Appendix 5: Main Consultation Analysis

INTRODUCTION

5.1 This document analyses the responses of consultees to "the main consultation".[1] It is designed to be read in conjunction with the Law Commission's final report on this project[2] which accompanies publication of the draft Sentencing Code, as well as the analysis of responses to the subsequent "consultation on children and young persons"[3] in this project.

5.2 The main consultation followed two smaller consultations on this project.

5.3 The first was on a specific aspect of the policy, namely the proposed mode of transition to the Code, which was published in an issues paper on 1 July 2015.[4] That issues paper was extremely well-received by consultees, and led to a positive set of recommendations in the interim report which followed it,[5] published on 19 May 2016, which also contains a detailed summary of consultees' responses on that issue. Those recommendations were incorporated into the draft bill which accompanied the main consultation.

5.4 The second was on our understanding of the current law of sentencing procedure in England and Wales. On 9 October 2015 we published a compilation of what we considered the current law of sentencing procedure.[6] This compilation was the subject of consultation from 9 October 2015 to 9 April 2016. On 7 October 2016 we published our report, analysing consultation responses and corrections.[7] Consultees had broadly agreed that we had comprehensively and accurately compiled the current law of sentencing, subject to a few minor corrections. This document then formed the basis of the draft bill which accompanied the main consultation.

5.5 The main consultation was published on 27 July 2017, and the consultation ran until 26 January 2018.

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

2 The Sentencing Code: Volume 1 (2018) Law Com No 382.

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

4 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.

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

6 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/.

7 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.

Consultation

5.6 The following consultees provided written responses to the main consultation:

(1) Professor Andrew Ashworth QC;

(2) Ben Hibbert (Solicitor, John Robinson and Co.);

(3) The Bar Council of England and Wales;

(4) The Crown Prosecution Service;

(5) David Sarwar (CILEX);

(6) Master Egan QC, Registrar of Criminal Appeals;

(7) Graham Skippen (Solicitor, Fison and Co.);

(8) The Howard League for Penal Reform;

(9) Her Majesty's Council of Circuit Judges (Criminal Sub-Committee);

(10) Lesley Molnar-Pleydell (Langley House Trust);

(11) Dr Kate Cook (Manchester Metropolitan University);

(12) The Law Society of England and Wales;

(13) The London Criminal Courts Solicitors' Association;

(14) The Magistrates' Association;

(15) Michael Devaney (Solicitor);

(16) The Ministry of Justice;

(17) Peter Douglas-Jones;

(18) The Prison Reform Trust;

(19) The Senior District Judge's Office **(**Emma Arbuthnot, Senior District Judge (Chief Magistrate), District Judges (Magistrates' Courts) Sam Goozee and Nicholas Watson, and Researcher to the Chief Magistrate, Talwinder Buttar); and

(20) The Sentencing Council.

5.7 The relatively modest number of written responses was anticipated, and was fairly unsurprising, in light in particular of:

(1) the density and volume of existing sentencing law, and the corresponding length and detailed nature of the main consultation and the draft bill which accompanied it;

(2) in consequence of (1) above, the fact that, for those practitioners and criminal justice professionals who did feed into the consultation, many understandably concluded that it made sense to do so through their representative professional body, which divided the body of material amongst its members, rather than individually;

(3) the fact that the main consultation in large part sought detailed feedback on questions related to drafting. Whereas many of those we spoke to during earlier informal consultation expressed general views as to their support for the project, and directions in which they would like to see it move, some may have felt it unnecessary or impractical to respond to the points of detail in the main consultation.

5.8 It was further re-assuring that responses came from a wide-range of stakeholders including academics, criminal justice agencies, members of the judiciary, legal practitioners and their professional associations, government departments, NGOs and members of the public.

5.9 In addition to the written responses to the main consultation, we conducted a number of consultation events to further seek the input of stakeholders. A summary of the handwritten feedback from four of those events, namely those held at Manchester University; City, University of London; No 5 Chambers, Birmingham; and Leeds University has been included at the end of this Appendix.[8]

5.10 At the end of this Appendix a number of pieces of detailed feedback received from consultees on drafting and other matters have also been set out.

5.11 A number of consultees made comments regarding our terms of reference in this project, which broadly speaking restrict us to consideration of the law relating to the process by which sentencing decisions are made, rather than the actual substance of sentencing decisions themselves (for instance maximum penalties for particular offences).

5.12 For instance, The Howard League for Penal Reform remarked that:

> Sentence inflation in recent years is high. According to data from the Ministry of Justice (2017) the use of community sentences has halved in the last ten years, more than three times as many people were sentenced to 10 years or more in the 12 months to June 2017 than at the same time in 2007 and for more serious offences, the average sentence is nearly two years longer than 10 years ago. The prison population is at an all-time high and projected to increase further by 2022 (Ministry of Justice, 2017). Given that reoffending rates on release from prison remain stubbornly high, in our view it is essential that any sentencing reform stems the flow into prison.

5.13 These arguments fall without the scope of this project, and so will not be considered further in this document.

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[8] For more detail, see The Sentencing Code: Volume 1 (2018) Law Com No 382, Chapter 2.

Overview of main points arising from the responses

5.14 The nature of this consultation, and indeed this project, was a codification and streamlining of the existing law. The bulk of the consultation questions therefore related to questions of structure, drafting and presentation, with the minority relating to minor substantive changes to sentencing law necessitated or strongly suggested by the act of codifying separate sources of law which were contradictory or did not sit easily together.

5.15 Many of the consultation questions asked whether consultees considered the re-drafted streamlined provisions to be an improvement on the current law and also sought feedback on how they might be improved.

5.16 In the vast majority of cases, as will be seen below, the unanimous or near-unanimous opinion of consultees was that the re-drafts constituted an improvement, albeit that additional helpful feedback was often forthcoming, excerpts of which are summarised in this document.

5.17 We were reassured by the chorus of support from consultees representing the professions and the judiciary, amongst others, for the proposition that much of the law governing sentencing procedure is in dire need of simplification, and that, in general, the Code achieved some greater clarity.

Structure of this document

5.18 Whereas the sequence and arrangement of questions in the main consultation itself was tied fairly closely to the structure of the Code, this analysis of responses is designed to be intelligible when read alone as a free-standing document. For this reason the responses are grouped thematically, with the result that they do not necessarily appear in exactly the same sequence in which they appeared in the main consultation. However, responses are still described by reference to the main consultation question number, so that this document can also easily be read alongside that consultation.

PART 1 – ACCURACY, CATEGORISATION AND SCOPE OF THE CODE

5.19 The first five questions in the main consultation related to a number of general matters regarding the accuracy and scope of the Code, and the way in which it categorised sentencing procedures and disposals.

The accuracy of the Sentencing Code

5.20 The first question in the main consultation related to a general point concerning the accuracy of the Code. It asked

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

5.21 Amongst those who responded specifically to this question, there was a general agreement that the Code did accurately reflect the law. 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), Graham Skippen (Solicitor, Fison and Co.), the Senior District Judges and the Ministry of Justice all agreed that it does.

5.22 The Registrar of Criminal Appeals stated that "the Code appears to be an accurate and comprehensive statement of sentencing law (subject to the caveats included within the text of the question)". Her Majesty's Council of Circuit Judges observed that "the Code is based on a comprehensive review of the current law. Compiling such a review in itself no doubt constituted a monumental task."

5.23 The Crown Prosecution Service added to their agreement that the "clean sweep will need to be monitored closely. There may be gaps for more specialist pieces of legislation".

The scope of the Sentencing Code

5.24 The second consultation question concerned the scope of the Code. It asked

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

5.25 Again, amongst those who responded specifically there was broad agreement with the decisions made on 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), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association, the Senior District Judges and the Ministry of Justice all expressed agreement.

5.26 Some consultees addressed some notable omissions from the Code which we had discussed in the main consultation, particularly confiscation and road traffic sentencing.

5.27 Her Majesty's Council of Circuit Judges stated that

> The Code would be self-defeating if there was not a coherent approach to the inclusion and exclusion of provisions. We understand the exclusion of certain areas such as confiscation. That is an area which would benefit from its own clean sweep in due course.

5.28 Similarly, on the issue of confiscation, Professor Andrew 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.

5.29 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.

The categorisation of orders

5.30 Consultation question 3 asked whether consultees agreed with the categorisation of sentencing disposals put forward in the table at pages 31 and 32 of the main consultation.[9] The question noted that this categorisation was designed to assist in ensuring that the Bill is structured in the most effective manner and will dictate whether provisions are placed in the third Group of Parts ("primary sentencing powers") or the fourth Group of Parts ("further powers relating to sentencing").

5.31 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), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association and the Senior District Judges, endorsed the categorisation as logical, though many added qualifications or further suggestions.

5.32 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.

5.33 The Law Society added that

> a) It should be made clear that the ancillary orders are different from the community requirements that can be imposed alongside community and suspended sentence orders; and
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> b) Whilst it may seem obvious in the context of the Code, it may be helpful if it were nevertheless made clear that the ancillary orders only apply in particular circumstances.

5.34 The Magistrates' Association expressed broad agreement, as long as it is clear it is a guide only and that there may be further conditions as to applicability. However, it further stated it would have concern regarding the imposition of surcharges to be dealt with administratively. In particular, if it were to include the Courts Charge which remains on statute books, the Magistrates' Association emphasised the importance of retaining judicial discretion in relation to the final imposition.

5.35 The Senior District Judges stated that

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[9] See, The Sentencing Code (2017) Law Commission Consultation Paper No 232, para 2.49.

> The categorisation appears logical, although we note that section 135 of the Magistrates' Courts Act 1980 (One day's detention) is omitted and Restraining Orders on page 31 of the consultation appear to be categorised as orders available only in addition to a primary sentencing power in the accompanying chart for adults. It should be made clear on that page that this order is available on both conviction and acquittal.

5.36 The Ministry of Justice regarded the categorisation as a potentially useful tool, although noted the need for accuracy.

5.37 In the fourth consultation question in the main consultation, we asked 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"?

5.38 There was less consensus in answers to this question, with clear views expressed in support but also clear views expressed in contradiction to the suggestion. However, the balance of opinion was broadly supportive.

5.39 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.

5.40 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.

