory referral conditions are too restrictive and often result in offenders receiving referral orders for serious offences, or being committed to the Crown Court where this would otherwise be inappropriate. Ian Cassidy, a Partner at Ben Hoare Bell LLP, commented that it is problematic that credit for an early guilty plea is absent from Referral Orders under the current sentencing guidelines. He observed that this means there was no incentive for an early plea, and a large incentive to wait until late in the trial process before pleading. A response to this final point may be that the credit for a guilty plea takes the form of the nature of the sentence which would not otherwise be imposed, that is to say, the credit for pleading guilty comes in the form of the referral order itself (rather than a more punitive sentence).

7.43 To make any changes to the availability or mandatory nature of referral orders would be outside the scope of this project. To make changes to sentencing guidelines, or to the appropriate credit for a guilty plea would similarly be far outside the scope of this project, and is the responsibility of the Sentencing Council. No changes have therefore been made in respect of these matters.

REPARATION ORDERS

7.44 Chapter 2 of Part 6 of the Sentencing Code contains those provisions relating to the availability, and making of, reparation orders. Schedule 5 contains those provisions relating to the breach, revocation and amendment of reparation orders. These provisions were previously found in sections 73 and 74 of the Powers of Criminal Courts (Sentencing) Act 2000 and paragraphs 2, 5, 6 and 6A of Schedule 8 to that Act.

7.45 These provisions have been restructured in the Code to provide greater simplicity to the law and to ensure consistency with other provisions in the Sentencing Code. Primarily, this has involved amendments to the court's powers on re-sentencing, so that the court always has their modern sentencing powers, rather than the powers the court had at the time of the original conviction, but the offender is still re-sentenced by reference to their age at conviction.

7.46 In the children and young person's consultation we sought consultees' views on the restructuring of these provisions. All consultees who provided views felt the restructuring and amendment of these provisions was helpful. Those who responded included the Law Society, the Legal Committee of Her Majesty's District Judges (Magistrates' Courts), the Crown Prosecution Service, the Bar Council and the Senior District Judge. The Magistrates' Association, in particular, welcomed the clarity the re-drafting provided in relation to when such orders were available, noting that the draft clause clearly set out that reparation orders can only be imposed where referral orders, youth rehabilitation orders or custodial sentences are not imposed.

YOUTH REHABILITATION ORDERS

7.47 Chapter 1 of Part 9 of the Sentencing Code contains those provisions relating to the availability and making of a youth rehabilitation order. Schedule 6 contains those provisions relating to the various requirements that can be imposed as part of a youth rehabilitation order. Schedule 7 contains those provisions relating to the breach, revocation and amendment of a youth rehabilitation order, as well as the effect of a further conviction while subject to a youth rehabilitation order. Schedule 8 contains those provisions relating to the transfer of youth rehabilitation orders to Northern Ireland, and the effect and subsequent amendment of transferred orders. In the current law, these provisions are contained in sections 1 to 8 of the Criminal Justice and Immigration Act 2008, and Schedules 1 to 3 to that Act.

Restructuring

7.48 The provisions relating to youth rehabilitation orders have been significantly restructured in the Sentencing Code. For example, those provisions contained in Chapter 1 of Part 9 are currently split across sections 1 to 8 of the Criminal Justice and Immigration Act 2008, and Parts 1, 3 and 4 of Schedule 1 to that Act. These provisions have been restructured, principally to aid comprehension, but also to ensure a consistent structure with the provisions relating to community orders, and the approach adopted by the Sentencing Code to disposals generally.

7.49 Similarly, in Schedule 6 those provisions relating to the requirements available as part of a youth rehabilitation order have been recast, wherever possible, to highlight the

matters that the court needs to specify in the order and the conditions that must be satisfied before such a requirement can be imposed. The provisions relating to activity requirements, for example, have been substantially re-structured in paragraphs 1 to 8 of that Schedule to delineate more clearly between the different types of activity requirement.

7.50 There have also been numerous minor amendments to these provisions to correct errors, to provide greater clarity and consistency to the law, and to give effect to the clean sweep policy.

7.51 In the children and young person's consultation we sought consultees' views on the restructuring of these provisions and, in particular, the provisions concerning the requirements capable of being imposed under a youth rehabilitation order. All consultees who provided views on the restructuring broadly welcomed it as an improvement which brings greater clarity to the relevant provisions as well as ease of use. Those supporting the change included the Law Society, the Legal Committee of Her Majesty's District Judges (Magistrates' Courts), Her Majesty's Council of Circuit Judges, the Bar Council and Dr Jonathan Bild (University of Cambridge).

7.52 Mr Justice William Davis, the Judicial Lead on Youth Justice for England and Wales, observed that while clause 194 accurately reproduces paragraph 35 of Schedule 1 to the Criminal Justice and Immigration Act 2008 (and the present position), when the Code is implemented, "the opportunity should be taken to introduce the power by regulation as has been argued for by all sides in the youth justice system for some time."

7.53 To enact such regulations – thereby making a substantive change to the law - would be outside the scope of this project, and no change has therefore been made in this respect. It would, however, be open to the Government to introduce such regulations either before, after, or to coincide with the introduction of the Sentencing Code. The implementation of the Code would do nothing to hinder this.

Recommendation 6.

7.54 We recommend that the Government review whether regulations under paragraph 35 of Schedule 1 to the Criminal Justice and Immigration Act 2008 should be made to allow courts periodically to review youth rehabilitation orders.

Paragraph 10(4) of the Criminal Justice and Immigration Act 2008

7.55 Under paragraph 6(2)(a) or 8(2)(a) of Schedule 2 to the Criminal Justice and Immigration Act 2008, a court may deal with an offender who breaches their youth rehabilitation order by ordering them to pay a fine.

7.56 The maximum fine that can be imposed for the breach of the order is £2,500 if the breach of the order occurred on or after 3 December 2012. If the breach occurred before that date, the maximum fine that can be imposed is £250 if the offender is aged under 14, and £1,000 if aged 14 or over. As the Sentencing Code will apply only to offenders convicted after its commencement, the clean sweep does not apply to this

provision, as no offender can be sentenced under the Code for a breach of an order imposed before it was commenced. For all persons subject to a youth rehabilitation order under the Sentencing Code, the breach of the order must occur on or after 3 December 2012 and the maximum fine will therefore be £2,500.

7.57 However, during the drafting of the Sentencing Code, a query arose as to whether to apply the principle of the clean sweep to paragraph 10(4) of Schedule 2 to the Criminal Justice and Immigration Act 2008. Under paragraph 10 of that Schedule, the Secretary of State may by order amend the maximum fine that may be imposed under paragraph 6(2)(a) or 8(2)(a) of that Schedule. This power is only exercisable if there appears to have been a change in the value of money since the maximum amount was last amended that justifies the change. By virtue of paragraph 10(4) of that Schedule, however, any amendment effected by an order under paragraph 10 may not have effect in relation to a youth rehabilitation order imposed for an offence committed before the amendment came into effect.

7.58 For the reasons set out in more detail in the children and young person's consultation,[209] we concluded that to omit this requirement would not be to impose a greater penalty than that which was available at the time of the commission of the offence. It would therefore comply with common law principles against retroactivity and Article 7 of the European Convention of Human Rights. We provisionally proposed to amend this sub-paragraph so that any subsequent amendments to the maximum fine that can be imposed for a breach of a youth rehabilitation order may have effect in relation to any conviction on or after that amendment. In the children and young person's consultation we sought consultees' views on this amendment.

7.59 In general, consultees were in favour of this amendment. The Law Society, welcomed it as providing a more logical approach to amendments, and the Ministry of Justice agreed that this would be in line with current legislation that reflects changes to monetary value. The Crown Prosecution Service, Dr Jonathan Bild (University of Cambridge) and Her Majesty's Council of Circuit Judges all agreed with the proposed amendment.

7.60 However, a small number of consultees either disagreed with the proposal or expressed concerns as to its operation. For example, while the Magistrates' Association acknowledged that this would make the process of sentencing following a breach easier they expressed concerns that it could result in a more punitive response.

7.61 Having carefully examined all the responses on this issue, we consider that it is important to recognise the limited nature of the proposed amendment, and the scope of the Sentencing Code. First, the power to amend the maximum fine under paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008 allows only minor changes to be made to the maximum fine that can be imposed on breach to reflect changes to monetary value. The proposed amendment does not change the scope of that power, it simply allows for amendments to have effect in relation to offences convicted on or after the change of the date, rather than only offences committed on

[209] See, The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234, paras 2.77 to 2.78, and example 2.

or after that date. Secondly, this change would not affect the level of sentence that should be imposed for the offence, nor the maximum sentence that could be imposed for the breach. It is not within the scope of the Sentencing Code to effect changes to the appropriate sentence to be imposed upon the breach of a youth rehabilitation order, and this will remain the domain of guidance issued by the Sentencing Council and the Court of Appeal (Criminal Division). Further, this amendment will not allow for a greater penalty to be imposed on breach than was previously available. It has always been open for the court to deal with an offender on breach by re-sentencing them to both a new, more punitive, youth rehabilitation order, and to impose a fine alongside that new order. This amendment simply changes the maximum fine that can be imposed alongside leaving a youth rehabilitation order to remain in force.

7.62 The Bar Council's Law Reform Committee, in their response, agreed with the proposed amendment, noting that it does not offend Article 7. However, they considered that Article 7 would be infringed where the breach is committed before the increase, but the new conviction post-dates the increase. This appears to argue against the position adopted by parliament in relation to the amendments effected by section 84 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which increased the fine available on a breach of a youth rehabilitation order from £250 (aged 10-13) and £1000 (aged 14-17) to £2500 in all cases). We do not consider that the amendments effected by that section were in breach of Article 7. However, regardless of that, our proposed amendment is more restrictive, applying the higher maximum fine only to cases where the *original* conviction occurred on or after the amendment.

7.63 The original proposed amendment to paragraph 10(4) of Schedule 2 to the Criminal Justice and Immigration Act 2008 was to ensure that any amendments brought about by that paragraph had effect for any conviction on or after the amendment came into force. Having considered these concerns, and discussed the matter with Parliamentary Counsel, we have made a minor alteration to the proposed amendment. The effect of paragraph 10(4) of that Schedule as amended will be that amendments under that paragraph may not have effect in relation to a youth rehabilitation order made in respect of an offence of which an offender is convicted before the amendment comes into force, but may have effect for all other cases. This will allow future governments to make further transitional provisions where they think it is necessary. It remains our view that, other than in exceptional circumstances, any such amendments should apply to any conviction on or after their commencement, in line with the general clean sweep policy which received unanimous support on consultation. We have made similar amendments to paragraph 12A(4) of Schedule 12 to the Criminal Justice Act 2003 and paragraph 11A(4) of Schedule 8 to that Act, which provide the Secretary of State with similar powers to amend the maximum fine that can be imposed for breach of a suspended sentence order or community order.

CUSTODIAL SENTENCES

Detention and training orders

7.64 Chapter 2 of Part 10 of the Sentencing Code contains those provisions relating to the availability and effect of custodial sentences available for offenders convicted while under age 18.

7.65 Clauses 233 to 248 in that chapter relate to the availability, making of, and effect of detention and training orders. Schedule 12 to the Sentencing Code contains those provisions relating to the breach of the supervision requirements of a detention and training order, and the commission of further offences during such an order. These provisions are currently found in sections 100 to 107 of the Powers of Criminal Courts (Sentencing) Act 2000.

7.66 The provisions have been substantially re-structured in the Sentencing Code. A number of sections have been split into multiple clauses, so as to make the effect of the provisions much clearer, as well as to ensure a consistent approach throughout the Sentencing Code. Similarly, those provisions now contained in Schedule 12 were previously contained in sections 104, 104A, 104B and 105 of the Powers of Criminal Courts (Sentencing) Act 2000. As these provisions deal with the breach of existing detention and training orders, they were re-drafted into a Schedule to ensure consistency with the general approach to breach provisions in the Sentencing Code.

7.67 Minor amendments have also been made to give greater clarity to the effect of these provisions, to provide for greater consistency, and to allow for the streamlining of certain provisions.

7.68 In the children and young person's consultation consultees' views were sought on the revised structure of the provisions concerning detention and training orders and, in particular, whether they agreed with the decision to re-draft sections 104, 104A, 104B and 105 of the Powers of Criminal Courts (Sentencing) Act 2000 in a Schedule to the Sentencing Code.

7.69 Consultees generally thought that the revised structure of the provisions was helpful, logical and brought clarity to the provisions.

7.70 Further, consultees unanimously agreed that it was sensible to have a consistent approach across the Sentencing Code to breaches, and welcomed the decision to re-draft sections 104, 104A, 104B and 105 of the Powers of Criminal Courts (Sentencing) Act 2000 in a Schedule to the Sentencing Code.

7.71 The Bar Council welcomed the general approach in Part 10 of the Sentencing Code of grouping together disposals by reference to the age at which the offender is convicted. However, they queried whether it might be more user-friendly to amend the Third Group of Parts more generally, so that it contained separate Parts detailing all the disposals available only for adult offenders, and all the disposals available only for children and young people.

7.72 We recognise the merits of such an approach and had considered it prior to the publication of the consultation paper. However, in light of the degree of duplication such an approach would require (far beyond that inherent in the re-drafting of Part 10 of the Sentencing Code), and the additional drafting resource it would require, we concluded that the benefits of such an approach were outweighed by the costs. Generally, the same provisions apply, with only very minor modifications which can be appropriately flagged in separate sections. In fact, it would be harder to see the differences for the law in relation to adults, and the law in relation to children and young persons if a substantial number of provisions were reproduced, with or without minor modifications. This could lead to error, with courts mistakenly considering the

effect of the law is the same in relation to children and young persons as it is in relation to adults. For this reason, we have not adopted the Bar Council's proposal on this issue.

Consecutive detention and training orders

7.73 Section 101(4) of the Powers of Criminal Courts (Sentencing) Act 2000, in the current law, prohibits the making of detention and training orders that would result in an offender being subject to such orders for a term exceeding 24 months. Section 101(5) of the Powers of Criminal Courts (Sentencing) Act 2000 similarly ensures that where an offender would be subject to detention and training orders for a term exceeding 24 months, any period of time exceeding 24 months is remitted.

7.74 The two subsections therefore serve similar purposes and in the children and young person's consultation we suggested that section 101(4) of the Powers of Criminal Courts (Sentencing) Act 2000 might be suitable for repeal. The key question here was whether consultees felt that the subsection served a valuable purpose in principle by explicitly preventing courts from imposing a detention and training order which would result in an offender being subject to detention and training orders for a period exceeding 24 months. In favour of its repeal we raised two arguments, that the subsection could leave the court powerless to impose a further detention and training order in some cases, and that it may mean that the court lacked powers to mark the seriousness of the offence for the purposes of the offender's antecedent history.

7.75 We noted that the repeal of this subsection would be a limited technical change, in that it would not generally alter the effect of the sentence imposed; rather, it would simply affect the way in which the sentence was pronounced and recorded.

7.76 In the children and young person's consultation we sought consultees' views on whether the subsection served a useful purpose in the light of section 101(5) of that Act, or whether they thought it ought to be repealed.

7.77 Consultees overwhelmingly felt that section 101(4) did serve a useful purpose and should be retained in the Sentencing Code. Her Majesty's Council of Circuit Judges acknowledged the tension between section 104(4) and (5) but said that they were uncomfortable with the idea of passing a sentence they knew would be administratively remitted. The Sentencing Council noted the importance of transparency in sentencing, and ensuring that offenders, victims and the public can have confidence that the sentence imposed would be served. They argued that the repeal of section 101(4) would run contrary to these aims, and that it was important in principle that there be an explicit maximum on the total length of consecutive detention and training orders. These feelings were echoed by Mr Justice William Davis (Judicial Lead on Youth Justice for England and Wales), the Law Society, the Legal Committee of Her Majesty's District Judges (Magistrates' Courts), the Senior District Judge, the Bar Council and the Crown Prosecution Service.

7.78 Only the Magistrates' Association were in favour of repealing section 101(4). They felt that it would be particularly useful for future cases for the court to be able to mark accurately the seriousness of the offence they are sentencing.

7.79 In contrast, both the Crown Prosecution Service and the Bar Council suggested the repeal of section 101(5). The Crown Prosecution Service argued that where there is an error that results in the breaching of section 101(4) this error ought to be corrected in open court, in the presence of the offender, as is the case with other errors. While we recognise the merits of such an argument, we believe the benefits of this subsection are such that it ought to be retained. The effect of the law is clear in such cases, and although in such cases the court will mislead the child or young person as to the effect of the imposed sentence, we do not consider this invalidates the sentence. As is noted in *R v Bright*[210] and *R v Giga*[211] a failure to explain properly the effect of a sentence does not make a sentence unfair in a sense giving rise to a proper ground of appeal.

7.80 However, in recognition of the near unanimous response from consultees that section 101(4) continues to serve a useful purpose, the effect of both section 101(4) and (5) of the Powers of Criminal Courts (Sentencing) Act 2000 have been retained and those provisions have been re-drafted in the Sentencing Code.

Post-sentence supervision

7.81 Section 106B of the Powers of Criminal Courts (Sentencing) Act 2000 provides that where an offender serving a detention and training order is aged 18 or over at the half-way point of the term of the order, and the term of the order is less than 24 months, the offender will be subject to a period of post-sentence supervision. By virtue of subsection (1)(c) of that section, section 106B applies only where the detention and training order was imposed in respect of an offence committed on or after 1 February 2015.[212]

7.82 For reasons explained in more detail in the children and young person's consultation,[213] we concluded that there was a legitimate argument that applying the clean sweep to this provision could result in imposing a more severe penalty on an offender than that available at the time of the offence, in breach of the common law principle against retroactivity and Article 7 of the European Convention on Human Rights. We accordingly proposed that the clean sweep be disapplied in relation to this section as re-drafted (clause 247). In the children and young person's consultation we sought consultees' views on this proposal.

7.83 Consultees, including the Sentencing Council, the Law Society, the Legal Committee of Her Majesty's District Judges (Magistrates' Courts), the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, and the Bar Council, unanimously agreed with this decision.

7.84 Accordingly, under the Code, post-sentence supervision for detention and training orders will continue to apply only to offences committed on or after 1 February 2015.

---

210 [2008] EWCA Crim 462, [2008] 2 Cr App R (S) 102.

211 [2008] EWCA Crim 703, [2008] 2 Cr App R (S) 112.

212 See, SI 2015/40, art 2(f).

213 See, The Sentencing Code: Disposals relating to children and young persons (March 2018) Law Commission Consultation Paper No 234, para 2.95.

Detention for a specified period ("grave crimes" provision)

7.85 The power to impose detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 enables a court to impose a sentence of detention for a determinate period or for life, on conviction for certain offences listed in that section.

7.86 Clause 250 provides for the availability of a sentence of detention for a specified period in relation to persons under 18. It features a table in subsection (1) which reproduces the offences to which the provision applies, this being structured in a format that renders it more comprehensible, with italicised cross headings grouping the types of offence together. Additionally, the provision features signposts to provisions setting out required sentences (of life and in respect of firearms), ensuring that users are aware of relevant provisions.

7.87 In the main consultation, we asked consultees whether this re-draft made the provision easier to understand. All consultees who responded to this question thought the re-draft an improvement. This included the Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Senior District Judges, the London Criminal Courts Solicitors' Association and Lesley Molnar-Pleydell (Langley House Trust).

7.88 At the time of the consultation, the table in clause 250 was found in Schedule 6 to the draft Bill. It was ultimately concluded, however, that while the addition of sub-headings and a tabular format helped make the effect of the provision far clearer, its length did not merit a separate Schedule. Accordingly, the provision was moved. The use of sub-headings within a section is a fairly novel concept but is one we believe aids clarity.

Extended determinate sentences

7.89 Clauses 254 to 257 re-draft section 226B of the Criminal Justice Act 2003 and related provisions, which provide the power to impose an extended determinate sentence of detention in the case of a person aged under 18 convicted of an offence listed in Schedule 15 to the Criminal Justice Act 2003. The re-drafting of these provisions mirrors the approach adopted in relation to their equivalent for those aged 18 to 20, and 21 and over in clauses 266 to 268 and 279 to 282.

7.90 Those provisions, and the changes made to them, are discussed in more detail in Chapter 9 of this Report.

Detention for life

7.91 There are two provisions in Chapter 2 of Part 10 of the Sentencing Code which provide a duty to impose a life sentence on an offender aged under 18. Clause 259 provides for the duty to impose a sentence of detention at Her Majesty's pleasure in cases of offenders aged 18 at the time of the offence who are convicted of murder. It is a re-draft of section 90 of the Powers of Criminal Courts (Sentencing) Act 2000, and drafting changes are limited to splitting the section into multiple subsections to make its effect clearer.

7.92 Clause 258 provides for the duty to impose a life sentence on a dangerous offender where the requisite conditions are satisfied. The corresponding provision in relation to adults is discussed in more detail in Chapter 9 of this Report. As the same issues

arise in relation to the drafting and the application of the clean sweep, reference should be made to that chapter.

7.93 Finally, clauses 260 and 261 provide for the place of detention for orders imposed under Chapter 2 of Part 10 of the Sentencing Code.

Orders in relation to parents and guardians

7.94 The current law provides for a number of orders capable of being imposed upon parents or guardians consequent on a finding of guilt in relation to a child or young person for whom they have parental responsibility. These are:

(1) parental payment orders;

(2) parental bind overs; and

(3) parenting orders.

Parental payment orders

7.95 The provisions relating to parental payment orders, currently contained in sections 136 to 138 of the Powers of Criminal Courts (Sentencing) Act 2000, have been significantly restructured in the Sentencing Code.

7.96 The power to order a statement as to a parent or guardian's financial circumstances, currently found in section 136 of that Act, has been combined with the general power to order a statement as to an offender's financial circumstances (currently in section 162 of the Criminal Justice Act 2003) in clauses 35 and 36 in Chapter 1 of Part 3 of the Sentencing Code. This has allowed the streamlining of these two provisions, and clarified the effect of section 136 of the 2000 Act, which currently applies a number of subsections of section 162 of the 2003 Act. Similarly, clause 383 reproduces section 138 of the Powers of Criminal Courts (Sentencing) Act 2000, to reproduce the relevant subsections of section 165 of the Criminal Justice Act 2003 as modified, rather than simply applying the relevant section with modifications.

7.97 Section 137 of the Powers of Criminal Courts (Sentencing) Act 2000 currently provides the court with the power, or in certain cases, duty, to make a parental payment order where the court imposes a fine, costs or compensation order on a child or young person who has been convicted of an offence. A parental payment order is an order that the financial penalty should be paid by the parent or guardian of the child or young person, rather than the child or young person themselves. Section 137 also provides the power, or duty, to make a parental payment order where a fine or surcharge is ordered to be paid under provisions listed in subsections (1A) and (2) of that section. However, there are no signposts or indications to the court in those provisions to the existence of this power, or duty.

7.98 The provision has been re-drafted so that clause 383 provides that the power, or duty, to make a parental payment order applies wherever an enactment provides that it does. Clauses have been added in all the appropriate places to state that this clause applies when imposing a financial order on a child or young person. This change helps to ensure that the courts are always aware of their powers or duties.

7.99 In the children and young person's consultation we sought consultees' views on whether the re-drafting of these provisions made the effect of the law clearer. Consultees, including the Bar Council, the Senior District Judge, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges and the Law Society, unanimously agreed that it did.

Parental bind overs

7.100 The courts' power to bind over an offender to keep the peace have only been signposted in the Sentencing Code. While they are often used in the disposal of criminal cases, they can be imposed on any individual who is before the court, including witnesses giving evidence, and complainants.[214] For this reason, we have concluded that it is not appropriate for them to be re-drafted in the Code. However, the power to bind over a parent or guardian contained in section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 is only exercisable upon the conviction of a person aged under 18, and this provision has accordingly been reproduced in clause 377. A number of minor linguistic changes have been made to this clause to ensure consistency of language in the Sentencing Code and to provide greater clarity.

Parenting orders

7.101 Chapter 4 of Part 11 of the Sentencing Code contains those provisions relating to the availability, making and effect of parenting orders that are reproduced in the Sentencing Code. These provisions are currently found in sections 8 to 10 of the Crime and Disorder Act 1998 and paragraphs 9D and 9E of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.

7.102 Parenting orders under section 8 of the Crime and Disorder Act 1998 are available where various civil orders are made, where various orders are imposed upon a child or young person consequent on a conviction, where a child or young person is convicted of an offence, or where a person is convicted of an offence under section 443 or 444 of the Education Act 1996. The scope of the Sentencing Code is limited to provisions about which a sentencing court needs to be aware in discharging its duty and in relation to a court's sentencing powers. This means in practice the scope is limited to orders available on a conviction.[215] In re-drafting these provisions a decision had to be made as to whether the entirety of section 8 of the Crime and Disorder Act 1998 should be signposted, or whether the section should be split, and if so, how. It was initially decided only to re-draft those forms of parenting order that are available upon the conviction of a child or young person, or of any person for an offence under section 443 or 444 of the Education Act 1996.

7.103 In the children and young person's consultation we sought consultees' views on this decision, and whether they agreed with the division we had arrived at.

---

214 For more detail see The Sentencing Code – Volume 1: Consultation Paper (July 2017) Law Commission Consultation Paper No 232, para 2.84.

215 For more detail, see Chapter 3.

7.104 Consultees unanimously agreed with this decision. The overwhelming feeling was perhaps well summarised by Dr Jonathan Bild (University of Cambridge) who observed:

> I am broadly in favour of the Sentencing Code containing as much of the relevant law as possible directly within the Code rather than signposted from the Code as this appears more in keeping with the ideals of the consolidation exercise. Therefore, I agree with the decision to re-draft these provisions in the Sentencing Code.

7.105 The Bar Council felt it would be desirable if civil parenting orders were also signposted within the Sentencing Code. However, to do this would be to expand drastically the scope of the Sentencing Code project. We consider that it is better that the Sentencing Code is consistent in this regard, in that it does not signpost civil orders, rather than inconsistent and potentially likely to induce errors as to the availability of other civil orders.

7.106 [In the light of the response of consultees we have retained these provisions in the Sentencing Code. We gave careful consideration to also re-drafting the provisions relating to parenting orders made as a consequence of a criminal behaviour order, and as a consequence of a sexual harm prevention order made on conviction. We ultimately, however, decided that the difficulty with separating these provisions from their civil counter-parts, and the possibility for divergence and confusion, meant that on balance it was better to retain these provisions in the Crime and Disorder Act 1998. We have though inserted into the Parts of the Sentencing Code relating to criminal behaviour orders and sexual harm prevention orders signposts to the power to make a parenting order where such an order is imposed on the conviction of a child or young person.

Appeals

7.107 In the children and young person's consultation we provisionally proposed to repeal (without restating) section 10(5) of the Crime and Disorder Act 1998. Section 10(5) of that Act creates an express power to appeal against a parenting order made against a parent or guardian for an offence under section 443 or 444 of the Education Act 1996.

7.108 It was then our view that the creation of an express power to appeal in this context, but not in relation to other behaviour orders, would create an implication that such orders are not sentences and that therefore there is no right of appeal against them.

7.109 We therefore asked consultees whether they agreed that parenting orders made against a parent or guardian for an offence under section 443 or 444 of the Education Act 1996 constitute sentences for the purposes of section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968. We did so on the understanding that if they did, there would be no issue in repealing section 10(5) of the Crime and Disorder Act 1998.

7.110 Consultees, including Her Majesty's Council of Circuit Judges, the Senior District Judge, the Legal Committee of Her Majesty's District Judges, the Bar Council, the Crown Prosecution Service and the Law Society, unanimously agreed that said orders would constitute sentences for the purposes of section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968. Therefore, even in the

absence of section 10(5) of the Crime and Disorder Act 1998 there would be a right of appeal against such parenting orders.

7.111 We are grateful to consultees for their legal analysis and we have accordingly omitted this provision.

Chapter 8: Non-custodial sentences

INTRODUCTION

8.1 In this chapter we explain the approach we have taken to the non-custodial sentencing orders that the court may impose following a conviction.

Structure

8.2 In preparing the main consultation, we explored possible approaches to the structure of the Sentencing Code, including the arrangement of those sentencing orders which are available to a court following a conviction. One approach we considered divided the orders into two categories: (1) primary sentencing powers – those orders which are capable of disposing of a case without the need for further orders (e.g. imprisonment, a community order, a fine, conditional discharge); and (2) further sentencing powers – those orders which can only be imposed in addition to a primary sentencing power (e.g. a criminal behaviour order or a sexual harm prevention order). We considered this way of presenting the orders would help users of the legislation and reduce the risk of errors arising from orders being erroneously imposed.

8.3 In the main consultation paper, we asked consultees whether there ought to be a duty on the court to adopt that classification when sentencing:

> [whether] 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"?

8.4 Responses to this question were mixed, with clear views expressed in support but also clear views expressed against the suggestion. However, the balance of opinion was broadly supportive.

8.5 The Bar Council, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges all expressed support.

8.6 Her Majesty's Council of Circuit Judges stated that:

> Again, this a valuable practical tool to ensure all aspects of the sentencing process are addressed. The terms *primary sentencing powers* and *further powers relating to sentencing* are unambiguous and focus the sentencer's mind on the structure of the sentence.

8.7 In contrast, the Law Society stated

> No; We do not believe it would be a good idea to make this mandatory, because currently judges have the power to make orders for 'no separate penalty' in relation to multiple offences on an indictment where they consider that the sentence for one

offence adequately represents the totality of the criminality of the acts which make up the offences in question.

8.8 The Ministry of Justice raised concerns that such a reform would go outside the scope of this project, by removing judicial discretion.

8.9 In the light of the mixed response to this proposal, we have decided not to create a duty on the court to impose a primary sentencing order. We have, however, decided to retain the structural approach of separating the orders which are capable of disposing of a case as the sole order imposed, from those which can only be imposed in conjunction with an order which can be the sole order imposed.

8.10 Accordingly, we have decided to place all orders which are, without more, capable of constituting the sentence to be imposed in a case into the Third Group of Parts ("Disposals"), and those orders which may only be imposed in addition to such orders into the Fourth Group of Parts ("Further powers of sentencing").

8.11 The Third Group of Parts contains custodial and non-custodial orders, including fines, compensation orders, discharges, orders for forfeiture and community orders. Those orders are dealt with in this chapter of the report. The custodial orders, including suspended sentence orders, are dealt with in Chapter 9 of the report. Orders which are exclusively available for offenders aged under 18 at conviction are dealt with separately in Chapter 7.

8.12 As noted above, we have, however, decided not to pursue the part of the proposal which would have created a duty on the court to impose at least one order from the former category. The Law Society's response in relation to the power to make no separate penalty raises a wider policy issue of whether a court should be able to take such a course. We have therefore decided not to recommend that the law be changed in this way.

8.13 The remainder of this chapter explores the re-drafting of the various provisions relating to non-custodial disposals.

DISCHARGES

8.14 Part 5 contains provisions providing for the power to discharge an offender absolutely or conditionally. We have made numerous changes to the way in which these provisions have been drafted. In the current law, section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 contains the power to impose both an absolute and conditional discharge. We took the view that the position would be simpler and clearer if the two powers were separated. Accordingly, clauses 79 and 80 contain the power to impose an absolute discharge and a conditional discharge, respectively.

8.15 These provisions follow the standard approach to drafting that we have adopted in the Code, namely to provide for a description of the order, the circumstances of its availability and then the test for its imposition. We have adapted some of the language to reflect modern drafting practices, for instance amending the word "from" in section 12 (1)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 to "beginning with". This ensures that the period for which a conditional discharge can be imposed is three

years, not three years and a day. This promotes consistency across the Code in relation to how periods of time are expressed.

8.16 The provisions dealing with offences committed during the period of a conditional discharge are introduced by clause 81 and located in Schedule 2. We have made a number of amendments here, to bring the provisions into line with our policy in relation to the re-sentencing of offenders (as to which see Chapter 5 of this Report). The changes ensure that:

(1) judges in the Crown Court are limited to the powers of the magistrates' courts in circumstances where they are re-sentencing an offender who committed a further offence during the currency of a conditional discharge where the original court was limited to the sentencing powers of the magistrates' court; and

(2) where an offender aged under 18 at conviction is to be re-sentenced following the commission of a further offence during the currency of a conditional discharge, the resentencing is by reference to their age at the date of the original conviction (as to this issue, see Chapter 7 of this Report).

8.17 These amendments both ensure that the Code is consistent in the way in which it deals with the re-sentencing of those under the age of 18 at the original conviction and clarifies that the re-sentencing court has the sentencing powers of the original court.

STREET OFFENCES

8.18 Clause 117 operates as a signpost to the power to impose an order under section 1(2A) of the Street Offences Act 1959. This order requires the offender to attend three meetings with a supervisor for the purposes of addressing the causes of the conduct constituting the offence. The signpost highlights the fact that where an order under the 1959 Act is imposed, no other penalty may be imposed.

8.19 We considered whether this power (and the subsequent provisions concerning breach and amendment of such orders) should be repealed and re-enacted in the Sentencing Code. As the 1959 Act is so short, we took the view that to remove those provisions relevant to sentencing and to bring them into the Code would be to leave the 1959 Act in an incoherent state, with just two substantive provisions remaining. Further, as the order under section 1(2A) applies only to the offence under section 1(1), to bring the provision into the Code would be to make the law more complex – requiring additional steps to be considered by the judge. Accordingly, we decided to draft this clause as a signpost to the 1959 Act.

FINES

Scope

8.20 Chapter 1 of Part 7 of the Sentencing Code contains those provisions relating to the imposition of fines. As we set out in the main consultation,[216] this does not reproduce the provisions which govern the maximum fine available for an offence; just as the

[216] The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 6.2 to 6.8.

provisions setting the maximum period of imprisonment for an offence, these provisions will continue to be found in, or in proximity to, the offence-creating provision.[217]

8.21 Chapter 1 of Part 7 does, however, contain those provisions relating to the maximum fine for an offence which are of general application. For example, the power of a magistrates' court or Crown Court to impose a fine where the maximum sentence for an offence does not include a reference to a maximum fine has been reproduced in the Sentencing Code (see clauses 119 and 120). Similarly, we decided to reproduce the standard scale for summary offences (see clause 122) as it applies to all summary only offences.

8.22 In contrast, section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which amended the maximum sentence for offences punishable by a maximum fine of £5,000, to allow for unlimited summary fines), has not been re-produced in the Sentencing Code. This provision is, in our view, one relating to the maximum fine available for specific offences, and not suitable for inclusion. It has, however, been signposted in clause 122(3), to ensure that those applying the standard scale are not misled.

8.23 Further, in line with the general policy for the Sentencing Code to include only provisions to which courts need to have reference when imposing sentence,[218] this chapter does not contain those provisions relating to the enforcement of financial penalties (such as those in Part 3 of the Magistrates' Courts Act 1980). This is to ensure that the Code remains navigable, clear and useful for sentencing courts.

8.24 In the main consultation paper we asked a general question seeking views on the balance that the Code strikes in including/excluding certain provisions relating to fines. Consultees were generally satisfied with the balance struck. The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association and the Senior District Judges all expressed support, though several added further comments.

8.25 The Bar Council expressed the view that it would be helpful to include in the Code the fine bands used in the Sentencing Council's guidelines. In contrast, the Magistrates' Association, while stressing the importance of an explanation of the fine bands being clearly available in a public document, argued that primary legislation is not necessarily the appropriate place for this information.

8.26 We do not believe that it would be appropriate to include the fine bands in the Sentencing Code for three reasons. First, the Sentencing Code includes only those provisions relating to the procedure of sentencing. It does not deal with the sentence that ought to be imposed where the court has a discretion; this remains the purview of the Sentencing Council and the Court of Appeal (Criminal Division). Secondly, to reproduce the fine bands would turn guidelines issued by the Sentencing Council into primary legislation. This would be a substantial change to the law, and not appropriate in a consolidation. Thirdly, we agree with the Magistrates' Association that as a matter

---

217 For more detail, see Chapter 3.

218 See, paragraph 3.27 above.

of principle, primary legislation is not the appropriate place for this information as it is sentencing guidance rather than primary law, and that they ought to continue to appear in the guidelines issued by the Sentencing Council.

8.27 The Senior District Judges expressed the view that the Sentencing Code ought to include the provisions for the enforcement of fines. They argued that the enforcement of fines in the magistrates' court is inextricably linked to sentencing. We continue to take the view that the inclusion of these provisions is inappropriate, on the grounds that:

(1) these provisions are contained in a single coherent "code" in Part 3 of the Magistrates' Courts Act 1980;

(2) the relevant provisions apply not only to fines imposed on conviction but also to fines in non-criminal cases; and

(3) to include those provisions relating to the enforcement of fines would be inconsistent with the general approach in the Sentencing Code of excluding provisions relating to the enforcement and administration of sentences.

8.28 Further, to include all provisions relating to the enforcement and administration of sentences would be an enormous task that we would not have been able to complete with the resources available.

The standard scale

8.29 Section 37 of the Criminal Justice Act 1982 provides for a standard scale of fines for summary offences. This provides for five levels, each of which are given a monetary value. We considered whether we should apply the clean sweep policy to this section. As the standard scale of fines has been subject to change, with some of the levels being increased, to do so would be remove the previous, historical, limits and apply the modern limits to all offenders. This would be to increase the maximum sentence for historical summary-only offences and would therefore breach the common law prohibition against retrospectivity and Article 7 of the European Convention on Human Rights. The number of cases to which this applies is likely to be very limited but the risk exists and therefore the clean sweep has been disapplied in this context. The historic layers therefore remain in force.

8.30 To avoid the need to refer to complex, and easily missed, transitional provisions, the differing figures have been reproduced in separate columns in clause 122.