5.41 The London Criminal Courts Solicitors' Association's support was more caveated, with their response stating

> In principle, this appears to be a sensible approach. We agree that a sentencing court should be directed that it must make at least one primary sentencing power when it deals with an offender for an offence and that it may make ancillary orders where appropriate. We are, however, concerned as to how and where these powers are included in the code. We agree these discretionary powers should be set out in a separate group of parts to the mandatory powers but urge that these discretionary powers are not to be presented in a table such as that which appears on pages 31-32 of the consultation paper. To do so may encourage sentencing courts to impose ancillary orders when not appropriate.

5.42 In addition, the Senior District Judges stated that "it would also be useful to include an indication that courts may need to give reasons for not exercising certain further powers (such as football banning orders)."

5.43 Of those who disagreed, 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.

5.44 The Crown Prosecution Service thought the provision otiose, as it was self-evident, but stated they had "no principled objection" to its inclusion.

5.45 The Ministry of Justice felt it was not necessary to include such a provision, and that the prescriptive nature of such a change would be substantial.

5.46 Professor Ashworth QC stated:

> I am unsure about this. It would seem to add a further duty for the sentencing court, and that runs counter to the aim of maximum simplicity. I recognise that there are some forbidden combinations of orders, but wonder whether there is a different way of signalling them.

Had any matters been overlooked in the Sentencing Code?

5.47 Finally, under this general section, consultation question 5 in the main consultation again related to the proper scope of the Code, asking "Do consultees approve of those matters which we have included within the Sentencing Code? Do all of them belong in the Sentencing Code?"

5.48 All consultees who expressed a direct answer to this question were supportive of the scope of the Code. The Bar Council, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association and the Senior District Judges all agreed everything which had been included was properly within the Code.

5.49 A few consultees expressed views in favour of greater inclusion, or further better categorisation and signposting of excluded provisions to aid the reader. 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.

5.50 Similarly, the Law Society stated:

> If anything, there should be more signposts to other Acts, particularly where there are forfeiture powers or powers to take away licenses upon conviction, for example the premises licence under the Licensing Act 2003.

5.51 The Magistrates' Association queried "whether aspects relating to enforcement and specific aspects of a community sentence should have their own section in the main body of the Code."

PART 2 – MENTAL HEALTH DISPOSALS

5.52 Consultation questions 6, 7 and 8 in the main consultation concerned sentencing disposals for those suffering from poor mental health.

5.53 Question 6 in the main consultation asked whether consultees agreed with the proposal that absolute discharges available on a special verdict should be redrafted in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act.

5.54 All bar one consultee who specifically addressed this question, namely 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), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association and the Senior District Judges, agreed with it.

5.55 Her Majesty's Council of Circuit Judges considered that:

> The current sentencing provisions relating to mentally disordered offenders are particularly complex and ambiguous. This proposal is a logical streamlining and so welcome.

5.56 The Law Society sounded the sole note of dissent, stating:

> No, we do not agree. The Code should avoid redrafting these provisions as this would lead to further confusion; in our view the preferable option is that suggested at paragraph 2.76, to instead insert into the Code the range of options available in such cases, so that the sentencing court can see the options available in one place in the Code.

5.57 In a similar vein, question 7 in the main consultation asked whether consultees agreed with the proposal to recast provisions relating to hospital orders available on a special verdict in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Finally, question 8 in the main consultation asked whether consultees agreed that those disposals available on a special verdict should all be contained in the Code.

5.58 There was complete consensus amongst consultees who responded to questions 7 and 8, 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), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association, the Senior District Judges and the Ministry of Justice all of whom agreed with these proposals.

PART 3 – SIGNPOSTING, OMMISSIONS FROM THE CODE AND STRUCTURE

5.59 A number of questions in the main consultation related to decisions to omit provisions or areas of law from the Code, the signposting of those areas which were to remain outside of the Code, and more generally whether the structure of the Code was as user-friendly as possible. Questions on these related topics will be considered

together here, though they were not completely sequential in the main consultation. Responses to questions 9 to 11, 18 to 19, 22 and 26 of the main consultation are all considered in this part.

Structure

5.60 Question 11 in the main consultation asked consultees whether they approved of the way in which the Code was structurally organised, whether it was in the most efficient possible layout and whether the available disposal powers were correctly ordered.

5.61 The Law Society, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.) and the Ministry of Justice all approved of the chosen structure.

5.62 The Bar Council made a helpful detailed suggestion for the improvement of the third group of parts, which we set out below at Appendix 3.

5.63 Professor Ashworth QC raised a question over the placing of Part 8, on driver disqualification, nestled between financial orders (Part 7) and community orders (Part 9) and in general would have welcomed more discussion and justification of the ordering chosen.

5.64 A number of consultees commented on the ordering of the disposals in general from least to most serious, and on the exception to that rule in the placing of suspended sentence orders immediately after custodial sentences. For instance:

> The [Sentencing] Council approves of the way in which the Code has been organised. The placement of suspended sentence orders directly after immediate custodial sentences is in accordance with the Council's Imposition Guideline which makes it clear that a suspended sentence order can only be considered once the custody threshold has been passed.

5.65 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.

5.66 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.

5.67 Similarly, the Magistrates' Association agreed that it is sensible for suspended sentence orders to come after immediate custody in terms of the list of options, even though this is a less serious option.

Omissions from the Code

5.68 Question 10 in the main consultation dealt with exclusions of provisions from the Code. It asked:

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

5.69 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.

5.70 The Law Society agreed with the line drawn, as did the Bar Council with the exception of the exclusion of those provisions relating to release.

5.71 Her Majesty's Council of Circuit Judges expressed general agreement, subject to specific points dealt with in answer to other specific questions, and also reiterated the point (first made in response to question 2 in the main consultation) that the law of confiscation would merit separate attention in a future streamlining exercise.

5.72 The London Criminal Courts Solicitors' Association also agreed with the approach taken, subject to the inclusion in due course of youth specific disposals.[10]

5.73 In a similar vein, the Crown Prosecution Service expressed agreement, but noted that it:

> …would welcome, at a later date, expanding the Code to bring within its parameters orders which are available only to those under the age of 18.[11] In relation to road traffic offences, we understand and agree with the reasons why these do not currently form part of the Code but would hope that, at some point in the future, further consideration could be given as to whether these provisions could be incorporated.

5.74 The Sentencing Council similarly were in agreement, stating:

> The Council does approve of the decisions taken not to include certain provisions in the Code for the reasons given in the consultation. In particular the Council notes and approves of the rationale at paragraphs 2.100 to 2.102 [of the main consultation] regarding the exclusion of the Sentencing Council constitution from the Code.

5.75 The Magistrates' Association noted:

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10 It was always intended that these provisions would be included in the Sentencing Code, but for reasons explained in The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 2.92 to 2.97, they were not included at the time of the publication of the main consultation. They have since been added and were the subject of a further consultation paper: The Sentencing Code: Disposals relating to children and young persons (2018) Law Commission Consultation Paper No 234.

11 As above, these orders have now been included in the Sentencing Code.

that youth justice,[12] sentencing for traffic offences and confiscation orders are excluded. The former is a distinct jurisdiction, with separate sentencing powers, and both sentencing for traffic offences and confiscation orders are dealt with in the Road Traffic Offenders Act 1988 and Proceeds of Crime Act 2002 respectively. However, [the Magistrates' Association] queries whether "release and probation arrangements" impact on sentencing decisions regarding breach, especially in terms of Post Sentence Supervision.

5.76 For their part, the Senior District Judges stated

> We understand the reason for the omission of Road Traffic sentencing but it is disappointing to one of our group. There is a question as to whether provisions in relation to sentencing breaches of post sentence supervision should be included as they affect the court's sentencing powers, although we note that it is reflected that courts may not make custodial sentences consecutive to recall provisions.

5.77 The Registrar of Criminal Appeals agreed

> with the Commission's reasoning as set out at paragraph 2.104 of the consultation paper that it would not be appropriate, at least at this time, to include the road traffic sentencing provisions in the Sentencing Code itself. It is a too large and complex self-contained area of sentencing law to fully incorporate into the Code at this time.

5.78 The Registrar went onto make some extremely useful points of detail regarding the line drawn around road traffic offences, some of these comments are set out here, and the further points of detail are set out in full below.

5.79 The Registrar noted that:

> As well as excluding any of the provisions, obligatory or discretionary, for disqualifying an offender from driving under the Traffic Acts, the Code does not include any of the provisions for endorsement, penalty points, 'totting' disqualifications, or interim disqualifications. It is a concern that sentencing judges may proceed under ss. 116 - 122 to disqualify the offender, rather than use the current signposting to the RTOA 1988 under s.124 as currently drafted. Almost all disqualifications from driving are currently passed under the Traffic Acts, not PCCSA 2000, and therefore this should be reflected in the prominence given to the RTOA 1988 for not only disqualifying, but also to other obligatory sentencing provisions…
>
> we ask if there is merit in considering whether to include in the Sentencing Code, at s.119, that the disqualification period must not be indefinite? Whilst a disqualification for life has been held to be possible by CACD, a disqualification for an indefinite period has been held not to be possible as it is uncertain.

Signposting

5.80 In the main consultation[13] we explained that a Sentencing Code of "maximum inclusion" would repeal and replace all sentencing provisions in the current law. We

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12 As above, these orders have now been included in the Sentencing Code.

13 The Sentencing Code (2017) Law Commission Consultation Paper No 232, paras 2.57 and following.

described how this would have the benefit of being exhaustively comprehensive, and allow us confidently to say that the Sentencing Code alone would provide the source of law in all future sentencing exercises. However, we further noted the need to consider the effect that this would have on other aspects of the law aside from sentencing. Powers reproduced in the Sentencing Code would be severed from the specific body of law to which they rightly belong. This potentially deprives the user who finds the power in the Sentencing Code of important context and enforcement regimes.

5.81 More unhelpfully still, we explained that the user who expects to find the power where it logically belongs, instead finds only a gap left by the repeal. A simple example here is the power to make company director disqualification orders, currently found in the Company Directors Disqualification Act 1986. It provides powers available when sentencing, but rightly belongs to a coherent and self-contained body of law, and would be less useful if "uprooted" and moved to the Sentencing Code.

5.82 We provisionally suggested that we must therefore avoid disrupting the law beyond the narrow reach of sentencing procedure. It was proposed in the main consultation that the Sentencing Code should contain every sentencing related provision, insofar as is possible, without creating unhelpful gaps in existing coherent regimes.

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

5.84 This section deals with responses on that topic of "signposting".

5.85 Question 9 in the main consultation dealt in general terms with signposting of other legislative provisions, and asked whether consultees approved of the approach taken with regard to signposting provisions, whether they were useful and whether they made the Code more comprehensive.

5.86 All consultees who responded specifically to this question, 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), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association, the Senior District Judges and the Ministry of Justice welcomed the use of signposts.

5.87 Her Majesty's Council of Circuit Judges stated that:

> We appreciate a comprehensive code might entail a work in the region of 1300 pages as per the compilation. Hence there is a need for signposting provisions. Practically, electronic navigating will make this process simple.

5.88 The London Criminal Courts Solicitors' Association agreed, commenting that:

> The signposting provisions appear useful and should be included in the code. We also agree that any amendments to the Crim PR or PD to reflect common law principles of sentencing should be signposted in the code.

5.89 Similarly, the Magistrates' Association considered that:

> …it would be unworkably disruptive to existing legislation to re-state all orders in the Sentencing Code where it is not necessarily directly related to sentencing practice. The suggestion to signpost provisions seems sensible.

5.90 Several consultees put forward further suggestions for signposting provisions, or comments on those signposts which had been included in the Code. Many of those appeared in response to the more specific questions which are analysed below (see for instance the comments of the Registrar of Criminal Appeals, and Professor Ashworth QC below in this section).

5.91 In response to this general question, the Senior District Judges expressed the view that:

> It would have been helpful for those using the Code to be referred by way of signposting to common law principles such as *R v Newton* rather than an oblique reference by way of a signpost to the Criminal Procedure Rules and practice directions. That is not to be, so we welcome the signpost to the Criminal Procedure Rules so that changes in that can be taken into account by the sentencing court. We assume the plan is to have signposts or electronic updates on a live document when significant sentencing case law comes into effect as means of keeping the Code current as a sentencing tool.

5.92 Further, the Law Society commented that "the power to bind over to keep the peace should be included".

Principal aim of the youth justice system

5.93 Question 18 asked whether the signposts provided by clause 55 of the Code (which provides signposts as to the principal aim of the youth justice system) were a useful addition.

5.94 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, the Senior District Judges and the Ministry of Justice all thought that it was useful.

5.95 Both Professor Ashworth QC and Her Majesty's Council of Circuit Judges noted that section 142A of the Criminal Justice Act 2003 which would provide statutory purposes of sentencing for the sentencing of persons under 18 has still not been commenced. Professor Ashworth QC raised the question of why this part of the statutory scheme had not been commenced at the time that other parts of the scheme were.

5.96 Graham Skippen (Solicitor, Fison and Co.) did not feel it was useful but provided no reasons.

The establishment and role of the Sentencing Council

5.97 Question 19 in the main consultation asked whether consultees agreed with the decision to leave out of the Sentencing Code those provisions relating to the establishment and role of the Sentencing Council.

5.98 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), Graham Skippen (Solicitor, Fison and Co.), the Senior District Judges, the Ministry of Justice, and, notably, the Sentencing Council itself, agreed with this decision.

5.99 Her Majesty's Council of Circuit Judges would also welcome some clarification of terminology in respect of the Guidelines, noting that, for instance, advocates often use the term "starting point" to mean the point before reduction for a guilty plea.

Duties when forming opinions

5.100 Question 22 in the main consultation asked whether consultees thought that the replacement of the list of provisions in section 156(1) of the Criminal Justice Act 2003 (duties when forming specific opinions), with signposts to the duty in all the qualifying provisions was helpful.

5.101 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 Senior District Judges and the Ministry of Justice all agreed that the proposed signposts were helpful.

5.102 The London Criminal Courts Solicitors' Association thought the signposting provisions well-drafted, and the Registrar of Criminal Appeals commented that "provision of the signposts should assist the Court (and other stakeholders) in accessing the details of the relevant duties."

5.103 Graham Skippen (Solicitor, Fison and Co.) did not feel it was useful but did not provide reasons for his opinion.

The definition of specified prosecutor

5.104 Question 26 in the main consultation related to a single free-standing point about 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.

5.105 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, Lesley Molnar-Pleydell (Langley House Trust) and Graham Skippen (Solicitor, Fison and Co.)) all agreed that the benefits outweighed the burdens.

PART 4 - CLARIFICATORY CHANGES AND MINOR CONSEQUENTIAL REFORMS

5.106 It is outside the scope of this project to make significant policy changes to the law of sentencing, to reform the penalties available to a sentencing court, or to alter the maximum or minimum sentence for an offence. However, there were some situations where, in the context of bringing together and seeking to simplify existing sentencing law, some minor amendments suggested themselves as clearly in the interests of the aims of this project, and the consolidation presented an opportunity to achieve minor technical or clarificatory improvements. We asked questions in the main consultation about the decisions we had made in these areas, and the responses to questions on this topic are considered together in this section. Questions 12 to 17, 20 to 21 and 23 to 25 from the main consultation are all considered under this heading.

Statutory surcharge

5.107 Question 12 in the main consultation asked whether consultees agreed that the obligatory statutory surcharge[14] should be an automatically imposed consequence of conviction, thereby removing the need for the court to make any reference to the surcharge, save for in those cases where the offender had limited means to satisfy other financial orders.

5.108 Answers to this question were mixed. The Law Society, the Bar Council and Graham Skippen (Solicitor, Fison and Co.) were against the proposal.

5.109 So, on balance, were the London Criminal Courts Solicitors' Association, the Magistrates' Association and the Senior District Judges. All noted the force in the arguments we had put forward in favour of making the surcharge automatic, such as the high error rate and consequent appeal cost. However, all were concerned with the potential confusion to defendants, and noted the court's discretion to reduce the total amount payable when compensation is also ordered.

5.110 The Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges and Lesley Molnar-Pleydell (Langley House Trust) were all in favour of the proposed change.

Mandatory sentencing

5.111 Questions 13 to 17 in the main consultation all related to mandatory sentencing provisions.

A defined list of mandatory sentences

5.112 Question 13 asked in general terms whether the introduction of a definition of mandatory sentence requirements in place of individual lists of such provisions was helpful.

5.113 There was near unanimity amongst consultees that this was a desirable development.

5.114 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

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[14] Often referred to in practice as the "victims' surcharge" – see, section 161A of the Criminal Justice Act 2003.

Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association and the Senior District Judges all expressed their support.

5.115 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."

5.116 Graham Skippen (Solicitor, Fison and Co.) felt that it was important that it incorporated all the relevant provisions.

5.117 The Ministry of Justice, however, expressed a preference for the current list system.

5.118 Question 14 in the main consultation asked whether consultees considered that the proposed definition of mandatory sentence requirements was correct, and whether special custodial sentences for offenders of particular concern (under section 236A of the Criminal Justice Act 2003) should be included in that definition.

5.119 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, Lesley Molnar-Pleydell (Langley House Trust) and the Senior District Judges all expressed approval of the general definition.

5.120 There was more variance of opinion on the specific limb of the question regarding offenders of particular concern. The Law Society and Bar Council were against the inclusion of this category of offender within the general definition, as were the Ministry of Justice. The Ministry of Justice noted that section 236A of the Criminal Justice Act 2003 was capable of operating in conjunction with section 166 of the Criminal Justice Act 2003 allowing a custodial sentence to instead be mitigated down to a community order.

5.121 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.

5.122 In this connection, the Registrar of Criminal Appeals considered:

> that Section 236A should be included, but otherwise the definition appears to be correct. If the criteria required by s.236A are met then the provision is engaged without a release clause and the court is required to impose a further 1 year licence period on a qualifying offence. The CACD has received numerous cases in which the court has been unable to impose the will of Parliament and add the additional one year period of licence as it would offend s.11(3) when the relevant mandatory additional year of licence has been overlooked in the Crown Court.

5.123 Her Majesty's Council of Circuit Judges noted that:

> The passing of section 236A sentences has had an unhappy history, as communicated to us by the previous Senior Presiding Judge. Any practical assistance to prevent the passing of unlawful sentences would be welcome.

The mandatory life sentence for murder

5.124 Questions 15 and 16 in the main consultation concerned the mandatory life sentence for murder.

5.125 Question 15 asked whether consultees agreed that the only offence for which the sentence is "fixed by law" is murder, and if so, how consultees would describe offences like those under section 51 of the International Criminal Court Act 2001 (genocide, crimes against humanity and war crimes).

5.126 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.

5.127 Graham Skippen (Solicitor, Fison and Co.), however, argued that the term fixed by law, encompasses any offence other than that contrary to common law.

5.128 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'."

5.129 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."

5.130 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."

5.131 Finally, on this point, the Registrar of Criminal Appeals proposed "offence (of murder/genocide/crimes against humanity/war crimes) which attracts a mandatory life sentence".

5.132 Following on from question 15, question 16 in the main consultation asked whether consultees thought that the term "fixed by law" should be replaced with a description of the order, namely "the mandatory life sentence for an offence of murder" (or something similar).

5.133 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.

5.134 Concerning 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).

Statutory purposes of sentencing

5.135 Question 17 in the main consultation concerned the relationship between the general statutory purposes of sentencing and mandatory sentencing regimes. It asked whether consultees agreed that section 142 of the Criminal Justice Act 2003 (dealing with the general purposes of sentencing) should be amended so that it applies "subject to" mandatory sentencing requirements, rather than being completely disapplied in such cases.

5.136 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, the Senior District Judges and Graham Skippen (Solicitor, Fison and Co.) were all in agreement with this proposal. Only the Ministry of Justice dissented.

Clarification of terms

5.137 Questions 20 and 21 in the main consultation related to matters of sentencing terminology which it was suggested currently lead to confusion and where clarification would be beneficial.

5.138 Question 20 asked whether the phrases "guideline category starting point" and "non-category starting point" provide greater clarity than the references to the "sentencing starting point" and "appropriate starting point" contained in section 125 of the Coroners and Justice Act 2009.

5.139 Responses were mixed, but the balance of opinion was not in favour of the proposed change here.

5.140 Those who did agree included the Crown Prosecution Service, Her Majesty's Council of Circuit Judges and the London Criminal Courts Solicitors' Association.

5.141 The Bar Council agreed "partly" but thought that "non-category starting point is not helpful". Similarly, the Registrar of Criminal Appeals considered it:

> an open question as to whether the proposed change of language introduces any further clarity. "Appropriate starting point" is a formulation that is, broadly speaking, understood by court users. Section 125 of the 2009 Act is very clear and easy to understand.