8.31 All consultees who responded specifically to this suggestion, namely the Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association, the Senior District Judges and Lesley Molnar-Pleydell (Langley House Trust) thought that the table was helpful.

8.32 The Registrar of Criminal Appeals, the Magistrates' Association and the Senior District Judges all thought that the fact that the maximum fine for offences committed after 13 March 2015 is now unlimited could have been portrayed more clearly in the table.

8.33 We considered what steps could be taken to reflect the effect of sections 85 and 86 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, after some exploratory work, including discussions with the Ministry of Justice as to whether level 5 could be omitted, we ultimately concluded that no changes could be made.

8.34 The issue arises from the manner in which the amendment to level 5 of the standard scale was brought about by sections 85 and 86 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 85 did not ensure that all references to level 5 fines became references to an unlimited fine, nor did it abolish level 5 fines. Subsection (5) allowed the Secretary of State to disapply section 85, and therefore preserve reference to a level 5 fine, or to create a separate maximum fine for the offence.

8.35 The primary difficulty here is that in relation to any particular offence the effect of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is unclear. This is because section 85 was drafted as a non-textual amendment. Rather than amending the text of every reference to an offence being punishable on summary conviction by a fine or maximum fine of £5,000 or more, section 85 instead requires such references to be read as a reference to a fine of any amount. This is also known in technical drafting terms as a "gloss".

8.36 To alleviate the potential for error by a court not identifying the existence and effect of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which effectively raised the value of level 5 from a £5,000 fine to an unlimited fine), clause 122 includes a signpost to section 85 and summarises its effect.

8.37 Sections 85, 86 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provide government ministers with the power to make textual amendments to any enactment to clarify the effect of these changes. However, these powers have not been exercised. As the Sentencing Code is not consolidating the maximum penalties available for an offence, this change cannot be achieved in the Sentencing Code. It is our view, however, that exercising these powers (to reflect the effect of sections 85 and 86) would bring greater transparency to this part of the law of sentencing.

Recommendation 7.

8.38 The Government should exercise the powers under sections 85, 86 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend the text of references to an offence punishable on summary conviction by a fine or maximum fine of £5,000 or more to reflect the effect of sections 85 and 86 of that Act.

Availability of a fine in the magistrates' court

8.39 Under the current law there is no provision which sets out the general availability of a fine as a sentence in the magistrates' court. In contrast, section 163 of the Criminal Justice Act 2003 clearly sets out the availability of a fine in the Crown Court when sentencing.

8.40 The Sentencing Code introduces a new clause – clause 118 – which clarifies when a fine is available on summary conviction, and the maximum available fine in such cases. Consultees were in near-unanimous agreement that this was a useful and helpful addition. Only one consultee felt it was unhelpful.

8.41 The Bar Council and the London Criminal Courts' Solicitors Association raised concerns that the provision may be too complicated. Having reviewed the provision, and explored the alternatives they proffered, we continue to feel the current clause is the simplest way of expressing the current legal position. We agree that the position does remain somewhat complex, but we note that if the Government did exercise the powers under sections 85, 86 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as recommended above, this provision could be further simplified.

COMPENSATION ORDERS

8.42 Chapter 2 of Part 7 of the Sentencing Code contains those provisions concerning compensation orders. This chapter largely re-writes the provisions in the Powers of Criminal Courts (Sentencing) Act 2000 regarding such orders, but also includes a signpost to other powers to order the payment of compensation under the Modern Slavery Act 2015 and the Prevention of Social Housing Fraud Act 2013.

8.43 Consultees unanimously agreed that the provisions as re-drafted were clearer and more accessible. A number of more detailed points of feedback were also received, which we have gratefully taken into account.

8.44 In particular, Her Majesty's Council of Circuit Judges noted that clause 144 (then clause 104 of the Bill published at the start of the main consultation) retained the phrase "plaintiff", while the civil courts now use the plainer English phrase "claimant". We are grateful to them for this observation, and have made this change in the draft Bill.

The clean sweep

8.45 In the main consultation, we provisionally proposed that the clean sweep ought to be applied to the removal on the limit on compensation orders in the magistrates' court made by the Crime and Courts Act 2013. It was our provisional view that as compensation orders were not punitive in their purpose,[219] they would not constitute a "penalty" for the purposes of Article 7 of the European Convention on Human Rights.[220] Therefore to impose a compensation order that is greater than the maximum order that was available at the time of the offence would not be to impose a greater penalty than the maximum available at the time of the offence.

8.46 The majority of consultees agreed with this analysis, including the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association and the Senior District Judges. However, the Bar Council, the Law Society and the London Criminal Courts Solicitors' Association all

---

219 See *R v Dorton* (1987) 9 Cr App R (S) 514.

220 As understood in *Welch v United Kingdom* (1995) 20 EHRR 247.

disagreed, arguing that compensation orders had a punitive effect on defendants in practice, and ought to be considered a "penalty" for the purposes of Article 7.

8.47 Without expressing a view as to which interpretation is correct, we consider that there is a legitimate argument about whether compensation orders are penalties for the purposes of Article 7 of the European Convention on Human Rights. Given the lack of certainty here, we have concluded that the clean sweep should be disapplied to changes to the maximum amount of compensation that can be ordered on summary conviction. Given the seriousness of breaching European Convention rights, and again without expressing a view as to the correct interpretation, the more conservative path was adopted here. The clean sweep has therefore not been applied to the financial limit on the power to make a compensation order in the magistrates' courts.

8.48 This has necessitated exceptions to the clean sweep not just for the change made by the Crime and Courts Act 2013 removing the limitations on compensation in the magistrates' court but also for the other historic changes to the maximum amount of compensation that can be imposed in the magistrate's courts. In particular:

(1) The increase from £2000 to £5000 effected by section 17 and Part 1 of Schedule 4 to the Criminal Justice Act 1991 which had effect only for offences committed on or after 1 October 1992;[221]

(2) The increase from £1000 to £2000 effected by article 2(1) and Schedule 1 to the Criminal Penalties etc. (Increase) Order 1984 (SI 1984/447) which had effect only for offences committed on or after 1 May 1984; and

(3) The increase from £400 to £1000 effected by section 60(1) of the Criminal Law Act 1977 which had effect only for offences committed on or after 1 December 1977.[222]

8.49 The effect of these exceptions has been reflected in a new table in clause 142(4) (mirroring the table used for the changes to the standard scale).

RESTITUTION AND RESTORATION OF PROPERTY

8.50 Chapter 3 of Part 7 of the Sentencing Code contains those provisions relating to the restitution and restoration of property. This principally re-drafts the general power to make a restitution order, currently contained in sections 148 and 149 of the Powers of Criminal Courts (Sentencing) Act 2000.

FORFEITURE AND DEPRIVATION OF PROPERTY

8.51 Chapter 4 of Part 7 of the Sentencing Code contains those provisions relating to forfeiture and deprivation of property. This principally re-drafts the general power to make a deprivation order, currently contained in sections 143 to 145 of the Powers of Criminal Courts (Sentencing) Act 2000. Section 144 of the 2000 Act previously modified the application of sections 1 and 2 of the Police Property Act 1897 for this

---

221 Criminal Justice Act 1991, Sch 12, para 6A and SI 1992/223, art 2(2) and Sch 2, para 1.

222 Criminal Law Act 1977, s 60(2) and SI 1977/1682, art 2 and Sch 1, para 1.

purpose. To make the effect of these provisions clearer we have instead re-drafted the relevant sections of the 1897 Act as modified in the Code.

8.52 As was set out in the main consultation paper, for a number of reasons including the narrow scope of a number of these other forfeiture powers, and that they are currently contained in pre-existing coherent regimes, we have not re-written these other powers in the Code. We have instead created a table signposting these other forfeiture powers and providing a description of their scope. As was acknowledged in the main consultation paper, due to their breadth and number we cannot be confident that this table is exhaustive, but we considered it was still a useful resource for users.

8.53 During the main consultation exercise, we asked consultees whether they agreed that the table was a helpful addition, and whether they could suggest any other forfeiture powers that ought to be included in the table.

8.54 Consultees were once more near-unanimous in endorsing the inclusion of the table as helpful. Only Graham Skippen (Solicitor, Fison and Co.) felt that unless the table could be made exhaustive it was unhelpful, although there was some debate as to its proper scope. The Bar Council, for example, having acknowledged the difficulty of creating an exhaustive table in this context, wondered whether it might be best to feature only those provisions which impose a duty to make a forfeiture order in certain situations. Others, such as the Law Society, the Registrar of Criminal Appeals, the Crown Prosecution Service and the London Criminal Courts Solicitors' Association were of the view that the inclusion of further forfeiture powers in the table would be helpful, all making various suggestions.

8.55 Having reviewed these suggestions, and having conducted some further research on the matter, the table in clause 160 has been amended to include forfeiture powers under:

(1) section 18 of the Cultural Property (Armed Conflicts) Act 2017;

(2) section 33C of the Environmental Protection Act 1990;

(3) section 42(3) of the Health and Safety at Work etc. Act 1974;

(4) section 7 of the Terrorism Act 2006;

(5) section 11A of the Terrorism Act 2006; and

(6) section 24(3) of the Forgery and Counterfeiting Act 1981.

8.56 As with the rest of the Sentencing Code we have not included in this signpost forfeiture powers which are not exercisable by a court on conviction, and are only exercisable on a civil application. This has meant some powers suggested by consultees have been excluded. For example, both the Bar Council and the Criminal Appeal Office suggested the inclusion of section 97 of the Trade Marks Act 1994, citing the frequency with which such powers are used in the relevant cases. This power is, however, exercisable only on a civil application, even if it can be dealt with at the conclusion of a case. The decision not to signpost such powers will of course not affect their availability, and it is noted that the simple fact that an application must be

made for such orders will ensure that the courts attention is brought to the relevant provision when necessary.

8.57 This chapter also contains a general signpost to the powers to make confiscation orders.

DISQUALIFICATION

Introduction

8.58 Part 8 of the Sentencing Code deals with orders of disqualification. Part 8 of the Code is divided into two Chapters; the first containing the provisions dealing with driving disqualification and the second dealing with other disqualification orders.

8.59 In this part of the Report we first consider the scope of the Sentencing Code and the various decisions made in relation to the inclusion or exclusion of certain provisions. We then consider the various changes which have been made to the provisions which have been included in the Sentencing Code.

Scope

8.60 The first thing to consider is what is meant by the term ‘disqualification’. A starting point may be to construe disqualification widely, encompassing all orders made by a judge in a criminal trial which prohibit certain behaviours. This would include ancillary orders such as (a) criminal behaviour orders and sexual harm prevention orders as well as (b) orders disqualifying a person from driving, or from keeping an animal. However, there is a distinction to be drawn between these different types of orders. Whereas criminal behaviour orders and sexual harm prevention orders are principally preventive in their purpose, driving disqualification orders serve a dual purpose of prevention and punishment.

8.61 Additionally, there is a distinction to be drawn on the basis of the nature of the power to disqualify. Whereas a driving disqualification and a disqualification from being a company director prohibit the offender from activities specified in the statute, orders such as criminal behaviour orders and sexual harm prevention orders provide courts with a wide discretion to define the terms of the orders, for instance, a prohibition from associating with named individuals or congregating in groups, usage of the internet, carrying knives and entering specific roads or areas.

8.62 A further consideration, discussed in detail in Chapter 3, is the existence of provisions relevant to a sentencing court but which have a wider application than just sentencing. The example we used in Chapter 3 was that of the disqualification of company directors. That power has relevance for purposes wider than merely a sentencing court. Accordingly, we opted to signpost this power rather than repeal it and redraft it into the Code. The rationale was that despite the benefit to the law of sentencing, making the Code more user-friendly and comprehensive, it would be to do damage to the Company Directors Disqualification Act 1986 and disrupt that regime to the extent that on the whole, the law was less clear and less accessible.

8.63 In other instances, although the power is exclusively applicable to sentencing, there are sometimes good reasons for signposting rather than incorporating into the Code. The principal such reason is the coherence of the existing scheme which would be

disrupted if we were to incorporate those aspects dealing only with criminal sentencing. The example we used in Chapter 3 in relation to provisions of a regime which was already coherent was that of driving disqualification under the Road Traffic Offenders Act 1988. Although the powers are exclusively sentencing powers, the 1988 Act is a self-contained, coherent enactment in relation to driving offences. To repeal the sentencing powers and redraft them in the Sentencing Code might be to improve the law of sentencing, but it would be to make the 1988 Act less accessible. On balance, we decided to signpost these provisions in the Sentencing Code.

8.64 We therefore decided to redraft, in the Code, those provisions which fall within the scope of the project as defined in Chapter 3 – ie procedural provisions of which a sentencing court needs to be aware. We have, however, excluded those which had a relevance beyond sentencing or those which were part of a coherent regime where to do so would disrupt that regime and on balance leave the overall state of the law in a worse position.

8.65 In Chapter 1 of Part 8 of the Sentencing Code this left us with the general driving disqualification powers under the Powers of Criminal Courts (Sentencing) Acts 2000 sections 146 and 147 and, in Chapter 2 of Part 8, other disqualification powers.

Provisions contained in this part

Driving disqualification

8.66 Clauses 162 to 169 reproduce sections 146 and 147 of the Powers of Criminal Courts (Sentencing) Act 2000. This chapter contains two principal powers – clause 163, the general power which is available upon conviction for any offence and clause 164, the power which is available where a motor vehicle was used for the purposes of crime.

8.67 We have made an exception to the clean sweep in clause 163. Under the current law, an order under that section is available only where the offence was committed on or after 1 January 1998. As the order is available either in conjunction with another sentence or as the exhaustive way of disposing of a case (and because it serves a dual purpose of punishment and public protection) applying the clean sweep would expose an offender to a more severe penalty than that which existed at the time of the offence. We have therefore retained this prospective commencement in the Sentencing Code. The commencement information (ie that the provision applies only to offences committed on or after 1 January 1998) is contained in subsection (1) of the clause. This is in line with our policy of making the Code as clear and simple as possible.

8.68 Clause 164 provides for the more limited power to impose a driving disqualification where an offender has been convicted in the Crown Court of an offence punishable on indictment by a sentence of 2 years' imprisonment or more, and where the court is satisfied that a motor vehicle was used for the purpose of committing, or facilitating the commission of, the offence. We have made a pre-consolidation amendment to section 147(1) to repeal the limitation on the imposition of this order to cases where the offender was committed to the Crown Court by virtue of section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. This change allows the Crown Court to impose a driving disqualification under this provision where the offender has been committed to the Crown Court under any provision which gives the Crown Court the power to deal with the offender as if convicted on indictment. This change does not

offend the clean sweep as in all cases the order would have been available if the offender had been committed under a different provision.

8.69 We have also made an exception to the clean sweep in this provision. Under the present law driving disqualification orders under that section where the offender is convicted of common assault or of any other offence involving an assault is only available where the offence is committed on or after 1 July 1992.[223] As explained above, applying the clean sweep would therefore potentially expose an offender to a greater maximum penalty than was available at the time of the offence. This transitional provision has therefore been retained, but instead of existing in a separate Schedule is it is now clear in clause 164 itself – see subsection (3).

8.70 Clauses 165 and 166 consolidate and combine provisions which applied to both powers under sections 146 and 147 of the 2000 Act in relation to the production of licences and the determination of the appropriate term of the disqualification. This streamlines the provisions and reduces the number of clauses to which it is necessary to refer. It also reduces the risk of inadvertent diversion of the two sets of provisions.

8.71 Clause 167 reproduces the relatively new provisions concerning the extension of driving disqualification where the court also imposes a custodial sentence. The provision has been slightly redrafted. To make it easier to read, the subsection containing the descriptions of how to calculate the extension periods is now in a table. When originally commenced in 2015, this provision was applicable only to offences committed wholly after the commencement date. We have not disapplied the clean sweep to this provision as there is no risk of exposing an offender to a more severe penalty than that which could have been imposed at the time of the offence, given it has been possible to impose a driving disqualification order under this (or a previous) power.

8.72 Clause 168 is the related extension of the driving disqualification power where the court imposes a custodial sentence (other than a suspended sentence) for an offence other than one on which the court imposes a driving disqualification order under clauses 163 or 164. There are limited changes to the drafting of this provision.

8.73 Finally, this chapter contains clause 170 which operates as a signposting provision to the power to disqualify under sections 34, 35 and 36 of the Road Traffic Offenders Act 1988 and the power to endorse a driving record under section 44 of that Act. For the reasons stated above, we determined that the best way to proceed was by not disturbing the coherence of the 1988 Act and instead, have used signposts here to alert users to the existence of these provisions.

Disqualification under other acts

8.74 Chapter 2 of Part 8 of the Sentencing Code contains just two clauses. Both of these operate as signposts. For the reasons articulated above, we chose to signpost rather than to repeal the provisions in question and redraft them in the Code.

8.75 Clause 171 operates as a signpost to powers under the Animal Welfare Act 2006. The Animal Welfare Act 2006 contains provisions that relate to offenders who have been

[223] Powers of Criminal Courts (Sentencing) Act 2000, Sch 11, para 8(b).

convicted of certain animal cruelty offences. These provisions give the court the power to make disqualification, destruction and deprivation orders. In the main consultation paper, we proposed merely to include a signpost to these provisions.

8.76 If the 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 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.

8.77 The clause also includes a reference to the power under the Dangerous Dogs Act 1991 to disqualify a person from owning or keeping a dog. The same reasoning applies here as it does to the animal welfare powers and therefore this subsection operates as a signpost.

8.78 Finally in this chapter of the Code, there is a signpost to the power to disqualify a person from being the director of a company. Again, for the reasons articulated above, we determined that the best approach was to use a signpost so as not to disturb the coherent body of law in the Company Directors Disqualification Act 1986.

COMMUNITY ORDERS

8.79 Part 9 of the Code contains provisions relating to community sentences. Youth rehabilitation orders are dealt with alongside the other orders which may only be imposed in relation to offenders aged under 18. The following discussion deals with community orders, which are capable of being imposed on offenders aged 18 or over at conviction for an imprisonable offence.

8.80 This part of the Sentencing Code is largely a simple re-statement of the existing legislation. We have, in line with our general policy, made substantial streamlining and consistency changes throughout as well as restructuring the order of the material. These do not, in most cases, alter the legal effect of the provision. The changes are designed to improve the clarity and accessibility of the law. In the remainder of this chapter of the Report, we explore the more extensive changes have been made.

Structure

8.81 We decided to restructure the provisions in accordance with our general approach across the Code. Accordingly, the Code first sets out a table containing details of all the requirements which may be imposed under a community order. In the main consultation paper, we asked consultees whether this structuring of the material in relation to community orders was helpful. The Law Society, the Crown Prosecution Service, the Registrar of Criminal Appeals, the London Criminal Courts Solicitors' Association and Lesley Molnar-Pleydell (Langley House Trust) all expressed enthusiasm for the re-drafting in the Code, with Her Majesty's Council of Circuit Judges welcoming "simplification of this unnecessarily complicated area". Accordingly, we have maintained this structure and in the following paragraphs we briefly describe the approach taken.

8.82 In order to ensure that the body of the Code is easy to navigate, the provisions detailing the different requirements are contained in a Schedule 9. The table at clause 201 provides the Part of the Schedule in which the provisions about each requirement are contained. Additionally, any particular restrictions or requirements in relation to (a) the availability; and (b) the imposition of the requirements are included in the table. We considered that this not only enhanced the navigability of the Code, but also was more likely to reduce the risk of a user failing to identify a relevant restriction or obligation. We asked consultees whether they agreed that this was an improvement on the current law. All consultees agreed that it was, save for the London Criminal Courts Solicitors' Association who suggested that the table should include all the relevant information rather than signposts to the relevant paragraphs of the Schedule. We considered this suggestion but found that it was impractical to present such voluminous information in tabular form without it becoming difficult to navigate and understand. Accordingly, we have generally retained the approach described in the consultation paper as endorsed by the majority of consultees.

8.83 After further consideration, however, we have amended the table to omit what was previously column 4: restrictions or obligations prior to imposing a requirement. It was felt that the amount of information presented – and in particular the references to the Schedule for transfer of orders to Scotland and Northern Ireland which would simply be misleading for most cases – limited the extent to which this column was useful. The Schedule has regardless been re-structured so that said restrictions or obligations prior to imposing a requirement exist in their own clearly defined paragraph. Users would need to have reference to the relevant Part of the Schedule to ascertain what their powers were anyway and accordingly it was felt that this signpost added relatively little. It has instead been replaced by a general signpost in clause 208(2).

8.84 Following the provisions detailing what constitutes a community order come the provisions detailing its availability. Clause 202 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.[224] For that reason, it is not included in the Sentencing Code. In clause 202 we have made an amendment to clarify that the restriction on imposing a community order in circumstances where a mandatory sentence applies is subject to section 73(5) of the Serious Organised Crime and Police Act 2005 (reduction in sentence for assistance given to prosecution). Clause 203 draws attention to the prohibition on imposing a community order and a suspended sentence order.[225]

8.85 Thereafter, the Code sets out the power to make a community order (in clauses 204 and 205) and the provisions concerning the availability and imposition of requirements (in clauses 206 to 208). Clause 204(4) alerts the user to the existence of the pre-sentence reports requirements and their application to community orders. Originally

---

224 *Fontenau v DPP* [2001] 1 Cr App R (S) 15.

225 This applies when the court imposes a suspended sentence order for the offence, any other offence of which the offender is convicted by of before it, or any other offence for which it deals with the offender.

this provision was contained in section 156 of the Criminal Justice Act 2003, however, we have chosen to re-order the provisions and additionally to include signposts in some places so as to reduce the risk of a user omitting to make reference to a provision when they should.[226] In the main consultation paper, we introduced the concept of an "available requirement" to ensure that a single version of these provisions can accommodate the fact that new community requirements may, from time to time, be piloted in specific areas of the country and for different purposes. We asked consultees whether they agreed that this device was useful and improved the clarity of the law in this area.

8.86 The majority of consultees thought that it did, with the Law Society, the Bar Council, the Crown Prosecution Service, Lesley Molnar-Pleydell (Langley House Trust), Her Majesty's Council of Circuit Judges and the Senior District Judges all expressing support.

8.87 The Bar Council's support was expressed subject to the caveat that:

> We are concerned that the current drafting of this chapter, and in particular clause 134, may possibly restrict the ability of court centres to try out new rehabilitative programmes, for example the Choices and Consequences ("C2") Programme operated in Hertfordshire. If there is any risk of such valuable local initiatives being compromised by the ways in which these provisions are currently drafted, we would value the opportunity to provide further input.

8.88 Her Majesty's Council of Circuit Judges also added that:

> We fear that, notwithstanding our concerns, inevitably new community requirements will continue to appear whether or not they simply represent a change of nomenclature. Again, we welcome the flexibility of the Code to be able to accommodate such initiatives, however long they last.

8.89 The London Criminal Courts Solicitors' Association explained that:

> The main problem we envisage with the 'available requirement' concept is that if a particular AR is available in one piloted area which is not available in other areas there will be no structure/ clarity on sentence. For example, in some areas more lenient penalties may be available to some Defendants but not to all which may lead to grounds for appeal. Difficulties then arise with unrepresented Defendants given the current issues Practitioners face with the increasing volume of refusals by the Legal Aid Agency to grant Representation Orders in the magistrates' courts for summary-only offences on the grounds that the "interest of justice test" is not met.

8.90 A similar concern regarding regional variance in availability of community order requirements was echoed by the Senior District Judges.

8.91 The Magistrates' Association noted "that there is no reference to the need for a Mental Health professional to agree to provide the order for a Mental Health Treatment

---

[226] As to which, see paragraph 3.79 above.

Requirement" and went on to say that "… Including reference to requirements which will be available by pilot is sensible."

8.92 Only the Registrar of Criminal Appeals thought the change added nothing, expressing the view that:

> The concept of an "available requirement" does not provide any further clarity. The availability of particular requirements is clearly set out at clause 135, the introduction of the term "available requirement" does not appear necessary. In addition, the table at clause 129 provides an index to the relevant restrictions for each individual requirement.

8.93 On balance, despite the mixed views of consultees, we have decided to retain this structural approach. No consultee suggested that the approach made the law less clear and we remain of the view that the benefits and clarity that this device brings outweigh any drawbacks. In response to the criticism regarding piloted requirements, we have inserted provisions which make clear that certain requirements are not available unless certain conditions are met. The following example provides an illustration of this in the case of the alcohol abstinence monitoring requirement currently being piloted.

Example 10

207 Community order: availability of particular requirements

Alcohol abstinence and monitoring requirement

(1) An alcohol abstinence and monitoring requirement is not an available requirement unless it is available by virtue of regulations under paragraph 1 of Schedule 24 (pilot schemes).

8.94 We consider that this meets the concerns of those consultees who expressed the view that the status of piloted requirements would be unclear if this approach were adopted.

Other changes

8.95 In addition to this high level structural change, we have made numerous minor changes here to improve the clarity and accessibility of the provisions. These include in clause 207 clarifying that an attendance centre requirement is available for an offender aged over 25 in circumstances where they were convicted when under 25.[227]

8.96 The following sections concern the imposition of particular requirements and detail provisions. For example, the requirement that courts ensure so far as is practicable

[227] In line with the general approach to sentencing, see for example *R v Ghafoor* [2003] EWCA Crim 1857, [2003] 1 Cr App R (S) 84.

that a community order requirement imposed avoids conflict with the offender's religious beliefs. These provisions have been streamlined and restructured.

8.97 The result of the application of the clean sweep to the provisions concerning community orders is to significantly simplify the law, including to:

(1) make a community order available for any offence, whenever committed, where the offender was convicted after the commencement of the Code;

(2) remove the partial commencement of the requirement that a court must (unless certain circumstances apply) impose at least one requirement for the purposes of punishment;

(3) remove the partial commencement of rehabilitation activity requirements so that under the Code, they apply to any offence, whenever committed;

(4) remove the partial repeal of supervision requirements and activity requirements, so that these are no longer available for any class of case; and

(5) remove the historic versions of the curfew requirements so that the most up to date/recent version applies to all cases.

8.98 There are other minor and technical changes. One example is clause 211 where we have amended the language to reflect the fact that a community order which imposes a drug rehabilitation requirement subject to review does not allow the Crown Court to delegate that review and that, accordingly, in some cases there will be no magistrates' court responsible for the review.

8.99 Finally, Chapter 2 of Part 9 of the Sentencing Code concludes with:

(1) provisions detailing the persons to whom copies of the orders must be provided;

(2) provisions concerning the duties of the offender to keep in touch with the responsible officer and to obtain permission before changing residence; and

(3) the introduction of the Schedules which provide for the breach, revocation and amendment of a community order and the transfer of community orders to Scotland and Northern Ireland.

Requirements

8.100 Schedule 9 provides for the requirements which may be imposed as part of a community order or suspended sentence order. The Schedule is divided into Parts, with one Part for each requirement. The broad structure adopted is for the description of the requirement to feature as the first paragraph of the Part, followed by details of any restriction on its imposition.

8.101 Numerous minor linguistic and structural changes have been made to the provisions in Schedule 9. Where these changes are of a more substantive nature, these can be found in Appendix 2 which details the changes made by pre-consolidation amendments.

Breach and amendment of orders

8.102 Schedule 10 provides for the court's powers on breach of a community order (whether by commission of a further offence or by failure to comply with a requirement), amendment of the order and revocation of the order. In particular, changes have been made to these provisions in relation to the power of the court to re-sentence an offender. These powers have been amended to give greater consistency across the Code. The equivalent material in Schedule 8 to the Criminal Justice Act 2003 provided for re-sentencing 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 consider 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.

8.103 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 re-sentencing (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 re-sentencing 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 would have been at the original sentencing hearing).

8.104 Elsewhere in the Schedule, the re-sentencing 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 the current sentencing powers (and not those the court had at the time of the original hearing).

> **Example 11**
>
> 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.

8.105 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.

8.106 In the main consultation paper, we asked whether consultees thought that these streamlining changes to the court's powers to revoke and resentence community orders have improved the consistency and clarity of the law. All consultees who responded to this question thought that the streamlining changes were an improvement. For example, the Registrar of Criminal Appeals stated:

> The previous inconsistency contained within schedule 8 CJA 2003 in the court's powers to revoke and resentence has been improved with the new drafting of paragraphs 15(3)(B)(ii) and 25(2)(b)(ii). It accords with the clean sweep, providing the re-sentencing court with powers under the Sentencing Code as it then appears rather than being limited to the powers it had at the time of the original sentencing hearing.

8.107 Numerous minor language and structural changes have been made to the provisions in Schedule 10. Where these changes are of a more substantive nature, these can be found in Appendix 2 which details the changes made by pre-consolidation amendment.

Transfer of orders to Northern Ireland and Scotland

8.108 Schedule 11 provides for the transfer of community orders from England and Wales to Scotland and Northern Ireland. Numerous minor language and structural changes have been made to the provisions in Schedule 11. Where these changes are of a more substantive nature, these can be found in Appendix 2 which details the changes made by pre-consolidation amendment.

Chapter 9: Custodial orders

INTRODUCTION

9.1 In this chapter of the Report, we explore the provisions which give sentencing courts the power to impose sentences of custody on those convicted of criminal offences. These are contained in Part 10 of the Sentencing Code.

9.2 In the following paragraphs, we consider the approach we have taken to the scope and structure of Part 10 of the Code, before detailing the particular provisions and any changes we have made in response to consultees' views on our provisional proposals in the main consultation paper.[228]

SCOPE AND STRUCTURE

9.3 The majority of the provisions contained in Part 10 of the Code fall comfortably within our policy on scope for the Code generally, as defined in Chapter 3. Provisions giving sentencing courts the power to impose a custodial sentence on an offender convicted of criminal offence are clearly provisions the court needs in order to sentence. There are, however, some provisions in Part 10 which fall closer to where we have drawn our boundary on scope.

9.4 For instance, we had determined that provisions which concern the administration and enforcement of penalties are not to be included in the Code, as they are not provisions a sentencing court needs in order to discharge its duties when sentencing. This resulted in the exclusion of release provisions from the Sentencing Code on the basis that the settled legal position is that release arrangements are not within the power of a sentencing court and are not to be considered when a court determines the appropriate sentence to be imposed. Similarly, there are provisions which automatically deduct time spent on remand in custody which require no order of a court before they take effect. Such provisions have been omitted from the Sentencing Code.

9.5 There is an exception to this general policy however, where, following discussions with Parliamentary Counsel, we determined that it was unavoidable. The exception applies to the provisions concerning the detention and training order where, because of the way in which the current law is arranged, it is not possible to separate the provisions. This will be explored in more detail below.

9.6 In the main consultation paper, we asked consultees whether it was desirable to split the provisions relating to specific custodial sentences into three age groups (under 18, 18 to 20 and 21 and over).

9.7 All consultees who responded agreed with the grouping of provisions into the three proposed age groups. This found favour with the Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council

---

228 The Sentencing Code (2017) Law Comm Consultation Paper No 232 paras. 9.1-9.46.

of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust) and the Senior District Judges.

9.8 The Registrar of Criminal Appeals stated:

> Clearly grouping the available sentences for offenders by age will ensure the powers available to the sentencing court are readily apparent and will reduce errors.

9.9 Agreeing with the structure chosen, the London Criminal Courts Solicitors' Association were of the view that:

> it is more important to ensure clarity in this area than be concerned about the length of drafting. It is an area of law in which errors are frequently made in our experience.

9.10 This reinforced our decision to draft provisions in a manner that has, in some instances produced longer clauses than the originating provision where doing so aids comprehension. For instance, where the effect of a provision can be made clearer and simpler, but to do so involves drafting a greater number of subsections or multiple provisions, we have chosen to adopt this approach. We have prioritised clarity over brevity.

9.11 We have therefore divided Part 10 into various chapters, with provisions applicable to those aged under 18, 18-20 and 21 or over distinct from one another. This replicates the approach taken by the current law but adopts a clearer and more coherent structure. For example, in the current law there is one set of provisions applicable to those aged 18 or over at conviction which are drafted in the alternative. Example 12 contains the provision containing the power to impose a suspended sentence in the current law, and the way in which we have re-drafted that provision in the Code.

Example 12 – Criminal Justice Act 2003

189 Suspended sentences of imprisonment

(1) If a court passes a sentence of imprisonment or, in the case of a person aged at least 18 but under 21, a sentence of detention in a young offender institution for a term of least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment or detention in a young offender institution is not to take effect unless—

(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and

(b) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.

Example 12 – Sentencing Code

264 Suspended sentence order for offender under 21: availability

(1) This section applies where, in dealing with an offender for an offence, the court imposes a sentence of detention in a young offender institution.

(2) A suspended sentence order (see section 285) is available in relation to that sentence if the term of the sentence of detention in a young offender institution is not more than 2 years.

277 Suspended sentence order for person aged 21 or over: availability

(1) This section applies where, in dealing with an offender for an offence, a court passes a sentence of imprisonment.

(2) A suspended sentence order (see section 285) is available in relation to that sentence if the term of the sentence of imprisonment is—

(a) at least 14 days, but

(b) not more than 2 years

9.12 As can be seen, our decision to divide the provisions by reference to the age of the offender produces slightly longer drafting overall. However, the provisions are clearer and easier to understand and the risk of a court imposing an unlawful sentence, for example imposing imprisonment upon an offender aged 19, is minimised.

9.13 Another benefit of this structure is that the effect of the different requirements applicable to those aged 18-20 and those aged 21 or over is clearer. For example, while a suspended sentence order can only be imposed on an offender aged 21 or over if the term is at least 14 days, a sentence of detention in a young offender institution is not available for a term of less than 21 days. Looking at the current law, section 189 of the Criminal Justice Act 2003 suggests that a suspended sentence order can be imposed in a term of 14 days in the case of an offender aged 18-20; it is only when one consults the relevant provision (contained in another enactment) setting out the power to impose a sentence of detention in a young offender institution that it is apparent that such a sentence must be for a minimum of 21 days.

TERMS USED TO DESCRIBE CUSTODIAL SENTENCES

9.14 In the main consultation paper, we noted that 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. We drew attention to the fact that this can cause confusion and results in errors which need to be remedied under the slip rule or on appeal against sentence where courts impose the wrong ‘type’ of sentence on an offender. This is notwithstanding the fact that a sentence is not invalidated when a judge makes a unlawful order by virtue of using the wrong “label” to describe the form the sentence will take; as for instance

where a court imposes a sentence of imprisonment (available only for those aged 21 or over at conviction) in the case of an offender under 21.

9.15 We provisionally proposed two alternative options to remedy this situation. The first was to retain the distinctions as between those aged under 18, 18 to 20 and 21 or over, but to create a provision which enabled courts to use a 'catch-all' term – such as "custody" – to refer to all sentences by deeming references to "custody" to refer to the appropriate type of custodial sentence for the offender's age. We suggested that it would 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.

9.16 The second was to allow for a single sentence of imprisonment to be imposed on all offenders aged 18 or older. This change would remove the requirement to specify whether a sentence of detention in a young offender institution, or imprisonment, was being imposed, but would not alter the place in which the sentence would be served. We noted, however, that such a change would go beyond the initial scope of the Sentencing Code project.

9.17 Reform was well-supported by consultees, including the Law Society, the Bar Council, the CPS, the Registrar of Criminal Appeals. Views were divided on which of our two options were preferable. Additionally, the Senior District Judges raised a concern as to the use of a catch-all term in relation to detention and training orders. Her Majesty's Council for Circuit Judges was of the opinion that the distinction in nomenclature was important and should be retained, although recognising that the practical differences between custodial sentences for a 20 and 21 year old were likely to be slight or non-existent. Accordingly, we have decided not to effect any change in the Sentencing Code, however we remain of the view that an amendment would be an improvement.

9.18 Although the nature of the change we could have achieved through the Sentencing Code is limited (because of its nature as a consolidation), the broader point as to the unnecessary complexity of different sentences for those aged 18-20 and those aged 21 or over at conviction remains. We therefore have decided to make a recommendation to remove this complexity by removing the distinction in nomenclature between the two sentencing orders. The effect of this would be to simplify statutory provisions (for instance, removing words to the effect of "or detention in a young offender institution, as the case may be") and removing the burden on the court to ensure the correct form of wording is used.

Recommendation 8.

9.19 We recommend that the distinction in nomenclature between imprisonment (for offenders aged 21 or over at conviction) and detention in a young offender institution (for offenders aged 18 to 20 at conviction) for the purposes of imposing a determinate custodial sentence be removed so that sentences for both age groups are expressed as "sentences of imprisonment". This sentence of imprisonment should continue to be served in different institutions depending on the offender's age.

9.20 We further recommend that the distinction in nomenclature between those aged 18-20 and 21 or over for the purposes of imposing life sentences (under common law, sections 224A, 225, 226 and 269 of the Criminal Justice Act 2003) be similarly streamlined, resulting in the sentence available under each of the relevant provisions being labelled "life imprisonment". Again, these sentences should continue be served in different institutions, depending on the offender's age.

9.21 Additionally, in the main consultation, we asked consultees whether we were correct in our interpretation of the position that murder is the only offence for which the sentence is "fixed by law". This is an outdated and opaque phrase which has the potential to cause confusion. If so, we asked how consultees would describe offences such as section 51 of the International Criminal Court Act 2001 which when they involve murder are to be dealt with as for an offence of murder.[229]

9.22 The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association and the Senior District Judges all agreed with the proposition in the first limb of this question. Only Graham Skippen (Solicitor, Fison and Co.) expressed mild disagreement, arguing that historically the term "fixed by law" has encompassed any offence other than that contrary to common law. We consider that this is clearly not the effect of this statutory reference, but note it does lend support to the view that the phrase is outdated and misleading.