5.142 Of those who disagreed, Lesley Molnar-Pleydell (Langley House Trust) thought that "these phrases are still too vague and open to misinterpretation."

5.143 Similarly, the Magistrates' Association disagreed, expressing concerns "that this is, in fact, more confusing and ambiguous compared to the current approach."

5.144 Significantly, given the subject matter of this question, the Sentencing Council were not in favour of this change, and gave helpful and clear reasons. These are worth setting out here in full:

> The Council does not agree with this proposal and has some additional comments about the way the Code covers the provisions in section 125 of the Coroners and

Justice Act 2009. Paragraph 5.26 of the consultation is written as though the proposed changes to terminology have been made to the Code although, in fact, they have not. The Council is of the opinion that while the proposed term 'guideline category starting point' may be clearer than the existing term 'sentencing starting point' to describe the initial sentence that the court arrives at before considering aggravating and mitigating factors, the existing term is also used in section 120 CJA 2009 which is not being incorporated into the Code.

Therefore, it does not seem possible to make the proposed change without the confusion of using different terms to describe the same thing. The Council does not consider that the proposal to change 'appropriate starting point' to 'non category starting point' would aid clarity. Section 56 (1) of the Code replicates section 125(1) Coroners and Justice Act 2009. The Council welcomes the fact that this important provision is stated clearly at the beginning of this chapter. However, 'sentencing guidelines' are not defined in the code; it would be helpful to include a reference (perhaps at section 59 of the code) to s120 (1) and (2) CJA 2009 where there is a definition. The danger of not doing so is that as the focus of section 57 is on offence specific guidelines, the code may give the impression that these are the only type of guideline to which the 'principal guidelines duty' applies.

5.145 Question 21 asked whether consultees agreed with the proposed replacement of the phrase "notional determinate term" with the term "appropriate custodial term" at clause 58 of the Code.

5.146 This change of wording found more favour with consultees. 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, Lesley Molnar-Pleydell (Langley House Trust) and the Sentencing Council all thought it an improvement.

5.147 For instance, Her Majesty's Council of Circuit Judges believed that "this change will emphasise the different nature of the extended sentence… It is a logical change."

5.148 In their response the Sentencing Council stated:

The Council agrees with the proposed replacement of the phrase 'notional determinate term' with the term 'appropriate custodial term' when referring to extended sentences. Section 58(3) of the code refers to the determination of the sentence condition for life sentences for a second listed offence. The Council supports this provision which aids clarity. However, it is unclear why there is not a similar provision relating to the 4 year term condition for extended sentences (sections 165(1)(e), 182(4) and 195(4) of the Code).

5.149 Of those who specifically responded to this question, only Graham Skippen (Solicitor, Fison and Co.), the Ministry of Justice and the London Criminal Courts Solicitors' Association preferred the current wording to the proposed change, the latter providing the caveat that "our views are not very strong on this point".

Statutory aggravating and mitigating factors

5.150 Questions 23 to 25 deal with points concerning statutory aggravating and mitigating factors.

Inclusion

5.151 Question 23 asked whether the scope of the Sentencing Code should include all mandatory aggravating factors including section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971.

5.152 All consultees who specifically addressed this question were in favour of the proposition.

5.153 The Law Society, The Bar Council, Professor Ashworth QC, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association, the Senior District Judges, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.) and the Ministry of Justice all thought this desirable.

5.154 Many of these consultees made similar points regarding the desirability of a comprehensive Code, a single reference point etc. For example, one of the fuller expressions of such sentiments came from Her Majesty's Council of Circuit Judges, who said:

> We take the view the exclusion of these provisions would be contrary to the principles of the Code. From a sentencer's perspective there would be a practical deficit if they were excluded. We repeat our request that as much as possible is contained within one point of reference. We believe if sentencers are continually having to navigate away from the Code their confidence in it might be undermined.

5.155 Professor Ashworth QC said he:

> would prefer the Code to include all mandatory aggravating factors, even the few that apply to a single offence. This is because they impose duties on the court as part of the sentencing process, and I would therefore expect to find them in the Code. I also support the proposal in 5.37 to universalise the duty to state that a mandatory aggravating factor has been taken into account.

Section 143 of the Criminal Justice Act 2003

5.156 Question 24 asked whether consultees agreed that the duty to treat previous convictions or the fact that the offender was on bail at the time of the offence, as aggravating factors under section 143 of the Criminal Justice Act 2003, should be amended, in line with the other duties to treat facts as aggravating factors, to include a duty to state in open court that the court has done so.

5.157 Again, there was near unanimous approval from those who responded to this question, 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). The only consultees who disagreed were Graham Skippen (Solicitor, Fison and Co.) and the Ministry of Justice, the latter considering section 174 of the Criminal Justice Act 2003 already makes this duty clear.

Reductions for guilty pleas

5.158 Question 25 asked whether it would be desirable in principle if section 144 of the Criminal Justice Act 2003 was amended so that a reduction for a guilty plea could allow a court to impose a sentence less than that required by either section 51A(2) of the Firearms Act 1968 or section 29(4) or (6) of the Violent Crime Reduction Act 2006 (the minimum sentence for certain firearms offences) provided that the sentence imposed was not less than 80% of the required sentence for an offender where the offender is over 18.

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

5.160 A number of consultees declined to express a view on this issue. Of those who did, the Bar Council, the Law Society, Her Majesty's Council of Circuit Judges, Professor Ashworth QC, the Registrar of Criminal Appeals and Graham Skippen (Solicitor, Fison and Co.) were all in favour of the proposal.

5.161 Professor Ashworth QC stated:

> reference is made in Q.25 to 'a package of recommendations in our final report which go beyond the Sentencing Code as currently enacted.' Given the parlous state of sentencing law, there will undoubtedly be great competition for places in any such package. I agree with the proposal contained in Q.25 relating to reductions of sentence for guilty pleas, and with other suggestions throughout the document. It will be a matter of political judgment how far such a package should go. But there remains a strong conflict between the statutory provisions urging courts to pass the least sentence appropriate…and the high prison use in England and Wales. Almost all reports on prisons and their use in the last 50 years (many chaired by judges) have resulted in recommendations for reducing the use of imprisonment, but a strong political will is necessary to ensure that a reduction in prison use occurs (chiefly through a reduction in the length of custodial sentences), combined with supporting changes from the Sentencing Council and the Court of Appeal. In 2014 the British Academy tackled this in its report, *A Presumption against Imprisonment*, and I would commend that report as a basis for a movement to revise the use of imprisonment downwards.

5.162 The Registrar of Criminal Appeals noted that:

> The suggested approach would be consistent with those offences currently identified in s. 144 CJA 2003 (third strike burglaries, third trafficking drug offences, offensive weapons and bladed articles). As consistency is one of the primary aims of the sentencing code, it would appear desirable to amend s. 144 CJA 2003 to include s. 51A(2) Firearms Act 1968 and s. 29(4) & (6) Violent Crime Reduction Act 2006.

5.163 Her Majesty's Council of Circuit Judges, having agreed with the proposal, went on:

> We appreciate this is not a change which the Code could effect. We do not see the logic in a 20% discount being available in respect of some mandatory minimum

sentences but not others. On the face of it there is inconsistency at best. We do not see illogicality and or inconsistency as promoting public confidence in the rule of law. We do not see the illogicality as being in keeping with the spirit or the effect of the Sentencing Council's *Reduction in Sentence for Guilty Plea Definitive Guideline* effective 1.6.17. That guideline, itself, envisages a discount for a guilty plea in some cases even where a mandatory life sentence for murder is required. We do not see why the two provisions referred to within this question should be excepted.

PART 5 – FINES, COMPENSATION ORDERS AND FORFEITURE

5.164 Questions 27 to 33 in the main consultation concerned fines, compensation orders and forfeiture powers and the responses to these questions will be considered together in this part.

Fines

Inclusion

5.165 Question 27 asked a general question about the balance that the Code strikes by including some general provisions on fines, but generally excluding provisions relating to the fine levels and maximum fines for particular offences.

5.166 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, the Ministry of Justice and the Senior District Judges all expressed a degree of support, though several added further comment.

5.167 The Bar Council stated:

> We can see the force in not incorporating Part 3 of the MCA 1980 into the Sentencing Code, for the reasons given in the consultation paper (at §6.6-6.8). We do however take the view that it would be helpful to include fine bands (A, B, C) as well as the fine levels, in a simple table in this chapter. Having considered the pros and cons of specifying (perhaps by way of a schedule) each offence on the statute book which attracts a fine, together with the statutory maximum, we have concluded that we agree with the approach taken by the Law Commission (see §6.2 [of the main consultation]), which is consistent with that taken in relation to sentence levels generally.

5.168 The Registrar of Criminal Appeals was similarly of the view that:

> Given that one of the aims of the sentencing code is to provide a single point of reference for sentencing law, it would appear eminently sensible to include the general provisions on financial penalties, which is the sentence most commonly imposed by the courts *(accounting for 74% of court disposals in the year ending June 2017- MOJ Criminal Statistics Quarterly, published November 2017).* In relation to fine levels, the draft code does make reference to significant provisions on fine levels (such as the changes to fine limits wrought by s.85 LASPOA 2012). It is accepted that the inclusion of maximum fine levels for each offence is probably unnecessary, due to the volume of offences that would need to be included.

5.169 The Magistrates Association commented that:

> It seems sensible to include general provision but exclude specific provisions relating to fine levels and maximum fines for particular offences as these levels may be susceptible to change. It is important that explanation of the fine Bands and how sentencers should take into account the financial circumstances of an offender is clearly set out and available as a public document. However, legislation is not necessarily the appropriate place for this information.

5.170 The Senior District Judges also expressed support for the general balance, but wondered whether the Code could have gone further, notably regarding fines enforcement:

> The fines section makes sense in terms of setting out general sentencing provisions where a fine may be imposed. However, even though enforcement of fines has not been included in the regime for the reasons set out in the draft Code, enforcement of fines in the magistrates' court is inextricably linked to sentencing, and enforcement of financial orders arguably should be included in the Code. Fines imposed by the Crown Court are equally enforced in the magistrates' court. It would make sense to have imposition and enforcement covered in a single code. This is especially as later in the Code, at Clause 154, reference is made to imprisonment for non-payment of fines.

Fine levels

5.171 Question 28 in the main consultation asked whether consultees found the table showing the summary fines levels over time in clause 122 of the Code helpful.

5.172 All consultees who responded specifically to this question, 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, Lesley Molnar-Pleydell (Langley House Trust) and Graham Skippen (Solicitor, Fison and Co.) thought the table helpful.

5.173 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.

Powers of the magistrates' court to fine

5.174 Question 29 in the main consultation asked whether consultees considered that the new clause 80 in the Code which sets out the general power of the magistrates' court to impose fines was helpful.

5.175 The Law Society, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association, the Senior District Judges, Lesley Molnar-Pleydell (Langley House Trust) and the Ministry of Justice all considered the provision to be a helpful addition.

5.176 The London Criminal Courts Solicitors' Association and the Bar Council were in favour of such a provision, but thought it could be drafted more simply.

5.177 Graham Skippen (Solicitor, Fison and Co.) felt it was not helpful.

Compensation orders

5.178 Question 30 in the main consultation asked, in general terms, whether consultees found the new streamlined compensation order provisions more accessible.

5.179 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 Lesley Molnar-Pleydell (Langley House Trust) all considered that the new provisions were more accessible.

5.180 Graham Skippen (Solicitor, Fison and Co.), seemed to misunderstand the question, noting that it could have been a signpost to section 130 of the Powers of Criminal Courts (Sentencing) Act 2000. The Sentencing Code will of course repeal and replace those provisions.

5.181 A number of more detailed points of feedback were also received, which we have gratefully taken into account.

5.182 For example, the Senior District Judges reiterated their view that it "would be helpful if enforcement and review of financial orders were to be included in the Code."

5.183 Her Majesty's Council of Circuit Judges helpfully added:

> Our experience is orders feature frequently in the Crown Court. We wonder if the ambit of this Code might cover the question of whether any sanction is available in the event of non-compliance with a compensation order. Some Crown Court judges understand that there may a sanction available for compensation orders above a certain sum. On a point of detail will the Code amend the terminology of PCC(S)A 2000 s.134(2) so it refers to claimant?

5.184 The Magistrates' Association considered that:

> The provisions as outlined are logical. However, at [clause] 94(b)(i)&(ii) [within the Code] it would be clearer to indicate that compensation for funeral expenses or bereavement due to a Road Traffic Accident are not available, and refer to [clause] 97(1) at that stage.

5.185 Question 31 in the main consultation asked whether consultees agreed that the removal of the limit on compensation orders can safely be retrospectively applied to offences which pre-date its commencement, as an example of the "clean sweep" in operation, given that the purpose of a compensation order is not punitive in its aims and therefore (we suggested) Article 7 is not engaged.

5.186 The majority of consultees who responded to this question agreed with the proposition, but it nonetheless proved controversial. The Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Magistrates' Association and the Senior District Judges were all in agreement.

5.187 However, those representing the professions, in the form of the Bar Council, the Law Society and the London Criminal Courts Solicitors' Association all disagreed, in the

main on the basis of the propensity for compensation orders to have a punitive effect on defendants in practice, whatever their theoretical classification.

5.188 For instance, the Law Society noted that compensation orders are "perceived by defendants to be punitive" and the London Criminal Courts Solicitors' Association described how compensation orders "have a punitive effect as they massively affect those on low incomes and benefits".

5.189 Graham Skippen (Solicitor, Fison and Co.), also disagreed.

Forfeiture Powers

5.190 Questions 32 and 33 in the main consultation concerned forfeiture powers. The table in clause 113 of the Code provided a non-exhaustive list of signposts to other conviction forfeiture powers not re-enacted in the Code itself. Question 32 asked whether consultees considered this table of signposts helpful.

5.191 Only Graham Skippen (Solicitor, Fison and Co.), thought the table was undesirable by virtue of its non-exhaustive nature. The Law Society, the Crown Prosecution Service, the Registrar of Criminal Appeals, Her Majesty's Council of Circuit Judges, the Senior District Judges and Lesley Molnar-Pleydell (Langley House Trust) all considered this clause helpful.

5.192 Neatly summarising the arguments in favour of a non-exhaustive list in this particular context (suboptimal though this option would appear at first blush) the Bar Council responded that

> In general, our view is that non-exhaustive lists ought to be avoided in the Sentencing Code insofar as possible. However, we understand that there are over 100 different forfeiture powers, many of which are offence specific. We appreciate the need to strike a balance between including those that are likely to be frequently used and keeping the relevant provisions to a manageable size, and to that end can see force in the inclusion of a non-exhaustive list of the main forfeiture powers – perhaps featuring only those provisions which require mandatory forfeiture of an items or items.

5.193 Question 33 in the main consultation asked, further, whether consultees had any suggestions for other forfeiture powers which had been omitted in the Code as published with the main consultation, but which should be included. Various helpful suggestions were received from the Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals and the London Criminal Courts Solicitors' Association, these are reproduced in full in Appendix. We have augmented the table in the Code accordingly.

PART 7 - COMMUNITY ORDERS

5.194 Questions 34 to 37 of the main consultation concerned community orders, and the responses to these questions will be considered together in this part.

Structure

5.195 Question 34 in the main consultation asked consultees whether the material relating to community orders in the draft Sentencing Code has been structured appropriately, and for any feedback regarding possible improvements.

5.196 The Law Society, the Crown Prosecution Service, the Registrar of Criminal Appeals, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.) and the Ministry of Justice 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".

5.197 The Registrar of Criminal Appeals considered that:

> The subheadings… provide a clear framework and guides the user to the relevant clauses. The table at clause 129 is a useful overview and embedded index to the detailed provisions within the Sentencing Code which deal with each requirement. The restructuring of the material, in particular moving the provisions relating to the requirements of community orders from the body of the Bill to schedule 3, makes it far more streamlined. Previously only provisions relating to breaches of community orders were contained within a schedule. As a user, due to the number of specific requirements, it is more convenient to refer to a schedule containing the relevant provisions rather than a section within the body of the legislation. The general prohibition on imposing a community order as well as custody is not included in the Code and [the Registrar] is in agreement that it does not need to be included.

5.198 A number of detailed drafting points were raised by the Magistrates' Association and the Senior District Judges, which we have gratefully considered.

5.199 One innovation in the re-drafting of the law on community orders was the introduction of the concept of an "available requirement", and question 35 in the main consultation asked consultees whether they considered this change had improved the clarity of the law.

5.200 The majority of consultees thought that it had, with the Law Society, the Bar Council, the Crown Prosecution Service, Lesley Molnar-Pleydell (Langley House Trust) all Her Majesty's Council of Circuit Judges and the Senior District Judges all expressing support.

5.201 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.

5.202 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.

5.203 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.

5.204 A similar concern regarding regional variance in availability of community order requirements was echoed by the Senior District Judges and Graham Skippen (Solicitor, Fison and Co.).

5.205 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 Requirement" and went on to observe that "… including reference to requirements which will be available by pilot is sensible."

5.206 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.

Table of available community requirements

5.207 Question 36 in the main consultation asked consultees whether the use of the table at clause 136 of the Code, showing the available community requirements, was an improvement over the current law.

5.208 All bar one of the consultees who responded to this question considered the table a welcome improvement.

5.209 The London Criminal Courts Solicitors' Association were not sure that the table as drafted did represent an improvement, suggesting instead that "the table could be made a bit more user-friendly by incorporating all information necessary for the purpose of sentence as opposed to simply referring to various schedules."

5.210 The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), Her Majesty's Council of Circuit Judges, the Magistrates' Association and the Senior District Judges all supported the table's inclusion.

5.211 Her Majesty's Council of Circuit Judges welcomed "the introduction of the phrase user-friendly to sentencing law" but wondered, in common with the London Criminal Courts Solicitors' Association, "if the table at clause 129 might be improved (it may not be practicable) so that the respective restrictions or obligations are set out in column 4 rather than a reference to schedules." The Senior District Judges thought the table would be "very useful to sentencers".

5.212 The Registrar of Criminal Appeals stated that:

> The Community Order Requirements Table at clause 129 clearly sets out the requirements available and usefully directs the reader to the relevant provisions for each requirement (not previously provided within the Criminal Justice Act 2003). It provides a useful at-a-glance point of reference for all community order requirements.

Revocation and resentencing

5.213 Question 37 in the main consultation asked whether consultees thought that the streamlining changes to the court's powers to revoke and resentence community orders have improved the consistency and clarity of the law.

5.214 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.

5.215 Similarly, the Magistrates' Association:

> welcomes these measures, which will secure greater consistency in sentencing. However, the MA would flag issues related to Mental Health Treatment Requirements, Drug Rehabilitation Requirements and Alcohol Treatment Requirements in relation to how attendance is monitored, given engagement with a Treatment Requirement should be voluntarily and therefore sanctions for non-engagement are unlikely to fulfil the aims of the requirement.

PART 8 – SUSPENDED SENTENCE ORDERS

5.216 Questions 38 to 42 in the main consultation concerned suspended sentence orders, and responses to these questions will be considered together in this part.

General structure

5.217 Question 38 in the main consultation asked in general terms whether consultees believed that the material relating to suspended sentence orders in the draft Sentencing Code was appropriately structured and for feedback on how it might be improved.

5.218 The Law Society, the Bar Council, the Crown Prosecution Service, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), Her Majesty's Council of Circuit Judges and the Senior District Judges all supported the new structure.

5.219 The Senior District Judges considered that:

> The provisions relating to the powers of the court in relation to suspended sentence orders and making "activation orders" are much clearer. The provisions within schedule 10 and cross referenced to clause 19 in relation to the magistrates' courts powers where an offender has committed an offence while subject to a Crown Court suspended sentence orders are much clearer and welcomed.

5.220 The Registrar of Criminal Appeals and the Magistrates' Association provided detailed feedback, for which we are grateful.

5.221 The Registrar of Criminal Appeals stated:

> As suspended sentences are a form of custodial sentence, it makes logical sense to include the chapters on suspended sentences within Part 10. It is agreed that consistency within the code is important and therefore the chapter dealing with adults aged between 18 and 21 ought to sit before the chapter dealing with adults over 21, to provide that consistency with the other parts of the code.
>
> However, the code as currently drafted puts the explanatory provisions on suspended sentences in chapter 5 of Part 10, which comes after the availability chapters 3 and 4. This perhaps does not provide the greatest of clarity. It may be more logical to have the explanatory chapter before the availability chapters: a reader is likely to read the explanatory provisions before the availability provisions.
>
> In relation to the overlapping provisions concerning suspended sentences and community sentences, it is agreed that greater clarity is provided by having separate provisions in the relevant chapters. As one of the primary purposes of the code is to provide a comprehensible and clear sentencing framework, it is important to distinguish between different forms of sentence, even if that results in some overlap.
>
> Furthermore, Schedule 3 clearly sets out the provisions relating to community requirements which can be cross referenced to both chapters dealing with community sentences and suspended sentences.