9.23 On the second limb, the Crown Prosecution Service suggested that "the section 51 offence could either be particularised or described as 'offences which statute prescribes be dealt with as an offence of murder'." The London Criminal Courts Solicitors' Association suggested that "the s.51 offences could be named specifically as genocide, crimes against humanity and war crimes rather than a collective term sought."

9.24 The Senior District Judges stated that "Offences like those under section 51 of the International Criminal Court Act could be described as "offences where the punishment is the mandatory life sentence fixed by law for the offence of murder." Finally, on this point, the Registrar of Criminal Appeals proposed "offence (of

[229] See, section 53(5) of the International Criminal Court Act 2001.

murder/genocide/crimes against humanity/war crimes) which attracts a mandatory life sentence".

9.25 In the light of the consultation responses, we are satisfied that the only offence for which the sentence is fixed by law is murder. We are further satisfied that offences such as section 51 of the International Criminal Court Act 2001 derive their mandatory sentence from the mandatory sentence for murder but do not fall within the description of an offence the sentence for which is fixed by law.

9.26 Secondly in this regard, we asked consultees whether it would be desirable to replace the term "fixed by law" with a more transparent description of the order, such as "the mandatory life sentence for murder".

9.27 The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association and the Senior District Judges all agreed with this further proposition. In terms of the replacement description, Her Majesty's Council of Circuit Judges commented that:

> The term fixed by law is an anachronism. We would suggest mandatory murder life sentence and mandatory genocide life sentence (if the latter attracts such a sentence).

9.28 Given the response of consultees, and our desire to remove an archaic and opaque term from the statute book, we accordingly undertook exploratory drafting work as to how we could remove this term from the Sentencing Code.

9.29 Our exploratory work revealed numerous challenges in replacing the term "fixed by law". Most significantly, there is the pervasiveness with which this term appears across the statute book.[230] For example, even if the Sentencing Code itself were to avoid using the term, clauses such as 273(13) of the Sentencing Code, which provide that offences to which that section applies are not to be regarded as offences for which the sentence is fixed by law would still need to be replicated. This is because the statute book at large would continue to refer to offences fixed by law.

9.30 A further concern is the need to ensure as consistent a replacement phrase as possible across the statute book. In some situations, it will be desirable to replace the words "an offence for which the sentence is fixed by law" with "murder, or offences punishable as murder" or an analogous phrase. In others it will be desirable to replace references to "fixed by law" with references to "the mandatory life sentence for murder" or some other similar phrase. This will need careful consideration in each place the term appears across the statute book, and work will need to be done to ascertain if there is a single phrase that may be used consistently. There may remain the need for glossing phrases to ensure that references to murder, or the mandatory life sentence for murder catches sentences imposed for offences involving murder under section 1A of the Geneva Conventions Act 1957 and section 53 of the International Criminal Court Act 2001. Our exploratory work also revealed the need to consider whether any replacement phrase for fixed by law need to be glossed to cover

230

offences under section 42 of the Armed Forces Act 2006 which carry mandatory life sentences under section 217 or 218 of that Act. This will need to be thought through on a case by case basis.

9.31 We continue to believe that the replacement of this term across the statute book would be desirable. The questions and difficulties that the task poses are not insurmountable. Unfortunately, due to the limited resources and scope of this project we have not been able to replace this phrase in the draft Sentencing Code.

Recommendation 9.

9.32 We recommend that the Government replace the phrase "fixed by law" with a more transparent statutory phrase, such as "the mandatory life sentence for murder" or "murder, or offences punishable as murder".

9.33 It remains possible that the Sentencing Code itself could implement these changes if further resource was provided for it before the introduction of the Code.

General provisions

9.34 Chapter 1 of Part 10 contains provisions of general application. There are two introductory clauses (221 and 222). Clause 221 provides a summary of the contents of Part 10, setting out what each chapter contains and, where possible, a brief description of the various provisions contained therein. Clause 222 provides the definition of the term "custodial sentence" and "pre-Code custodial sentence". The latter provides a mechanism for ensuring a smooth transition between the current law and the Sentencing Code. This will be needed where, for example, a power in the Code depends on the operation or existence of a custodial sentence imposed under the current law such as the power to impose a custodial sentence to run consecutively to a sentence already imposed.

9.35 The provisions which follow provide for general limits on the power of the court to impose a custodial sentence. This brings together provisions of the Magistrates' Courts Act 1980, the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003. These provisions include the limitations on the power of the magistrates' court to impose a custodial sentence, the restriction on imposing a custodial sentence consecutive to a sentence from which an offender has not been released and restrictions on imposing a custodial sentence where an offender is not legally represented. Additionally, there is a signpost to the restrictions contained in the Mental Health Act 1983 in relation to the imposition of a custodial sentence in circumstances where a hospital or guardianship order has been made.

9.36 The next group of clauses concerns the powers to impose discretionary custodial sentences. This includes the so-called "custody threshold" provision (see clause 230(2)) which limits a custodial sentence to a case in which the court considers that the offence is so serious that neither a fine nor a community sentence can be justified (currently section 152 of the Criminal Justice Act 2003). In clause 230 (and elsewhere throughout the Code) we have introduced "mandatory sentence requirement" as a defined term. Previously, section 152 of the Criminal Justice Act 2003 featured a

lengthy list of mandatory sentences to which the custody threshold did not apply. The use of a defined term to replace this lengthy list enables the provision to be shorter and more easily intelligible. Additionally, if and when Parliament decides to create another mandatory sentence requirement or repeal or amend an existing requirement, this enables the single list contained in the provision providing the definition of the term to be updated with a single amendment. In the current law, it is necessary to identify all places across the statute book in which the list is used, and update each one accordingly. This new approach therefore removes the risk of inconsistencies or errors where not all instances of the list are identified.

9.37 In the main consultation paper, we asked consultees whether they agreed that this was helpful. There was strong support amongst consultees who responded specifically to this question that this was a desirable development.[231] Her Majesty's Council of Circuit Judges expressed the view that:

> This helpfully groups together all mandatory sentence requirements and is in keeping with the ethos of the Code to provide, where possible, a single point of reference.

9.38 We have also included a signpost to the other provisions (which are not mandatory sentence provisions) to which clause 230(2) is subject. The section of the Code also provides for requirements in relation to offenders suffering from mental disorders in respect of whom the court proposes to impose a custodial sentence.

9.39 In the main consultation, we also asked whether consultees considered that the benefits of re-drafting sections 132 and 133 of the Magistrates' Courts Act 1980 into the Sentencing Code outweighed the potential disadvantages. The response on consultation was mixed, with consultees broadly in favour of re-drafting these provisions. The Law Society, the Bar Council, Her Majesty's Council of Circuit Judges and the London Criminal Courts Solicitors Association' were all in favour of re-drafting these sections in the Sentencing Code. However, the Criminal Appeal Office, the Ministry of Justice, and the Crown Prosecution Service felt that for the reasons identified in the consultation signposting was the preferred course.

9.40 Despite the broad support from consultees for the reproduction of these clauses in the Sentencing Code we have not re-drafted them. After further consideration we have concluded that the difficulty of redistributing the provisions (leaving the civil powers in the Magistrates' Courts Act 1980) identified in the consultation paper[232] are such that it is best to simply signpost these provisions. The signposts to sections 132 and 133 are contained in clause 224.

Offenders aged under 18

9.41 Chapter 2 of Part 10 contains provisions relating to those aged under 18 at the date of conviction. This includes two orders known as detention and training orders and

---

231 The Law Society, the Bar Council, the Registrar of Criminal Appeals, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges all expressed their support.

232 The Sentencing Code (2017) Law Commission Consultation Paper No 232, para 9.15 and 9.16.

detention under section 91 (sometimes referred to as the "grave crimes" provision). These are discussed in Chapter 7 of this Report which concerns the disposals specifically relating to the sentencing powers of a court in relation to those aged under 18.

Adults aged under 21

9.42 Chapter 3 of Part 10 of the Sentencing Code contains provisions applicable to those aged 18 to 20 at the date of conviction. This includes provisions dealing with the power to impose a sentence of detention in a young offender institution and a suspended sentence of detention in a young offender institution.

9.43 Clauses 262 and 263 contain relevant information about the power to impose a sentence of detention in a young offender institution. The provisions set out the availability of such sentences and include a signpost to the general provisions which apply to custodial sentences, ensuring that a user is aware of the "custody threshold" provision and the requirement to impose minimum sentences in particular circumstances. There is also a signpost to the provisions detailing the requirements and related provisions concerning the imposition of a suspended sentence.

9.44 We have made a pre-consolidation amendment here to update the reference to section 79 of the Powers of Criminal Courts (Sentencing) Act 2000 (now repealed) to a reference its replacement, section 152 of the Criminal Justice Act 2003.

9.45 Clause 264 provides the power to impose a suspended sentence in relation to a sentence of detention in a young offender institution. As explained, we consider this brings clarity to the law and ensure that the risk of imposing unlawful sentences is minimised.

9.46 Clause 265 contains the provision requiring a court to impose a special custodial sentence for "offenders of particular concern" on those aged between 18 and 20 at the date of conviction. This is a close re-draft of the current law with some of the provisions rearranged slightly to aid comprehension and to accord with the approach we have adopted across the Code.

9.47 In the main consultation, we asked whether consultees considered that the proposed definition of mandatory sentence requirements should include the special custodial sentence for offenders of particular concern (under section 236A of the Criminal Justice Act 2003).

9.48 The Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Senior District Judges, and the London Criminal Courts Solicitors' Association were all in favour of inclusion. The Law Society, the Bar Council, and the Ministry of Justice felt that these were not mandatory sentences as understood for the purposes of that definition. In the light of the lack of consensus we have chosen not to include the special custodial sentence for offenders of particular concern (under section 236A of the Criminal Justice Act 2003) with the definition of mandatory sentence. We note that there is at least an ambiguity and potentially an inconsistency in this aspect of the sentencing regime, however. We recommend that the Government examine whether or not the special custodial sentence for offenders of particular concern (under section

236A of the Criminal Justice Act 2003) should be included within the definition of mandatory sentence.

Recommendation 10.

9.49 We recommend that the Government examine whether the definition of mandatory sentence requirement contained in clause 399 ought to include reference to sentences for special custodial sentences for offenders of particular concern (under clauses 265 and 278).

9.50 Clause 266 contains the power to impose an extended determinate sentence of detention in a young offender institution. In relation to extended sentences generally, we have simplified the provisions by separating out the availability of the sentence and the conditions for its imposition.

9.51 It will be noted that these provisions have been arranged in ascending order of severity. During the main consultation exercise, we asked consultees whether they preferred the sentencing orders to be arranged by ascending or descending order of severity. There was a mixed response, though a clear majority in favour of arrangement in ascending order of severity.

9.52 The Law Society, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges were all in favour of an ascending arrangement.

9.53 Opinion at the Bar Council was split, and the Crown Prosecution Service had no preference. Her Majesty's Council of Circuit Judges and the Registrar of Criminal Appeals would prefer a descending arrangement.

9.54 Having analysed these responses, we determined that the approach which best accords with the overall sentencing scheme was arranging the provisions in ascending order of severity. This is because there is a duty upon a sentencing court to impose the least severe sentence which is commensurate with the seriousness of the offence (see section 153 of the Criminal Justice Act 2003). Accordingly, it seems more appropriate that sentencing courts begin with the least severe sentencing option and work up the scale.

9.55 Clauses 269 and 270 concern the interaction of sentences of detention in a young offender institution with other sentences. We have made a pre-consolidation amendment in relation to section 97(5) of the Powers of Criminal Courts (Sentencing) Act 2000 which has been re-drafted in clause 269 subsection (2) to amend an out of date reference (replacing section 84 of the 2000 Act with section 265 of the Criminal Justice Act 2003).

9.56 Clauses 272 and 273 detail the availability of a sentence of custody for life under sections 94 of the Powers of Criminal Courts (Sentencing) Act 2000 (seriousness of the offence justifies life imprisonment) and section 224A of the Criminal Justice Act 2003 (offender has been convicted for a second listed offence). In the current law, these provisions are contained in different enactments; by bringing them together, the

powers of the court are clearer and more accessible, and the regime is more coherent.

9.57 As discussed earlier in this report, our general approach to displaying commencement information (and other relevant information) is to display it in the body of the provision in the main part of the Code, as opposed to it being located either in another enactment or in a piece of secondary legislation. In relation to the life sentence under clause 273 (section 224A of the Criminal Justice Act 2003) this brings much greater clarity than in the current law.

9.58 The matter is complicated when we consider the application of the clean sweep policy. We determined that this provision falls within both exceptions we identified in Chapter 4 of this report, namely that it exposes an offender to a higher sentence than that which applied at the time of the commission of the offence (in that it enables a life sentence to be imposed for an offence which does not ordinarily have life as a maximum sentence) *and* that it imposes a recidivist premium which did not occur before that date. Therefore, we have excluded this from the application of the clean sweep.

9.59 The order is available only for certain offences which are listed in Schedule 15. However, the position is complicated by the transitional arrangements under the current law. This sentence is only available for offences committed on or after 3 December 2012. In 2015, further offences were added to the Schedule, but only in cases where one of those offences was committed on or after that date. Therefore, there are two relevant dates to which reference must be had in applying this provision. In order to make the effect of these provisions as clear as possible, Schedule 15 contains the list of offences and a column specifying the date after which the offence must have been committed for the provision to apply. We are confident that this is an improvement to the clarity and accessibility of the law in this area. We had proposed this change in the main consultation paper, asking consultees whether they thought this device was useful. All consultees who provided an answer to this question agreed.[233] Additionally, the Registrar of Criminal Appeals suggested an amendment to the wording. We discussed this with Parliamentary Counsel who advised retaining the original wording as it was more concise.

9.60 Clause 274 provides for the required sentence of custody for life for a "dangerous" offender where the offence was committed on or after 4 April 2005. Here, in line with the approach explained above, we have separated the provisions relating to those aged 18-20 from those relating to those aged 21 or over.

9.61 In the main consultation, we provisionally proposed to exclude this provision from the application of the clean sweep, on the basis that such sentences were mandatory in nature. All consultees who responded agreed with the proposed exclusion. This included the Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Senior District Judges and the London Criminal Courts Solicitors' Association.

---

[233] The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, HM's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust) and the Senior District Judge's Office.

9.62 The Registrar of Criminal Appeals stated:

> It is agreed that s.225 and s.226 should be outside of the scope of the clean sweep. The number of cases that will be affected will be small and the objective of the code will not in any way be undermined by the exclusion on s.225 and s.226. It is envisaged that in the majority of cases if the statutory criteria had been satisfied but the offence falls outside of the clean sweep it is likely to attract life in any event. The powers of the Court to impose condign punishment are not diminished, Article 7 issues are not engaged and the number of cases will be negligible; for these reasons the suggested approach is agreed.

9.63 The London Criminal Courts Solicitors' Association were likewise of the view that:

> these sections should not be affected by the Sentencing Code because the mandatory nature of the sentence is decided by whether other criteria are met first. Once those criteria are met it is a mandatory sentence and should be untouched in the same manner as other mandatory sentences discussed earlier in the consultation.

9.64 We remain of the view that this provision falls within our policy of exceptions to the clean sweep. We have therefore preserved the limited commencement of the provision. It will continue to apply only to cases where the offence was committed on or after 4 April 2005. In the current law, that date is displayed in a piece of secondary legislation. In line with our approach to displaying exceptions to the clean sweep, we have drafted the provision to display the relevant commencement information on its face. The following example contains an excerpt of the provision.

Example 13

Required sentence of custody for life for offence carrying life sentence

(1) This section applies where a court is dealing with an offender for an offence

where—

(a) the offender is aged 18 or over but under 21 at the time of conviction,

(b) the offence is a Schedule 19 offence (see section 306),

(c) the offence was committed on or after 4 April 2005, and

(d) 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 (see sections 305(1) and 307).

9.65 As can be seen the date from which the provision applies is clearly stated in the first subsection of the provision. We consider that this is likely to reduce errors such as that which occurred in *R v GJD*[234] where a sentencing court in 2006 imposed a

[234] [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin).

sentence under this provision which was not available because the offence was committed before the relevant date. This error was not noticed until 2015.

9.66 Finally, clause 275 provides for the duty to impose a sentence of custody for life on a person aged under 21 at the date of conviction who is convicted of a murder committed at a time when they were aged 18 or over.

Adults aged 21 and over

9.67 Chapter 4 of Part 10 of the Code contains provisions about the available custodial sentencing orders applicable to those aged 21 or over at the time of conviction. These provisions mirror those in Chapter 3 of Part 10, adopting the same arrangement of ascending order of severity and the same approach to signposting of the provisions.

9.68 The discussion of those provisions above applies in relation to adults aged 21 and over, with the exception of the particular provisions relating to the imposition of the sentence of detention in a young offender institution, which are specific to adults aged 18-20. For instance, in relation to clause 285, we have disapplied the clean sweep for the reasons discussed above in relation to adults under the age of 21. Where possible, we have adopted the same style of drafting and arrangement to ensure consistency across the Code in order to aid comprehension and accessibility.

SUSPENDED SENTENCES

Structure and general provisions

9.69 Chapter 5 of Part 10 of the Code contains the provisions relating to the imposition of a suspended sentence; whereas the provisions creating the power to impose a suspended sentence when a custodial sentence has been passed are contained in Chapters 3 (for those aged 18-20) and 4 (for those aged 21 or more).

9.70 Clause 286 states what a suspended sentence order is, including explaining the activation of a suspended sentence order and (unlike with community orders) the discretion to impose a community requirement. The list of community requirements is contained in clause 287. This table mirrors the table in relation to community orders, setting out the Part of Schedule 9 in which further provision about that particular requirement is located. It will be noted that both sets of provisions concerning community orders and suspended sentence orders use the same schedule (Schedule 9) for the details of the requirements.

9.71 The remainder of this chapter of the Code closely follows the approach taken in relation to community orders (as to which see Chapter 8 of this Report), with minor variations where necessary. For instance, clause 289 provides that a suspended sentence order which has not taken effect is to be treated, generally, as a sentence of imprisonment (or as the case may be, a sentence of detention in a young offender institution). Clause 293 reproduces the power under section 191 of the Criminal Justice Act 2003 to provide for a review of suspended sentence orders. In subsection (2), we have clarified the relationship between this provision (which creates a general power to provide for a review of a suspended sentence order) and the provision creating the power to impose a drug rehabilitation requirement which was unclear in the current law. This change has been made by pre-consolidation amendment.

9.72 In relation to suspended sentence orders with community requirements, we identified a disparity between the way in which these provisions and the provisions concerning the youth rehabilitation order are drafted in the current law. The latter contained an express provision giving the Crown Court the power to direct that any breach of the order is to be dealt with by the magistrates' courts (as opposed to the default position that it returns to the Crown Court). The legal position is the same in relation to suspended sentence orders, however the power in the current law was not so clearly expressed. Accordingly, we have re-drafted this in line with the corresponding provision for youth rehabilitation orders (see clause 189).

9.73 We have made numerous changes of language to streamline and clarify matters such as the cessation of the responsible officer's role under section 198 of the Criminal Justice Act 2003.

9.74 The clean sweep applies to suspended sentence orders such that under the Code, for any offence carrying a sentence of imprisonment, a suspended sentence order can be imposed irrespective of the date of the commission of the offence. Under the current law, offences committed prior to 4 April 2005 were subject to an old, repealed but partially saved regime. This application of the clean sweep significantly streamlines the volume of material to which a sentencing court must refer.

Breach of a suspended sentence order

9.75 Clause 303 introduces Schedule 16 which provides for the court's powers on breach of a suspended sentence order (whether by commission of a further offence or by failure to comply with a requirement), amendment of the order and revocation of the order. There is no power for a court to re-sentence an offender on a breach of a suspended sentence order, however there are powers which enable the court to impose additional requirements. We have clarified the language so that it is more apparent that the powers are those available to the court at the breach hearing, not those available at the original sentencing hearing. This is in line with our general policy to provide sentencing courts with the most up to date sentencing powers, thereby avoiding the preservation of unnecessary layers of old legislation which has been repealed.[235] Additionally, we have amended the language to provide that the powers are those as if the offender had just been convicted by the court. This is to ensure that any changes to the regime which are made in the period between conviction and breach hearing apply. Without this amendment, a change introduced in that intervening period commenced to apply only to cases in which the offence was committed on or after the commencement date would not apply to the offender at the breach hearing. This is in line with our general policy of avoiding the creation or preservation of layers of provisions which apply to an increasingly small number of historic cases. We have also made some streamlining changes to ensure consistency across the Code, in particular in relation to other schedules concerning the imposition of community requirement.

[235] See paragraph 8(2)(c) of Schedule 12 to the Criminal Justice Act 2003 and paragraph 13(1)(d)(i) of Schedule 16 to the Code.

Transfer of orders to Northern Ireland and Scotland

9.76 Schedule 17 provides for the transfer of suspended sentence orders from England and Wales to Scotland and Northern Ireland. Numerous linguistic and structural changes have been made to these provisions. In particular, this Schedule has been significantly restructured and new defined terms introduced. These changes received widespread support on consultation. Where these changes are of a more substantive nature, these can be found in Appendix 2 which details the changes made by pre-consolidation amendment.

DANGEROUS OFFENDERS

9.77 Chapter 6 of Part 10 contains provisions relating to the dangerousness regime. The "dangerousness regime" refers to the provisions of the Criminal Justice Act 2003 which apply to offenders who have been convicted of an offence listed in Schedule 15 to that Act and who are considered to pose a significant risk of serious harm to members of the public by the commission of further offences listed in that schedule.

9.78 Under the current law, these provisions are complex and overlapping. In addition, other provisions (not considered to be part of the dangerousness regime) further complicate matters. A sentencing court has to have regard to the power to impose an extended determinate sentence under sections 226A and B of the Criminal Justice Act 2003 (extended sentence for dangerous offenders) and the duties to impose a life sentence under sections 225 and 226 of that Act (life sentence for dangerous offenders), and section 224A of that Act (life sentence for a second listed offence). Under the current law, extended sentences and life sentences for dangerous offenders rely upon the same schedule for the list of offences which make those sentences available.[236] Schedule 15 to the Criminal Justice Act 2003 contains offences with maximum sentences ranging from two years' imprisonment to life imprisonment. Accordingly, it is not obvious, on the face of the Schedule, which offences listed apply only to the power to make an extended sentence.

9.79 Accordingly, in the main consultation paper, we proposed dividing Schedule 15 into three schedules, one for each sentencing order and a third (remaining in the Criminal Justice Act 2003) for non-sentencing purposes. The Magistrates' Association, the Law Society, the Bar Council, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the Senior District Judges, Lesley Molnar-Pleydell (Langley House Trust), the Ministry of Justice and the London Criminal Courts Solicitors' Association all agreed with this approach. The Registrar of Criminal Appeals lamented the "unfortunate" situation that the complexity of sentencing legislation required multiple Schedules, lengthening the statute book, in order to make the effect of the law clear. Only Graham Skippen (Solicitor, Fison and Co.) thought that Schedule 15 should not be divided.

9.80 We have therefore made this change in the Sentencing Code. Schedule 18 contains all offences listed in Schedule 15 to the 2003 Act and applies to the power to make an extended sentence. Schedule 19 contains only those offences which appear in Schedule 15 to the 2003 Act which carry a maximum of life imprisonment and applies to the duty to impose a life sentence under the dangerousness provisions. Separately,

---

[236] Subject to conditions for the imposition of such sentences being met.

Schedule 15 contains the offences to which the duty to impose a life sentence following a conviction for a second listed offence applies. Each sentencing order therefore has its own Schedule of offences, bringing clarity and simplicity to the application of this aspect of sentencing law. We consider that this reduces any risk of imposing an unlawful sentence due to confusion as to whether the provision applies to the offence in question.

9.81 Chapter 6 begins with interpretative provisions which are central to this chapter of the Code; clause 306 defines "specified offence" as an offence listed in Schedule 18 and clause 307 defines "Schedule 19 offence" as an offence listed in Schedule 19. Following those provisions, the chapter sets out the provisions relating to the assessment of dangerousness and supplementary provisions relating to certificates of conviction and appeals.

9.82 In the main consultation paper we asked consultees whether the proposed signposts to the definitions of serious offence, specified offence and the provision related to the assessment of dangerousness were useful. Consultees largely agreed with this change, however the Bar Council questioned the value of amending "serious offence" to "Schedule [13] offence". The Code retains these signposts. Having considered the point raised by the Bar Council we continue to think that the shift away from "serious offence" is clearer and more transparent. The term "Schedule 19 offence" is defined in clause 307 and used throughout the Code, where relevant.

9.83 The provisions relating to the imposition of extended sentences and life sentences under the dangerousness provisions have been separated because the current law requires that they be dealt with as separate issues: the question of whether or not the offender is "dangerous" is distinct from the question of whether an extended or life sentence should or must be imposed.[237]

MINIMUM SENTENCES

9.84 Chapter 7 of Part 10 of the Sentencing Code contains those provisions creating minimum sentences for particular offences. These are the provisions requiring the imposition of a custodial sentence of at least a particular length unless there are circumstances which would make it unjust to do so. The provisions relating to mandatory life sentences (whether for murder or for offences listed in Schedule 15 to the Criminal Justice Act 2003) have been re-drafted in Chapters 2, 3 and 4 of Part 10 of the Code, as explained above.

Provisions included

9.85 The Sentencing Code does not contain any provisions relating to the maximum sentence for any specific offence. As was explained in Chapter 3 of this Report, these are substantive criminal provisions rather than procedural provisions and therefore outside the scope of this exercise. Further, it is desirable in principle that provisions as to the maximum sentence for an offence can be found close to the offence-creating provision, in the same section or enactment.

---

[237] L Harris and S Walker, 'Difficulties with dangerousness: determining the appropriate sentence - Part 2' [2018] Crim LR 782.

9.86 Although the minimum sentences in this chapter relate only to specific offences we consider that they are different in nature to maximum sentences. First, the majority of these provisions apply to a number of different offences. Secondly, they significantly affect the exercise of the court's discretion in the sentencing process. Thirdly, in contrast to the provisions relating to maximum sentences there is no clear practice as to where minimum sentence provisions should be located, and a number are located in general sentencing enactments.

9.87 The draft Sentencing Code, as published at the time of the main consultation, omitted a small number of minimum sentence provisions.[238] These provisions were those that applied where the offender had only committed a single offence, and we recognised that there were arguments that they were best left in the same enactment as the offence-creating provisions. Further, some applied to both Scotland and England and Wales and we noted it was possible that this could lead to confusion if the provisions remained in force in the original enactments for Scotland but were contained in the Sentencing Code for England and Wales.

9.88 However, we similarly recognised the arguments for bringing all of the relevant minimum sentence provisions into the Sentencing Code. Namely that this avoided the need to go to a second statute to view a complete list of such provisions; that it provided the opportunity to simplify and streamline these provisions; and that a number of the provisions applied to multiple offences.

9.89 In the main consultation we therefore sought consultees views on which minimum sentence provisions should be included in the Sentencing Code and which ought to be left in their current enactments.

9.90 Consultees, including the Law Society, the Bar Council, Professor Ashworth QC, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the Senior District Judges, and the London Criminal Courts Solicitors' Association, were unanimously in favour of including all the relevant minimum sentence provisions in the Sentencing Code. The comments of the Registrar of Criminal Appeals neatly explain the overwhelming sentiment:

> It is preferable that all minimum sentencing provisions are in one composite body of law. Overlooking minimum sentencing provisions thwarts the will of Parliament and undermines the integrity of the criminal justice process. As such, all minimum sentence provisions / mandatory sentence requirements should be kept together if at all possible and practical. As with the current legislation the more different provisions that need to be referred to when sentencing, the more likely errors are going to be made.

---

238 Namely, section 51A of the Firearms Act 1968 (minimum sentence for certain firearms offences); section 29(4) and (6) of the Violent Crime Reduction Act 2006 (minimum sentence for using someone to mind a weapon); section 1A of the Prevention of Crime Act 1953 (minimum sentence for threatening with an offensive weapon in public); and 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).

9.91 Accordingly, those minimum sentence provisions that were not originally included in the draft Sentencing Code,[239] as published at the time of the main consultation, have now been included in this chapter of the Sentencing Code.

Re-drafting

9.92 The clean sweep has not, and will not, be applied to minimum sentence provisions in line with our recommendation in the transition report.[240] Minimum sentences under the Sentencing Code will continue to apply only to those offences committed after their commencement. The effect of such restrictions has, however, been made far clearer in the re-drafting of these provisions. Courts will no longer have to refer to commencement orders to ascertain from when the minimum sentences have effect.

9.93 A number of significant changes have been made in the re-drafting of the provisions relating to mandatory sentences. For example, the minimum sentence provisions relating to repeat weapons offences currently contained in section 1 of the Prevention of Crime Act 1953, and sections 139 and 139A of the Criminal Justice Act 1988 have all been re-drafted as a single clause (clause 315). Similarly, the minimum sentence provisions for a single weapons offence contained in section 1A of the Prevention of Crime Act 1953 and section 139AA of the Criminal Justice Act 1988 have also been combined into a single clause (clause 312).

9.94 More substantial re-drafting has been undertaken in relation to the minimum sentence provisions relating to firearms currently contained in section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006. Not only have these provisions generally been combined into a single clause (clause 311) but the offences to which they apply have been placed into a Schedule (Schedule 20). This Schedule not only makes clearer the effect of the various transitional provisions, but also allows for the simplification of the substantive clause.

9.95 None of these changes have altered the effect of these minimum sentence provisions.

EFFECT OF LIFE SENTENCES

9.96 Chapter 8 of Part 10 of the Sentencing Code contains those provisions relating to the making of a minimum term order or a whole life order when passing a life sentence. These orders govern the minimum period before which an offender serving a life sentence may be released or whether they can ever be released. They are currently contained in section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and section 269 of the Criminal Justice Act 2003. These provisions have been streamlined to the extent they can be, and re-drafted to provide greater transparency as to their effect.

---

239 Namely, section 51A of the Firearms Act 1968 (minimum sentence for certain firearms offences); section 29(4) and (6) of the Violent Crime Reduction Act 2006 (minimum sentence for using someone to mind a weapon); section 1A of the Prevention of Crime Act 1953 (minimum sentence for threatening with an offensive weapon in public); and 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).

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

SENTENCE ADMINISTRATION

9.97 Chapter 9 of Part 10 of the Sentencing Code contains those provisions relating to the administration of custodial sentences. As was noted in Chapter 3 of this Report, the Sentencing Code does not generally 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. This is because these provisions relate to the administration and enforcement of sentence and do not need to be considered when imposing sentence.

9.98 However, a limited number of provisions relating to the administration of sentences must be exercised by the court when sentencing, rather than operating administratively. These are sections 238 (power of the court to recommend licence conditions for certain prisoners), 240A (crediting of time on bail subject to qualifying curfew) and 243 (crediting of time spent in custody awaiting extradition) of the Criminal Justice Act 2003. These provisions have therefore been included in the Sentencing Code, as provisions of which the sentencing court needs to be aware when sentencing.

9.99 In the main consultation we sought consultees views as to whether we had struck the correct balance here. We asked whether we had identified all the provisions relating to the administration of custodial sentences that a court needs to be aware of when sentencing to properly exercise its functions.

9.100 Consultees, including the London Criminal Courts Solicitors' Association, the Registrar of Criminal Appeals, the Law Society, Her Majesty's Council of Circuit Judges and the Bar Council, unanimously agreed that we had.

9.101 The Registrar of Criminal Appeals noted that an amendment to sections 240A and 243 of the Criminal Justice Act 2003 so that they would be credited administratively would be desirable. The Registrar commented:

> There does not appear to any good reason why days spent in custody awaiting extradition and time in custody on remand in respect of indeterminate sentence should not be administratively credited. Appeals are regularly heard to rectify errors and omissions on these uncontroversial issues resulting in unnecessary time and expense. An amendment to these provisions would be welcomed.
>
> Equally, directions under [section 240A of the Criminal Justice Act 2003] are frequently missed. The prison service could not reasonably be expected to deal with this administratively as the number of days on a qualifying curfew will not be apparent from their records. However, there is no reason why a direction (which is to an offender's benefit) should not be dealt with by the sentencing court rather than on appeal to the [Court of Appeal (Criminal Division)]. This could be achieved by an amendment to what is now [section 155 of the Powers of Criminal Courts (Sentencing) Act 2000]. A provision allowing a direction to be given after the expiration of the 56-day period by agreement could be expressly provided for.

9.102 Such an amendment would be outside the scope of this project, and accordingly no such change has been made here.

Chapter 10: Further provisions relating to sentencing

INTRODUCTION

10.1 In this chapter of the Report, we deal with the Fourth and Fifth Groups of Parts of the Sentencing Code.

10.2 The Fourth Group of Parts, comprised of Chapters 1 to 6 of Part 11, deals with sentencing orders which are not capable of providing for the complete disposal of a case. We have chosen to label these "behaviour orders" as they give a sentencing court the ability to impose prohibitions and/or requirements upon a person who has been convicted of a criminal offence so as to prevent or address particular behaviour. These orders are all secondary sentencing orders, which are to be imposed alongside the primary disposal for the offence. A primary disposal is an order which can be the complete disposal of the case. There are other orders located elsewhere in the Code which one might describe as behaviour orders, however, in each instance the order is capable of being the sole order which disposes of a case for sentencing purposes. For instance, driving disqualification, located in Part 8 of the Sentencing Code could be described as a behaviour order, however, it is capable of being the only sentence imposed for an offence.

10.3 In line with the general decisions taken as to the scope of the Sentencing Code, we have included here only orders that are available as part of the sentencing process on conviction.[241] We have not included those orders which can only be made in separate civil proceedings, ordinarily on the application of a third party, such as anti-social behaviour injunctions under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014. While it may be useful for a sentencing court to know that such orders are potentially available in separate civil proceedings, these orders are outside the scope of the Sentencing Code.

10.4 Some behaviour orders are available on conviction as part of the sentencing process, but also as a result of a civil application, an acquittal, a finding that the defendant is not guilty by reason of insanity, or a finding that the defendant is under a disability and has done the act charged against them. These present particular issues in deciding whether it is best to:

(1) move the provisions in their entirety into the Sentencing Code;

(2) move the provisions relating to orders available on conviction into the Sentencing Code and leave their counterparts available as a result of other findings or civil applications in the original legislation; or

[241] See generally, Chapter 3.

(3) leave the provisions in their current enactments and to signpost them in the Sentencing Code.

10.5 The decisions we have taken in relation to each type of order are explained in more detail below, when each order is discussed.

10.6 Chapter 1 of Part 11 of the Sentencing Code contains provisions for imposing criminal behaviour orders; Chapter 2 contains provisions for imposing sexual harm prevention orders; Chapter 3 deals with restraining orders; Chapter 4 deals with parenting orders; Chapter 5 deals with the powers to bind over; and Chapter 6 deals with other behaviour orders.

10.7 The Fifth Group of Parts, containing Parts 12 to 14, contains miscellaneous and supplementary provision relating to sentencing. Part 12 includes provisions in relation to financial orders imposed where an offender is aged under 18, commencement and alteration of a Crown Court sentence, the power to make a recommendation for deportation and the review of a sentence following a failure by an offender to provide assistance to a prosecutor under a statutory agreement. Part 13 contains various interpretive provisions and Part 14 includes provisions introducing the schedule of uncommenced amendments to the Code, transitional and saving provisions and provisions dealing with commencement and extent.

FURTHER POWERS RELATING TO SENTENCING

Criminal behaviour orders

10.8 Chapter 1 of Part 11 of the Sentencing Code contains the provisions relating to the power to impose a criminal behaviour order. These orders are available only on conviction and only in addition to another sentence or a conditional discharge. Clause 330, in line with the general approach to introducing orders used in the Sentencing Code, sets out what a criminal behaviour order is. The following provisions (clauses 331 to 334) concern the imposition of a criminal behaviour order. Here, we have made numerous pre-consolidation amendment changes to ensure consistency of definition in relation to youth offending teams, consistency of language across the Code in relation to the availability of sentencing orders, and consistency in relation to the use of terms “resides” or “lives”.

10.9 Clauses 335 to 338 concern interim orders, reviews of orders and the variation and discharge of orders. Breaches of orders are dealt with by clause 340 which closely follows the drafting in the current law. Clauses 340 and 341 reproduce supplementary provision in relation to the issuing of guidance by the Secretary of State and special measures for witnesses. We have made a pre-consolidation amendment to remove the transitional provision previously contained in section 33(5) of the Anti-social Behaviour, Crime and Policing Act 2014 as it is broadly spent and risks implying (in relation to other orders) that no account may be taken of conduct occurring prior to commencement.

10.10 In drafting the Code we have made minor improvements to the structure and language of these provisions, principally to bring the provisions into line with the approach taken with other provisions in the Code.

Sexual harm prevention orders ("SHPO")

10.11 Chapter 2 of Part 11 of the Sentencing Code reproduces the provisions from the Sexual Offences Act 2003 providing the power to make a SHPO on conviction for an offence listed in Schedules 3 or 5 to that Act.

10.12 SHPOs are available:

(1) on conviction,

(2) on a civil application,

(3) on a finding that the defendant is not guilty of an offence listed in Schedule 3 or 5 by reason of insanity, or

(4) on a finding that the defendant is under a disability and has done the act charged against the defendant in respect of an offence listed in Schedule 3 or 5.

10.13 To avoid separating these provisions, during the main consultation we asked consultees whether they agreed with our decision to signpost – rather than repeal and re-enact in the Code – the power to make an SHPO. Although there were some consultees who agreed with the decision to signpost these provisions,[242] the majority of consultees considered that the provisions themselves should be in the Code.