5.222 The Magistrates' Association had the following observations:

> It is noted that clause 200(1) is drafted with the assumption that a custodial sentence "is not to take effect unless…" However, magistrates' pronouncements are drafted conversely (i.e. magistrates would say "We are sending you to prison for a total period of X. However, this will be suspended…") This highlights an inconsistency as to the emphasis and assumptions around an SSO, and this may need to be addressed, although this should probably be a wider piece of work which this legislation alone would not address.

It may be helpful to have information on breach included at this point, rather than in a completely separate schedule (schedule 10).

It is stated that suspended sentences clearly amount to less serious punishment than custodial sentences, but are also more serious punishment than Community Orders. However, it should be made clear that SSOs are custodial sentences.

Custodial sentences (including suspended sentences) for 18-21 year olds are in a separate section to over 21 year olds - does this make sense and will it make any difference to sentencers?

Re-arrangements

5.223 Questions 39 to 42 in the main consultation provoked minimal discussion amongst consultees, and so the responses to them will be considered together.

5.224 For ease of reference, question 39 asked whether the table in clause 201 of the Code setting out the restrictions and obligations in relation to the imposition and availability of community requirements on suspended sentences was helpful. Question 40 asked whether the rearrangement of paragraphs 8 to 12 of schedule 12 to the Criminal Justice Act 2003 (suspended sentence enforcement) in paragraphs 10 to 21 of schedule 10 to the Code clarified the powers of the courts. Similarly, question 41 asked whether re-ordering of schedule 13 to the Criminal Justice Act 2003 (transfers of suspended sentence orders to Scotland or Northern Ireland) in schedule 11 to the Code improved the clarity and accessibility of the law. Finally, question 42 asked whether the introduction of the phrases SSSO (Scotland Suspended Sentence Order) and NISSO (Northern Ireland Suspended Sentence Order) in schedule 11 was useful.

5.225 The Law Society, the Bar Council, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the Ministry of Justice and the London Criminal Courts Solicitors' Association answered each of these questions in the affirmative, considering each change an improvement to the law. Lesley Molnar-Pleydell (Langley House Trust) also agreed with each but question 42. Graham Skippen (Solicitor, Fison and Co.) agreed with each apart from the changes identified in questions 41 and 42.

5.226 In terms of additional comments or amplification, the Crown Prosecution Service said of the change in question 39 that the addition of gridlines to the table would aid easy reference to it. The Ministry of Justice noted that tables might be more difficult to amend in future.

5.227 Her Majesty's Council of Circuit Judges in connection with the changes in question 40, wondered:

> whether the Code is able to accommodate, either in this schedule or elsewhere or at all, the question of whether time spent on remand awaiting the original sentence (either community order or SSO) can be taken in account when re-sentencing.

5.228 The Magistrates' Association and the Senior District Judges also agreed with the changes proposed in questions 39 and 40, though they expressed no views with respect to questions 41 and 42. In terms of the new table, dealt with at question 39, setting out the restrictions and obligations in relation to the imposition and availability

of community requirements, the Magistrates' Association further noted that "there is no mention of restrictions in law regarding treatment requirements."

5.229 The main doubts expressed in response to this group of questions came from the Registrar of Criminal Appeals. The Registrar was cautiously supportive of the change to the schedule on transfers of suspended sentence orders to Scotland and Northern Ireland (question 41), stating:

> Schedule 10 to the draft code is far longer than its source legislation, which it could be argued undermines one of the primary aim of drafting a "simple" piece of legislation. However upon several readings the Schedule does provide a very clear structure and is easily comprehensible, which compensates for the length. There is force in the argument that the proposed draft promotes accessibility because it reduces the need for cross referral to other parts of the code.

5.230 However, with respect to the re-draft of schedule 12 to the Criminal Justice Act 2003 on suspended sentence enforcement in schedule 10 to the Code (question 40 in the main consultation), the Registrar stated that:

> There is some logic in re arranging the paragraphs as they appear in the CJA 2003, such that the paragraphs dealing with the relevant Court is dealt with before the powers of the Court upon breach or further conviction. However, the paragraphs as they appeared in the CJA were clear and the re arrangements do not, upon reading the two together, provide further clarity. It may be unnecessary to make such re arrangements.

5.231 With respect to the new acronyms, SSSO and NISSO, the Registrar did not consider that these added anything to the Code's accessibility. Lesley Molnar-Pleydell (Langley House Trust) sounded a similar note of caution, stating "whilst I see the reasoning, acronyms can be baffling for all concerned" as did Graham Skippen (Solicitor, Fison and Co.) arguing the public has difficult already with acronyms.

PART 8 – CUSTODIAL SENTENCES

5.232 Questions 43 to 53 in the main consultation concerned custodial sentences, and responses to these questions will be considered together in this part.

Structure

5.233 Questions 43 and 44 concerned the structure of these provisions. Question 43 asking a general question about whether it is desirable to split the provisions relating to specific custodial sentences into three age groups (under 18, 18 to 20, and 21 and over). Question 44 asked whether the provisions should be set out in ascending, or descending, order of severity.

5.234 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 of Circuit Judges, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), the Ministry of Justice and the Senior District Judges.

5.235 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.

5.236 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.

5.237 As to the arrangement of provisions by severity, there was a more mixed response, though a clear majority were in favour of arrangement in ascending order of severity.

5.238 The Law Society, the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association, the Ministry of Justice and the Senior District Judges were all in favour of an ascending arrangement.

5.239 Opinion at the Bar Council was split, and the Crown Prosecution Service had no preference.

5.240 Her Majesty's Council of Circuit Judges and the Registrar of Criminal Appeals would prefer a descending arrangement. According to the Registrar, this would have advantages in the application of mandatory sentencing regimes, since sentencing court:

> will need to consider whether they have a duty to impose a mandatory custodial sentence before proceeding to consider the other options open to them. It would serve as a checklist and ensure that any mandatory provisions were not overlooked. For example, s.236A CJA 2003 special custodial sentences; Clause 193 requires Judge to have decided that they will not impose an EDS under s194 or imprisonment for life before requiring the imposition of a special custodial sentence where the criteria are met. This approach would also be in line with long-established practitioner texts (e.g Archbold from 5-370 onwards) and the general structure that mitigation would take. This approach is exemplified in *R v Burinskas* [2014] EWCA Crim 334.

A "catch-all term"

5.241 Question 45 in the main consultation asked whether consultees believed that either a "catch-all term" to cover all custodial sentences, or removing the distinction between a sentence of imprisonment or detention in a young offender institution, with the one sentence simply being served in a different place depending on age, might be desirable.

5.242 Consultees were generally supportive of a change here. The Law Society, the Bar Council, the Crown Prosecution Service, the Registrar of Criminal Appeals, the London Criminal Courts Solicitors' Association and Lesley Molnar-Pleydell (Langley House Trust) all expressed support in respect of one of these changes, although opinions within this group as to which change to adopt was varied.

5.243 The Magistrates' Association and the Registrar of Criminal Appeals, for example, preferred a catch all term. The Registrar of Criminal Appeals further observed that

> It is hoped that this approach will eradicate unlawful sentences that are routinely imposed. Recurring errors include imprisonment being imposed on defendants under the age of 21; s.91 sentences being imposed instead of detention YOI and vice versa; incorrect pronouncements of Imprisonment for life/ Custody for life/ Detention during Her Majesty's pleasure.

5.244 The London Criminal Courts Solicitors' Association also expressed support for a defined term which when passed would result in the appropriate age-related sentence being imposed. They commented that the distinction between sentences for those aged 18 to 20, and 21 and over remained important, given the "… significant body of scientific research that shows that the brain is continuing to develop between the ages of 18 and 21 and should be treated differently from fully formed adults …"

5.245 In contrast, Lesley Molnar-Pleydell (Langley House Trust) felt the latter option was better. Meanwhile, the Crown Prosecution Service and the Law Society expressed no preference between the options.

5.246 Those who disagreed with either change included the Senior District Judges, Her Majesty's Council of Circuit Judges, the Ministry of Justice and Graham Skippen (Solicitor, Fison and Co.). Her Majesty's Council of Circuit Judges commented:

> We are concerned the introduction of a catch-all term to cover all custodial sentences would have the opposite effect to that intended. Sentencers might send an offender under 21 to custody without giving careful consideration to the statutory test required for the imposition of the respective order. As set out in 9.8 there are only three types of determinate custodial sentences. We believe it is important to continue to draw a distinction between those three types. Whilst the practical difference between the circumstances of the custodial sentence for a 20 and 21 year old might be slight or non-existent, we believe the nomenclature is important from the perspective of both the offender and the wider public.
>
> We would not support the replacement of the term imprisonment with an alternative for those 21 and above.

5.247 The Senior District Judges raised different concerns relating in particular to difficulties with detention and training orders and detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 that could arise from the use of a catch-all term.

Sections 132 and 133 of the Magistrates' Courts Act 1980

5.248 Question 46 in the main consultation asked consultees whether the benefits of re-drafting sections 132 and 133 of the Magistrates' Courts Act 1980 (minimum and consecutive terms of imprisonment: powers of the magistrates' court) into the Sentencing Code outweighed the potential disadvantages, or whether the approach pursued in the Code, namely signposting the provisions, was preferable.

5.249 Whilst several consultees thought signposting a sensible compromise, the balance of opinion was in favour of re-drafting into the Code.

5.250 The Ministry of Justice and the Crown Prosecution Service were both content with the signposting approach, the latter stating:

> We are of the view that the risk of divergence is low as the Code would immediately become the first point of call when matters of sentence are being considered. However we balance two factors against that low risk. We are of the view that the sign-posting of the two sections from the Magistrates' Courts Act 1980 ["MCA 1980"] in clause 154 leaves no room for confusion. We also note that the MCA 1980 is a single coherent piece of legislation and we support the approach you have taken in respect of such matters. Therefore for those reasons, we are content with the draft Code as it stands.