10.14 Her Majesty's Council of Circuit Judges stated:

> We believe the frequency with which we encounter Sexual Harm Prevention Orders in the Crown Court means this ancillary order should be included, notwithstanding the risks identified in the paper.

10.15 The Registrar of Criminal Appeals also supported the inclusion of the SHPO provisions:

> If the purpose of the Code is to be a comprehensive source of sentencing provisions, it would seem axiomatic that the Sexual Harm Prevention Order (SHPO) provisions ought to be included within the Code.

10.16 We also asked consultees whether, if they thought that the provisions should be included in the Code (rather than being signposted), it would be appropriate to repeal and re-enact only the provisions which applied to a sentencing court.

10.17 Of those who responded, Her Majesty's Council of Circuit Judges was supportive of this approach. Other responses took a more neutral position, however. The Registrar of Criminal Appeals suggested that such an approach might be inconsistent with the proposal to include in the Code restraining orders on acquittal which, it was noted, were orders available on application.

10.18 We discussed these responses at length with Parliamentary Counsel, and carefully considered the advantages and disadvantages of re-drafting these provisions in the

---

[242] The Law Society and Lesley Molnar-Pleydell (Langley House Trust).

Sentencing Code. We concluded that the best approach was to reproduce in the Sentencing Code only the power to make an order on conviction. The powers to make an SHPO following a civil application, the return of a special verdict or a finding that the accused has done the act charged having been found unfit to plead, will remain in the Sexual Offences Act 2003.

10.19 As was explained in Chapter 3 of the Report above, the Sentencing Code only contains orders available to a sentencing court and does not include those available in separate civil proceedings. Further, it contains only those provisions which are necessary for a sentencing court to discharge its functions, not all provisions which a court may conceivably wish to be aware of. In almost all instances, this relates to post-conviction powers. The one notable exception, discussed below, is restraining orders available on acquittal which it is necessary for the Code to include for pragmatic reasons.

10.20 While we acknowledge the force of the argument made by the Registrar of Criminal Appeals in relation to consistency, we consider that it is appropriate to distinguish between powers available on conviction and acquittal on the one hand, and powers available in entirely separate civil proceedings on the other.

10.21 It will be recalled that we have decided not to repeal and restate in the Code the provisions under the Criminal Procedure (Insanity) Act 1964. This Act provides the powers for a court to deal with a defendant following a special verdict or a finding that they have done the act charged having been found to be unfit to plead. The reasons for this decision are explored at paragraphs 3.36 and 3.40 above.

10.22 Consistent with this decision, we have also left the provisions relating to the power to make a SHPO under equivalent circumstances in the Sexual Offences Act 2003.

10.23 We consider that this produces a coherent policy, leaving the powers of a court to make an order protecting individuals from sexual harm in non-conviction cases in the Sexual Offences Act 2003 and the powers available on conviction in the Sentencing Code.

10.24 The provisions have been restructured to ensure consistency with the general drafting approach taken to orders in the Sentencing Code. This includes the introduction of separate and clearly labelled provisions explaining what an SHPO is and the meaning of “sexual harm”. In the current law the provisions were ordered in such a way that this fundamental definitional provision was located after the principal provision in a section entitled “supplemental”. This reordering of the provisions, not only ensures consistency within the Sentencing Code but also aids legal transparency in drawing greater attention to a concept which is integral to the application of the test for imposing an SHPO.

10.25 Clause 345 brings together the conditions currently listed in section 103A of the Sexual Offences Act 2003 and supplementary provisions currently in section 103B. We have re-drafted and re-ordered these provisions so as to provide, in a single clause, all the circumstances in which an order will be available. Reference is made to the lists of offences in Schedules 3 and 5 to the Sexual Offences Act 2003. It would have been possible to repeal and restate those schedules in the Code. However, as those schedules have applications for purposes other than sentencing procedure that

would have created difficulty for those seeking to apply the schedules in a non-sentencing context. Additionally, pressures of time and resource weighed against the possibility of re-drafting the schedules (to the extent they apply to the power to make an SHPO) in the Code. Accordingly, we have left the schedules in the Sexual Offences Act 2003. It would, of course, be open to a government in the future to re-draft the schedules and incorporate them in the Code if it was considered desirable for the lists of offences for which a court may impose an SHPO on conviction to be contained in the Code. This would be an amendment to the Code that would be fully in line with its spirit.

10.26 We discussed this approach with consultees at some of our consultation events. The responses were that on balance, it was more helpful to have the core provisions in the Code than to leave them in the Sexual Offences Act 2003 – even if it would be necessary to refer to the schedules in the Sexual Offences Act 2003.

10.27 In clause 347 we have introduced the concept of a "prohibition period" which clarifies that prohibitions may be imposed for different periods of time and that the court must specify the length of time for which each prohibition is imposed. Clauses 349 to 358 make provision for appeals, variation and discharge, notification requirements and breach of SHPOs. We have made a number of streamlining changes which improve the coherence and clarity of the provisions, but substantially, the provisions remain largely as they appeared in the Sexual Offences Act 2003.

Restraining orders

10.28 Chapter 3 of Part 11 of the Sentencing Code contains provisions empowering the court to impose a restraining order both (a) on conviction and (b) on an acquittal. We asked consultees whether they thought that restraining orders available on acquittal should be repealed and re-enacted in the Sentencing Code. All consultees who responded to this question agreed that the power to make a restraining order on an acquittal ought to be contained in the Code. The Registrar of Criminal Appeals stated that "although such an order is not strictly speaking a sentence, it seems likely that a sentencer might expect to find the provisions for such an order within the Code."

10.29 We have made minor streamlining changes to these provisions. These included amending the structure and order of the provisions to make them more accessible and introducing provisions at the beginning of the chapter defining the order and its availability as we have done throughout the Sentencing Code. In relation to restraining orders on acquittal, clause 361 reflects a pre-consolidation amendment to clarify that a restraining order on acquittal is available in the magistrates' court. Previously, the language was ambiguous on this point.

10.30 The remaining provisions of this chapter of the Sentencing Code concern the procedure for the variation or discharge of an order and the consequences of breaching an order. In relation to evidence in proceedings relating to restraining orders (clause 363) we have made a pre-consolidation amendment to clarify that the civil rules of evidence do not apply in relation to proceedings for an offence under clause 364 (currently section 5(5) of the Protection from Harassment Act 1997). This is not a change in the substance of the law but merely a clarification that while the civil rules of evidence apply to proceedings relating to making, varying or discharging a

restraining order, they are not intended to apply to proceedings for the offence of breaching such an order.

Parenting orders

10.31 Chapter 4 of Part 11 of the Sentencing Code contains provisions relating to parenting orders. Parenting orders are currently contained in sections 8 to 10 of the Crime and Disorder Act 1998. As re-drafted in the Code, these provisions have been substantially re-organised in line with the general approach to structuring the sentencing powers of courts in the Sentencing Code.

10.32 We have made numerous drafting changes to improve the language and bring clarity to the provisions. In particular, the various powers to impose a parenting order (on conviction, where a criminal behaviour order has been imposed, where a parent or guardian fails to attend meetings of the youth offender panel and in respect of certain offences under the Education Act 1996) have each been drafted in separate clauses. This is designed to aid comprehension and to make the provisions easier to navigate, allowing the user to more quickly alight on the provisions relevant to them.

10.33 Following the provisions detailing the various powers and duties to impose a parenting order, there are several clauses dealing with the procedure in such cases. Clauses 372 to 376 apply to parenting orders generally and have been arranged so as to reduce the amount of text.

10.34 These orders are discussed in more detail in Chapter 7 above.

Binding over

10.35 Chapter 5 of Part 11 of the Sentencing Code contains the provisions dealing with the power to bind over a parent or guardian where a person under the age of 18 is convicted of an offence.

10.36 Again, these provisions have been re-ordered in line with the structural approach adopted throughout the Code. There are also streamlining and linguistic changes, for example we have made a pre-consolidation amendment to ensure consistency across the Code in relation to “revoking” or “discharging” an order.

10.37 Finally, subsection (1) of clause 379 operates as a signpost to the other powers to bind over persons on conviction. Subsection (2) of the clause operates as an avoidance of doubt provision to clarify that the powers contained in the Code do not repeal, replace or otherwise affect other powers to bind over.

Other behaviour orders

10.38 Chapter 6 of Part 11 of the Sentencing Code contains clause 380 which operates as a signpost to other behaviour orders which we have not re-drafted in the Code. The orders listed in this clause have been left in their current enactments in accordance with the policy described in Chapter 3 of this Report. Principally, this is because either they are relevant to purposes other than sentencing or they currently form a coherent and self-contained enactment or part of an enactment on a particular topic. As described earlier in this Report, to repeal and re-enact such provisions would have an unacceptable cost for the enactment from which the provisions would be moved. We also included a signpost to the notification provisions under the Sexual Offences Act

2003 in this clause. Although these do not require a court to impose an order as they operate as an automatic consequence of conviction, sentencing courts ought to know about these provisions as they may be required to refer to them when explaining the effect of the sentence of the court.[243]

10.39 As noted earlier in this Report, in the main consultation paper we asked consultees whether the use of signposting was useful in circumstances where it was not possible to repeal and re-enact particular provisions. All consultees who responded specifically to this question, welcomed the use of signposts.[244]

10.40 We also asked consultees whether they agreed that the clause as drafted in the Bill included all the orders that a sentencing court ought to be aware of. Most respondents agreed, including the CPS, the Registrar of Criminal Appeals and the Law Society. The Magistrates' Association felt that the table ought to address disqualification or destruction orders in relation to animals (available under the Animal Welfare Act 2006 or the Dangerous Dogs Act 1991). These orders have been signposted elsewhere in the Sentencing Code in clauses 160 and 171 respectively. We consider these are better locations for such orders, alongside the other orders in respect of the forfeiture of property or the disqualification of offenders. Further, we asked consultees whether presenting the clause as a table was useful. All consultees who responded to this question agreed it was, however, the London Criminal Courts Solicitors' Association and the Bar Council suggested minor presentational amendments to the format and layout of the table.

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

10.41 The Fifth Group of Parts contains miscellaneous provisions about sentencing, provisions relating to the variation and commencement of sentence and various interpretative provisions.

Miscellaneous provision about sentencing

10.42 Part 12 of the Sentencing Code contains 7 Chapters:

(1) Chapter 1 concerns the imposition of financial orders where the offender is aged under 18;

(2) Chapter 2 contains provisions in relation to the commencement of a Crown Court sentence and the variation of a Crown Court sentence (also known as the "slip rule");

(3) Chapter 3 concerns the power of the court to make a recommendation for deportation;

---

[243] Notification requirements under Part 2 of the Sexual Offences Act 2003 are triggered when a person is convicted of a sexual offence listed in Schedule 3 to the 2003 Act with the length of the notification requirements determined by the nature and length of sentence imposed by the court.

[244] Namely the Law Society, the Bar Council, the Registrar of Criminal Appeals, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges.

(4) Chapter 4 contains those provisions relating to the review of sentences for assistance to the prosecution;

(5) Chapter 5 concerns the power of the magistrates' court to dispense with a recognizance;

(6) Chapter 6 concerns the power of the Secretary of State to make rules and issue codes of practice in relation to the imposition of community orders and suspended sentence orders; and

(7) Chapter 7 concerns the execution of warrants between England and Wales and Scotland.

Financial orders for those under aged 18

10.43 Chapter 1 of Part 12 of the Sentencing Code concerns the imposition of financial orders where the offender is aged under 18. Clauses 381 and 382 provide the court with the power to order a parent or guardian to pay an order for costs or compensation or a fine. There is separate provision in clause 382 in relation to costs, as orders for costs are not dealt with in the Sentencing Code. In relation to compensation, fines and the surcharge, there are explicit provisions in the provisions concerning those orders which apply clause 381 to those under 18 when convicted.[245] We have signposted the power under clause 381 in those provisions to draw attention to the power or duty to impose an order for the parent or guardian of the person aged under 18 to pay the fine or other financial order.

10.44 Clause 383 provides for the power to determine the parent's or guardian's financial circumstances where:

(1) an order for financial circumstances has been made; but

(2) there has been a failure to comply or where there has otherwise been a failure to cooperate with the court's inquiries into the financial circumstances under clause 35.

10.45 This is signposted in clause 128.

10.46 There are other minor drafting changes in these provisions including the correction of an error in relation to a missing reference to section 108 of the Powers of Criminal Courts (Sentencing) Act 2000 in section 165(3) of the Criminal Justice Act 2003 which has now been rectified in clause 383(4)(b).

Commencement and alteration of Crown Court sentence

10.47 Chapter 2 of Part 12 of the Sentencing Code contains provisions in relation to the commencement of a Crown Court sentence and the variation of a Crown Court sentence (also known as the "slip rule"). Clause 384 reproduces section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 which makes provision for a sentence imposed by a Crown Court to take effect from the beginning of the day on which it is made. We have brought together some definitions which relate to the

[245] See, for example, clauses 42(4)(a), 128(2) and 140(2).

provision which were previously located in another enactment, thereby making the provision comprehensive and reducing the risk of error.

10.48 We noted in the main consultation that there was no corresponding provision for sentences imposed by the magistrates' courts. We sought consultees views on whether this provision should be extended to orders made by the magistrates' courts. Consultees were near unanimous in their support for this change, with only one consultee considering it undesirable.

10.49 The weight of consultee response here re-assured us in our analysis of the law. We felt a change was particularly necessary here given the potential for confusion and disparity that could be introduced by consolidating this provision without there being an equivalent provision for the magistrates' court. We further noted that section 142(5) of the Magistrates' Courts Act 1980 proceeded on the general basis that this position applied to magistrates' court sentences in the context of sentences imposed at slip-rule hearings except where the court otherwise directs. Accordingly, we feel confident that this change is simply a clarificatory change to the law, and have made it in the draft Sentencing Code by pre-consolidation amendment.

10.50 In the main consultation we also recognised there was some ambiguity as to the extent to which section 154 of the Powers of Criminal Courts (Sentencing) Act 2000, or the Crown Court's inherent jurisdiction, granted the power to impose a sentence that begins other than on the day on which it is imposed. To that end we asked consultees whether they agreed 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. Of those who responded to this question, all agreed that that was the position. Further, all except Graham Skippen (Solicitor, Fison and Co.) considered it would be desirable to codify the position.

10.51 We have, unfortunately, not been able to make this change. Although the weight of evidence from consultation supported our view that there was no power to impose a sentence other than to impose it consecutively on the expiry of another sentence, there still remained too much doubt for us to affect this change by pre-consolidation amendment. Regrettably much of this doubt stems from the inconsistent drafting practices adopted in relation to community orders and behaviour orders.[246] This doubt means we cannot categorically rule out the possibility that section 154 would be interpreted as providing a broader discretion to the court to impose a sentence to take effect later than the day it was imposed (but not consecutively to another sentence). Without being able to confidently understand the potential impacts of this change, we have not been able to make this change in the draft Sentencing Code.

10.52 Clause 385 contains provision in relation to the "slip rule" power of the Crown Court to alter a sentence within a period of 56 days beginning on the day on which the

[246] Such as the contrast between youth rehabilitation orders for which paragraph 30 of Schedule 1 to the Criminal Justice and Immigration Act 2008 tightly defines the circumstances in which an order can be imposed to take effect on a day other than the day on which it is made, and the position for community orders where only section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 applies.

sentence was imposed. The clause closely follows the structure of the present section 155 of the Powers of Criminal Courts (Sentencing) Act 2000.

10.53 We asked consultees three questions in relation to the slip rule:

(1) whether the 56-day limit should be extended and if so, to what period of time;

(2) whether the time limits should differ for alterations of sentence which are corrections of errors of law and alterations of sentence for other reasons; and

(3) whether the requirement that the alteration of sentence be conducted by the same judge who imposed the sentence should be amended to allow a resident judge to make the alteration in circumstances where it is not reasonably practicable for the original judge to make the alteration.

10.54 In relation to the questions about the extension of time limits, with the exception of the Law Society and the Crown Prosecution Service, consultees disagreed that the time limit should be extended beyond 56 days, citing the need for finality. The London Criminal Courts Solicitors' Association's response captured the spirit of those responses which disagreed with our proposal:

> No – it is sufficiently long for an error to be identified and the matter brought to the Court's attention. The desirability of this function must be balanced against defendants needing certainty as the slip rule does not always operate in their favour.

10.55 The Law Society felt the time limit should be increased to 128 days. The Crown Prosecution Service also thought that it should be extended and queried whether there was a need to have a limitation on when the power could be exercised. They suggested that an "interests of justice" test may provide sufficient protections to offenders.

10.56 In light of the mixed nature of the responses, we have decided not to make this change in the Sentencing Code.

10.57 In relation to the possibility of introducing differing time periods for corrections of errors of law and amendments for other reasons, consultees disagreed with our proposal. The Senior District Judges stated that differing time limits could lead to confusion. Her Majesty's Council of Circuit Judges also disagreed with our proposal for the same reason. For this reason, we have decided not to make this change in the Code.

10.58 Finally, in relation to the possibility of enabling the resident judge to make the amendment to sentence in circumstances where it was not reasonably practicable for the judge who imposed sentence to do so, responses were generally favourable. The Senior District Judges, the Registrar of Criminal Appeals, the Bar Council and the Law Society were all in favour.

10.59 Her Majesty's Council of Circuit Judges were more circumspect, however, referring to the use of technology possibly resolving many circumstances in which the original sentencing judge is unavailable. We note in this regard, that this restriction still causes

issues in practice. This is illustrated by the recent case of *R v Filer*[247] where the original sentencing judge was away and not due to return until after the expiry of the 56-day period. Although the parties agreed, for reasons of pragmatism, that the matter could be heard by a different judge, the Court of Appeal ultimately had to hold the orders imposed at the slip-rule by the different judge unlawful. As the Court of Appeal was limited by section 11(3) of the Criminal Appeal Act 1968, they could not themselves correct the legal error of the original trial judge. The result is that the offender did not receive sentences under section 236A of the Criminal Justice Act 2003 on the counts for which such sentences were required by law.

10.60 The Registrar of Criminal Appeals also raised the point that the status of "resident judge" is not statutory.

10.61 In light of these consultation responses, it is clear that consultees overwhelmingly (if not unanimously) support an amendment to the law so as to avoid the practical difficulties and unnecessary costs involved where the sentencing judge is unavailable to make an alteration of sentence within the 56-day period prescribed by statute. How that is to be achieved, and whether technology could be used to address many of these issues, is however, a matter for debate, and may require broader court reform. Accordingly, we recommend that the Government review the operation of section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 in this respect.

Recommendation 11.

10.62 The Government should review section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and whether the power should be exercisable by a differently constituted court.

Deportation

10.63 Chapter 3 of Part 12 of the Sentencing Code concerns the power of the court to make a recommendation for deportation. Clause 386 provides a signpost to the power in section 6 of the Immigration Act 1971 for the court to make a recommendation for deportation when sentencing an offender for an offence punishable with imprisonment, where the offender is aged 17 or over when convicted and is not a British citizen.

10.64 There were two main reasons why the decision was taken to signpost, rather than re-draft, this provision. First, the Immigration Act 1971 applies to deportation from the United Kingdom generally and extends to England and Wales, Scotland and Northern Ireland, and therefore if repealed and replaced for courts in England and Wales in the Sentencing Code there was a risk of divergence that could be undesirable. Secondly, the power under section 6 of the Immigration Act 1971 relies heavily on other definitions and provisions in that Act. To remove it from the context of the Immigration Act 1971 would only be to complicate its application for courts and again would introduce an even greater risk of undesirable divergence.

247 [2018] EWCA Crim 2346.

Assistance of prosecution: review of sentence

10.65 Chapter 4 of Part 12 of the Sentencing Code contains provisions concerning the review of sentences which:

(1) have been discounted in consequence of an agreement between a specified prosecutor and the defendant for the defendant to provide assistance to the prosecution and where the offender has failed to provide that assistance; and

(2) where an offender is still serving a sentence and, pursuant to an agreement made with a specified prosecutor, enters into an agreement to provide assistance to the prosecution.

10.66 We have made numerous drafting changes in reproducing these provisions. These include:

(1) the introduction of the defined term "original sentence" allowing for the presentation of the provision in clearer terms;

(2) the correction of the now defunct reference to section 174(1)(a) in section 73(7) of the Serious Organised Crime and Police Act 2005; and

(3) the clarification that the reference to a discounted sentence in section 74(10) includes a sentence passed in pursuance of section 73 which has been substituted under section 74(5) but is less than the sentence which the court would have passed but for the agreement to provide assistance.

10.67 Additionally, these provisions have been separated from those dealing with the reduction of sentence at the original sentencing hearing. This is in line with the approach taken across the Code of presenting provisions in the order in which a court is likely to deal with them in practice. These provisions, which relate to the review of a sentence, necessarily arise after the imposition of sentence and therefore are located with other provisions which arise after the court has exercised its powers at the sentencing hearing.

10.68 In the main consultation paper, we asked consultees whether they approved of the way in which the parts of the Code were ordered, and more generally about the structural organisation of the material and whether it was presented in a way that was the most efficient for users. The Law Society, the Crown Prosecution Service and Lesley Molnar-Pleydell (Langley House Trust) all approved of the chosen structure. Others made suggestions as to the order of some of the disposals. However, there was support for the overall approach of structuring things in the order in which they are likely to arise in practice.

Recognizances, rules and warrants

10.69 Chapter 5 of Part 12 of Part 12 of the Sentencing Code concerns the power of the magistrates' court to dispense with a recognizance.[248] Chapter 6 of Part 12 contains provision for the Secretary of State to provide rules relating to community orders and

[248] A recognizance is an undertaking made by a person before a court to observe a condition imposed by the court.

suspended sentence requirements. It also contains a duty imposed upon the Secretary of State to issue a code of practice in relation to the processing of data gathered in the course of the electronic monitoring of offenders under community orders or suspended sentence orders. Chapter 7 of Part 12 deals with the execution of warrants between England and Wales and Scotland.

INTERPRETATION

10.70 Part 13 of the Sentencing Code contains interpretative provisions which are provided for in:

(1) clause 397 which provides the definition of terms such as “court”, “extended sentence”, “sentence of imprisonment” and interpretative provisions in relation to references to sentences of imprisonment;

(2) clause 398 which provides that any reference in the Code to an offence includes a reference to that offence committed by aiding, abetting, counselling or procuring the commission of that offence, as well as the definition of inchoate offences;

(3) clause 399 which lists the mandatory sentence requirements (and a brief description of the circumstances in which they apply) and defines “required life sentence” for the purposes of the Code;

(4) clause 401 which provides a definition of “sentence”; and

(5) clause 403 which provides a definition for references to “local authority”.

10.71 In relation to clause 399, the used of the term “mandatory sentence requirement” as a defined term has allowed for simpler and clearer drafting of general provisions. The example below illustrates the difference in approach.

10.72 Subsection (2A) of section 142 of the Criminal Justice Act 2003 lists a number of provisions which are referred to in subsection (2)(c) of that section. In the draft Code, this list has been replaced at subsection (3)(a) with the term “mandatory sentence requirement”, making the provision easier to read and avoiding any inadvertent omissions should the list be amended in future.

Example 14 – Criminal Justice Act 2003

142 Purposes of sentencing

(2) Subsection (1) does not apply—

(a) in relation to an offender who is aged under 18 at the time of conviction,

(b) to an offence the sentence for which is fixed by law,

(c) to an offence the sentence for which falls to be imposed under a provision mentioned in subsection (2A), or

(d) in relation to the making under Part 3 of the Mental Health Act 1983 of a hospital order (with or without a restriction order), an interim hospital order, a hospital direction or a limitation direction.

(2A) The provisions referred to in subsection (2)(c) are—

(a) section 1(2B) or 1A(5) of the Prevention of Crime Act 1953 (minimum sentence for certain offences involving offensive weapons);

(b) section 51A(2) of the Firearms Act 1968 (minimum sentence for certain firearms offences);

(c) section 139(6B), 139A(5B) or 139AA(7) of the Criminal Justice Act 1988 (minimum sentence for certain offences involving article with blade or point or offensive weapon);

(d) section 110(2) or 111(2) of the Sentencing Act (minimum sentence for certain drug trafficking and burglary offences);

(e) section 224A of this Act (life sentence for second listed offence for certain dangerous offenders);

(f) section 225(2) or 226(2) of this Act (imprisonment or detention for life for certain dangerous offenders);

(g) section 29(4) or (6) of the Violent Crime Reduction Act 2006 (minimum sentence in certain cases of using someone to mind a weapon).

Example 14 – Sentencing Code

57 Purposes of sentencing: adults

(3) Subsection (1) does not apply—

(a) to an offence in relation to which a mandatory sentence requirement applies (see section 396), or

(b) in relation to making any of the following under Part 3 of the Mental Health Act 1983—

(i) a hospital order (with or without a restriction order),

(ii) an interim hospital order,

(iii) a hospital direction, or

(iv) a limitation direction.

SUPPLEMENTARY PROVISION

10.73 Part 14 of the Code contains supplementary provisions including the introduction of clauses 407 (amendments to the Sentencing Code); 408 (powers to amend the Sentencing Code); 409 (transitional and savings provisions); 410 (consequential amendments); and 411 (repeals and revocations).

10.74 Clause 412 concerns the extent of the Sentencing Code. Although the Code generally extends only to England and Wales, there are a limited number of provisions which extend to Northern Ireland and Scotland. These are primarily to facilitate the transfer of orders between the jurisdictions. Clause 413 concerns the extension of the Code to the Channel Islands or the Isle of Man

10.75 Clause 414 introduces Schedule 24 which makes provision for the two pilot schemes which, at the date of publication of this report, are in force in relation to community orders and suspended sentence orders.

10.76 Finally, clauses 415 and 416 provide for the commencement of the Code and short title of the Sentencing Code.

Chapter 11: Implementation

THE PRODUCT OF THIS REPORT

11.1 Accompanying this report, in Appendices 3 and 4 respectively, are the draft Sentencing (Pre-Consolidation Amendments) Bill and the draft Sentencing Code Bill.

11.2 The introduction and implementation of both Bills is ultimately a matter for Parliament and Government. Both Bills are, however, ready to be introduced to Parliament subject to:

(1) any changes that will be necessary to incorporate legislation enacted since the conclusion of drafting on the Sentencing Code;[249]

(2) any changes that Government wishes to make (such as the extension of the Bill to the Armed Forces); and

(3) the drafting of the consequential amendments which the Sentencing Code Bill will make necessary.

Consequential amendments

11.3 The Sentencing Code Bill includes transitional provisions, a Schedule of repeals and tables of origins and destinations. The Schedule of consequential amendments required for the Sentencing Code Bill has not been drafted. Consequential amendments are amendments to other pieces of legislation which are required in consequence of substantive provisions effecting change in a Bill (here the Sentencing Code).[250] As the Sentencing Code is a consolidation it does not, in general, bring about any substantive change to the law. Accordingly, the consequential amendments necessary are predominantly ones updating references to provisions in the Sentencing Code.

11.4 In the course of this project, it became clear that it was not an efficient use of resource to draft a complete Schedule of consequential amendments in time for publication with this Report.

11.5 Unlike most of the draft Sentencing Code Bill and the Schedule of repeals, a Schedule of consequential amendments would be liable to become out of date quickly. Amendments to the substantive drafting of the Bill will only be needed to incorporate new sentencing provisions or amendments into the Sentencing Code. By contrast, the consequential amendments will be made to many areas of law other than sentencing (across a diverse range of Acts in which reference to existing sentencing legislation is

---

[249] At the conclusion of drafting on 14 November 2018 there were a small number of Bills preceding through Parliament containing sentencing provisions which would need to be incorporated into the Sentencing Code if enacted or which amend provisions which will be replaced by the Sentencing Code. See, for example, the amendments to Schedule 15 of the Criminal Justice Act 2003 effected by the Counter-Terrorism and Border Security Bill 2017-19.

[250] See Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (7th edition, 2017), section 6.5.

made). They will need to account for any further legislative changes to all those areas. Given the scale of the Sentencing Code Bill, it was felt that Parliamentary Counsel's time was best devoted to the substantive drafting of the Bill, and the compilation of the Schedule of repeals and tables of origins and destinations.

Law Commission recommendations

11.6 As noted at paragraphs 1.60 to 1.63 above, this report makes a number of recommendations that go beyond the enactment of the Sentencing Code and the Sentencing (Pre-Consolidation Amendments) Bill. Some of these amendments could be made by primary legislation, or secondary legislation, prior to the introduction of the Sentencing Code, and the Code amended accordingly.

11.7 Additionally, the draft Sentencing Code itself reflects some proposed Law Commission consolidation recommendations in relation to more minor matters, such as the modification of commencement provisions. For example, many of the uncommenced provisions re-drafted in Schedule 22 of the draft Sentencing Code can be brought into force by commencement orders or regulations and with different powers to make transitional, modificatory or consequential provisions. As far as possible it would be preferable to apply the same powers to all. Similarly, a number of transitional provisions which insert references into sentences of detention in a young offender institution are automatically repealed on the commencement of section 61 of the Criminal Justice and Court Services Act 2000 (which repeals that sentence), while other references to detention in a young offender institution need to be repealed by separate commencement regulations. In some cases there is no power to make transitional provisions where it will be necessary to preserve references to such sentences after their repeal (for example, where it is necessary to consider the previous sentences an offender has received). The draft Sentencing Code proceeds on the basis that it is preferable that in all cases there is a power to make any necessary transitional amendment, and that the distinction between these cases should be removed so that all come into force using commencement regulations.

11.8 The substance of these proposed Law Commission consolidation recommendations are all more limited in their effect than reforms that could be achieved by pre-consolidation amendments. However, due to their technical and wide-ranging nature attempting to achieve such reform by pre-consolidation amendment would be incredibly difficult in drafting terms, and likely involve a large number of individual amendments. Accordingly it is preferable to effect these changes by way of blanket Law Commission recommendations. As the draft Sentencing Code is likely to be subject to some minor amendments prior to introduction it is preferable to make these recommendations in concert with the introduction of the Bill. For now, therefore, these proposed recommendations are simply proposed recommendations, and are reflected as such in the origins of the draft Sentencing Code. These recommendations will be given effect in a short ancillary report published at the time of the introduction of the Bill.[251]

---

[251] As with the Powers of Criminal Courts (Sentencing) Act 2000, the report of which was 11 pages: see, Powers of Criminal Courts (Sentencing) Bill (2000) Law Com No 264, Scot Law Com No 175.

THE SENTENCING (PRE-CONSOLIDATION AMENDMENTS) BILL

11.9 The Sentencing (Pre-Consolidation Amendments) Bill contains five clauses and two Schedules. It gives effect to the clean sweep policy[252] and to the pre-consolidation amendments listed in Schedule 2 to the Bill. These pre-consolidation amendments are further amendments to sentencing legislation which facilitate, or are otherwise desirable in connection with, the consolidation of the Sentencing Code. The use of pre-consolidation amendments is standard practice in consolidations and is necessary to ensure an effective consolidation.[253] The changes they make are technical in nature: they correct errors, and allow for the legislation to be streamlined. However, they do alter the effect of the law, albeit in highly limited ways, and cannot therefore be made by the consolidation Bill. The table in Appendix 2 lists each pre-consolidation amendment and explains its purpose and effect.

11.10 As we made clear in the main consultation,[254] because the Sentencing Code Bill is a consolidation, the Sentencing (Pre-Consolidation Amendments) Bill must be enacted before the Sentencing Code Bill. This is so that the Sentencing Code Bill consolidates the law as amended or otherwise changed by the Sentencing (Pre-Consolidation Amendments) Bill, and does not itself bring about any change to the substance of the law.

11.11 As the Sentencing (Pre-Consolidation Amendments) Bill will make changes to the law – to give effect to the clean-sweep and the pre-consolidation amendments – it must pass through Parliament as a normal Public Bill.[255] While the Bill has been drafted so that it can be introduced alone, its provisions could also be incorporated as clauses in any other Public Bill within which sentencing is in "scope".[256] It is possible that the Bill could be introduced through the special procedure for Law Commission Bills. Under that procedure Bills are introduced in the House of Lords and the second reading in both the House of Lords and House of Commons is conducted in Committee. Evidence may only be received in the Committee stage of the House of Lords, not both the House of Lords and House of Commons as is ordinary. This procedure

---

252 Discussed in greater detail in Chapter 4.

253 See, for example, section 76 of the Charities Act 2006 which gave the Minister the power to make pre-consolidation amendments to facilitate the consolidation of charities law in the Charities Act 2011; or section 36 of the National Health Service Reform and Health Care Professions Act 2002 which did the same for the purposes of facilitating the consolidation of the law relating to the National Health Service in the National Health Service Act 2006, the National Health Service (Wales) Act 2006, and the National Health Service (Consequential Provisions) Act 2006.

254 A New Sentencing Code for England Wales (2017) Law Commission Consultation Paper No 232, paras 2.14 to 2.19.

255 Public Bills change the law as it applies to the general population. See Sir Malcom Jack (ed), *Erskine May Parliamentary Practice* (24th edn, 2011) chapters 27 to 29; Daniel Greenbeg (ed), *Craies on Legislation* (11th edn, 2017) paras 5.2.1 to 5.2.49; Diggory Bailey and Luke Norbury (eds), *Bennion on Statutory Interpretation* (7th edn, 2017) section 2.9.

256 The "scope" of a Bill governs the amendments or clauses that can be inserted within it. As defined by Erskine May, "The scope of a bill presents the reasonable limits of its collective purposes, as defined by its existing clauses and schedules.", Sir Malcom Jack (ed), *Erskine May Parliamentary Practice* (24th edn, 2011) 564. Amendments cannot be made to a Bill that are outside its scope. For example, the Sentencing (Pre-Consolidation Amendments) Bill could not be amended to deal with an issue relating to the National Health Service. Such an amendment would clearly be outside the collective purpose of the Sentencing (Pre-Consolidation Amendments) Bill.

therefore takes up less time on the floor of the house, and allows time for debate on the Bill to be found where it would otherwise not be available.

11.12 When the Sentencing Code Bill is enacted, the Sentencing (Pre-Consolidation Amendments) Bill will come into force immediately before the consolidation occurs. A legal fiction is created where the changes in the Sentencing (Pre-Consolidation Amendments) Bill come into force for a fraction of a second before the consolidation is enacted, allowing the Sentencing Code Bill to consolidate the law as amended by the Sentencing (Pre-Consolidation Amendments) Bill. The changes will come into force only for the purpose of the consolidation, and will not have effect for any other cases. Once the Sentencing Code Bill is enacted the Sentencing (Pre-Consolidation Amendments) Bill will then be entirely repealed, having served its purpose.

THE CONSOLIDATION PROCESS

11.13 As has been discussed in greater detail in Chapter 3, the Sentencing Code Bill is a consolidation Bill. Consolidation Bills are implemented by a special parliamentary procedure, governed by the House of Lords Standing Order No 51 and the House of Commons Standing Order No 140. This procedure severely restricts the amendments that can be made to such Bills and expedites their passage through both Houses of Parliament. As we noted above, consolidation Bills restate the existing law and as parliamentarians debated the substance of the provisions when they were originally enacted no further Parliamentary debate is considered necessary.

11.14 Consolidation Bills are ordinarily introduced in the House of Lords.[257] After their second reading, instead of proceeding to a debate in Committee – as would be the case for an ordinary Bill - a consolidation Bill is automatically referred to the Joint Committee on Consolidation Bills. The Joint Committee is comprised of 12 Lords[258] and 12 Members of Parliament.[259] Its role is principally to scrutinise the Bill to confirm that it is an accurate consolidation of the law. Proceedings are technical in nature and the Joint Committee will generally take oral evidence on the Bill, in particular from the Parliamentary Counsel responsible for it.[260] The Joint Committee may amend the Bill but only so as to improve or correct the consolidation. It may not amend the effect of the law.

11.15 Once the Bill has been confirmed as an accurate consolidation by the Joint Committee, a report is issued and the Bill is sent to a Committee of the whole House of Lords. Again, amendments may only be made to improve or correct the consolidation. Amendments to change the effect of the law are not allowed. This process is ordinarily concluded very quickly, with little or no debate.[261]

11.16 The Bill is then introduced in the House of Commons, where it follows an expedited procedure pursuant to House of Commons Standing Order No 58. There is no further

---

257 Sir Malcom Jack (ed), *Erskine May Parliamentary Practice* (24th edn, 2011) 621.

258 House of Lords Standing Order No 51.

259 House of Commons Standing Order No 140.

260 Sir Malcom Jack (ed), *Erskine May Parliamentary Practice* (24th edn, 2011) 916.

261 Daniel Greenbeg (ed), *Craies on Legislation* (11th edn, 2017) para 5.3.4.

committee stage, and no debate is allowed at either second or third reading. Instead the House is simply asked to approve or reject the Bill. Both the second and third reading can occur on the same day.[262]

11.17 The process as a whole therefore requires far less debate and parliamentary time than an ordinary Public Bill. This should not, however, be regarded as a sinister and undemocratic process of legislating. Nor should it be conceived of as a way of 'sneaking' Bills through the back door. This expedited procedure is simply a recognition of the fact that consolidation Bills cannot themselves make changes in the law, and Parliament is therefore only being asked to reaffirm law that has already been enacted (and therefore been subjected to the full Parliamentary process before). As Daniel Greenberg notes:

> If consolidation Bills were subjected to the same degree of substantive consideration as other Bills it is obvious that there would be time for few if any to make progress in an average Session of Parliament.[263]

COMMENCEMENT

11.18 The Sentencing Code Bill, like most modern Acts of Parliament, will not come into force as soon as it is enacted.

11.19 It might be supposed that as a consolidation Bill restates the existing law the period of time between enactment and commencement ought to be relatively short. However, the scale of the restructuring of the law typically requires an embedding period. Forms and systems will need to be updated, and professional users will need to familiarise themselves with the new structure of the law. For this reason, the general presumption for consolidation Bills is that there ought to be at least a three month interval between enactment and commencement (rather than the customary minimum of two months for ordinary Bills).[264] Considering the exceptional scale of the Sentencing Code Bill, it is thought that the period between enactment and commencement will be longer than that.

11.20 Further, although the Sentencing Code is a consolidation it will herald some substantive change to the law. The Sentencing (Pre-consolidation Amendments) Bill gives effect to a substantial policy change in the form of the clean sweep, and to further amendments. Additionally, unlike an ordinary consolidation, the Sentencing Code will not apply to all cases. As is discussed in more detail in Chapter 4, it will apply only to offenders convicted after its commencement. Additional time will therefore be needed to train professional users, such as judges and practitioners, on the effect of these changes to the law.

---

262 As occurred with the Co-Operative and Community Benefit Societies Act 2014, see *Hansard* (HC), 17 March 2014, vol 577, Business without Debate.

263 Daniel Greenbeg (ed), *Craies on Legislation* (11th edn, 2017) para 5.3.2.

264 Daniel Greenbeg (ed), *Craies on Legislation* (11th edn, 2017) para 10.1.5; Diggory Bailey and Luke Norbury (eds), *Bennion on Statutory Interpretation* (7th edn, 2017) section 5.1.

11.21 We envisage that a number of months between the Code's enactment, and its commencement, will be essential.

11.22 It is hoped that the Sentencing Code will be brought into force at either the start of April or October in the year after it is enacted. This would bring the Sentencing Code into force at the same time as changes to the Criminal Procedure Rules and Criminal Practice Directions are generally brought into force. It is also increasingly the practice of the Sentencing Council to bring new guidelines into force at one of these points in the year. Common commencement dates, as the Government has recognised in the context of business regulation,[265] allows for users of legislation to more easily and effectively prepare for legislative change. They particularly assist those involved in the training of the legal profession and judges, and the publishers of practitioner materials.

TRAINING

Judiciary

11.23 We have been in regular contact with Judicial College, the body responsible for the training and continuing professional development of members of the judiciary, in relation to any training needs prior to the coming into force of the Sentencing Code.

11.24 Judicial College provides lectures and support to the judiciary. We recognise the need for training on the operation of the Sentencing Code, the effect of the clean sweep and other notable changes from the operation of the current law. We will meet with Judicial College again, nearer to the time of enactment, to establish the precise training needs but at present it is envisaged that a small number of lectures, with ongoing support, will be sufficient. These can be delivered through the existing modules for Judicial College training at a negligible extra cost to the public.

11.25 The principal reason for anticipating that the training burden will be limited is because the Sentencing Code is primarily a consolidation; while the wording and layout of the provisions will change, judges will be familiar with the effect of the law under the Code as the substance has, for overwhelming majority of clauses, not changed.

Practitioners

11.26 Similar considerations apply to practitioners, and others such as probation staff and third sector organisations. We have been in touch with representatives of the professions throughout the project and have discussed training needs. Training will need to be organised prior to the commencement of the Code.

Ongoing exposure and support

11.27 A key part of the implementation phase of the project will be to draw attention to the existence of the Sentencing Code and its commencement date. We will do this by writing short articles for publication in trade press, liaising with Judicial College and the representatives of the professions and requesting that they bring the Code to the

---

[265] See Statutory Instrument Practice (5th edition) at para 3.12.19, available at http://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf (last visited 9 November 2018).

attention of their members through the various means of communication that they currently employ.

Digital Accessibility

11.28 In the modern age it is increasingly important that legislation is digitally accessible. Few now engage with legislation exclusively in paper form and it is expected that legislation will be easily accessible, and usable, online. More generally, it is important that legislation be accessible by all. Free services like legislation.gov.uk significantly improve public accessibility of legislation.

11.29 The Sentencing Code has been drafted with this in mind, and informed by research by the National Archives and the Office of the Parliamentary Counsel on how users of legislation interact with it on legislation.gov.uk.[266] The extensive use of signposts in the Sentencing Code, for example, should greatly improve the accessibility of the law online, where they can be hyperlinked to the relevant provision.

11.30 More generally throughout the drafting process we have worked closely with those at the National Archives responsible for legislation.gov.uk. We have sought to ensure that the Sentencing Code will be as digitally accessible as possible; and that it will always be kept fully up to date on legislation.gov.uk. The version of the draft Sentencing Code published with the main consultation[267] was the first ever draft bill hosted on legislation.gov.uk.[268]

11.31 Reflecting the Sentencing Code's unconventional approach to drafting, in particular to the inclusion of uncommenced amendments, there will be a further need to engage with commercial providers of legislation to ensure that it is displayed in a manner most helpful to users.

11.32 For example, LexisNexis by default shows legislation as it would look if all amendments were commenced, with underlining or italics used to note where amendments or repeals are not in force (or not in force for all purposes). While this may be useful with ordinary Acts of Parliament, or even with previous consolidation Bills (which had taken a different approach to the drafting of uncommenced amendments), because of the approach we have taken it may be more useful if a different approach was taken by the commercial providers.

11.33 By way of example, typically, legislation amending a particular Act of Parliament ("the amending Act") will not (or not necessarily) be contained within the Act to be amended ("the amended Act"). Accordingly, it is helpful where commercial providers bring together all uncommenced amendments and offer an option to view them as if they were in force. However, as the Sentencing Code has chosen to redraft all the uncommenced amendments in full, and place them into a schedule of the Code, the usual approach taken by the commercial providers may not be particularly helpful. This is because there is no need for the user to undertake their own research to locate

---

266 See, Alison Bertlin, "What works best for the reader? A study on drafting and presenting legislation" 2014 The Loophole 25 accessible at https://www.gov.uk/government/publications/legislation-what-works-best-for-the-reader (last visited 9 November 2018).

267 A New Sentencing Code for England Wales (2017) Law Commission Consultation Paper No 232.

268 See http://www.legislation.gov.uk/ukdpb/2017/sentencing-bill/contents (last visited 9 November 2018).

the provisions in the amending Act or Acts which will, if commenced, amend the amended Act. Instead, the user can merely make reference to the schedule in the Sentencing Code.

11.34 In fact, the usual approach taken by the commercial providers may negate the advantages of placing all uncommenced amendments to the Sentencing Code in a dedicated Schedule (Schedule 22). The purpose of this is to enable users of the Code to be confident that the legislation they are looking at is in force without having to be concerned with ascertaining whether the entirety of the provision is in fact in force.

11.35 Of course, it will be for the individual commercial providers to make their own editorial decisions, however we are of the view that it is sensible for us to make contact with them to inform them of our approach and the reasons underlying it so that they are able to make an informed decision.

11.36 There are of course limits in what can be achieved in this respect. Legislation is still constrained by the requirement that the official version of legislation is the version printed and laid in Parliament, and the limits of the software employed by Parliamentary Counsel. The legislative difficulties in referring to common law, or to secondary legislation limit what can be achieved with signposts.[269] The Criminal Procedure Rules and Criminal Practice Directions are supplementary codes of a sort, and are increasingly helping to mitigate the effects of these challenges. However, it is hoped that developments in the digital display of legislation will play a significant role in helping ensure greater accessibility.

11.37 For example, above we refer to the fact that the use of signposts allows for the easy hyperlinking of relevant material. It is easy to imagine a future where if the provision that is signposted is the location of a definition then hovering over the signpost will simply display the relevant definition. It is hoped that the Sentencing Code may serve as a useful basis for such work.

[269] For instance, if a common law doctrine such as a *Goodyear* indication was modified or abolished by subsequent case law, the reference in the legislation would be incorrect. That may have unintended consequences. In relation to secondary legislation, the frequency with which it is amended, superseded or revoked would similarly create an additional burden on the legislature to amend the primary legislation, either by way of a Henry VIII clause or by another piece of primary legislation.

Chapter 12: The Future of the Sentencing Code

MAINTAINING THE SENTENCING CODE

12.1 Once enacted the Sentencing Code has the potential to bring ongoing benefits to the law of sentencing procedure.

12.2 It will be necessary, however, to take steps to ensure that the effect of these benefits is not lost over time. One of the benefits is of course that the legislation is all in one statute. When sentencing law has been consolidated in the past, that particular benefit has typically been lost rapidly as new enactments on sentencing procedure mean that the law is no longer to be found in a single source. For example, the Powers of Criminal Courts (Sentencing) Act 2000 was a consolidation of a substantial part of sentencing procedure law (though a smaller proportion than the Code will consolidate). It therefore provided the usual benefits that an ordinary consolidation brings by virtue of bringing together provisions from various Acts of Parliament and the correction of errors. The clarity and simplicity brought by the 2000 Act was quickly undermined, however, by repeals, amendments and further sentencing procedure legislation enacted in Acts of Parliament without those changes being incorporated into the 2000 Act. This is, in part, what has led to the need for the Sentencing Code.

12.3 To ensure that the benefits of the Sentencing Code – the time and costs savings, the simplicity, clarity and accessibility, and the transparency – are preserved, it will be necessary to effect a change in the way government approaches future sentencing legislation. This task is more manageable than it first seems. We consider that there are a number of measures we can promote which will encourage those creating and enacting sentencing legislation in the future to recognise the benefits of the Sentencing Code and how they should be maintained. These are to suggest that:

(1) All future sentencing procedure law should be drafted as an insertion, substitution or amendment to the Code thereby retaining the completeness of the Sentencing Code.

(2) When future provisions are enacted which amend the Code, they should be inserted into Schedule 22 in the Code (which houses all the uncommenced provisions), unless they are to be fully commenced for all purposes at a point in time known at enactment. This will maintain the clarity of the main body of the Code and reduce the risk of error that can arise from applying uncommenced law.

(3) When considering commencement for new provisions that are to be inserted into the Code, care should be taken to maintain the effect of the clean sweep clause. The provisions inserted should apply to all cases where the conviction occurs on or after the new provision comes into force (irrespective of the date of the commission of the offence or other trigger event), unless it falls within the limited class of cases in paragraph 12.33. The inserted provision should, in all cases, make clear the date from which it applies and in relation to which

conduct – and that should be clear from the face of the provision itself and not only from a commencement order.

(4) More generally, when insertions and amendments are made to the Code, it is important to maintain the drafting practice of displaying commencement information on the face of the Act rather than only in the commencing statutory instrument.

NEW SENTENCING PROCEDURE LAW

12.4 It is important to emphasise that the Sentencing Code does not seek to restrict parliament's sovereignty as to the content of any future Bill in any way, nor stifle the appetite for amending sentencing procedure legislation, nor does it limit the way in which Parliament legislates. It would neither be appropriate or desirable to do so. However, we hope to encourage parliamentarians to make changes to sentencing procedure law through the Sentencing Code (by way of insertion or amendment) rather than by creating stand-alone provisions in a stand-alone enactment.

12.5 By "future amendments to sentencing procedure law" we mean any enactment creating new law or amending the current law of sentencing procedure. Making such changes *in* the Sentencing Code – either by inserting new provisions, substituting or amending existing provisions - rather than in a separate enactment, will help to secure the benefits of the Sentencing Code in the long term. If, on the other hand, amendments that are made remain in other enactments outside the Code, the law of sentencing procedure will swiftly be fractured, as the sources spread across multiple locations in the statute book. In due course the law will lose its clarity and accessibility and once again become more difficult for users to access and understand. Many of the benefits of the Sentencing Code, both principled and financial, would be lost.

Amendments to the law of sentencing procedure

12.6 There are numerous ways in which the law of sentencing procedure could be amended:

(1) the amendment of words contained in the current law;

(2) the insertion of words to the current law;

(3) the repeal of words of the current law;

(4) the substitution of words of the current law; and

(5) the creation of a new provision purporting to amend the current law.

12.7 There are various ways in which such amendments could be achieved, which, while not having any impact upon the intention behind the legislation, nor its effect, could have a significant impact on the accessibility and clarity of the law. It is for this reason that we propose an approach which will usually result in amendments being drafted as amendments or insertions to the Sentencing Code. Only very rarely would substantive sentencing procedure law be located outside of the Code. In such circumstances, consequential amendments should still be made to the Sentencing Code, to provide signposts to these provisions.

Where to draw the line?

12.8 A key challenge is therefore the way in which future drafters and parliamentarians determine whether future legislative provisions should be drafted as an amendment or insertion to the Code, or whether they should be located in other enactments.

12.9 Our proposed approach reflects the policy we developed to set the scope of the Sentencing Code (as to which see Chapter 3). In summary, the policy is to include in the Code all provisions a sentencing court needs in order to discharge its duties. The exception to this general rule is where to do so would disrupt a coherent statutory regime or where the provisions are relevant for other, non-sentencing purposes and cannot be neatly, clearly and comprehensively divided between the Code and the other piece of legislation.

12.10 In Chapter 3 we illustrate this exception with the example of the power of a sentencing court to disqualify a person from being or acting as the director of a company, or otherwise be involved in its formation or management. The power to disqualify following a conviction (and the associated provisions) are also relevant for non-sentencing purposes. To sever the provisions and re-draft those pertaining to the power following a conviction would be to produce two incomplete sets of provisions, resulting in a lack of clarity in both areas of law. We therefore decided that it was preferable for the substantive provisions to remain in the Company Directors Disqualification Act 1986 and to insert a signpost to them into the Code.

12.11 Accordingly, we propose that the default position should be that all law concerning sentencing procedure should be drafted as amendments to the Sentencing Code, unless:

(1) the provision(s) amend, modify or otherwise extend law which is currently contained outside the Sentencing Code, e.g. the power to disqualify an offender from acting as the director of a company;

(2) the provision(s) are applicable to areas of law other than sentencing procedure and cannot be satisfactorily split between the Sentencing Code and the other piece(s) of legislation, e.g. a new regime concerning the imposition of orders relating to mental health; or

(3) the provisions create a new, self-contained and coherent Code on another area of law which would be incomplete if the sentencing provisions were drafted in the Sentencing Code, e.g. a new confiscation of criminal proceeds regime.

12.12 In the case of the three exceptions listed above, we propose that signposts to the existence of any such new laws should be inserted in the Sentencing Code at the appropriate place, with a brief description of the effect. For instance, imagine the Knives Act 2026 was enacted, containing a new forfeiture power. The preferred approach may be to retain the Knives Act 2026 as a comprehensive account of the regulation of knives. In that case, what should be inserted into the Code in 2026 is a signpost as to the existence of an order available on conviction empowering the court to forfeit a knife used in an offence.

The impact of our proposed approach

12.13 It is an important feature of this proposal that it will not alter the substance or effect of any new law; we are concerned only with the way in which the new law is enacted and presented to users. In fact, if Parliament wishes to amend the law of sentencing procedure in the future, as no doubt it will, it may be that our proposal assists in the conception, drafting and accessibility of the new law. The Sentencing Code will have become the 'first port of call' for the primary law on sentencing procedure. Users will therefore expect to find the law of sentencing procedure (in substance or by signpost) contained in the Sentencing Code.

12.14 The proposals contained in this chapter of the report in no way seek to influence policymaking or the effect of any future parliamentary decision of the law on sentencing in the future. The proposals merely aim to maximise the positive effects of the Sentencing Code and ensure their longevity.

Examples

12.15 In the following paragraphs, we set out some hypothetical examples of the way in which amendments could be made to the Sentencing Code.

Amendment to the current law contained in the Sentencing Code

12.16 The following example demonstrates the approaches to an amendment to the law of sentencing procedure. It concerns the amendment to the number of hours available under an unpaid work requirement imposed as part of a community or suspended sentence order. Imagine that a new piece of legislation, the Sentencing (Amendments) Bill 2025 wishes to increase the number of hours of unpaid work that an offender may be required to perform under a community order or suspended sentence order.

12.17 It would be possible to draft the clause in the 2025 Bill which will give effect to this as a non-textual amendment; that is, one which purports to amend the meaning without in fact amending the text of the relevant provision. However, it is our view that a better approach would be to make a textual amendment to the Sentencing Code. This means that users have to refer to one, rather than two, enactments.

Example 15

SENTENCING (AMENDMENTS) ACT 2025

PART 1

Chapter 1

Amendments of the Sentencing Act [2020]

1 Unpaid work requirements

In paragraph 2(1)(b)(ii) of Schedule [j2003_199], for "300" substitute "300, or for convictions on or after 1 October 2025, 400".

Creation of a new sentencing provision

12.18 Example 16 illustrates our proposed approach to the creation of a new provision relating to sentencing procedure. It would be possible for this provision to be freestanding in a separate enactment, for example, the Sentencing (Written Remarks) Bill 2024. This would require users to refer to two enactments in order to locate and understand the law of sentencing procedure. Accordingly, it is our view that the best option is to draft this provision to be inserted into the Sentencing Code. This ensures that the Code remains the first port of call for sentencing procedure legislation rather than one of a growing list of enactments containing such provisions. The latter approach would begin to return us to the present situation with the attendant problems described earlier in this Report.

Example 16

SENTENCING (WRITTEN REMARKS) ACT 2024

1 Written sentencing remarks

After section [j2003_174]] insert—

"Duty to provide written copy of sentencing remarks

XX Duty to provide written copy of sentencing remarks

(1) This section applies where a person is convicted of an offence on or after 1 October 2024, and the court has –

(a) passed a sentence; or

(b) imposed a discharge on the offender;

(2) The court must provide the offender with a written copy of the sentencing remarks.

(3) In this section, "sentencing remarks" means any pronouncement made by the court when passing sentence or, as the case may be, imposing a restraining order under section [j1997_5A], as to the sentence or restraining order imposed, including--

(a) an explanation of the effect of the sentence or other orders imposed;

(b) an explanation of the effect of non-compliance; and

(c) the ability of the court to vary or review the sentence or order imposed."

Substitution of an existing provision

12.19 Example 17 relates to the purposes of sentencing for persons under the age of 18 who are convicted of an offence. Imagine that the Criminal Justice Bill 2023 seeks to remove the effect of the current provision and enact and bring into force a different provision. It would be possible to achieve the same result by (a) the repeal of the text in the Code (in the example below, section 58); and (b) create as a freestanding provision in a separate enactment a new provision dealing with the purposes of sentencing for under 18s. We are of the view that the better approach is to draft the new provision as an amendment to the Sentencing Code. Not only is this a neater piece of drafting but it ensures that the new provision is located in an enactment where users would expect to find it.

Example 17

CRIMINAL JUSTICE ACT 2023

26 Purposes of sentencing: Under 18s

For section 58 of the Sentencing Act [2020] substitute—

"YY Purposes etc of sentencing: offenders under 18

(1) This section applies where a court is dealing with an offender aged under 18 in respect of an offence for which they were convicted on or after 1 October 2023.

(2) The court must have regard to--

(a) the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18: see section 37(1) of the Crime and Disorder Act 1998);

(b) in accordance with section 44 of the Children and Young Persons Act 1933, the welfare of the offender, and

(c) the purposes of sentencing mentioned in subsection (3) (so far as it is not required to do so by paragraph (a).

(3) Those purposes of sentencing are—

(a) the punishment of offenders,

(b) the reform and rehabilitation of offenders,

(c) the protection of the public, and

(d) the making of reparation by offenders to persons affected by their offences."

Insertion of a signpost

12.20 Example 18 illustrates the creation of a new sentencing provision which is to be located outside of the Sentencing Code but which is relevant to sentencing procedure. In line with our policy as explained above, it is necessary to signpost the existence of this provision so that users are aware of it and where it is located.

12.21 Imagine that the Confiscation Bill 2022 creates a new regime about the confiscation of the proceeds of crime. A Part of the Bill creates a new confiscation of criminal cash order. A provision in that Part regulates the interaction of the new confiscation of criminal cash order and compensation orders under the Code. As the new confiscation of criminal cash regime is self-contained, the provision relating to compensation orders is drafted in the Confiscation Bill 2022 but the Bill also proposes to insert a signpost to the provision in the Sentencing Code. Example 18 demonstrates how that signpost would operate.

Example 18

CONFISCATION ACT 2022

104 Compensation orders

After section [j2000_130d] of the Sentencing Act [2020], insert—

"**136A Interaction between confiscation and compensation orders**

For provision about the interaction between confiscation orders made under the Confiscation Act 2022 and compensation orders made under section [j2000_130], see section 156 of the Confiscation Act 2022."

New provisions which relate to sentencing but not sentencing procedure

12.22 There will be, of course, new law created which relates to sentencing but does not concern sentencing procedure as defined by the scope of the Sentencing Code. Such provisions therefore will not need to be drafted as amendments, insertions or signposts in the Sentencing Code and instead, can be drafted as freestanding provisions in a separate enactment. It will then be for parliamentarians and parliamentary drafters to determine whether a signposting provision should be inserted into the Code to alert users to the existence of the new provisions which are to be located in a different enactment.

UNCOMMENCED AMENDMENTS

12.23 Amendments to sentencing law will fall into one of two categories: (1) the provision is enacted but not brought into force, and it is unknown at the time of enactment when the provision will be brought into force; and (2) the provision is enacted and at the time of commencement, it is known when the provision will be brought into force. In the case of the latter, these amendments should remain in the amending Act and then, when brought into force, be inserted into, or amend, the Sentencing Code. In the case of the former, however, we recommend that these amendments are inserted into

Schedule 22, which contains other uncommenced amendments. This approach will enable users to look at the Code with complete confidence that the provision they are looking at is in force and contains all the information they need to know.

12.24 For example, section 151 of the Criminal Justice Act 2003 has been enacted but not brought into force. It provides a sentencing court with the power to impose a community order on a persistent offender who has previously been fined despite the fact that the seriousness of the offence is not sufficient to warrant a community order. The provision currently sits in the body of the 2003 Act alongside other provisions which are in force. Users may mistakenly believe this provision is in force. In the Sentencing Code, this provision will appear only in a Schedule until such time as it is brought into force. As all the provisions in the Schedule are uncommenced, there is no risk that a user will mistake the provision for one which is in force and vice versa, all provisions in the body of the Code are in force and so there is no risk that a user will mistake a provision to be uncommenced.

12.25 Similar practices have been employed in previous consolidations, by placing uncommenced provisions in the Schedule of a separate Act containing various consequential provisions.[270] The approach has not, however, been maintained after the commencement of the consolidation. In our opinion, there are great benefits in terms of clarity and certainty that can be derived from continuing a practice of placing all future amendments to the Sentencing Code in a separate Schedule until they are commenced.

12.26 In order to maintain the clarity and ease of understanding this approach provides, it will therefore be necessary to encourage a practice of drafting all future amendments to the Sentencing Code so that they are amendments to the Schedule of uncommenced amendments until commenced unless the commencement date is known at the at the point of enactment. Example 19, below, provides an example of how an uncommenced provision which will, when commenced, amend the Sentence Code could be drafted and inserted into Schedule 22]. It is our intention that all such amendments to the Sentencing Code will be drafted in this way, and inserted into schedule 22 until the date of commencement. Of course, however, we cannot bind Parliament and it will be for parliamentarians to ensure that the sanctity of the Code is protected in this way.

---

[270] See, for example, Schedule 2 to the Road Traffic (Consequential Provisions) Act 1988. This approach has been used relatively rarely, however. More often consolidations are drafted as if all amendments to them are in force, and then transitory modifications are drafted, requiring the user of the legislation to read the provision as if the amendments are not in force if the amendments have not been commenced: see, for example, Schedule 3 to the National Health Service (Consequential Provisions) Act 2006. Such an approach, in our opinion, negates a significant advantage of consolidating the law.

Example 19

THE CRIMINAL JUSTICE ACT 2027

2 Further provision about pre-sentence drug testing

In Schedule [jA1s] to the Sentencing Act [2020], after paragraph 1 insert--

"Further provision about re-sentence drug testing

1A After section 34A (as inserted by paragraph 1 above), insert

34B Pre-sentence drug testing: Code of practice

(1) The Secretary of State may by regulations provide for a code of practice to have effect in relation to pre-sentence drug testing."

12.27 The examples above (examples 15 to 19) are drafted as though the commencement date is known, although if it were not known, we recommend that they should be drafted as example 19, namely that the new provision is inserted into Schedule 22 until such time as the commencement date is known.

MAINTAINING THE BENEFITS OF THE CLEAN SWEEP

12.28 The clean sweep clause does not continue to operate once the Sentencing Code has been commenced. If subsequent new law is commenced with transitional arrangements – something which we have tried to remove from sentencing procedure law by virtue of the clean sweep - the clean sweep clause will not remove them.

Example 20

In 2025, a new provision is inserted into the Code and commenced in 2026. It is commenced prospectively, only to apply to cases in which the offence was committed on or after the commencement date.

As the clean sweep does not continue to operate, the prospective commencement of the new provision will remain. This will create a layer of legislation which applies to cases pre-dating the commencement, and another for those post-dating the commencement.

12.29 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 to the Code are drafted and enacted in a way that retains the benefit of our new approach to transitional arrangements.

12.30 The Sentencing Code will not affect future government's ability to determine when sentencing legislation should be commenced or for whom and where, neither will it attempt to do so. However, we would hope to see the effect of the clean sweep and our novel approach to transition preserved. This will involve encouraging a culture among Parliamentary Counsel and legislators where all amendments to the Sentencing Code have effect for all convictions after the commencement of the Sentencing Code.

Commencement policy

12.31 Where there is a good reason to commence a change to the law with transitional provisions, we hope that we can encourage parliamentarians to adopt an approach to commencement which is still in the spirit of the Sentencing Code. That is to say, in a manner which ensures that it is absolutely clear as to the circumstances in which the amendment applies. It is not possible for us to dictate how this might be achieved, however, we recommend that wherever possible, a commencement policy consistent with the spirit of the Code is adopted.

12.32 In order to preserve the benefits of the Code for many years to come, wherever possible new amendments to the Sentencing Code should be commenced so that they apply to all convictions on or after their commencement. While it would be cleaner, and simpler, if all amendments to the Sentencing Code applied to any case in which the offender was convicted on or after the commencement of the Code itself, this would require complex transitional provisions to ensure that it did not operate on previously imposed orders.[271] Further, as a practical matter, the retrospective nature of such a commencement policy would require every amendment to sentencing procedure law to gain the Attorney General's consent, making legislating in this area more difficult.

12.33 There will, however, be a limited class of cases where this commencement is inappropriate, namely 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.

12.34 Careful consideration ought to be given to whether this is the case. The different approaches to commencement present in the current law have added an additional layer of complexity to the law of sentencing procedure. The Sentencing Code adopts a unified approach to commencement, by reference to the date of conviction which if

[271] In this respect, the arguments are the same as to why the Code does not apply to previously existing orders: see, Chapter 5.

adopted in relation to future amendments to the Code will help preserve the many benefits brought about by the Code. Exceptions to this policy should be well justified.

12.35 In all cases is important that the class of classes to which the new provision applies is clear in the provision itself. There should be no need to look to other sections of legislation, or indeed to secondary legislation. It is important that the effect of any transitional provisions is obvious, and not easily missed.

12.36 Example 21 illustrates how a provision amending the Sentencing Code to which an exception to the general commencement policy is required might be drafted to achieve what we consider to be the desired outcome.

Example 21

For example, a section being inserted into the Sentencing Code which does not apply to all offences convicted after the Sentencing Code is commenced would ideally take the following form, including on its face, the trigger event (the commission of the offence) and the date from which it applies (1 January 2026):

XX Community support charge

(1) This section applies where a person is convicted of an offence committed on or after 1 January 2026.

12.37 Accordingly, we recommend that a common commencement policy should be adopted which uses the date of conviction as the trigger event and displays the commencement date clearly on the face of the operative provision.

12.38 Section 104 of the Deregulation Act 2015 gives a Minister of the Crown the power to replace references to dates described in legislation with the date itself by statutory instrument. We recommend that this should be used after the commencement of amendments or insertions to the Sentencing Code 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. For example, if subsection (1) of a clause which came into force on 1 January 2025 read ““This section applies only to offences committed on or after the commencement of this section.” it would be amended to read “This section applies only to offences committed on or after 1 January 2025.” 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.

Recommendation 12.

12.39 We recommend that amendments to the Sentencing Code are enacted so that:

(1) wherever possible, any provision which is being inserted into, or amending, the Sentencing Code should apply to all cases where the offender is convicted on or after the commencement of that provision;

(2) in all cases the provision being inserted into, or amending, the Sentencing Code should be drafted in such a way that the provision in the Code makes clear to what cases it applies;

(3) the power under section 104 of the Deregulation Act 2015 is used to replace references to the day of commencement with the date on which commencement occurred;

(4) where the commencement date is not known upon enactment the amendment is inserted in schedule 22 until such time as it is brought into force.

The effect of these devices

12.40 It is important to recognise that the use of this Sentencing Code "house style" does not alter the substance of a provision, nor its force. They are merely drafting devices which aim to aid comprehension and reduce errors.

12.41 Accessibility and clarity of the law may be of secondary importance to some parliamentarians who are perhaps more concerned with the substantive effect of the provisions which they are proposing or debating. That focus upon the effect of the provisions, however, is ordinarily based in a desire that it be as effective as possible. For the law to be as effective as possible, it needs to be clear, simple, transparent and accessible. Parliamentarians should want the law to be as clear and effective as possible. They should, therefore, support the aims of the Code and the use of the devices discussed in this chapter as a means of securing the benefits of the Code for many years to come. In any event, it would be rather odd if, when faced with a suggestion that their new piece of sentencing procedure law should be drafted as an insertion or amendment to the Sentencing Code (rather than as a stand-alone provision in a separate enactment), a parliamentarian objected. It is our view that any such objection would be without justification given the substance of the provision(s) would be unchanged by their location on the statute book and their objection would do damage to the sanctity of the Code.

Chapter 13: Recommendations

13.1 This chapter collates all the recommendations we have made in this Report. Beyond the core recommendation of this report – to enact the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill – this Report also makes a number of further recommendations for the reform of sentencing law.

13.2 These further recommendations for reform have not been reflected in either of the draft Bills and both Bills can be enacted and implemented without the accompanying reforms.

13.3 The principal reasons for not having given effect to these further recommendations in the draft Bills are:

(1) The recommendations would amount to changes to the penalties available to the court, and are therefore outside the terms of reference of this project.

(2) The recommendations are for further consideration by Government, as the potential reforms may require a more careful consideration of the practical or policy impacts, and may need to be accompanied by wider reform.

(3) The recommendations would not be suitable for pre-consolidation amendments and would therefore need separate primary or secondary legislation. That is either because of the extent to which they amount to a substantive change in the law, or because they amend the law in a way that does not affect the consolidation.

13.4 This does not, of course, detract from the merits of these further recommendations, all of which have been informed by the extensive consultation we have undertaken in the course of this project. We believe all of them merit careful consideration by Government and hope that they will be implemented by future primary or secondary legislation.

Recommendation 1.

13.5 We recommend that the draft Sentencing Code Bill and draft Sentencing (Pre-Consolidation Amendments) Bill be enacted.

Paragraph 1.59

Recommendation 2.

13.6 We recommend that the power to make a hospital order, currently in section 37 of the Mental Health Act 1983 as modified by section 5A of the Criminal Procedure (Insanity) Act 1964 is redrafted (with modifications) into the 1964 Act so that all three powers available to a court under section 5A are contained within the 1964 Act.

Paragraph 3.40

Recommendation 3.

13.7 We recommend that the minimum sentence provisions contained in section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 are amended so as to allow a reduction for a guilty plea to the extent that the final sentence is no less than 80% of the prescribed minimum term, so as to bring them into line with the minimum sentence provisions contained in the Powers of Criminal Courts (Sentencing) Act 2000, the Criminal Justice Act 1988 and the Prevention of Crime Act 1953.

Paragraph 6.44

Recommendation 4.

13.8 The Government should include warrants and adjournments for previously imposed orders with a particular focus on the places to which a child or young person may be remanded or held, in its ongoing review of the provisions regarding remand.

13.9 Once that review is complete the Government should consider amending the Sentencing Code to include general provisions which ensure a consistent approach in these areas.

Paragraphs 7.26 and 7.27

Recommendation 5.

13.10 We recommend that the Government consider whether the word "child" or an analogous phrase should be used when referring to persons convicted under the age of 18 in future legislation, and whether the Sentencing Code should be amended to adopt such language.

Paragraph 7.38

Recommendation 6.

13.11 We recommend that the Government review whether regulations under paragraph 35 of Schedule 1 to the Criminal Justice and Immigration Act 2008 should be made to allow courts periodically to review youth rehabilitation orders.

Paragraph 7.54

Recommendation 7.

13.12 The Government should exercise the powers under sections 85, 86 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend the text of references to an offence punishable on summary conviction by a fine or maximum fine of £5,000 or more to reflect the effect of sections 85 and 86 of that Act.

Paragraph 8.38

Recommendation 8.

13.13 We recommend that the distinction in nomenclature between imprisonment (for offenders aged 21 or over at conviction) and detention in a young offender institution (for offenders aged 18 to 20 at conviction) for the purposes of imposing a determinate custodial sentence be removed so that sentences for both age groups are expressed as "sentences of imprisonment". This sentence of imprisonment should continue to be served in different institutions depending on the offender's age.

13.14 We further recommend that the distinction in nomenclature between those aged 18-20 and 21 or over for the purposes of imposing life sentences (under common law, sections 224A, 225, 226 and 269 of the Criminal Justice Act 2003) be similarly streamlined, resulting in the sentence available under each of the relevant provisions being labelled "life imprisonment". Again, these sentences should continue be served in different institutions, depending on the offender's age.

Paragraphs 9.19 and 9.20

Recommendation 9.

13.15 We recommend that the Government replace the phrase "fixed by law" with a more transparent statutory phrase, such as "the mandatory life sentence for murder" or "murder, or offences punishable as murder".

Paragraph 9.32

Recommendation 10.

13.16 We recommend that the Government examine whether the definition of mandatory sentence requirement contained in clause 399 ought to include reference to sentences for special custodial sentences for offenders of particular concern (under clauses 265 and 278).

Paragraph 9.49

Recommendation 11.

13.17 The Government should review section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and whether the power should be exercisable by a differently constituted court.

Paragraph 10.62

Recommendation 12.

13.18 We recommend that amendments to the Sentencing Code are enacted so that:

(1) wherever possible, any provision which is being inserted into, or amending, the Sentencing Code should apply to all cases where the offender is convicted on or after the commencement of that provision;

(2) in all cases the provision being inserted into, or amending, the Sentencing Code should be drafted in such a way that the provision in the Code makes clear to what cases it applies;

(3) the power under section 104 of the Deregulation Act 2015 is used to replace references to the day of commencement with the date on which commencement occurred;

(4) where the commencement date is not known upon enactment the amendment is inserted in schedule 22 until such time as it is brought into force.

Paragraph 12.39

Appendix 1: Table of exceptions to the ‘clean sweep’

1.1 In this table, we explain the exceptions to the clean sweep policy in Schedule 1 of the draft Sentencing (Pre-Consolidation Amendments) Bill (as to which see Appendix 3) and why we have decided to apply an exception in each case. As explained in Chapter 4 of the Report, we identified two categories of exception to the clean sweep: (1) in order to comply with article 7 of the European Convention on Human Rights and the common law rule against retroactivity, in circumstances where the clean sweep would otherwise expose an offender to a more severe penalty than that which applied at the time of the offence; and (2) cases in which, although there would be no breach of article 7, it would breach common standards of fairness to apply the clean sweep where to do so would mandate a minimum punishment. The table indicates beside each provision which exception applies: “(1) (article 7)”; or “(2) (mandatory sentence)”.

1.2 Where a provision is replicated in the Sentencing Code, the relevant clause is identified. Not all exceptions are replicated in the Sentencing Code – for example where the exception applies to secondary legislation. This does not affect the effect of the clean sweep exception, which preserves the transitional arrangements in the relevant provision.