5.251 The Registrar of Criminal Appeals expressed the arguments on both sides, explaining:

> For the reasons identified in the consultation it would appear that signposting is the preferred course. Whether the scope of the sentencing powers available to the Court is done by way of signposting or redrafting into the Code it is important that the limits in sentencing multiple summary offences are clear. The CACD regularly corrects errors of this type; see R v Mills [2016] EWCA Crim 672. It may be that redrafting the provisions into the code is preferable as it is invariably the Crown Court that will make this kind of slip; the Magistrates' Court being cognisant of their powers.

5.252 The Senior District Judges, the Magistrates' Association, Her Majesty's Council of Circuit Judges, the London Criminal Courts Solicitors' Association, the Law Society and the Bar Council were all in favour of re-drafting. The Bar Council added a query "whether s.158(2) ought to appear before s.153 in the Sentencing Code, it being a general *de minimis* provision".

Section 91 of the Powers of Criminal Courts (Sentencing) Act 2000

5.253 Question 47 asked whether consultees thought that the re-drafting of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 (sentencing of offenders under 18 convicted of serious offences) makes the provision easier to follow and apply.

5.254 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, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.) and the Ministry of Justice.

5.255 A number of additional comments were helpfully added. The Bar Council thought the provision "could be improved by, for example, including reference in clause 169(2) (and in clause 171) to a separate schedule containing the relevant provisions, as has been done with clause 169(1)."

5.256 The Registrar of Criminal Appeals agreed, but thought also that:

> it may be preferable to retain the established and recognised term *"grave crime"* within the clauses themselves. Perhaps the heading could be "Detention for grave crimes and mandatory sentences of detention." Following on from question 44 [in the main consultation] it would be preferable to have grave crimes (clauses 168,170

and 171) situated between DTOs and EDS as that is where they fall in the scale of severity. It is confusing and not user friendly to list the provisions in their present format i.e. DTO, EDS and then detention.

5.257 Finally, on this question, the Senior District Judges agreed the re-draft an improvement, but were concerned that it:

> suggests that only those convicted on indictment are eligible for such sentences and we wonder whether a cross reference to clause 15 which provides for committal for sentence under section 3B of the Powers of Criminal Courts Sentencing Act 2000, as amended, might be helpful.

Application of the clean sweep to sections 225 and 226 of the Criminal Justice Act 2003

5.258 Question 48 in the main consultation asked whether consultees agreed that the 'clean sweep' should not apply to sections 225 or 226 of the Criminal Justice Act 2003 (life sentence where serious offence committed and offender considered to be "dangerous"). This was our provisional view,[15] on the basis that such sentences were arguably mandatory in nature, and should therefore not be caught by the IP1 policy.

5.259 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, Graham Skippen (Solicitor, Fison and Co.), the Ministry of Justice and the London Criminal Courts Solicitors' Association.

5.260 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.

5.261 The London Criminal Courts Solicitor's 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.

Minor re-drafting

5.262 Questions 49 to 51 in the main consultation sought consultees' views on particular drafting decisions made in the Code relating to custodial sentencing provisions. These

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[15] See, The Sentencing Code (2017) Law Commission Consultation Paper No 232, para 9.24.

questions elicited minimal discussion from consultees and so will be considered together.

5.263 For ease of reference, question 49 in the main consultation asked whether consultees agreed that the approach taken in the re-drafted version of Schedule 9 (availability of extended sentences for offences committed on different dates) was helpful. Question 50 asked about the splitting up of Schedule 15 to the Criminal Justice Act 2003 into three Schedules for ease of reference, and whether this was desirable. Finally, question 51 asked whether consultees found the signposts to the definitions of "specified offence" and "serious offence", as well as the test of dangerousness, helpful.

5.264 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 the drafting innovations referred to, in each case. The Magistrates' Association provided no response to question 49, but agreed in the case of questions 50 and 51. Graham Skippen (Solicitor, Fison and Co.) agreed with question 49, but disagreed with questions 50 and 51.

5.265 The Registrar of Criminal Appeals also expressed support in each case, and provided helpful further comment.

5.266 In the case of question 49 (availability of extended sentences) the Registrar stated:

> Having the transitional provisions (i.e. relevant dates) in the Code itself rather than in multiple pieces of secondary legislation achieves the objective of codification and the relevant law being accessible and contained in one comprehensive codified statute. It is unfortunate that there will be traps for the unwary and it is likely that the significance of the date of the previous offence will be overlooked. However, on the grounds that the clean sweep cannot bite in these circumstances (on Article 7 grounds) this appears to be the most viable solution to a complex issue. Rather than using the term "cut-off date" perhaps more transparent, user friendly terminology could be used, eg: "Manslaughter: provided the offence was committed on or after 3/12/12.

5.267 On question 50, the Registrar continued in the same vein that:

> As alluded to [in the response to question] 49 [of the main consultation] it is unfortunate that there will be multiple schedules adding a degree of complexity. However, on account of the limitations of the clean sweep in this regard no viable alternative appears to be apparent. As there are multiple schedules it may be useful for the heading to each schedule to be more readily identifiable and to identify if the clean sweep applies to it. For example *"Schedule 12 Specified Offences for the purposes of s.221 (extended sentences; clean sweep applied*)" The approach taken in schedule 13 (a specific example of which is provided at paragraph 39) is precisely the approach commended in answer to question 49. The rationale for the differing approach is that there "are far fewer transition times that need to be replicated in this schedule." The approach in this schedule is far clearer and perhaps a consistent approach is required to prevent confusion and errors in practice.

5.268 In relation to question 51, the Bar Council, agreeing on the point, added:

> The signposting is helpful. The separation of *"specified"* and *"serious"* offences into clauses 221 and 222 is also probably helpful. However, we query whether the change in terminology from *"serious offence"* to *"Schedule 13"* offence is a step towards or away from clarity and accessibility?

Inclusion of minimum sentences

5.269 Question 52 in the main consultation asked whether consultees thought that all the minimum sentence provisions listed in paragraph 9.41 of the main consultation[16] should be re-drafted in the Sentencing Code, rather than simply signposted (as was the case in the draft Sentencing Code which accompanied the main consultation).

5.270 All consultees who responded[17] were in favour of these provisions being re-drafted into the Code, rather than merely signposted, and several provided justifications which bear setting out in full.

5.271 The Law Society considered that:

> it would be preferable for all minimum sentence provisions to be re-drafted in the Code, as this would be consistent with what we understand the aims of the project to be, i.e. creating a single Code applicable to all sentencing exercises. We agree with the arguments set out in paragraph 9.43, and consider that the benefits of doing so would outweigh the disadvantages.

5.272 Professor Ashworth QC stated:

> I suggest that the title of the section from para. 9.38 onwards should be altered to 'mandatory sentencing requirements', and I favour including the full list of those provisions in the Code (see [paras] 9.40 and 9.41 [in the main consultation]). This is not just to facilitate cross-references (such as that in s. 144 CJA 2003) where such sentencing requirements are excluded from a general provision, but also because there is a good practical reason for listing them in one place. However, I understand the argument that placing them in the Code means isolating them from the offence-based context in which they were enacted; the suggestion is that, when the details of the mandatory sentencing requirement are placed in the Code, the original offence-based provision should contain a signpost *to the* Code so as to ensure that people reading the original provision are kept aware of the minimum sentence (or whatever form the mandatory requirement takes).

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16 Namely, section 51A of the Firearms Act 1968 (minimum sentence for certain firearms offence); 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).

17 The Law Society, Bar Council, Professor Ashworth QC, the Crown Prosecution Service, Her Majesty's Council of Circuit Judges, the Senior District Judges, Lesley Molnar-Pleydell (Langley House Trust), Graham Skippen (Solicitor, Fison and Co.), the Magistrates' Association, the Ministry of Justice and the London Criminal Courts Solicitors' Association.

5.273 The Registrar of Criminal Appeals explained:

> 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. With minimum term requirements, if such provisions are missed and an offender receives a lower sentence than they should have received, sometimes far lower, then the CACD is in a difficult position and cannot ordinarily increase the sentence for that offence to what it should in law have been otherwise it would offend s.11(3) CAA 1968 unless the overall sentence is not increased.
>
> Legislative amendments should be considered to s.11(3) CAA 1968 to allow greater flexibility for the CACD to amend an unlawful sentence to one which was required by law to be passed even if that were to mean the offender was treated more harshly. The number of mandatory sentences has increased since PCCSA 2000 and CJA 2003, therefore this amendment has become more necessary over time, since the 1968 Criminal Appeal Act came into force. Restrictions could still be in place with only an increase in sentence being permitted to pass a particular mandatory/minimum sentence in accordance with the will of Parliament.

5.274 More generally the Registrar observed that:

> The number of mandatory sentences has increased since PCCSA 2000 and CJA 2003, therefore this amendment has become more necessary over time, since the 1968 Criminal Appeal Act came into force. Restrictions could still be in place with only an increase in sentence being permitted to pass a particular mandatory/minimum sentence in accordance with the will of Parliament.
>
> One clear problem with the Code as presently drafted is that for sentencing for offensive weapons in particular, there would be part of the sentencing provisions such as s.1 PCA 1953 and ss.139 and 139A CJA 1988 reproduced in the Sentencing Code, but other similar provisions such as s.1A PCA 1953 and s.139AA CJA 1988 excluded from the Code, but signposted. That is neither desirable nor in accordance with the aim of this project to bring together all sentencing legislation in one place. The position would be that both the Code and the originating statute would have to be considered. Amendment and inclusion of the other provisions would also prove to be a useful opportunity to simplify the provisions relating to minimum terms for offensive weapons/knives which have been introduced piecemeal and appear quite confusing.

5.275 Question 53 in the main consultation asked whether, if it was not considered desirable to re-draft all of the provisions referred to in question 52, provisions should be re-drafted in the Sentencing Code, and which ought to be left in their current locations? It will be apparent from the analysis of the responses of consultees to question 52 above that this question did not directly fall to be answered by any consultees, though the Registrar of Criminal Appeals noted that:

As is apparent from our response to Question 52 above, we consider all minimum term provisions should be re-drafted into the Sentencing Code if at all possible. However, if that is not possible, then the offensive weapons provisions should all be kept together for clarity in the Code.

The provisions under s.51A Firearms Act 1968 (minimum sentence for certain firearms offences) however could be signposted and retained in the original legislation. They are self-contained and detailed provisions.