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
1	para.7 of Sch.7 to the Domestic Violence, Crime and Victims Act 2004	42(1)	The statutory surcharge, inserted by the Domestic Violence, Crime and Victims Act 2004, mandates a payment (determined by reference to the sentence imposed) by offenders convicted on or after 1 April 2007.	This preserves the 1 April 2007 commencement date. Without an exception, offenders who committed offences at a time when the surcharge did not exist would, under the Code, be subjected to this additional, more severe, penalty.	(1) (article 7)
2	s.54 of the Criminal Justice and Courts Act 2015	46	The criminal courts charge, inserted by the Criminal Justice and Courts Act 2015, mandates a payment by offenders who were convicted of offences committed on or after 13 April 2015.	This preserves the 13 April 2015 commencement date. Without an exception, offenders who committed offences at a time when the charge did not exist would be subjected to this additional, more severe, penalty.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
3	art.7(2) of SI 2012/1696	Not replicated	The statutory surcharge, inserted by the Domestic Violence, Crime and Victims Act 2004, mandates a payment (determined by reference to the sentence imposed) by offenders convicted on or after 1 April 2007. These regulations set the amount of that payment, and replace previous regulations which set smaller amounts.	This preserves the 1 October 2012 commencement date for these regulations. Without an exception, offenders who committed offences at a time when the amount payable under the surcharge was less would, under the Code, be subjected to this additional, more severe, penalty.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
4	art.3 of SI 2014/2120	Not replicated	The statutory surcharge, inserted by the Domestic Violence, Crime and Victims Act 2004, mandates a payment (determined by reference to the sentence imposed) by offenders convicted on or after 1 April 2007. These regulations set the amount of that payment, and replace previous regulations which set smaller amounts.	This preserves the 1 October 2012 commencement date for these regulations. Without an exception, offenders who committed offences at a time when the amount payable under the surcharge was less would, under the Code, be subjected to this additional, more severe, penalty.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
5	art.3 of SI 2016/389	Not replicated	The statutory surcharge, inserted by the Domestic Violence, Crime and Victims Act 2004, mandates a payment (determined by reference to the sentence imposed) by offenders convicted on or after 1 April 2007. These regulations set the amount of that payment, and replace previous regulations which set smaller amounts.	This preserves the 1 October 2012 commencement date for these regulations. Without an exception, offenders who committed offences at a time when the amount payable under the surcharge was less would, under the Code, be subjected to this additional, more severe, penalty.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
6	para.10 of Sch.16 to the Crime and Courts Act 2013	142	The Crime and Courts Act 2013 commenced changes to the compensation order provisions allowing a magistrates' court to impose an order of any sum whereas previously it was subject to a limit.	The exception preserves the limit for old cases. To apply the clean sweep would be to allow the courts to impose a compensation order of any sum for an offence which, at the time of its commission, could only have received a limited fine. Consultees' views were that a compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence.	(1) (article 7)
7	para.6A of Sch.12 to the Criminal Justice Act 1991 so far as it relates to certain amendments made by section 17(3) of that Act	142	The Criminal Justice Act 1991 commenced changes to the compensation order provisions allowing a magistrates' court to impose an order up to £5000 whereas previously the maximum that could be imposed was £2000.	The exception preserves the limit for old cases. To apply the clean sweep would be to allow the courts to impose a compensation order of any sum for an offence which, at the time of its commission, could only have received a limited fine. Consultees' views were that a compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
8	art.1(2) of SI 1984/447 so far as it relates to art.2(1) of that SI	142	SI 1984/447 effected changes to the compensation order provisions allowing a magistrates' court to impose an order up to £2000 whereas previously the maximum that could be imposed was £1000.	The exception preserves the limit for old cases. To apply the clean sweep would be to allow the courts to impose a compensation order of any sum for an offence which, at the time of its commission, could only have received a limited fine. Consultees' views were that a compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence.	(1) (article 7)
9	para.3(3) of Sch.8 to the Magistrates' Courts Act 1980 as it has effect by virtue of paragraph 2 of Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000	142	This provision preserves the previous changes to the maximum compensation order made by the magistrates' court made by the Criminal Law Act 1977.	The exception preserves the limit for old cases. To apply the clean sweep would be to allow the courts to impose a compensation order of any sum for an offence which, at the time of its commission, could only have received a limited fine. Consultees' views were that a compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
10	art.2, and Sch. 1 to, SI 1977/1682 as saved, so far as it relates to s.60(2) of the Criminal Law Act 1977	142	SI 1977/1682 commenced changes to the compensation order provisions allowing a magistrates' court to impose an order up to £1000 whereas previously the maximum that could be imposed was £400.	The exception preserves the limit for old cases. To apply the clean sweep would be to allow the courts to impose a compensation order of any sum for an offence which, at the time of its commission, could only have received a limited fine. Consultees' views were that a compensation order can be considered to be a penalty and therefore, applying the clean sweep would expose offenders to penalties in excess of that which applied at the time of their offence.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
11	reg.6(1) of SI 2013/534 so far as it relates to art.3(h) of SI 2013/453 so far as that relates to the commencement of paragraphs 53 and 69 of Sch.5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012	Not replicated – will be in the transitional provisions.	The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made amendments to the provisions relating to legal representation in proceedings relating to the imposition of custodial sentences or certain requirements under a youth rehabilitation order	To allow the clean sweep to apply to these provisions would remove the effect of the saving provision. Exceptions are needed to ensure that certain provisions operate correctly where Legal Aid was made available prior to 1 April 2013.	This falls within neither of our primary exceptions. This exception is necessary to ensure that certain provisions operate correctly where Legal Aid was made available prior to 1 April 2013.

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
12	para.8(b) of Sch.11 to the Powers of Criminal Courts (Sentencing) Act 2000	164	Section 38 of the Road Traffic Act 1991 extended the power to order driving disqualification to offences of common assault, and offences involving an assault for which driving disqualification was not previously available. The effect of this provision is now reproduced in section 147 of the Powers of Criminal Courts (Sentencing) Act 2000.	To remove this exception would be to allow for driving disqualification orders to be imposed where they were not previously available. This would be to subject some offenders to a more severe penalty under the Code than that which applied at the time of the offence.	(1) (article 7)
13	s.146(1) of the Powers of Criminal Courts (Sentencing) Act 2000	163	Section 39 of the Crime (Sentences) Act 1997 extended the power to order driving disqualification to all offences. The effect of this provision is now reproduced in section 146 of the Powers of Criminal Courts (Sentencing) Act 2000.	To remove this exception would be to allow for driving disqualification orders to be imposed where they were not previously available. This would be to subject some offenders to a more severe penalty under the Code than that which applied at the time of the offence.	(1) (article 7)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
14	art.7(2)(h) of SI 2012/2906, so far as it relates to para.51 of Sch.12 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012	Not replicated in the Code	The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made changes in respect of the remand of children and young persons. SI 2012/2907 commenced various provisions which effected this change and made amendments consequent upon the change. One such amendment was to remove reference to section 23 of the Children and Young Persons Act 1969 in section 242 of the Criminal Justice Act 2003. Article 7(2)(h) preserves that reference for remands prior to the commencement date.	The saving provision ensures that the references in section 242 of the Criminal Justice Act 2003 remain correct, in line with the way in which the provisions to which they relate were commenced. The changes necessary upon allowing the clean sweep to apply would disproportionately affect the law surrounding remand which is a topic outside of our scope. The impact of this for sentencing would be minimal and therefore is was decided that this should be excluded from the operation of the clean sweep.	This falls within neither of our primary exceptions. This exception is necessary to ensure that those children and young persons remanded before 2012 have their time remanded credited for a custodial sentence imposed in relation to that remand.

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
15	s.106B of the Powers of Criminal Courts (Sentencing) Act 2000	247	This provision imposed a further period of supervision at the expiry of a detention and training order in certain circumstances for offences committed on after 1 February 2015.	The clean sweep would remove the 1 February 2015 commencement date so that it applied to all offenders irrespective of the date of the offence. This would be to subject some offenders to a more severe penalty under the Code than that which applied at the time of the offence.	(1) (article 7)
16	s.224A of the Criminal Justice Act 2003(1)(b)	273 and 283	This provision imposes a mandatory life sentence on offenders who have been convicted of a second offence listed in Schedule 15B to the Criminal Justice Act 2003. The sentence applies only to offences committed on or after 3 December 2012.	The clean sweep would under the Code subject those who had committed their offence before 3 December 2012 to a mandatory life sentence which did not exist at the time of the offence. The exception preserves the prospective commencement.	(1) (article 7); and (2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
17 and 18	ss.225 and 226 of the Criminal Justice Act 2003	258, 274 and 285	This provision imposes a mandatory life sentence on offenders who have been convicted of an offence listed in Schedule 15 to the Criminal Justice Act 2003 in circumstances where they are considered to be a "dangerous offender". The sentence applies only to offences committed on or after 4 April 2005.	The clean sweep would subject those who had committed their offence before 4 April 2005 to a mandatory life sentence which did not exist at the time of the offence. The exception preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
19	s.2(10) of the Criminal Justice and Courts Act 2015	Sch.19	Section 2 of the Criminal Justice and Courts Act 2015 commenced amendments to Sch.15 to the Criminal Justice Act 2003 to add offences to the schedule. Subsection (10) of that section ensured that the commencement applied, in so far as it applied to the life sentences under sections 225 and 226 of the 2003 Act, only to offences committed on or after 13 April 2015.	The clean sweep would require the imposition of a life sentence under the Code for an offence to which the mandatory life sentence did not apply at the date of the commission of the offence. The exception preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
20	s.3(9) of the Criminal Justice and Courts Act 2015 so far as it relates to section 224A of the Criminal Justice Act 2003	Sch.15	Section 3 commences amendments to Sch.15B to the Criminal Justice Act 2003, inserting offences to the schedule. Subsection (9) limits the application of those amendments to offences on or after 13 April 2015.	The clean sweep would remove the prospective commencement, making the automatic life sentence apply to the offences inserted to the schedule irrespective of the date on which they were committed. That would expose an offender to a mandatory life sentence under the Code in circumstances where that did not apply at the time their offence was committed. Accordingly, the partial exception preserves the prospective commencement for those cases.	(1) (article 7); and (2) (mandatory sentence)
21	Para.5(2) of Sch.2 to SI 2005/950 as it relates to the repeal of section 109 of the Powers of Criminal Courts (Sentencing) Act 2000	Not replicated	This preserves the prospective only repeal of section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. To remove it would be to disapply a mandatory sentence.	The clean sweep would remove the prospective repeal, repealing section 109 for all offenders.	Neither, this is part of the general policy of the Code not to alter mandatory sentences.

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
22	s.109(1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000	Not replicated	This provision imposes a mandatory life sentence on offenders who have been convicted of a second serious offence. The provision applies only to offenders convicted after 30 September 1997.	The clean sweep would require the imposition of a life sentence under the Code for an offence to which the mandatory life sentence did not apply at the date of the commission of the offence. The exception preserves the prospective commencement.	(2) (mandatory sentence)
23	para.37 of Schedule 22 to the Coroners and Justice Act 2009, except so far as it relates to Schedule 15 to the Criminal Justice Act 2003 as it applies to sections 226A and 226B of that Act, and section 3A and 3C of the Powers of Criminal Courts (Sentencing) Act 2000.	Sch.19	Paragraph 37 provides a transitional and saving provision for the amendments made by section 138 of the Coroners and Justice Act 2009 which inserted certain offences to Schedule 15 to the Criminal Justice Act 2003; the insertions to the schedule apply in relation to offences committed on or after 12 January 2010.	The clean sweep would remove the prospective commencement, making the dangerousness regime apply to the offences inserted to the schedule irrespective of the date on which they were committed. That would expose an offender to a mandatory life sentence under the Code in circumstances where that did not apply at the time their offence was committed. Accordingly, the partial exception preserves the prospective commencement for those cases.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
24	s.27(4) of the Criminal Justice and Courts Act 2015	Sch.21	Section 27 omits paragraph 5(2)(a) of Schedule 21 to the Criminal Justice Act 2003 and inserts paragraph 4(2)(b), the effect of which is to increase the "normal" starting point for an offence of murder of a police officer or prison officer during the course of their duty from 30 years' imprisonment to a whole life order.	The clean sweep would remove the prospective nature of the commencement of this amendment, thereby rendering the "normal" starting point for a murder of a police officer or prison officer during the course of their duty to be a whole life order. This would, in some circumstances, apply under the Code a higher starting point to cases to which it did not apply at the time of the offence. The exception to the clean sweep preserves the prospective commencement of this amendment.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
25	art.3 of SI 2010/197	Sch.21	Article 3 limits the commencement of the insertion of paragraph 5A of Schedule 21 to the Criminal Justice Act 2003 which creates a new "normal" starting point for certain cases of murder, to cases in which the offence was committed on or after 2 March 2010.	The clean sweep would remove the prospective nature of the commencement of this amendment, thereby rendering the "normal" starting point for a murder involving the taking of a weapon to the scene with the intention to commit and offence and in fact committing murder with that weapon, to be 25 years in all cases. This would, in some circumstances, apply this highertstarting point to cases to which it did not apply at the time of the offence. The exception to the clean sweep preserves the prospective commencement of this amendment.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
26	art.7(4) of SI 2010/816	Sch.21	Article 7(4) limits the commencement of the amendments to Schedule 21 of the Criminal Justice Act 2003 (the effect of which is to remove reference to the defence of provocation in paragraph 11, dealing with mitigating factors and to insert reference to fear of violence in that paragraph) to cases in which the offence was committed on or after 4 October 2010.	The clean sweep would remove the prospective commencement of these amendments. In line with our policy of preserving the prospective commencement of amendments to Schedule 21, because of the mandatory nature of the life sentence for murder, the exception to the clean sweep ensures that the commencement date of 4 October 2010 is preserved.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
27	para.9(b) of Schedule 22 to the Criminal Justice Act 2003	Sch.21	Paragraph 9(b) of Schedule 22 of the 2003 Act prescribes that paragraph 10 of that schedule (minimum term imposed in murder cases where offence committed before 18 December 2003 must not be greater than that which the court considers the Secretary of State would have been likely to notify under the practice pertaining prior to December 2002) applies only in relation to cases in which the offence was committed on or after 18 December 2003.	The clean sweep would remove the prospective commencement of Schedule 21 to the Criminal Justice Act 2003, thereby exposing an offender who committed their offence prior to 18 December 2003 to a higher minimum term than that which would have been likely to be imposed at the time of their offence. The exception to the clean sweep preserves this limitation for those cases prior to that date.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
28	art.3(1)(a) of SI 2012/2906 as it relates to s.65(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012	Sch.21	Article 3(1)(a) of SI 2012/2906 limits the commencement of section 65(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which ensures that murders aggravated by hostility related to disability or transgender identity attract a 30-year starting point) to offences committed on or after 3 December 2012.	The clean sweep would remove the prospective commencement of this amendment. In line with our policy of preserving the prospective commencement of amendments to Schedule 21, because of the mandatory nature of the life sentence for murder, the exception to the clean sweep ensures that the commencement date of 3 December 2012 is preserved.	(2) (mandatory sentence)
29	s.51A(1)(b) of the Firearms Act 1968	311	Section 51A(1)(b) ensures that the minimum sentence applies to offences which were committed on or after the commencement of the provision, 22 January 2004.	The effect of the clean sweep would be to remove the prospective commencement of these amendments, thereby exposing an offender to a mandatory minimum sentence under the Code which did not exist at the time they committed their offence. The exception to the clean sweep preserves this prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
30	s.30(5) of the Violent Crime Reduction Act 2006	311	Section 30 of the 2006 Act made amendments to section 51A of the Firearms Act 1968 which provides for a minimum sentence upon conviction for certain firearms offences. Subsection (5) provides that the amendments (which include the addition of certain offences to the list of 'trigger' offences) applies only in relation to offences committed on or after 6 April 2007.	The effect of the clean sweep would be to remove the prospective commencement of these amendments, thereby exposing an offender to a mandatory minimum sentence under the Code which did not exist at the time they committed their offence. The exception to the clean sweep preserves this prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
31	para.41(1) of Schedule 22 to the Coroners and Justice Act 2009 in so far that it relates to amendments made by paragraph 10 of Schedule 17 to that Act to sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000	313 and 314	Paragraph 10 of Schedule 17 to the 2009 Act extends the minimum sentence provisions under section 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000 so that previous convictions in member states of the European Union or another part of the UK may be taken into account to the same extent as such a conviction in England and Wales.	Paragraph 41(1) limits the commencement of this amendment to offences committed on or after 15 August 2010. The effect of the clean sweep would be to expose an offender to the minimum sentence in circumstances where they would not have been so exposed at the time of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
32	s.110 of the Powers of Criminal Courts (Sentencing) Act 2000, subsections (1)(a) and (2A)(a)(ii)	313	Section 110 creates a minimum sentence of 7 years' imprisonment in cases where the offender has two previous "relevant" convictions for Class A drug trafficking. This was commenced prospectively only, applying only to cases in which the 'new' offence was committed on or after 1 October 1997.	The clean sweep would operate to remove the prospective commencement of this provision, the effect of which would be to expose an offender to a minimum sentence under the Code in circumstances where no such liability existed at the time of the commission of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)
33	s.111 of the Powers of Criminal Courts (Sentencing) Act 2000, subsections (1)(a) and (1)(c)	314	Section 111 creates a minimum sentence of 3 years' imprisonment in cases where the offender has two previous "relevant" convictions for domestic burglary. This was commenced prospectively only, applying only to cases in which the 'new' offence was committed on or after 1 October 1997.	The clean sweep would operate to remove the prospective commencement of this provision, the effect of which would be to expose an offender to a minimum sentence under the Code in circumstances where no such liability existed at the time of the commission of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
34	s.1(2A)(a) of the Prevention of Crime Act 1953	315	Section 1(2A) introduces a minimum sentence for offenders convicted of an offence under section 1, where at the time of the offence they had a relevant conviction. This was commenced prospectively only, applying only to cases in which the offence was committed on or after the introduction of the minimum sentence.	The clean sweep would operate to remove the prospective commencement of this provision, the effect of which would be to expose an offender to a minimum sentence under the Code in circumstances where no such liability existed at the time of the commission of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
35	s.139(6A)(b) of the Criminal Justice Act 1988	315	Section 139(6A) introduces a minimum sentence for offenders convicted of an offence under section 139, where at the time of the offence they had a relevant conviction. This was commenced prospectively only, applying only to cases in which the offence was committed on or after the introduction of the minimum sentence.	The clean sweep would operate to remove the prospective commencement of this provision, the effect of which would be to expose an offender to a minimum sentence under the Code in circumstances where no such liability existed at the time of the commission of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)

Paragraph of Schedule 1	Provision in current law	Relevant clause in the Sentencing Code	Description of provision	Effect of exception to clean sweep	Which exception applies?
36	s.139A(5A)(b) of the Criminal Justice Act 1988	315	Section 139A(5A) introduces a minimum sentence for offenders convicted of an offence under section 139A, where at the time of the offence they had a relevant conviction. This was commenced prospectively only, applying only to cases in which the offence was committed on or after the introduction of the minimum sentence.	The clean sweep would operate to remove the prospective commencement of this provision, the effect of which would be to expose an offender to a minimum sentence under the Code in circumstances where no such liability existed at the time of the commission of the offence. The exception to the clean sweep preserves the prospective commencement.	(2) (mandatory sentence)

Appendix 2: Table of Pre-Consolidation Amendments

2.1 This table explains the effect and purpose of every pre-consolidation amendment contained in Schedule 2 of the draft Sentencing (Pre-Consolidation Amendments) Bill (as to which see Appendix 3). The table is organised by reference to the paragraph in that Schedule that makes the relevant pre-consolidation amendment. The table shows the provision of the current law that is amended, where the change is reflected in the draft Sentencing Code Bill (if it is), and summarises the effect of the change. Not all pre-consolidation amendments are replicated in the draft Sentencing Code Bill. The pre-consolidation amendments that are not replicated are largely those that repeal part of the current law. As the Sentencing Code consolidates the current law as amended repealed provisions are of course not replicated.

2.2 The entries relating to the provisions of the current law amended use a series of abbreviations. These abbreviations are the same as those used in the table of origins that accompanies the draft Sentencing Code in Appendix 4 and users of this table are recommended to have reference to that table.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 2	PCC(S)A 2000 s.1ZA	7(4)	Provides consistency with other references to issued guidance, and clarifies that guidance may be re-issued by the Secretary of State.
1, 3	PCC(S)A 2000 s.1D(7) (inserting this subsection)	13(2)	Ensures that where a deferment order was made by a magistrates' court that the exact same constitution does not have to deal with the order when the period finishes, and any magistrates' court acting in the same local justice area can deal with the offender.
1, 4	PCC(S)A 2000 s.3(2)(a)	Not replicated	Omits unnecessary "in the court's opinion".

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 5(1), (2)	PCC(S)A 2000 s.3A(2)	15(1)	Substitutes “the court is of the opinion” for “it appears to the court” to provide consistency with the wording of other committal provisions.
1, 5(1), (3)	PCC(S)A 2000 s.3A(4) (making paragraph (b) subsection (4A))	15(4) and (5)	Corrects the grammar and effect of this subsection by splitting it into two.
1, 5(1), (4)	PCC(S)A 2000 s.3A(5)	15(6)	Ensures that the section is not read as limiting the court’s power to commit a specified offence on a guilty plea.
1, 6	PCC(S)A 2000 s.3B(2)	Not replicated	Omits unnecessary “in the court’s opinion”.
1, 7(1), (2)	PCC(S)A 2000 s.3C(2)	17(1)	Substitutes “the court is of the opinion” for “it appears to the court” to provide consistency with the wording of other committal provisions.
1, 7(1), (3)	PCC(S)A 2000 s.3C(4)	17(4)	Ensures that the section is not read as limiting the court’s power to commit a specified offence on a guilty plea. Also corrects the grammar of the subsection.
1, 8(1), (2)	PCC(S)A 2000 s.4(5)	21(5)	Ensures that the powers of the Crown Court on a committal under section 4 of the PCC(S)A 2000 where section 5(1) does not apply are the powers of the original magistrates’ court, rather than the powers of that court if they had just convicted the offender.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 8(1), (3)	PCC(S)A 2000 s.4(8) (making paragraph (b) subsection (9))	18(9)	Corrects the grammar and effect of this subsection by splitting it into two.
1, 9(1), (2)	PCC(S)A 2000 s.4A(1)(a)	19(5)	Corrects a grammatical error in this subsection
1, 9(1), (3)	PCC(S)A 2000 s.4A(5)	22(5)	Ensures that the powers of the Crown Court on a section 4A committal where section 5A(1) does not apply are the powers of the original magistrates' court, rather than the powers of that court if they had just convicted the offender.
1, 10	PCC(S)A 2000 s.5(1)	Not replicated	Ensures that the powers of the Crown Court on committal are those they would have if they had convicted the offender at the time the offender was actually convicted, rather than the powers they would have if they had just convicted the offender.
1, 11	PCC(S)A 2000 s.5A(1)	22(2)	Ensures that the powers of the Crown Court on committal are those they would have if they had convicted the offender at the time the offender was actually convicted, rather than the powers they would have if they had just convicted the offender.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 12	PCC(S)A 2000 s.6(4)	20(1)	Ensures that where the court commits an offender for sentence under section 6(6) or 9(3) of the Bail Act 1976, section 43 of the Mental Health Act 1983, or paragraph 22(1) of Schedule 8 to the Criminal Justice Act 2003 that any other appropriate offences can also be committed to the Crown Court correcting a lacuna in the law identified in *R v De Brito* [2013] EWCA Crim 1134.
1, 13(1), (2)(a)	PCC(S)A 2000 s.7(1)	23(2)	Ensures that the powers of the Crown Court on a section 6 committal are the powers of the original magistrates' court, rather than the powers of that court if they had just convicted the offender.
1, 13(1), (2)(b)	PCC(S)A 2000 s.7(4) (omitting this subsection)	Not replicated	This subsection can be omitted as a consequence of the changes to the powers on committal now ensuring that the offender is sentenced by reference to their age at conviction.
1, 14(1), (2)(a)	PCC(S)A 2000 s.8(2)	25(2), (3) and (4)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 14(1), (2)(b)	PCC(S)A 2000 s.8(2)	25(2)	Clarifies that the youth court should sit where the magistrates' court which sent the offender sat, not where the Crown Court sat.
1, 14(1), (3)(a)	PCC(S)A 2000 s.8(3)	25(8)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 14(1), (3)(b)	PCC(S)A 2000 s.8(3)	25(8)	Amends the language to reflect the fact that an offender may be bailed on remission for sentence.
1, 14(1), (4)(a)	PCC(S)A 2000 s.8(4)	25(9) and 26(1)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 14(1), (4)(b)	PCC(S)A 2000 s.8(4)(a)	26(1) and (2)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit. Also amends the language to reflect the fact that an offender may be bailed on remission for sentence.
1, 14(1), (4)(c)	PCC(S)A 2000 s.8(4)(b)	25(9)	Change made to modernise language.
1, 14(1), (4)(d)	PCC(S)A 2000 s.8(4)(b)(ii)	25(9)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 14(1), (5)	PCC(S)A 2000 s.8(4A) and (4B) (inserting these subsections)	29(1), (2), (3) and (4)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit.
1, 14(1), (6)(a)	PCC(S)A 2000 s.8(5)	26(1) and 29(1)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 14(1), (6)(b)	PCC(S)A 2000 s.8(5)	26(1)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit.
1, 14(1), (6)(c)	PCC(S)A 2000 s.8(5)	25(4)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 14(1), (6)(d)	PCC(S)A 2000 s.8(5)	29(5)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit.
1, 14(1), (7)(a)	PCC(S)A 2000 s.8(6)	25(4)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 14(1), (7)(b)	PCC(S)A 2000 s.8(6)	25(5)	Change made to clarify the legal position.
1, 14(1), (8)	PCC(S)A 2000 s.8(7)	25(5)	Substitutes references to remitting the case for references to remitting the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 15(a)	PCC(S)A 2000 s.9(2)(b)	27(3)	Substitutes references to dealing with the case for references to dealing with the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 15(b)	PCC(S)A 2000 s.9(2)(b)	27(3)	Substitutes references to dealing with the case for references to dealing with the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 16(1), (2)(a)	PCC(S)A 2000 s.10(2)(a)	28(3)	Change made to clarify the offence must be punishable by imprisonment by the convicting court (ie on summary conviction, not just on indictment).
1, 16(1), (2)(b)	PCC(S)A 2000 s.10(2)(b)	28(3)	Change made for consistency of language.
1, 16(1), (3)(a)	PCC(S)A 2000 s.10(3)	29(2)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit.
1, 16(1), (3)(b)	PCC(S)A 2000 s.10(3)(b)	28(4)	Substitutes references to dealing with the case for references to dealing the offender, in line with the wording adopted in much of sections 9 and 10 of the PCC(S)A 2000 and employed in the committal provisions.
1, 16(1), (4)	PCC(S)A 2000 s.10(6)	29(5)	Makes changes to allow for the streamlining of the provisions relating to adjournment, remand and appeal for powers to remit.
1, 17	PCC(S)A 2000 s.12(1)(b)	80(5)	Change made to ensure that the maximum period of a conditional discharge is 3 years, not 3 years and a day.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 18(1), (2)	PCC(S)A 2000 s.13(5)	Para 5(4) of Schedule 2	Change made for consistency of references to committing offenders to/in custody.
1, 18(1), (3)	PCC(S)A 2000 s.13(6)	402(1) and paras 5(2) and 6(2) of Schedule 2	Ensures that if an offender who was convicted under age 18 and given a conditional discharge is later re-sentenced they are re-sentenced by reference to their age at conviction.
1, 18(1), (4)	PCC(S)A 2000 s.13(6A) (inserting this subsection)	402(2) and (3) and para 7(2) of Schedule 2	Amendment made to ensure that the Crown Court when re-sentencing a conditional discharge are limited to magistrates' court powers if the original court was.
1, 18(1), (5)	PCC(S)A 2000 s.13(7)	402(2) and para 7(2) of Schedule 2	Ensures that if an offender who was convicted under age 18 and given a conditional discharge is later re-sentenced they are re-sentenced by reference to their age at conviction.
1, 18(1), (6)	PCC(S)A 2000 s.13(8)	402(1) and para 5(3) of Schedule 2	Ensures that if an offender who was convicted under age 18 and given a conditional discharge is later re-sentenced they are re-sentenced by reference to their age at conviction.
1, 18(1), (7)	PCC(S)A 2000 s.13(9) (omitting this subsection)	Not replicated	This subsection was omitted as it is no longer necessary now that the other powers to re-sentence have been amended so that an offender who was convicted under age 18, given a conditional discharge, and later re-sentenced is re-sentenced by reference to their age at conviction rather than their age at re-sentencing.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 19(1), (2)	PCC(S)A 2000 s.15(1A) (inserting this subsection)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
1, 19(1), (3)	PCC(S)A 2000 s.15(2)(b)	Not replicated	Omits the words "the criminal division of" to provide consistency to references to the Court of Appeal in the Sentencing Code.
1, 20	PCC(S)A 2000 s.16(1)	84(1)	Clarifies referral orders are available for offenders convicted aged under 18, even if they have become aged 18 prior to sentence – this is in line with the general approach to sentencing espoused in *R v Ghafoor* [2003] EWCA Crim 1857.
1, 21	PCC(S)A 2000 s.17(4A) (inserting this subsection)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
1, 22	PCC(S)A 2000 s.24(5)	97(4)	Makes missed consequential amendments reflecting the repeal of paragraphs 11 and 12 of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000, and the amendment of paragraph 10 of that Schedule and insertion of paragraph 6A.
1, 23	PCC(S)A 2000 s.30(4)	406(4)	This change allows for powers to make regulations to be streamlined in the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 24(1), (2)	PCC(S)A 2000 s.73(3)	109(2)	This change is made to clarify that reparation orders are made in respect of an individual offence.
1, 24(1), (3)	PCC(S)A 2000 s.73(4)	110(1)	These changes are made to clarify that reparation orders are made in respect of an individual offence.
1, 24(1), (4)	PCC(S)A 2000 s.74(4B)	110(4)	Clarifies that subsection (4A) of section 73 of the Powers of Criminal Courts (Sentencing) Act 20000 does not confer a free-standing power to revoke a youth rehabilitation order.
1, 24(1), (5)	PCC(S)A 2000 s.73(5)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
1, 25(1), (2)	PCC(S)A 2000 s.74(3)(a)	112(7)	Requires the court to avoid, so far as practicable, any conflict of the requirements of the proposed reparation order with the requirements of any other court order (not simply any other youth community order) the offender is or will be subject to.
1, 25(1), (3)	PCC(S)A 2000 s.74(5)(a)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
1, 25(1), (4)	PCC(S)A 2000 s.74(6)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 25(1), (5)	PCC(S)A 2000 s.74(8)(b)	114(2)	This change allows reparation made by a reparation order to be made on the day the order is made and ensures that such reparation must be completed within 3 months of that date rather than 3 months and a day.
1, 26(1), (2)	PCC(S)A 2000 s.83(2)	226(2)	This amendment ensures that a court may not impose an extended sentence of detention under section 226B of the Criminal Justice Act 2003 on a person who is not legally represented (unless section 83(3) of the Powers of Criminal Courts (Sentencing) Act 2000 applies).
1, 26(1), (3)	PCC(S)A 2000 s.83(5)	226(4)	This makes a missed consequential amendment to insert references to suspended sentences made under the Criminal Justice Act 2003 which have not yet taken effect.
1, 26(1), (4)	PCC(S)A 2000 s.83(6)	226(5)	This change ensures that the gloss in section 83(6) of the Powers of Criminal Courts (Sentencing) Act 2000 applies equally to references to being sentenced to imprisonment.
1, 27	PCC(S)A 2000 s.91(6) (inserting this subsection)	252(2) and Sch.22 para.47	Glosses the reference to punishable with imprisonment the case of an offender aged 18 or over in section 91(5) of the Powers of Criminal Courts (Sentencing) Act 2000 so that it reads aged 21 or over – in recognition of the prohibition on imprisoning an offender aged under 21 in section 89 of the Powers of Criminal Courts (Sentencing) Act 2000, and that section 61 of the Criminal Justice and Court Services Act 2000 repealing that section is not yet commenced.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 28	PCC(S)A 2000 s.96(b)	230(2) and (4)	Replaces references to the now repealed section 79 of the Powers of Criminal Courts (Sentencing) Act 2000 with references to the relevant subsections of its replacement, section 152 of the Criminal Justice Act 2003.
1, 29	PCC(S)A 2000 s.97(5)	269(2)	Replaces reference to the now repealed section 84 of the Powers of Criminal Courts (Sentencing) Act 2000 with reference to its replacement, section 265 of the Criminal Justice Act 2003.
1, 30	PCC(S)A 2000 s.100(1)(b)	Not reflected in the Code	Omits reference to the conditions of section 152(3) of the Criminal Justice Act 2003 being satisfied, as those conditions can only be satisfied in the case of an offender aged 18 or over at conviction.
1, 31(1), (2)	PCC(S)A 2000 s.101(1A) (inserting this subsection)	236(2)	This amendment clarifies the maximum term of a detention and training order for a summary offence (that being an offence over which the Crown Court would not normally have jurisdiction).
1, 31(1), (3)	PCC(S)A 2000 s.101(2)	236(2)	Makes a change consequential on the PCA at paragraphs 1, 30(1), (2) so that section 101(2) of the Powers of Criminal Courts (Sentencing) Act 2000 now applies only to indictable offences.
1, 31(1), (4)	PCC(S)A 2000 s.101(2B) (inserting this subsection)	236(4)	Clarifies that by default a detention and training order takes effect at the beginning of the day on which it is made.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 31(1), (5)	PCC(S)A 2000 s.101(14) (inserting this subsection)	236(2)	Provides a necessary transitional provision consequential on the PCA at paragraphs 1, 30(1), (2) so that in the inserted section 101(1A) of the Powers of Criminal Courts (Sentencing) Act 2000 the reference to an offender aged 18 or over receiving imprisonment is a referenced to an offender aged 21 or over – in recognition of section 89 of the Powers of Criminal Courts (Sentencing) Act 2000, and that section 61 of the Criminal Justice and Court Services Act 2000 has not yet been commenced.
1, 32(1), (2)	PCC(S)A 2000 s.103(2A)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
1, 32(1), (3)	PCC(S)A 2000 s.103(3)(a)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
1, 32(1), (4)	PCC(S)A 2000 s.103(4) (omitting this subsection)	Not replicated	Omits now defunct subsection, which was required only for local probation boards which were abolished by section 11 of the Offender Management Act 2007.
1, 33(1), (2)	PCC(S)A 2000 s.104(3A)(b)	Sch. 12 para.3(3)	Aligns the maximum period of further detention or supervision under section 104 of the Powers of Criminal Courts (Sentencing) Act 2000 with the maximum period of further detention under section 105 of that Act.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 33(1), (3)	PCC(S)A 2000 s.104(3B)	Sch. 12 para.3(4)	Makes transitional provision for offences committed at some point over multiple days, in line with that in section 105(4) of the Powers of Criminal Courts (Sentencing) Act 2000.
1, 33(1), (4)	PCC(S)A 2000 s.104(3D)(a)	Sch. 12 para.3(6)	Ensures consistency of language with section 105(2)(a) of the Powers of Criminal Courts (Sentencing) Act 2000.
1, 34	PCC(S)A 2000 s.104B(7)(b)	406(4)	This change allows for powers to make regulations to be streamlined in the Sentencing Code.
1, 35	PCC(S)A 2000 s.105(2)	Sch. 12 para.7(2)	This change simplifies the wording of section 105(2) of the Powers of Criminal Courts (Sentencing) Act 2000 to make it clearer to which court it applies.
1, 36(1), (2)	PCC(S)A 2000 s.106(4)	244(2)	Ensures that where an offender is subject concurrently to a detention and training order and a sentence of detention in a young offender institution the offender will always be treated as if subject only to the sentence of detention in a young offender institution, for the purposes of release: that being the sentence for the offence for which he was convicted later.
1, 36(1), (3)	PCC(S)A 2000 s.106(6)	246	This change ensures that this subsection applies appropriately to the re-sentencing powers in the Code as they have been amended.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 37	PCC(S)A 2000 s.106B(4)(b)	247(4)	Amends reference to a youth offending team in recognition of section 39(1) of the Crime and Disorder Act 1998 which allows multiple youth offending teams to be established by local authorities.
1, 38	PCC(S)A 2000 s.110(6)(b)	313(6)	This amendment clarifies that a sentence of custody for life under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000, where it is available, can be imposed on an offender to whom section 110 of that Act applies.
1, 39(1), (2)	PCC(S)A 2000 s.130(1)	Not replicated	Makes amendment consequential to the PCAs at paragraphs 1 and 39(1), (3).
1, 39(1), (3)	PCC(S)A 2000 s.130(1A) (inserting this subsection)	134(2)	This amendment expresses more clearly and simply that a compensation order may be the only sentence imposed for an offence if no other sentence is required.
1, 39(1), (4)	PCC(S)A 2000 s.130(2), (2ZA), (2A) (omitting these subsections)	Not replicated	Subsections (2) and (2ZA) of section 130 to the Powers of Criminal Courts (Sentencing) Act 2000 are unnecessary following the PCAs at paragraphs 1 and 39(1), (3). Subsection (2A) can be omitted as the court is already required by virtue of subsection (3) to explain why it has not imposed a compensation order if it had power to, and therefore to consider exercising that power.
1, 40(1), (2)	PCC(S)A 2000 s.132(1)	141(1)	Amends reference so that compensation is not received until any pending appeal is resolved.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 40(1), (3)	PCC(S)A 2000 s.132(2)	141(2)	Clarifies that reference to compensation orders being suspended in section 132(2) of the Powers of Criminal Courts (Sentencing) Act 2000 is reference to the compensation not being received due to the effect of subsection (1) of that section.
1, 41(1), (2)	PCC(S)A 2000 s.133(2)(a)	143(1)	Amends reference so that the power under subsection (1) of section 133 of the Powers of Criminal Courts (Sentencing) Act 2000 cannot be exercised until any pending appeal is resolved.
1, 41(1), (3)	PCC(S)A 2000 s.133(5)(b)	Not replicated	Omits the words “the criminal division of” to provide consistency to references to the Court of Appeal in the Sentencing Code.
1, 42	PCC(S)A 2000 s.134(2)	144(3) and (4)	Replaces reference to “plaintiff” with reference to “claimant” to reflect the more modern term used in civil proceedings since the introduction of the Civil Procedure Rules (SI 1998/3132).
1, 43(1), (2)	PCC(S)A 2000 s.137(1A)	42(4)	Ensures that section 137(1A) of the Powers of Criminal Courts (Sentencing) Act 2000 applies to all offenders convicted aged under 18, even if they have become aged 18 prior to the imposition of the surcharge – this is in line with the general approach to sentencing espoused in *R v Ghafoor* [2003] EWCA Crim 1857.
1, 43(1), (3)	PCC(S)A 2000 s.137(1A)	42(4)	Makes consequential grammatical changes necessary due to the amendment by paragraphs 1 and 43(1), (3).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 44	PCC(S)A 2000 s.139(2)	130(1)	Clarifies that section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 does not apply to offenders convicted aged under 18, even if they have become aged 18 prior to sentencing - this is in line with the general approach to sentencing espoused in *R v Ghafoor* [2003] EWCA Crim 1857.
1, 45	PCC(S)A 2000 s.140(6)	131(6)	Replaces reference to the now repealed Justices of the Peace Act 1997 with the relevant section of the Courts Act 2003 that replaced it.
1, 46(1), (2)	PCC(S)A 2000 s.144(1)(a)	157(3)	Ensures that the six month period begins with the day on which the order is made, rather than the day after, and provides consistency in the Sentencing Code as to references to time periods.
1, 46(1), (3)	PCC(S)A 2000 s.144(3)	158(3)	Replaces reference to “relevant authority” with reference to “relevant body” in consequence of the amendments made to section 2 of the Police (Property) Act 1897 by paragraph 62 of Schedule 16 to the Police Reform and Social Responsibility Act 2011.
1, 46(1), (4)	PCC(S)A 2000 s.144(5)	158(3)	Replaces reference to “relevant authority” with reference to “relevant body” in consequence of the amendments made to section 2 of the Police (Property) Act 1897 by paragraph 62 of Schedule 16 to the Police Reform and Social Responsibility Act 2011.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 47	PCC(S)A 2000 s.147(1)(b) (omitting this paragraph)	Not replicated	Allows an offender to be disqualified from driving under section 147 of the Powers of Criminal Courts (Sentencing) Act 2000 where they have been committed under any power that gives the Crown Court the power to deal with them as if convicted on indictment (not simply under section 3 of that Act).
1, 48(1), (2)	PCC(S)A 2000 s.149(2) (omitting this subsection)	Not replicated	Repeals subsection as it is unnecessary and its existence could incorrectly imply in other places in the Sentencing Code that powers of the court were only exercisable on application.
1, 48(1), (3)(a)	PCC(S)A 2000 s.149(3)	150(2)	This amendment, alongside that at paragraph 48(3)(b) ensures that a restitution order made against a third party ceases when the offender successfully appeals their conviction(s) as an order made against the offender would.
1, 48(1), (3)(b)	PCC(S)A 2000 s.149(3)(a)	150(3)	This amendment, alongside that at paragraph 48(3)(a) ensures that a restitution order made against a third party ceases when the offender successfully appeals their conviction(s) as an order made against the offender would.
1, 48(1), (3)(c)	PCC(S)A 2000 s.149(3)(b) (omitting this paragraph)	Not replicated in the Code	This amendment repeals the explicit right of appeal given to an offender subject to a restitution order as it is unnecessary (already being provided for by section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968), and implies in other cases that there is no right of appeal against the order.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 48(1), (3)(d)	PCC(S)A 2000 s.149(4)	150(6)	This amendment provides consistency as to the language of references to orders not taking effect until there is no further possibility of them being varied or set aside on appeal.
1, 49(1), (2)	PCC(S)A 2000 s.150(7)	377(9)	This change ensures consistency of language in in relation to the use of the words “among other things” and “includes, in particular” when introducing lists of examples.
1, 49(1), (3)	PCC(S)A 2000 s.150(10)	378(3)	This change ensures consistency of language in relation to references to “revoking” or “discharging” orders.
1, 50	PCC(S)A 2000 s.154(1)	384(1)	This change extends section 154 of the PCC(S)A 2000 to magistrates’ courts.
1, 51(1), (2)(a)	PCC(S)A 2000 Sch.1 para.5(3)(a)	Sch.4 para.7(3)	Inserts a missed consequential amendment to the power to extend a referral order under paragraph 6A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.
1, 51(1), (2)(b)(i)	PCC(S)A 2000 Sch.1 para.5(5)(a)	402(1), Sch.4 para.7(4)	This change provides the court re-sentencing the offender with the powers they would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 51(1), (2)(b)(ii)	PCC(S)A 2000 Sch.1 para.5(5)(b)	Sch.4 para.7(5)	This change ensures consistency of language in in relation to the use of the words “have regard to”, “take account of”, and “take into account”.
1, 51(1), (3)	PCC(S)A 2000 Sch.1 para.6A(8) (inserting this sub-paragraph)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
1, 51(1), (4)	PCC(S)A 2000 Sch.1 para.9	Sch.4 paras.10(4), 11(3)	Inserts a missed consequential amendment to the power to extend a referral order under paragraph 6A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.
1, 51(1), (5)	PCC(S)A 2000 Sch.1 para.9ZD(3)	Sch.4 para.12(3)	This change ensures consistency of language in in relation to the use of the words “have regard to”, “take account of”, and “take into account”.
1, 51(1), (6)(a)	PCC(S)A 2000 Sch.1 para.9D(7)	373(5)	Replaces the reference to section 18(3) of the Crime and Disorder Act 1998 (which relates to now defunct local probation boards which were abolished by section 11 of the Offender Management Act 2007) with reference to section 18(3A) of that Act (which relates to their replacement).
1, 51(1), (6)(b)	PCC(S)A 2000 Sch.1 para.9D(7)	375(2)	Ensures that the relevant sections of the Crime and Disorder Act 1998 apply to parenting orders made as a result of a referral order as they apply to a case where the parenting order is made on the conviction of a child or young person of an offence.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 51(1), (7)	PCC(S)A 2000 Sch.1 para.13(8)	408(2)	Makes consequential amendments for the insertion of section 17(4A) of the Powers of Criminal Courts (Sentencing) Act 2000 by paragraph 21.
1, 51(1), (8)(a)	PCC(S)A 2000 Sch.1 para.14(2A)	Sch.4 para.17(3)	Inserts a missed consequential amendment to the power to extend a referral order under paragraph 6A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.
1, 51(1), (8)(b)	PCC(S)A 2000 Sch.1 para.14(3)	Sch.4 para.17(2)	This change provides the court re-sentencing the offender with the powers a magistrates' court would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.
1, 51(1), (8)(c)	PCC(S)A 2000 Sch.1 para.14(4)	Sch.4 para.17(4)	This change ensures consistency of language in in relation to the use of the words "have regard to", "take account of", and "take into account".
1, 52(1), (2)(a)	PCC(S)A 2000 Sch.8 para.2(1)	Sch.5 para.1(2)	This amendment ensures that where an offender is now aged 18 or over further proceedings in relation to a reparation order are dealt with in a magistrates' court rather than a youth court.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 52(1), (2)(b)(i)	PCC(S)A 2000 Sch.8 para.2(2)(b)	402(1), Sch.5 para.2(2)	This change provides the court re-sentencing the offender with the powers they would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.
1, 52(1), (2)(b)(ii)	PCC(S)A 2000 Sch.8 para.2(2)(c)	Sch.5 para.2(2)	This amendment ensures consistency of language in the Sentencing Code as to references to “committing in custody” or “committing to custody”.
1, 52(1), (2)(c)	PCC(S)A 2000 Sch.8 para.2(3)	Sch.5 para.2(3)	This amendment ensures consistency of language in relation to references to committing “an offender” or “an offender’s case” in the provisions relating to post-sentencing committals.
1, 52(1), (2)(d)	PCC(S)A 2000 Sch.8 para.2(4)	402(1), Sch.5 para.3(2)	This change provides the court re-sentencing the offender with the powers they would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.
1, 52(1), (2)(e)	PCC(S)A 2000 Sch.8 para.2(4A) (inserting the sub-paragraph)	402(2), (3), Sch.5 para.3(2)	Amendment made to ensure that the Crown Court when re-sentencing a reparation order are limited to magistrates’ court powers if the original court was.
1, 52(1), (2)(f)(i)	PCC(S)A 2000 Sch.8 para.2(8)	Not replicated	Omits the words “the criminal division of” to provide consistency to references to the Court of Appeal in the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 52(1), (2)(f)(ii)	PCC(S)A 2000 Sch.8 para.2(8)	Not replicated	This amendment omits these glossing words as they are unnecessary and simply complicate the position.
1, 52(1), (2)(g)	PCC(S)A 2000 Sch.8 para.2(8A) (inserting this sub-paragraph)	Sch.5 para.3(7)	This amendment clarifies that proceedings in relation to breaches of reparation orders in the Crown Court are decided by the judge and not the jury, so as to avoid doubt by contrast with other provisions in the Code that already expressly provided this.
1, 52(1), (3)	PCC(S)A 2000 Sch.8 para.5(1)	Sch.5 para.5(4)	This change provides the court who is amending a reparation order with the powers they would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.
1, 52(1), (4)(a)	PCC(S)A 2000 Sch.8 para.6(5)(b)	Not replicated	This amendment, combined with those at paragraph 52(4)(c) and (d) ensure that those subject to reparation orders who are under 18 may still only be remanded to local authority accommodation, the normal rules of remand operate in relation to offenders aged 18 or over.
1, 52(1), (4)(b)	PCC(S)A 2000 Sch.8 para.6(6)	Not replicated	Omits this sub-paragraph as it has been entirely subsumed by the power to remand in paragraph 6A of Schedule 8 to the Powers of Criminal Courts (Sentencing) Act 2000.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
1, 52(1), (4)(c)	PCC(S)A 2000 Sch.8 para.6(6A) (inserting this sub-paragraph)	Sch.5 para.7(5)	This amendment, combined with those at paragraph 52(4)(a) and (d) ensure that those subject to reparation orders who are under 18 may still only be remanded to local authority accommodation, the normal rules of remand operate in relation to offenders aged 18 or over.
1, 52(1), (4)(d)	PCC(S)A 2000 Sch.8 para.6(7) (omitting this sub-paragraph)	Not replicated	This amendment, combined with those at paragraph 52(4)(a) and (c) ensure that those subject to reparation orders who are under 18 may still only be remanded to local authority accommodation, the normal rules of remand operate in relation to offenders aged 18 or over.
53, 54(1), (2)	CJA 2003 s.143(2A) (inserting this subsection)	65(3)	Streamlines the provisions relating to statutory aggravating factors so wherever a court treats a statutory aggravating factor as aggravating it must state that fact in open court.
53, 54(1), (3)	CJA 2003 s.143(3)	64	Streamlines the provisions relating to statutory aggravating factors so wherever a court treats a statutory aggravating factor as aggravating it must state that fact in open court.
53, 54(1), (4)	CJA 2003 s.143(6)	65(6), (7)	Replaces references to “defendant” with reference to “offender” as in all cases the person will have already been convicted of an offence. This change also provides increased consistency of language in the Code.
53, 55	CJA 2003 s.146(7) (inserting this subsection)	66(6)	This amendment allows for the streamlining of sections 145 and 146 of the Criminal Justice Act 2003 into a single section.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 56	CJA 2003 s.150(3) (inserting this subsection)	177(3), 202(3)	This amendment ensures that the restriction on imposing community sentences where a mandatory sentence applies is subject to section 73(5) of the Serious Organised Crime and Police Act 2005, which gives effect to the intent of that provision.
53, 57(1), (2)	CJA 2003 s.154(6)	224(6)	This amendment re-aligns section 154 of the Criminal Justice Act 2003 with section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 and reverses unintentional discrepancies introduced by the Tribunal, Courts and Enforcement Act 2007.
53, 57(1), (3)	CJA 2003 s.154(8)	224(5)	This amendment re-aligns section 154 of the Criminal Justice Act 2003 with section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 and reverses unintentional discrepancies introduced by the Tribunal, Courts and Enforcement Act 2007.
53, 58	CJA 2003 s.163	120(2)	Omits reference to section 110 of the Powers of Criminal Courts (Sentencing) Act 2000, as all offences to which it applies have maximum sentences on indictment of imprisonment and a fine. Reference to section 111 of that Act cannot be omitted, as the maximum sentence for burglary under section 9 of the Theft Act 1968 does not allow for both imprisonment and a fine to be imposed, and omitting reference to section 111 in section 163 of the Criminal Justice Act 2003 would therefore increase the maximum sentence for that offence.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 59	CJA 2003 s.164(3)	125(2)	This change ensures consistency of language in in relation to the use of the words “among other things” and “includes, in particular” when introducing lists of examples.
53, 60(1), (2)	CJA 2003 s.177(1)	207(4)	Ensures that an attendance centre requirement as part of a community order is available where the offender is convicted aged under 25, even if they have since passed that age – this is in line with the general approach to sentencing espoused in *R v Ghafoor* [2003] EWCA Crim 1857.
53, 60(1), (3)	CJA 2003 s.177(5B)	220	Amends the time at which a community order ceases to have effect, so that it ceases at the end of the end date, rather than the start. This change has been made to align the period for which orders run under the Sentencing Code.
53, 60(1), (4)	CJA 2003 s.177(7) (inserting this subsection)	208(12) and 209(3)	Ensures the correct operation of this subsection where piloting arrangements have not been made for the new electronic monitoring requirements. This is necessary as a result of the Code treating the consequential amendments made by these requirements as in force in all cases, but the new requirements only being available in piloted areas.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 61(1), (2)	CJA 2003 s.190(1)	291(4)	Ensures that an attendance centre requirement as part of a suspended sentence order is available where the offender is convicted aged under 25, even if they have since passed that age – this is in line with the general approach to sentencing espoused in *R v Ghafoor* [2003] EWCA Crim 1857.
53, 61(1), (3)	CJA 2003 s.190(6) (inserting this subsection)	292(3)	Ensures the correct operation of this subsection where piloting arrangements have not been made for the new electronic monitoring requirements. This is necessary as a result of the Code treating the consequential amendments made by these requirements as in force in all cases, but the new requirements only being available in piloted areas.
53, 62(1), (2)	CJA 2003 s.191(2)	293(3)	This amendment allows for an order that imposes a drug rehabilitation requirement subject to review to also provide for the rest of the order to be reviewed under section 191 of the Criminal Justice Act 2003.
53, 62(1), (3)(a)	CJA 2003 s.191(4)	293(5)	This amendment aligns references to the area the courts acts in: “in which the court acts”, rather than “area for which the court acts”.
53, 62(1), (3)(b)	CJA 2003 s.191(4)	293(5)	This amendment simplifies the language used here, and ensures consistency in relation to references to specifying things in orders in the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 62(1), (3)(c)	CJA 2003 s.191(4)	293(5)	This amendment aligns references to the area the courts acts in: “in which the court acts”, rather than “area for which the court acts”.
53, 62(1), (4)	CJA 2003 s.191(5)	Not replicated	Omits the words “the criminal division of” to provide consistency to references to the Court of Appeal in the Sentencing Code.
53, 63	CJA 2003 s.196(1B) (inserting this subsection)	300(1), 301(1) and 302(2)	Clarifies that the responsible officer’s role under sections 198, 220 and 220A in relation to a suspended sentence order cease at the end of the supervision period.
53, 64	CJA 2003 s.198(1)	300(1)	In combination with the pre-consolidation amendment at paragraph 63 clarifies that the responsible officer’s role under section 198 in relation to a suspended sentence order cease at the end of the supervision period.
53, 65	CJA 2003 s.199(3)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
53, 66	CJA 2003 s.200A(2)	Sch.9 para.4(2)	Clarifies that the order must specify the maximum number of days on which the offender may be instructed to participate in activities – not specify a number of hours, expressed in days, for which the offender may be instructed to participate in activities.
53, 67	CJA 2003 s.203(2)	Not replicated in the Code	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 68	CJA 2003 s.204(3)	Sch.9 para.9(5)	Clarifies that a curfew requirement imposed on amendment can run for up to 12 months, rather than until 12 months from when the order was originally made - replicating more clearly the effect of the courts power to impose new requirements on amendment.
53, 69	CJA 2003 s.205(2)	Sch.9 para.11(4)	Clarifies that the period specified under an exclusion requirement in the case of a community order must not run for more than 2 years from when the order takes effect – aligning the reference to time periods with curfew requirements as amended by paragraph 68.
53, 70	CJA 2003 s.206(4)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
53, 71	CJA 2003 s.206A(2), (3)	Sch.9 para.15(3) and (4)	Clarifies that a foreign travel prohibition requirement imposed on amendment can run for up to 12 months, rather than until 12 months from when the order was originally made - replicating more clearly the effect of the courts power to impose new requirements on amendment.
53, 72(1), (2)(a)	CJA 2003 s.207(2)	Sch.9 para.16(3)	This amendment aligns mental health treatment requirements under a community order with those under a youth rehabilitation order which expressly allow for the requirement to specify different kinds of treatment for different periods.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 72(1), (2)(b)	CJA 2003 s.207(2)(a)	Sch.9 para.16(3)	Ensures the hospital or care home must be specified in the order, aligning mental health treatment requirements of that kind with those relating to treatment as non-resident patients or by or under the direction of registered medical practitioners or psychologists.
53, 72(1), (3)	CJA 2003 s.207(3)(c)	Sch.9 para.17(4)	Clarifies that the offender must have expressed his willingness to comply with the requirement proposed to be made, rather than with a mental health treatment requirement generally.
53, 73(1), (2)	CJA 2003 s.208(1)	Not replicated	Alongside the amendment at paragraph 73(3) ensures consistency in language in relation to treatment requirements requiring the offender to have “expressed willingness to comply with the requirement” rather than consent.
53, 73(1), (3)	CJA 2003 s.208(1A) (inserting this subsection)	Sch.9 para.18(3)	Alongside the amendment at paragraph 73(2) ensures consistency in language in relation to treatment requirements requiring the offender to have “expressed willingness to comply with the requirement” rather than consent.
53, 74(1), (2)	CJA 2003 s.209(1)(b)	Sch.9 para.19(1), (7) and (8)	This change simply aims to provide greater clarity to the effect of this provision.
53, 74(1), (3)	CJA 2003 s.209(2)(c)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 74(1), (4)	CJA 2003 s.209(4)	Sch.9 para.19(4)	This amendment aligns drug rehabilitation requirements under a community order with drug treatment requirements under a youth rehabilitation order which expressly allow for the requirement to specify different kinds of treatment for different periods.
53, 75	CJA 2003 s.210(4)	Not replicated	Omits the words “the criminal division of” to provide consistency to references to the Court of Appeal in the Sentencing Code.
53, 76(1), (2)	CJA 2003 s.211(3)(b)	402(1), Sch.9 para.22(4)	This change provides the court re-sentencing the offender with the powers they would have if the offender had just been convicted by them (rather than the powers the court which made the order had), but as if the offender were the age at which they were actually convicted.
53, 76(1), (3)	CJA 2003 s.211(3A) (inserting this subsection)	402(2), (3)	Amendment made to ensure that the Crown Court when re-sentencing an offender who fails to express willingness to comply with a new drug rehabilitation requirement proposed to be imposed are limited to magistrates’ court powers if the original court was.
53, 77(a)	CJA 2003 s.212(5)	Sch.9 para.23(4), (5)	This amendment aligns alcohol treatment requirements under a community order with intoxicating substance treatment requirements under a youth rehabilitation order which expressly allow for the requirement to specify different kinds of treatment for different periods.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 77(b)	CJA 2003 s.212(5)(c)	Sch.9 para.23(5)	Clarifies that if an alcohol treatment requirement is to be treatment by or under the direction of a person (rather than resident or non-resident treatment) that person is to be the person specified under section 212(1) of the Criminal Justice Act 2003.
53, 78	CJA 2003 s.212A(12)	Sch.9 para.26(5)	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
53, 79(1), (2)	CJA 2003 s.217(1)(a)	215(4), 300(4)	Expands the requirement to avoid conflicts with other orders so that the requirement is to ensure, so far as practicable, that requirements avoid conflicts with any other court order.
53, 79(1), (3)	CJA 2003 s.217(2)	Not replicated	Omits unnecessary reference to requirements imposed by the responsible officer as the responsible officer has no power to impose requirements.
53, 80(1), (2)	CJA 2003 s.218(3)	Sch.9 para.28	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
53, 80(1), (3)(a)	CJA 2003 s.218(4)	Sch.9 para.34(1)	This PCA is necessary to achieve a grammatically correct outcome.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 80(1), (3)(b)(i)	CJA 2003 s.218(4)(a)	Sch.9 para.34(1)	This PCA is necessary to achieve a grammatically correct outcome.
53, 80(1), (3)(b)(ii)	CJA 2003 s.218(4)(a)	Sch.9 para.34(1)	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
53, 80(1), (3)(c)	CJA 2003 s.218(4)(b)	Sch.9 para.34(1)	This PCA is necessary to achieve a grammatically correct outcome.
53, 80(1), (4)(a)	CJA 2003 s.218(9)	Sch.9 para.35	This PCA is necessary to achieve a grammatically correct outcome.
53, 80(1), (4)(b)(i)	CJA 2003 s.218(9)(a)	Sch.9 para.35	This PCA is necessary to achieve a grammatically correct outcome.
53, 80(1), (4)(b)(ii)	CJA 2003 s.218(9)(a)	Sch.9 para.35	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
53, 80(1), (4)(c)	CJA 2003 s.218(9)	Sch.9 para.35	This PCA is necessary to achieve a grammatically correct outcome.
53, 81	CJA 2003 s.219(1)(d)	213(2), 298(2)	This change conforms references to a provider of probation services “acting” or “operating” in an area.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 82	CJA 2003 s.220A(4A) (inserting this subsection)	217(7), 302(7)	This amendment clarifies that permission given by the responsible officer cannot be used to circumvent the procedures in Schedules 9 and 13 to the Criminal Justice Act 2003 governing movement to Scotland or Northern Ireland; nor to move out of the United Kingdom.
53, 83	CJA 2003 s.222(1)(c)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
53, 84	CJA 2003 s.223(4)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
53, 85	CJA 2003 s.236A(7)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
53, 86(1), (2)	CJA 2003 s.238(1)	328(2)	Amends the section to make reference to release from detention in the case of an offender serving a sentence of detention in a young offender institution.
53, 86(1), (3)	CJA 2003 s.238(4) (omitting subsection)	Not replicated	This provision has been repealed as it is unnecessary (because the section expressly applies only to sentences of imprisonment or detention in a young offender institution), and its retention would introduce doubt in other places in the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 87	CJA 2003 s.269(6A) (inserting this subsection)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
53, 88	CJA 2003 s.298(3)	Sch.22 para.29	Corrects a grammatical error.
53, 89(1), (2)	CJA 2003 Sch.8 para.5(2)(c)	Sch.10 para.6(4)	Aligns the reference to the time period with the wording of the operative time period in paragraph 6(1)(b) of Schedule 8 to the Criminal Justice Act 2003.
53, 89(1), (3)	CJA 2003 Sch.8 para.7(3)(a)	Sch.10 para.8(3)	Amends language to reflect the fact that a community order imposed by the Crown Court which also imposes a drug rehabilitation requirement subject to review does not allow the Crown Court to delegate that review; and that accordingly in some cases there will be no magistrates' court responsible for the review.
53, 89(1), (4)	CJA 2003 Sch.8 para.9(1)(a)	Sch.10 para.10(5)	This change provides the magistrates' court amending a community order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made.
53, 89(1), (5)(a)	CJA 2003 Sch.8 para.10(1)(a)	Sch.10 para.11(2)	This change provides the Crown Court amending a community order with the powers they would have if the offender had just been convicted before them for the offence in relation to which the order was made.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (5)(b)	CJA 2003 Sch.8 para.10(1)(b)	402(1), (2), Sch.10 para.11(2)	This change provides that when the Crown Court is re-sentencing a community order it has the powers it would have if the offender had just been convicted before them for the offence in relation to which the order was made (rather than the powers the original court had). However, if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.
53, 89(1), (5)(c)	CJA 2003 Sch.8 para.10(3C) (inserting this sub-paragraph)	402(3)	This change provides that when the Crown Court is re-sentencing a community order if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.
53, 89(1), (6)	CJA 2003 Sch.8 para.11(2) (omitting this paragraph)	Not replicated	This sub-paragraph is unnecessary in light of the amendment made by paragraph 89(17) to paragraph 26 of Schedule 8 to the Criminal Justice Act 2003, so that any requirement that applies to the court when making a community order applies when amending an order.
53, 89(1), (7)	CJA 2003 Sch.8 para.11A(4)	408(2)	Amends this transitional provision so that any amendment can have effect for any offence of which the offender was convicted on or after the commencement of that amendment. The result is that any offender already serving a community order is not liable to the increased fine, and there is therefore no breach of Article 7 of the European Convention on Human Rights.
53, 89(1), (8)(a)(i)	CJA 2003 Sch.8 para.13(6)	Sch.10 para.14(4)	Ensures consistency of language in referring to "the appropriate magistrates' court".

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (8)(a)(ii)	CJA 2003 Sch.8 para.13(6)	Sch.10 para.14(4)	Ensures that the magistrates' court does not need to summon the offender if they plan to simply revoke the order. This provides consistency with the position in relation to youth rehabilitation orders.
53, 89(1), (8)(b)	CJA 2003 Sch.8 para.13(7)(a)	Sch.10 para.14(2)	Amends language to reflect the fact that a community order imposed by the Crown Court which also imposes a drug rehabilitation requirement subject to review does not allow the Crown Court to delegate that review; and that accordingly in some cases there will be no magistrates' court responsible for the review.
53, 89(1), (9)(a)	CJA 2003 Sch.8 para.14(2)(b)	402(1), Sch.10 para.15(4)	This change provides that when the Crown Court is re-sentencing a community order it has the powers it would have if the offender had just been convicted before them for the offence in relation to which the order was made (rather than the powers the original court had).
53, 89(1), (9)(b)	CJA 2003 Sch.8 para.14(2A) (inserting this sub-paragraph)	402(2), (3)	This change provides that when the Crown Court is re-sentencing a community order if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.
53, 89(1), (9)(c)	CJA 2003 Sch.8 para.14(5)	Sch.10 para.15(3)	Ensures that the Crown Court does not need to summon the offender if they plan to simply revoke the order. This provides consistency with the position in relation to youth rehabilitation orders.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (10)(a)	CJA 2003 Sch.8 para.17(1)(b)	Sch.10 para.18(1)	This change provides the court amending a community order on application with the powers they would have if the offender had just been convicted by or before them for the offence in relation to which the order was made.
53, 89(1), (10)(b)	CJA 2003 Sch.8 para.17(3)(b)	402(1), Sch.10 para.18(8)	This change provides the court re-sentencing a community order where the offender fails to express willingness to comply with a proposed treatment requirement with the powers they would have if the offender had just been convicted by or before them for the offence in relation to which the order was made.
53, 89(1), (10)(c)	CJA 2003 Sch.8 para.17(3A) (inserting this sub-paragraph)	402(2), (3), Sch.10 para.18(8)	This change provides that when the Crown Court is re-sentencing a community order where the offender fails to express willingness to comply with a proposed treatment requirement, that if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.
53, 89(1), (11)(a)(i)	CJA 2003 Sch.8 para.18(1)	Sch.10 para.19(1), (2)	Amends references to "medical practitioner or other person" to bring greater clarity to the person who must make the report.
53, 89(1), (11)(a)(ii)	CJA 2003 Sch.8 para.18(1)	Sch.10 para.19(3)	This change was made for consistency of language. There is no power to amend or vary an existing community requirement, the court must revoke and replace the requirement.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (11)(b)	CJA 2003 Sch.8 para.18(2A) (inserting this sub-paragraph)	Sch.10 para.19(4)	Amends references to “medical practitioner or other person” to bring greater clarity to the person who must make the report.
53, 89(1), (12)	CJA 2003 Sch.8 para.21(2)(b)	402(1), Sch.10 para.23(2)	This change provides the magistrates’ court re-sentencing a community order where the offender has been convicted of a new offence with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made.
53, 89(1), (13)	CJA 2003 Sch.8 para.22(1)	Sch.10 para.24(2)	Change made for consistency of references to committing offenders to/in custody.
53, 89(1), (14)(a)	CJA 2003 Sch.8 para.23(2)(b)	402(1), Sch.10 para.25(2)	This change provides the Crown Court re-sentencing a community order where the offender has been convicted of a new offence with the powers they would have if the offender had just been convicted before it for the offence in relation to which the order was made.
53, 89(1), (14)(b)	CJA 2003 Sch.8 para.23(2A) (inserting this sub-paragraph)	402(2), (3)	This change provides that when the Crown Court is re-sentencing a community order where the offender has been convicted of a new offence, that if the community order was made by the magistrates’ court, or by the Crown Court in circumstances where they were limited to magistrates’ court powers, the Crown Court on re-sentencing may only exercise magistrates’ court powers.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (15)(a)	CJA 2003 Sch.8 para.24(1)	Sch.10 para.15(2)	Ensures that no application can be made to vary a Crown Court community order while an appeal against that order is pending.
53, 89(1), (15)(b)	CJA 2003 Sch.8 para.24(1)	Sch.10 para.20(5)	Ensures that no application can be made to extend a Crown Court community order while an appeal against that order is pending.
53, 89(1), (16)(a)	CJA 2003 Sch.8 para.25(2)	Sch.10 paras.18(4), 23(3), 25(3)	Clarifies that the exception in sub-paragraph (2) of paragraph 25 of Schedule 8 to the Criminal Justice Act 2003 applies only where the order only does one of the listed things; inserts references to orders only revoking the community order; and makes language changes to reflect that there is no power to reduce the period of a requirement, that the requirement must be revoked and replaced with one of a shorter duration.
53, 89(1), (16)(b)	CJA 2003 Sch.8 para.25(3) (inserting this sub-paragraph)	Sch.10 paras.23(3), 25(3)	This amendment ensures that where the offender is before the court, because he has just been convicted by or before it, or is appearing for sentence, there is no duty to further summons the offender.
53, 89(1), (17)	CJA 2003 Sch.8 para.26	Sch.10 paras.13(5), 18(6)	Gives effect to the intended effect of this paragraph, which is to ensure that any requirement that applies to a court imposing a community order applies to a court imposing a requirement on the amendment of a community order.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 89(1), (18)(a)	CJA 2003 Sch.8 para.27(1)	Not replicated	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in section 219 of the Criminal Justice Act 2003 that are applicable on making a suspended sentence order or community order.
53, 89(1), (18)(b)	CJA 2003 Sch.8 para.27(2)	Sch.10 para.27(6)	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in section 219 of the Criminal Justice Act 2003 that are applicable on making a suspended sentence order or community order.
53, 89(1), (18)(c)	CJA 2003 Sch.8 para.27(3) (omitting this sub-paragraph)	Not replicated	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in section 219 of the Criminal Justice Act 2003 that are applicable on making a suspended sentence order or community order.
53, 90(1), (2)	CJA 2003 Sch.9 para.1(6)(c)	Sch.11 para.20(5)	Clarifies that the requirement to specify an appropriate court for the purposes of further proceedings in relation to community payback orders applies only if the order specifies that the corresponding order is a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 90(1), (3)(a)	CJA 2003 Sch.9 para.3(1)(a)	Sch.11 para.16(1)	Replaces reference to now repealed petty sessions districts in Northern Ireland with reference to their replacements, administrative court divisions specified under section 2 of the Justice Act (Northern Ireland) 2015.
53, 90(1), (3)(b)	CJA 2003 Sch.9 para.3(5)	Sch.11 para.20(1)	Replaces reference to now repealed petty sessions districts in Northern Ireland with reference to their replacements, administrative court divisions specified under section 2 of the Justice Act (Northern Ireland) 2015.
53, 90(1), (4)	CJA 2003 Sch.9 para.5	Sch.11 para.29	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
53, 90(1), (5)	CJA 2003 Sch.9 para.9(za) (inserting this sub-paragraph)	Sch.11 para.19	Inserts a requirement to explain the effect of paragraph 8 of Schedule 9 to the Criminal Justice Act 2003 (that the order is to be treated as a corresponding order) – so that the offender understands the relevance of the requirements of the legislation relating to that corresponding order.
53, 90(1), (6)	CJA 2003 Sch.9 para.10	Sch.11 para.25	Ensures that the limits applying to a home court amending the order are those that would apply if the offender had just been convicted by or before it.
53, 90(1), (7)	CJA 2003 Sch.9 para.11(a)(ii)	Not replicated	Gives effect to abolition of petty sessions districts by section 1 of the Justice Act (Northern Ireland) 2015.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 90(1), (8)	CJA 2003 Sch.9 para.15(b)	Sch.11 para.27	Ensures that a certificate signed by the clerk of the home court of a failure to comply with the requirements of a community order are admissible as evidence of failure before any appropriate court in England and Wales – not just the court which made the order.
53, 91(1), (2)	CJA 2003 Sch.12 para.6(2)	Sch.16 para.8(1)	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.
53, 91(1), (3)	CJA 2003 Sch.12 para.7(2)	Sch.16 para.9(1)	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.
53, 91(1), (4)(a)(i)	CJA 2003 Sch.12 para.8(1)(a)	Sch.16 para.12(2)	Includes missed reference to cases where the offender is committed by the magistrates’ court to the Crown Court to be dealt with for a breach of community requirement or a further conviction under paragraph 8(6) of Schedule 12 to the Criminal Justice Act 2003.
53, 91(1), (4)(a)(ii)	CJA 2003 Sch.12 para.8(1)(b)	Sch.16 para.11(1), 12(3)	Corrects reference to suspended sentence which ought to have referred to suspended sentence order – reflecting the differing definitions of those phrases in section 189(7) of the Criminal Justice Act 2003.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 91(1), (4)(b)(i)	CJA 2003 Sch.12 para.8(2)	Not replicated	Omits these words as unnecessary. The duty to deal with the offender in one of the listed ways in paragraph 8(2) of Schedule 12 to the Criminal Justice Act 2003 necessarily imports a duty to consider the offender's case.
53, 91(1), (4)(b)(ii)	CJA 2003 Sch.12 para.8(2)(c)	Sch.16 para.13(1)	This amendment ensures that where the court is imposing more onerous community requirements to mark a failure to comply with a suspended sentence order (or a further conviction), they may impose any requirements they could if the offender had just been convicted by or before them for the offence in relation to which the order was made.
53, 91(1), (4)(c)	CJA 2003 Sch.12 para.8(6)	Sch.16 para.10(3)	Inserts missed reference to having to deal with the offender under paragraph 8(2)(d) of Schedule 12 to the Criminal Justice Act 2003.
53, 91(1), (4)(d)	CJA 2003 Sch.12 para.8(7A) (inserting this sub-paragraph)	Sch.16 para.11(3)	Disapplies the duty to deal with the suspended sentence order where the magistrates' court has committed the order under section 6 of the Powers of Criminal Courts (Sentencing) Act 2000 to be dealt with by the Crown Court.
53, 91(1), (5)	CJA 2003 Sch.12 para.9(1)(b)	Sch.16 para.15(2)	Ensures that a suspended sentence order can be ordered to be activated to run consecutively to any custodial sentence, not simply a sentence of imprisonment.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 91(1), (6)	CJA 2003 Sch.12 para.10(2) (omitting this sub-paragraph)	Not replicated	This sub-paragraph is unnecessary in light of the amendment made by paragraph 91(13) to paragraph 21 of Schedule 12 to the Criminal Justice Act 2003, so that any requirement that applies to the court when making a suspended sentence order applies when amending an order.
53, 91(1), (7)	CJA 2003 Sch.12 para.12A(4)	408(2)	Amends this transitional provision so that any amendment can have effect for any offence of which the offender was convicted on or after the commencement of that amendment. The result is that any offender already serving a community order is not liable to the increased fine, and there is therefore no breach of Article 7 of the European Convention on Human Rights.
53, 91(1), (8)	CJA 2003 Sch.12 para.13(1)	Sch.16 para.21	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.
53, 91(1), (9)	CJA 2003 Sch.12 para.14(1)	Sch.16 para.21	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.
53, 91(1), (10)	CJA 2003 Sch.12 para.14A(1)	Sch.16 para.21	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 91(1), (11)(a)	CJA 2003 Sch.12 para.15(1)(b)	Sch.16 para.25(1)	This amendment ensures that where the court is replacing the requirements of a suspended sentence order on application that they may impose any requirement of the same kind they could if the offender had just been convicted by or before them for the offence in relation to which the order was made.
53, 91(1), (11)(b)	CJA 2003 Sch.12 para.15(3) (omitting this sub-paragraph)	Not replicated in the Code	This sub-paragraph is unnecessary in light of the amendment made by paragraph 91(13) to paragraph 21 of Schedule 12 to the Criminal Justice Act 2003, so that any requirement that applies to the court when making a suspended sentence order applies when amending an order
53, 91(1), (11)(c)	CJA 2003 Sch.12 para.15(4)(b)	402(1), Sch.16 para.25(7)	This change provides the court re-sentencing a suspended sentence order where the offender fails to express willingness to comply with a proposed treatment requirement with the powers they would have if the offender had just been convicted by or before them for the offence in relation to which the order was made.
53, 91(1), (11)(d)	CJA 2003 Sch.12 para.15(4A) (inserting this sub-paragraph)	402(2), (3)	This change provides that when the Crown Court is re-sentencing a suspended sentence order where the offender fails to express willingness to comply with a proposed treatment requirement, that if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 91(1), (12)	CJA 2003 Sch.12 para.18(1)	Sch.16 para.21	Clarifies that “in force” in this context means during the course of the supervision period (the period during which community requirements are in force), not the course of the operational period.
53, 91(1), (13)	CJA 2003 Sch.12 para.21	Sch.16 paras.16(2), 25(3)	Gives effect to the intended effect of this paragraph, which is to ensure that any requirement that applies to a court imposing a suspended sentence order applies to a court imposing a requirement on the amendment of a suspended sentence order.
53, 91(1), (14)(a)(i)	CJA 2003 Sch.12 para.22(1)	Not replicated	This amendment confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in section 219 of the Criminal Justice Act 2003 that are applicable on making a suspended sentence order or community order.
53, 91(1), (14)(a)(ii)	CJA 2003 Sch.12 para.22(1)	Not replicated	The only power to revoke a suspended sentence order in Schedule 12 to the Criminal Justice Act 2003 is that in paragraph 15(4) of that Schedule – which requires the court to revoke the order and to re-sentence the offender. As paragraph 22(1) of that Schedule applies only on the amendment of an existing order, these words are otiose and can be omitted.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 91(1), (14)(b)	CJA 2003 Sch.12 para.22(2)	Sch.16 para.28(6)	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in section 219 of the Criminal Justice Act 2003 that are applicable on making a suspended sentence order or community order.
53, 91(1), (14)(c)	CJA 2003 Sch.12 para.22(3) (omitting this sub-paragraph)	Not replicated	This paragraph is unnecessary once the duty to provide copies of an order has been transferred onto the court rather than a proper officer of the court.
53, 92(1), (2)	CJA 2003 Sch.13 para.1(6)	Sch.17 para.4(2)	Provides that an order may not be amended under paragraph 1 of Schedule 13 to the Criminal Justice Act 2003 so as to provide that it is subject to review under section 191 or 210 of that Act.
53, 92(1), (3)(a)	CJA 2003 Sch.13 para.6(1)(a)	Sch.17 para.12(1)	Replaces reference to now repealed petty sessions districts in Northern Ireland with reference to their replacements, administrative court divisions specified under section 2 of the Justice Act (Northern Ireland) 2015.
53, 92(1), (3)(b)	CJA 2003 Sch.13 para.6(5)	Sch.17 para.8(2)	Provides that an order may not be amended under paragraph 6 of Schedule 13 to the Criminal Justice Act 2003 so as to provide that it is subject to review under section 191 or 210 of that Act.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 92(1), (4)	CJA 2003 Sch.13 para.7(a)	Sch.17 para.14(1)	Replaces reference to now repealed petty sessions districts in Northern Ireland with reference to their replacements, administrative court divisions specified under section 2 of the Justice Act (Northern Ireland) 2015.
53, 92(1), (5)	CJA 2003 Sch.13 para.8(1)(b)	Sch.17 para.1(1)	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
53, 92(1), (6)	CJA 2003 Sch.13 para.11(b)	Sch.17 para.1(1)	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
53, 92(1), (7)(a)	CJA 2003 Sch.13 para.12(5)	Sch.17 para.24(2), (3)	Ensures that where there is a breach of a suspended sentence order the relevant officer in Scotland or Northern Ireland must either give a warning or provide information to the home court in Scotland or a justice of the peace in Northern Ireland, rather than refer the matter to an enforcement officer to deal with the matter in England and Wales. The effect of paragraph 12(8) of Schedule 13 to the Criminal Justice Act 2013 being that if the matter was referred to a court in England and Wales by the enforcement officer (rather than the court in Scotland or Northern Ireland) that the court would have no power to deal with the offender.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 92(1), (7)(b)	CJA 2003 Sch.13 para.12(5ZA) (inserting this sub-paragraph)	Sch.17 para.28	Ensures that where there is a breach of a suspended sentence order the relevant officer in Scotland or Northern Ireland must either give a warning or provide information to the home court in Scotland or a justice of the peace in Northern Ireland, rather than refer the matter to an enforcement officer to deal with the matter in England and Wales. The effect of paragraph 12(8) of Schedule 13 to the Criminal Justice Act 2013 being that if the matter was referred to a court in England and Wales by the enforcement officer (rather than the court in Scotland or Northern Ireland) that the court would have no power to deal with the offender.
53, 92(1), (7)(c)(i)	CJA 2003 Sch.13 para.12(6)	Sch.17 para.31	Makes a missed consequential amendment to apply the necessary modifications to paragraph 14A of Schedule 12 to the Criminal Justice Act 2003.
53, 92(1), (7)(c)(ii)	CJA 2003 Sch.13 para.12(6)	Sch.17 para.31	Makes a missed consequential amendment to reflect the change in language in paragraphs 14 and 14A of Schedule 12 to the Criminal Justice Act 2003 from “the local justice area concerned” to the “local justice area specified in the order”.
53, 92(1), (7)(c)(iii)	CJA 2003 Sch.13 para.12(6)(b)	Sch.17 para.31	Replaces reference to now repealed petty sessions districts in Northern Ireland with reference to their replacements, administrative court divisions specified under section 2 of the Justice Act (Northern Ireland) 2015.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
53, 92(1), (8)(a)	CJA 2003 Sch.13 para.20(5)	Sch.17 para.40(2)	Replaces now defunct reference to petty sessions areas in England and Wales with reference to their replacement, local justice areas.
53, 92(1), (8)(b)	CJA 2003 Sch.13 para.20(6)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 94	CJIA 2008 s.1(4)(b)	Sch.22 para.28(3)	Creates a transitional provision to ensure that if an order is made under section 100(2)(b)(ii) of the Powers of Criminal Courts (Sentencing) Act 2000 making detention and training orders available for those convicted under age 12 the provision operates correctly.
93, 95(1), (2)(a)	CJIA 2008 s.4(2)(b)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 95(1), (2)(b)	CJIA 2008 s.4(2)(b)	191(5)	Clarifies that the relevant local justice area here is the home local justice area specified in the order, and that there is not a further requirement to specify a local justice area for the purpose of this subsection.
93, 95(3)	CJIA 2008 s.4(5)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 96(1), (2)	CJIA 2008 s.5(1)	192(1)	This change ensures consistency of language with section 5(5) of the Criminal Justice and Immigration Act 2008 and Schedule 2 to that Act (youth rehabilitation order “in force” rather than “has effect”).
93, 96(1), (3)	CJIA 2008 s.5(3)	192(4)	Requires the responsible officer to avoid, so far as practicable, that any instructions avoid conflict with the requirements of any other court order the offender is be subject to (rather than only any other youth rehabilitation order the offender is subject to).
93, 97(1), (2)(a)	CJIA 2008 s.7(1)	Not replicated	This change allows for the streamlining of definitions of local authority in the Sentencing Code.
93, 97(1), (2)(b)	CJIA 2008 s.7(1)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 97(1), (3)	CJIA 2008 s.7(1A), (1B) (inserting these subsections)	403(1), (2)	This change allows for the streamlining of references to local authorities in relation to local authority accommodation, local authority fostering and youth offending teams.
93, 97(1), (4)(a)	CJIA 2008 s.7(2)	405	Omits reference to local authority as unnecessary as under no provision of Part 1 of the Criminal Justice and Immigration Act 2008 is the local authority required to determine the age of a person.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 97(1), (4)(b)	CJIA 2008 s.7(2)	Not replicated	Omits reference to local authority as unnecessary as under no provision of Part 1 of the Criminal Justice and Immigration Act 2008 is the local authority required to determine the age of a person.
93, 98(1), (2)	CJIA 2008 s.11(4)(b)	Not replicated	Makes an amendment consequential on the changes enacted by paragraphs 76 and 82 of Schedule 4 to the Criminal Justice and Immigration Act 2008 limiting community orders to those aged 18 or over.
93, 98(1), (3)	CJIA 2008 s.11(5)(b)	Not replicated	Makes an amendment consequential on the changes enacted by paragraphs 76 and 82 of Schedule 4 to the Criminal Justice and Immigration Act 2008 limiting community orders to those aged 18 or over.
93, 99(1), (2)(a)	CJIA 2008 Sch.1 para.8(3)(a)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (2)(b)	CJIA 2008 Sch.1 para.8(4)	Sch.6 para.8	This change provides consistency for the provisions relating to requiring the consent of persons other than the offender and the responsible officer.
93, 99(1), (3)	CJIA 2008 Sch.1 para.10(3)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 99(1), (4)(a)	CJIA 2008 Sch.1 para.11(3)(a)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (4)(b)	CJIA 2008 Sch.1 para.11(4)	Sch.6 para.13(2)	This change provides consistency for the provisions relating to requiring the consent of persons other than the offender and the responsible officer.
93, 99(1), (5)	CJIA 2008 Sch.1 para.12(3)(a)	Sch.6 para.15	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
93, 99(1), (6)	CJIA 2008 Sch.1 para.13(2)(b) (omitting this paragraph)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (7)(a)	CJIA 2008 Sch.1 para.14(4)	Sch.6 para.19(1)	Ensures that the requirement applies to each place proposed to be specified as part of a curfew requirement, reflecting that under paragraph 14(2) of Schedule 1 to the Criminal Justice and Immigration Act 2008 a curfew requirement can specify different places for different days.
93, 99(1), (7)(b)	CJIA 2008 Sch.1 para.14(4)	Sch.6 para.19(1)	Clarifies that the place that the court must obtain and consider information about is any place proposed to be specified as part of the curfew requirement, not any place proposed to be specified in the order.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 99(1), (8)	CJIA 2008 Sch.1 para.16(7)(b) (omitting this paragraph)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (9)	CJIA 2008 Sch.1 para.18(7)	Sch.6 para.27	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
93, 99(1), (10)	CJIA 2008 Sch.1 para.20(2)(a)	Sch.6 para.28(2)	Reverses a change made by regulation 40 of the Regulation and Inspection of Social Care (Wales) Act 2016 (Consequential Amendments) Regulations 2018 (SI 2018/195) which restricted the words “but not in hospital premises where high security psychiatric services within the meaning of [the Mental Health Act 1983] are provided to hospitals within paragraph 20(2)(a)(iv) of Schedule 1 to the Criminal Justice and Immigration Act 2008, whereas the provision previously applied to all hospitals referred to in paragraph 20(2)(a). This change appears to have been accidental and outside the scope of the intended effect of the Welsh Regulations.
93, 99(1), (11)(a)	CJIA 2008 Sch.1 para.22(4)(a)	Sch.6 para.32(3)	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
93, 99(1), (11)(b)	CJIA 2008 Sch.1 para.22(4)(c)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 99(1), (12)	CJIA 2008 Sch.1 para.23(3)(a)	Sch.6 para.35(3)	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
93, 99(1), (13)	CJIA 2008 Sch.1 para.24(4)(b)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (14)	CJIA 2008 Sch.1 para.26(6)(a)	Sch.6 para.44(2)	Conforms references in the Code to notices which have been issued by the Secretary of State to avoid doubt as to whether or not they can be withdrawn.
93, 99(1), (15)	CJIA 2008 Sch.1 para.27(5)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
93, 99(1), (16)(a)(i)	CJIA 2008 Sch.1 para.29(1)(b) (omitting this paragraph)	Not replicated	This paragraph is otiose, as paragraph 29(3)(c) of Schedule 1 to the Criminal Justice and Immigration Act 2008 already requires the court to ensure as far as practicable that any requirements imposed by a youth rehabilitation order avoid conflict with the requirements of any other youth rehabilitation order to which the offender *may be subject*.
93, 99 (1), (16)(a)(ii)	CJIA 2008 Sch.1 para.29(1)	Not replicated	Omits the word “orders” as unnecessary following the amendment at paragraph 99(16)(a)(i).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 99(1), (16)(b)	CJIA 2008 Sch.1 para.29(3)(c)	185(11)	Requires the court to avoid, so far as practicable, any conflict of the requirements of the proposed youth rehabilitation order with the requirements of any other court order (not simply any other youth rehabilitation order) the offender is or may be subject to.
93, 99(1), (17)	CJIA 2008 Sch.1 para.30(1)	198(1)	Ensures youth rehabilitation orders take effect from the beginning of the day imposed, as is the general presumption for orders by virtue of section 154 of the Powers of Criminal Courts (Sentencing) Act 2000.
93, 99(1), (18)(a)(i)	CJIA 2008 Sch.1 para.31(1)	182(1)	Clarifies that the section applies only where an offender is being sentenced for two or more offences at once.
93, 99(1), (18)(a)(ii)	CJIA 2008 Sch.1 para.31(1)	Not replicated	The words “associated” add nothing here as the paragraph only applies where the court is sentencing two offences at once. This phrase has accordingly been removed to simplify the position.
93, 99(1), (18)(b)	CJIA 2008 Sch.1 para.31(3)	182(3)	Reflects the introduction of paragraph 30(1A) of Schedule 1 to the Criminal Justice and Immigration Act 2008 which allows for youth rehabilitation orders to take effect at a later date.
93, 99(1), (19)	CJIA 2008 Sch.1 para.32(4)	198(3)	Amends the time at which a youth rehabilitation order ceases to have effect, so that it ceases at the end of the end date, rather than the start. This change has been made to align the period for which orders run under the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 99(1), (20)(a)	CJIA 2008 Sch.1 para.34(A1) (inserting this sub-paragraph)	190(1)	This amendment conforms this paragraph with other provisions relating to the provision of copies of orders in the Sentencing of Code
93, 99(1), (20)(b)	CJIA 2008 Sch.1 para.34(1)(c)	190(2)	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007 and conforms reference to officer of a provider of probation services so that it must also be acting at the court.
93, 99(1), (20)(c)	CJIA 2008 Sch.1 para.34(2)	190(4)	This amendment conforms this paragraph with other provisions relating to the provision of copies of orders in the Sentencing of Code
93, 99(1), (20)(d)	CJIA 2008 Sch.1 para.34(3)(b)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 99(1), (21)	CJIA 2008 Sch.1 para.36(1)	[j2008_Sch1para36](1)	This amendment removes the power of a Crown Court making a youth rehabilitation order on an appeal from a magistrates' court to make an order that the magistrates' court should deal with further proceedings. An order in such circumstances would have no effect due to the effect of paragraph 2 of Schedule 2 to the Criminal Justice and Immigration Act 2008 which treats orders made on an appeal from the magistrates' court as made by a magistrates' court for the purpose of further proceedings.
93, 100(1), (2)	CJIA 2008 Sch.2 para.2(b)	Not replicated	Omits the words "the criminal division of" to provide consistency to references to the Court of Appeal in the Sentencing Code.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (3)(a)	CJIA 2008 Sch.2 para.6(2)(b)	Sch.7 para.6(5), (6)	This change provides the magistrates' court amending a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (3)(b)	CJIA 2008 Sch.2 para.6(2)(c)	402(1), Sch.7 para.6(5)	This change provides the magistrates' court re-sentencing a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (4)(a)	CJIA 2008 Sch.2 para.7(1)(b)	Not replicated	Removes reference to being required to act under paragraph 6(2) of Schedule 2 to the Criminal Justice and Immigration Act 2008: the exercise of powers under that paragraph is discretionary.
93, 100(1), (4)(b)	CJIA 2008 Sch.2 para.7(2)(a)	Sch.7 para.6(3)	This amendment ensures consistency of language in the Sentencing Code as to references to "committing in custody" or "committing to custody".
93, 100(1), (5)(a)	CJIA 2008 Sch.2 para.8(2)(b)	Sch.7 para.7(2), (3)	This change provides the Crown Court amending a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (5)(b)	CJIA 2008 Sch.2 para.8(2)(c)	402(1), (2), (3), Sch.7 para.7(2)	This change provides the Crown Court re-sentencing a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted). It, however, also ensures that if the order was made in a situation where the original sentencing court was limited to magistrates' court powers that the new court is so limited.
93, 100(1), (6)	CJIA 2008 Sch.2 para.10(4)	408(2)	Amends this transitional provision so that any amendment can have effect for any offence of which the offender was convicted on or after the commencement of that amendment. The result is that any offender already serving a youth rehabilitation order is not liable to the increased fine, and there is therefore no breach of Article 7 of the European Convention on Human Rights.
93, 100(1), (7)(a)	CJIA 2008 Sch.2 para.11(2)(b)(ii)	402(1), Sch.7 para.12(5)	This change provides the magistrates' court re-sentencing a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (7)(b)	CJIA 2008 Sch.2 para.11(6)	Not replicated	Ensures that no application may be made to revoke the youth rehabilitation order while an appeal against it is pending.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (8)(a)	CJIA 2008 Sch.2 para.12(2)(b)(ii)	402(1), Sch.7 para.13(4)	This change provides the Crown Court re-sentencing a youth rehabilitation order with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (8)(b)	CJIA 2008 Sch.2 para.12(2A) (inserting this sub-paragraph)	402(2), (3)	Ensures that where the Crown Court who originally made the order was limited to magistrates' court sentencing powers, the Crown Court re-sentencing for the offence is similarly limited.
93, 100(1), (8)(c)	CJIA 2008 Sch.2 para.12(5)	Not replicated	Ensures that no application may be made to revoke the youth rehabilitation order while an appeal against it is pending.
93, 100(1), (9)	CJIA 2008 Sch.2 para.13(4)(b)	Sch.7 para.15(3), (4)	This change provides the magistrates' court amending a youth rehabilitation order with the power to impose any requirements they could impose if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (10)	CJIA 2008 Sch.2 para.14(4)(b)	Sch.7 para.15(3), (4)	This change provides the Crown Court amending a youth rehabilitation order with the power to impose any requirements they could impose if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (11)(a)	CJIA 2008 Sch.2 para.16(4)(b)	402(1), Sch.7 para.17(8)	This change provides the court re-sentencing a youth rehabilitation order where the offender fails to express willingness to comply with a proposed treatment requirement with the powers they would have if the offender had just been convicted by or before them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (11)(b)	CJIA 2008 Sch.2 para.16(4A) (inserting this sub-paragraph)	402(2), (3)	This change provides that when the Crown Court is re-sentencing a youth rehabilitation order where the offender fails to express willingness to comply with a proposed treatment requirement, that if the court was limited to magistrates' court powers when originally sentencing, the Crown Court is similarly limited.
93, 100(1), (12)	CJIA 2008 Sch.2 para.17(b)	Sch.7 para.14	Applies the definition of appropriate court in paragraph 16A of Schedule 2 to the Criminal Justice and Immigration Act 2008 to this paragraph to allow for the streamlining of the definition throughout Part 4 of the Schedule.
93, 100(1), (13)(a)	CJIA 2008 Sch.2 para.18(4)	402(1), Sch.7 para.21(2)	This change provides the magistrates' court re-sentencing a youth rehabilitation order as a result of a new conviction with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (13)(b)	CJIA 2008 Sch.2 para.18(9)(a)	Sch.7 para.22(2)	This amendment ensures consistency of language in the Sentencing Code as to references to “committing in custody” or “committing to custody”.
93, 100(1), (13)(c)	CJIA 2008 Sch.2 para.18(11)(a)	Sch.7 para.22(4)	This amendment ensures consistency of language in the Sentencing Code as to references to “committing in custody” or “committing to custody”.
93, 100(1), (14)(a)	CJIA 2008 Sch.2 para.19(3)	402(1), Sch.7 para.23(2)	This change provides the Crown Court re-sentencing a youth rehabilitation order as a result of a new conviction with the powers they would have if the offender had just been convicted by them for the offence in relation to which the order was made (but as if they were still the age at which they were in fact convicted).
93, 100(1), (14)(b)	CJIA 2008 Sch.2 para.19(3A) (inserting this sub-paragraph)	402(2), (3)	This change provides that when the Crown Court is re-sentencing a youth rehabilitation order as a result of a new conviction, that if the court that originally made the order was a magistrates’ court, or was limited to magistrates’ court powers, the Crown Court may only exercise the powers of a magistrates’ court.
93, 100(1), (15)(a)(i)	CJIA 2008 Sch.2 para.20(2)	Sch.7 paras.12(4), 13(3), 17(1), 21(3), 23(3)	Clarifies that the exception in sub-paragraph (2) of paragraph 20 of Schedule 2 to the Criminal Justice and Immigration Act 2008 applies only where the order only does a listed thing.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (15)(a)(ii)	CJIA 2008 Sch.2 para.20(2)(b) (omitting this paragraph)	Not replicated	Makes a language change to reflect that there is no power to reduce the duration of a requirement, that the requirement must be revoked and replaced with one of a shorter duration.
93, 100(1), (15)(a)(iii)	CJIA 2008 Sch.2 para.20(2)(ba) (inserting this paragraph)	Sch.7 para.17(1)	Makes a language change to reflect that there is no power to reduce the duration of a requirement, that the requirement must be revoked and replaced with one of a shorter duration.
93, 100(1), (15)(b)	CJIA 2008 Sch.2 para.20(3) (inserting this sub-paragraph)	Sch.7 paras.21(3), 23(3)	This amendment ensures that where the offender is before the court, because he has just been convicted by or before it, or is appearing for sentence, there is no duty to further summons the offender.
93, 100(1), (16)(a)	CJIA 2008 Sch.2 para.21(2)(b)	Sch.7 para.24(2)	Ensures that where an offender is still under 18 they are brought back before the youth court, rather than an adult magistrates' court.
93, 100(1), (16)(b)	CJIA 2008 Sch.2 para.21(9)(b) (omitting this paragraph)	Not replicated	Ensures the ordinary rules for remanding those aged 18 or over apply, so that offenders aged 18 to 20 do not need to be remanded to prison.
93, 100(1), (17)	CJIA 2008 Sch.2 para.23	Sch.7 paras.10(2), 17(4)	Gives effect to the intended effect of this paragraph, which is to ensure that any requirement that applies to a court imposing a youth rehabilitation order applies to a court imposing a requirement on the amendment of a youth rehabilitation order.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 100(1), (18)(a)(i)	CJIA 2008 Sch.2 para.24(1)	Not replicated	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in paragraph 34 of Schedule 1 to the CJIA 2008 that are applicable on making a youth rehabilitation order.
93, 100(1), (18)(a)(ii)	CJIA 2008 Sch.2 para.24(1)(c)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.
93, 100(1), (18)(b)(i)	CJIA 2008 Sch.2 para.24(2)	Not replicated	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in paragraph 34 of Schedule 1 to the CJIA 2008 that are applicable on making a youth rehabilitation order.
93, 100(1), (18)(b)(ii)	CJIA 2008 Sch.2 para.24(2)	Sch.7 para.27(8)	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in paragraph 34 of Schedule 1 to the CJIA 2008 that are applicable on making a youth rehabilitation order.
93, 100(1), (18)(c)	CJIA 2008 Sch.2 para.24(3) (omitting this sub-paragraph)	Not replicated	These amendments confer the duty to provide copies of an order on the court, rather than its proper officer, in line with the corresponding provisions in paragraph 34 of Schedule 1 to the CJIA 2008 that are applicable on making a youth rehabilitation order.
93, 100(1), (19)	CJIA 2008 Sch.2 para.25	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 101(1), (2)	CJIA 2008 Sch.3 para.1(5)(a)	Sch.8 para.7(1)	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (3)	CJIA 2008 Sch.3 para.2(5)(a)	Sch.8 para.7(1)	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (4)	CJIA 2008 Sch.3 para.3(a) (omitting this paragraph)	Not replicated	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (5)(a)	CJIA 2008 Sch.3 para.4(1)	Sch.8 para.11	Inserts a requirement to explain the effect of paragraph 9 of Schedule 3 to the Criminal Justice and Immigration Act 2008 (that the order is to be treated as a corresponding order) – so that the offender understands the relevance of the requirements of the legislation relating to that corresponding order.
93, 101(1), (5)(b)	CJIA 2008 Sch.3 para.4(2)	Sch.8 para.13(1)	This amendment conforms this duty to provide copies with other duties to provide copies of orders in the Code.
93, 101(1), (6)(a)	CJIA 2008 Sch.3 para.5(2)(d)	Not replicated	Reference to restrictions on fostering requirements is omitted as otiose because under paragraphs 1(7) and 2(7) of Schedule 3 to the Criminal Justice and Immigration Act 2008 an order under those paragraphs cannot require compliance with a fostering requirement in Northern Ireland.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 101(1), (6)(b)	CJIA 2008 Sch.3 para.5(5)	Sch.8 para.9	Replaces reference to the Education and Library Board (abolished by section 3 of the Education Act (Northern Ireland) 2014) with reference to its replacement, the Education Authority.
93, 101(1), (6)(c)	CJIA 2008 Sch.3 para.5(6A)	Sch.8 para.13(4)	Replaces reference to the Education and Library Board (abolished by section 3 of the Education Act (Northern Ireland) 2014) with reference to its replacement, the Education Authority.
93, 101(1), (7)	CJIA 2008 Sch.3 para.8	Sch.8 para.22	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (8)	CJIA 2008 Sch.3 para.11	Sch.8 para.16	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (9)	CJIA 2008 Sch.3 para.12(c)	Sch.8 para.18	Ensures that the limits applying to a home court amending the order to impose a curfew requirement are those that would apply if the offender had just been convicted by or before it (as if the age when actually convicted).
93, 101(1), (10)	CJIA 2008 Sch.3 para.13(2)	Sch.8 para.19(2)	Gives effect to abolition of petty sessions districts in Northern Ireland by section 1 of the Justice Act (Northern Ireland) 2015.
93, 101(1), (11)	CJIA 2008 Sch.3 para.16(1)	Sch.8 para.21(3)	Ensures that if the offender has moved back to England and Wales the court may amend the order without having to comply with the conditions in paragraph 2(2)(a) and (b) of Schedule 3.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
93, 101(1), (12)	CJIA 2008 Sch.3 para.17(3) (inserting this sub-paragraph)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
93, 102(1), (2)	CJIA 2008 Sch.4 para.54 (omitting this paragraph)	Not replicated	This amendment is consequential on the pre-consolidation amendment to section 74(3) of the Powers of Criminal Courts (Sentencing) Act 2000 which requires the court to avoid, so far as practicable, any conflict of the requirements of the proposed reparation order with the requirements of any other court order (not simply any other youth community order) the offender is or will be subject to.
93, 102(1), (3)	CJIA 2008 Sch.4 para.73(5) (inserting this sub-paragraph)	Sch.22 para.12(1)	Makes a missed consequential amendment for the currently uncommenced section 151(2B) of the Criminal Justice Act 2003.
103(1), (2)	CP(I)A 1964, s.5(3A) (inserting this subsection)	Not replicated	This provision re-drafts the effect of applying section 12(1) of the Powers of Criminal Courts (Sentencing) Act 2000 with the modifications in section 5A(6) of the Criminal Procedure (Insanity) Act 1964 so that the power to make an absolute discharge in such cases is contained, stand-alone, in the Criminal Procedure (Insanity) Act 1964.
103(1), (3)	CP(I)A 1964, s.5A(6) (omitting this subsection)	Not replicated	Repeals this provision as its effect is reproduced in the new section 5(3A) of the Criminal Procedure (Insanity) Act 1964.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
104	MCA 1980 s.113(3)	Not replicated	Makes a missed consequential amendment to extend the effect of this clause to committals for sentence under sections 3A, 3B or 3C of the Powers of Criminal Courts (Sentencing) Act 2000.
105	POA 1985 s.21F	406(4)	This change allows for the streamlining of powers to make regulations and rules in the Sentencing Code.
106(1), (2)	PHA 1997 s.5(3A)	363(1)	Clarifies that the civil evidence rules are not intended to apply in relation to proceedings for an offence under section 5(5) of the Protection from Harassment Act 1997.
106(1), (3)	PHA 1997 s.5A(1)	361(1)	Streamlines references to “by or before a court” so as not to imply that restraining orders on acquittal are not available for magistrates’ courts.
107(1), (2)	CDA 1998 s.9(5A) (inserting this subsection)	375(2)	This change makes the power to insert new provisions in a parenting order clearer, and ensures greater consistency of language in the Sentencing Code.
107(1), (3)	CDA 1998 s.10(5) (omitting this subsection)	Not replicated	This subsection has been omitted so as not to risk implying, in the case of other sentences included in the Code, that there is no power to appeal against the order.
108	CJCSA 2000 Sch.7 para.4(2)	Not replicated	Omits now defunct reference to local probation boards which were abolished by section 11 of the Offender Management Act 2007.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
109(1), (2)(a)	SOCPA 2005 s.73(5A) (inserting this subsection)	74(5), 388(6)	Clarifies which minimum sentences can be negated by a reduction under section 73 of the Serious Organised Crime and Police Act 2005.
109(1), (2)(b)	SOCPA 2005 s.73(6A) (inserting this subsection)	76	This change in language allows for the streamlining of these savings provisions in the Code.
109(1), (2)(c)	SOCPA 2005 s.73(7)	74(4), 387(7), 388(9)	Corrects now defunct reference to section 174(1)(a) of the Criminal Justice Act 2003 to refer to its replacement section 174(2).
109(1), (2)(d)	SOCPA 2005 s.73(8A) (inserting this subsection)	401	This change was made for greater consistency in the Code, and to allow for the streamlining of the definition of sentence.
109(1), (3)	SOCPA 2005 s.74(16) (inserting this subsection)	388(2), (8), 392(2)	Corrects reference to having offered to give evidence in pursuance of a written agreement to also cover cases where evidence was given in pursuance of such an agreement; clarifies references to discounted sentences include those where only some of the evidence offered was given but which are still less than would have been imposed if no evidence was offered; clarifies that the duty to explain sentence in open court applies to a sentence discounted on review as it applies to a sentence discounted at the original sentencing hearing; and corrects now defunct reference to section 174(1)(a) of the Criminal Justice Act 2003 to refer to its replacement section 174(2).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
109(1), (4)	SOCPA 2005 s.75(6) (inserting this subsection)	390(2), (3)	Changes made to simplify the language and omit unnecessary words.
110	TCEA 2007 Sch.13 para.154(2)	224(4)	Reversing disparity introduced by the Tribunal, Courts and Enforcement Act 2007 between section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 154 of the Criminal Justice Act 2003 to allow for the two provisions to be streamlined and simplified.
111(1), (2)	CJA 2009 s.125(2)(a)	60(1)	Change made for consistency of language in referring to an offender.
111(1), (3)(a)	CJA 2009 s.126(1A) (inserting this subsection)	60(6)	Inserts reference to extended sentences of detention in a young offender institution, pending the commencement of the repeal of such sentences by section 61 of the Criminal Justice and Court Services Act 2000.
111(1), (3)(b)	CJA 2009 s.126(2)	61(3)	Applies section 126(3) of the Coroners and Justice Act 2009 to decisions determining whether the sentence condition in section 224A(3) of the Criminal Justice Act 2003 is met.
111(1), (3)(c)(i)	CJA 2009 s.126(4)	Not replicated	Amendment necessary as following amendments by the Criminal Justice and Immigration Act 2008 extended sentences are a discretionary sentence, and not mandatory.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
111(1), (3)(c)(ii)	CJA 2009 s.126(4)	61(4)	Inserts the necessary reference to section 224A(3) of the Criminal Justice Act 2003 consequential on the amendment made by paragraph 111(3)(b).
111(1), (4)(a)	CJA 2009 Sch.17 para.8(5)	Sch.22 para.19(2)	Replaces references to “defendant” with reference to “offender” as in all cases the person will have already been convicted of an offence. This change also provides increased consistency of language in the Code.
111(1), (4)(b)	CJA 2009 Sch.17 para.8(6)(c)	Sch.22 para.19(3)	Replaces references to “defendant” with reference to “offender” as in all cases the person will have already been convicted of an offence. This change also provides increased consistency of language in the Code.
112	CCA 2013 Sch.16 para.20(4)	Sch.11 para.15, Sch.17 para.11(2)	This amendment corrects a lacuna in the current legislation which refers to “that locality” but doesn’t refer to a defined locality.
113(1), (2)(a)	ABCPA 2014 s.22(6)	331(3)	This change was made for consistency of language in the sentencing code in relation to the availability of orders.
113(1), (2)(b)	ABCPA 2014 s.22(9)(b)	Not replicated	This change was made to align this provision with the others in the Sentencing Code relating to avoiding conflicts with the requirements of other court orders.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
113(1), (2)(c)(i)	ABCPA 2014 s.22(10)(a)	331(6)	Change made to ensure a consistency of definition in relation to references to youth offending teams.
113(1), (2)(c)(ii)	ABCPA 2014 s.22(10)(b)	Not replicated	Change made to ensure a consistency of definition in relation to references to youth offending teams.
113(1), (3)(a)	ABCPA 2014 s.24(5)(a)	333(5)	Change made to ensure a consistency of definition in relation to references to youth offending teams.
113(1), (3)(b)	ABCPA 2014 s.24(5)(b)	Not replicated	Change made to ensure a consistency of definition in relation to references to youth offending teams.
113(1), (4)	ABCPA 2014 s.29(1), (2)	338(1), (2)	Change made for consistency of references to the area in which the offender “resides” or “lives”.
113(1), (5)	ABCPA 2014 s.33(5)	Not replicated	Omits this transitional provision as it is broadly spent, and risks implying in relation to other orders that no account may be taken of conduct prior to commencement.
114	P(P)A 1897 s.1(2) (for the purpose of PCC(S)A 2000 s.144(1))	157(3)	Ensures that the six month period begins with the day on which the order is made, rather than the day after, and provides consistency in the Sentencing Code as to references to time periods.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
115	PCC(S)A 2000 s.160(6) (for all purposes other than PCC(S)A 2000 s.36B)	406(5)	This change allows for the streamlining of powers to make transitory, transitional or saving provisions in regulations under the Code. Reference to section 36B of the Powers of Criminal Courts (Sentencing) Act 2000 has been excluded as it is not being re-drafted in the Code.
116	CJA 2003 s.291(3) (inserting this subsection for England and Wales)	Sch.23 para.18(3)	Clarifies that these provisions can be repealed for all cases – even those convicted before its commencement.
117	CTA 2008 s.33 (as it has effect in England and Wales)	408(2)	Aligns powers to make orders in the Sentencing Code, so that they may apply to any offence convicted after their commencement, in line with the general clean sweep and commencement policy.
118	SI 2005/886 Sch. para.76	Not replicated	Omits amendment to section 103(4) of the PCC(S)A 2000, consequential on the omission of that subsection by the PCA at paragraph 32(4).

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
119	SI 2005/950 Sch.2 para.5(2)	Not replicated	Inserts a missed saving provision to clarify that the repeal of section 109 of the PCC(S)A 2000 is of no effect in relation to an offence committed before 4 April 2005. The confusion here arises from the manner in which this section was repealed. The CJA 2003 included two repeals of this provision, both commenced by SI 2005/950. While the SI included a specific saving for the repeal in Schedule 37 to the CJA 2003 (see para.5(2)(xii)) there was no saving for the repeal in section 303(d)(iv). The intended effect of the SI must have been to make savings in relation to both repeals.
120	SI 2007/1324 art.2(b)	311(3)	Clarifies that an offender under age 21 may still receive a life sentence where the firearms mandatory minimum sentence applies.
121(1), (2)	SI 2012/2906 art.7(3) (for the purposes of SI 2012/2906 art.7(2)(h so far as it relates to LASPOA 2012 Sch.12 para.51)	205(3)	This amendment inserts a missed transitory provision, explicitly ensuring that committals to local authority accommodation before 3 December 2012 can be considered when considering the effect of any period in custody on the length of a community order.
122(1), (2)(a)	SI 2005/643 art.3(4)(a)	274(3)	Provides the necessary glosses to section 225 of the Criminal Justice Act 2003 so that in the case of offenders aged 18 to 20 at conviction references to imprisonment for life are references to custody for life.
122(1), (2)(b)	SI 2005/643 art.3(8)	328(2)	Glosses reference to prison to cover release from detention under a sentence of detention in a young offender institution.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
123(a)(i)	PCC(S)A 2000 s.99(5) (in relation to any time before the commencement of CJCSA 2000 s.61)	329(7)	Clarifies that section 99 of the Powers of Criminal Courts (Sentencing) Act 2000 applies to sentences under sections 93, and 94 of that Act.
123(a)(ii)	PCC(S)A 2000 s.99(5) (in relation to any time before the commencement of CJCSA 2000 s.61)	329(7)	Clarifies that section 99 of the Powers of Criminal Courts (Sentencing) Act 2000 applies to sentences under section 226A of the Criminal Justice Act 2003
123(b)	PCC(S)A 2000 s.101(2A) (in relation to any time before the commencement of CJCSA 2000 s.61)	Not replicated.	Modifies reference to an offence imprisonable in the case of an offender aged 18 or over, to refer to an offence imprisonable in the case of an offender aged 21 or over in recognition of the limit on imprisonment in section 89 of the Powers of Criminal Courts (Sentencing) Act 2000
123(c)	CJA 2003 s.154(1), (2) (in relation to any time before the commencement of CJCSA 2000 s.61)	224(1), (2)	Provides the necessary glosses to section 154 of the Criminal Justice Act 2003 so that in the case of offenders aged 18 to 20 at conviction references to imprisonment are reference to detention in a young offender institution.

Paragraph of Schedule 2	Provision of the current law amended	Relevant clause in the draft Sentencing Code	Summary of effect
123(d)	CJA 2003 s.165(3) (in relation to any time before the commencement of CJCSA 2000 s.61)	127(3)	Inserts missed reference to detention under section 108 of the Powers of Criminal Courts (Sentencing) Act 2000.
124	CJCSA 2000 Sch.7 para.177 (at any time before the repeal of section 78 of the Powers of Criminal Courts (Sentencing) Act 2000)	Sch.22 para.39	Reverses the accidental commencement of the repeal of paragraph 177 of Schedule 7 to the Criminal Justice and Court Services Act 2000, which allows for references to detention in a young offender institution in section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 to be repealed on the commencement of section 61 of the Criminal Justice and Court Services Act 2000.
125	CJIA 2008 Sch.1 para.20(6) (until the commencement of CSWA 2017 Sch.5 para.45)	Sch.6 para.30(5)	Makes a missed consequential to reflect the renaming of the Health Professions Order 2001 as the Health and Social Work Professions Order 2001 by section 213(4) of the Health and Social Care Act 2012, until the commencement of CSWA 2017 Sch.5 para.45 which renames the order the Health Professions Order 201.

Appendix 3: Draft Sentencing (Pre-Consolidation Amendments) Bill

The draft Sentencing (Pre-Consolidation Amendments) Bill can be found in Volume 2 of this Report, or on the project's page on the Law Commission Website:

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

Appendix 4: Draft Sentencing Code Bill and Table of origins

The draft Sentencing Code Bill (with an accompanying table of origins can be found in Volume 2 of this Report, or on the project's page on the Law Commission Website:

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

Appendix 5: Main Consultation Analysis

A full consultation analysis for the main consultation paper can be found on the project's page on the Law Commission Website:

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

Appendix 6: Children and Young Person's Consultation Analysis

A full consultation analysis for the children and young person's consultation paper can be found on the project's page on the Law Commission Website:

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

CCS1118988608

978-1-5286-0881-7