PART 9 – ADMINISTRATION OF PENALTIES AND ANCILLARY ORDERS

5.276 Questions 54 to 58 in the main consultation concerned the administration of penalties, and ancillary sentencing orders.

Inclusion

5.277 Question 54 asked simply whether we had included all the provisions relating to the administration of sentence that a court needs to be aware of when sentencing to properly exercise its functions.

5.278 The Law Society, the Bar Council, the Crown Prosecution Service, Lesley Molnar-Pleydell (Langley House Trust), Her Majesty's Council of Circuit Judges, Graham Skippen (Solicitor, Fison and Co.), the London Criminal Courts Solicitors' Association, the Ministry of Justice and the Senior District Judges all agreed that we had.

5.279 The Registrar of Criminal Appeals also agreed, and added:

> Administrative crediting of time on remand by the prison service ought to be the norm. There does not appear to be 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 s.240A 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 CACD. This could be achieved by an amendment to what is now s.155 PCCSA. A provision allowing a direction to be given after the expiration of the 56 day period by agreement could be expressly provided for.

5.280 The Magistrates' Association, also concurring, noted that:

> all provisions relating to the administration of sentence are included. However, it is notable that, in s238(2), the court should give a direction specifying the credit period for someone who has spent time on remand. In the Magistrates' Court, this will be calculated by the appropriate authority/prison service/YOI, and this is what is contained on the pronouncement card. If the court is required to do this in future, it is likely that legal advisers will have to calculate this, and this will take time.

Behaviour orders

5.281 Question 55 in the main consultation asked whether consultees agree that the orders included in clause 262 of the Code are those which a sentencing judge needs to be aware of. Question 56 in the main consultation, specifically whether consultees agreed that restraining orders on acquittal belong in the Sentencing Code.

5.282 With the exception of one modest suggested addition[18] all consultees agreed entirely with the proposed inclusions and exclusions of provisions in this area.

5.283 Question 56 in the main consultation asked consultees whether they agreed that restraining orders on acquittal belong in the Sentencing Code.

5.284 All consultees who responded to this question unanimously agreed they did. 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 Ministry of Justice, the London Criminal Courts' Solicitors Association, Lesley Molnar-Pleydell (Langley House Trust), the Magistrates' Association, Graham Skippen (Solicitor, Fison and Co.) and the Senior District Judges. The Bar Council, however, felt it was particularly important that they were appropriately identified as non-conviction disposals.

5.285 Question 57 in the main consultation asked whether consultees agreed with the decision to signpost, but not to re-draft, Sexual Harm Prevention Orders in the Code. The question asked further whether, if the view is that they should be re-drafted into the Sentencing Code, consultees considered that this justified splitting the versions available on application and the variations available to a sentencing court, and splitting schedule 3, re-drafting it in the Sentencing Code for the purpose of Sexual Harm Prevention Orders and leaving in the Sexual Offences Act 2003 for the purpose of notification?

5.286 The Law Society, the Crown Prosecution Service, Graham Skippen (Solicitor, Fison and Co.), the London Criminal Courts Solicitors' Association and Lesley Molnar-Pleydell (Langley House Trust) all agreed with the idea of simply signposting.

5.287 The Bar Council stated:

> We can see the force in signposting rather than redrafting SHPOs, as a court dealing with sexual offenders will already likely to be operating within the framework of the SOA 2003, and it is important to read the provisions of that Act governing SHPOs together with the statutory scheme into which they fall. However, we are concerned that any such signposting should be as comprehensive as possible, and to that end would suggest the inclusion of a reference to Sexual Risk Orders within the Code (to mirror the reference to SHPOs).

5.288 Conversely, in favour of re-drafting and full inclusion, Professor Ashworth QC stated:

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[18] The Bar Council suggested the addition of a signpost to the powers under the Licensing Act 2003 to remove a Designated Premises Supervisor or make a closure order.

> In relation to the SHPO, I should have thought that if an order is available on conviction, then the presumption should be that it will appear in the Code. I understand the argument that this would involve splitting the varying forms of the SHPO and perhaps repeating material in the Schedules. But the recent case of *JB*[19] indicates that the simplicity of the Code may not be the greatest concern here: clarity for users may be enhanced by writing the variations out fully in the Code. I would therefore suggest that signposting would not be sufficient on this occasion. This is an issue on which practitioner consultations will be informative.

5.289 Arguing powerfully for their re-drafting into the Code, the Registrar of Criminal Appeals stated:

> 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. In relation to the whether the splitting of provisions is justified, this Response adopts a neutral stance, but notes that it is contemplated that restraining orders on acquittal are to be included, and they are in effect orders made on application (although it is accepted that such orders are made following the conclusion of criminal proceedings).

5.290 Similarly, HM Council of Circuit Judges responded:

> 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. We answer yes to the second part of the question. Announcement of the notification requirements are not part of the sentence.

5.291 Again, on the side of re-drafting these provisions, the Magistrates Association responded:

> No. Notwithstanding the difficulties of splitting the versions, the importance of the availability of the orders to a sentencing court would suggest that SHPO should be re-drafted into the Code, even if notifications are left as is.

5.292 Finally, the Senior District Judges' "considered these should be re-drafted into the Code and the versions should be split."

Signposts

5.293 The final question in this section, question 58 proved relatively uncontroversial. This question asked whether consultees thought that the format of the table of signposts in clause 262 was helpful.

5.294 All consultees who responded expressed strong support for the proposed drafting. Some consultees made very minor further suggestions on the content and form of the proposals.[20]

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19 [2017] EWCA Crim 568.

20 A few consultees made further formatting suggestions, and the Magistrates' Association noted that there was no mention of any disqualification/destruction orders in relation to animals (i.e. dangerous dogs).

PART 10 - TIMING AND REVIEW OF SENTENCE AND RELATED MATTERS

5.295 Questions 59 to 63 concerned the parts of the Code dealing with review of sentence and related matters.

Taking effect of sentences

5.296 Question 59 asked whether consultees agreed that sentences imposed by the magistrates' courts take effect from the beginning of the day on which they are imposed (unless otherwise directed), and whether section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 should therefore be extended to them to make this clear.

5.297 All consultees, except Graham Skippen (Solicitor, Fison and Co.), agreed this should be the case.

5.298 Question 60 asked whether consultees 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, and if so, whether consultees considered that it would be desirable to formally codify this position.

5.299 The Law Society, the Crown Prosecution Service, Lesley Molnar-Pleydell (Langley House Trust), Her Majesty's Council of Circuit Judges and the LCCSA agreed with both parts of the questions.

5.300 The Senior District Judges also agreed, adding that "we agree and consider it would be desirable to codify as the position is not clear."

5.301 Graham Skippen (Solicitor, Fison and Co.), 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 but did not consider it desirable to formally codify this position.

The slip-rule

5.302 Question 61 in the main consultation asked whether consultees agreed that the 56-day limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended, and if so how long should any limit be.

5.303 Consultees were split on this question.

5.304 The Law Society were in favour of an extension to 128 days. The Crown Prosecution Service were also in favour of extension, stating:

> Yes, we do think the time limit ought to be extended. We query whether it would be necessary to have a statutory limitation on when an application could be made and suggest that perhaps it would suffice to limit by application of an interests of justice test.

We recognise that there is an argument that errors of law justify a longer time limit than amendment for other reasons because the latter arguably contain inherent weaknesses not associated with the former, namely:

- they undermine the principle of finality of sentence;
- they leave open the possibility of a sentence being varied to his detriment hanging over the head of the defendant; and
- sentencing requires a balancing of factors and, even if aided by a transcript, the weight given to each factor might not easily be recalled after a long passage of time.

We have concluded, on balance, that drawing such a line would be arbitrary and might on occasion cause injustice. We consider protection for defendants is already afforded by the principle, established in case law, that variations to the detriment of the offender are justified only in exceptional circumstances. If concerns remained, applications could be subject to an interests of justice test.

5.305 On the other hand, Her Majesty's Council of Circuit Judges were against any change, stating:

> There should be finality as soon as practicable. 56 days is a period now well-known to practitioners. A further extension of it might be seen as an invitation for inertia.

5.306 Similarly, the London Criminal Courts Solicitors' Association thought the current limit:

> 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.

5.307 Graham Skippen (Solicitor, Fison and Co.) felt that the need to apply for leave from the Court of Appeal after 56 days was an important block on otherwise unmeritorious applications.

5.308 Representative of the more general lack of consensus, the Senior District Judges were split internally on the issue.

5.309 Question 62 asked whether the time limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 should be longer for the correction of errors of law than for the amendment of sentence for other reasons.

5.310 All consultees who responded to this suggestion were against it.

5.311 The final question in the main consultation, question 63, asked whether consultees agreed that the requirement that the alteration of sentence must be conducted by the same judge who imposed the original sentence should be removed, in favour of a provision which allowed the resident judge of the Crown Court centre in question to make the alteration in circumstances where it is not reasonably practicable for the original judge to sit inside the 56-day period.

5.312 The vast majority of consultees were in favour of this proposal, but many added helpful further comment.

5.313 The Bar Council was in favour, as were the London Criminal Courts Solicitors' Association, Lesley Molnar-Pleydell (Langley House Trust) and Graham Skippen (Solicitor, Fison and Co.). The Law Society also agreed "provided that the records maintained by the sentencing judge are sufficient for the alteration of the sentence to be fairly made."

5.314 The Crown Prosecution Service also agreed although suggested that "or with the consent of the parties' should be an additional option."

5.315 The Senior District Judges agreed, stating further that "The Resident Judge or his/ her Deputy should be able to alter the sentence."

5.316 The Registrar of Criminal Appeals gave helpful lengthy comments which bear setting out in full:

> Supported the extension of the 56 day limit, although it is acknowledged that there needs to be finality and certainty in relation to sentencing. When this Office recognises that an unlawful sentence has been passed, it will often be too late to invite Counsel to get the matter relisted in the Crown Court because of the length of time between lodging the grounds of appeal and the file being considered by the CACD.
>
> This results in the unlawful sentence having to be rectified in this court if possible, even in circumstances where the remainder of the appeal may not be granted leave or renewed. This uses valuable resources which could be used elsewhere. Therefore, we would be in favour of extending the length of time in which the Crown Court could vary the sentence. This would also benefit those circumstances where the sentencing judge may not be readily available in 56 days. Between October 2016 October 2017, it took an average of 2.5 months (from receipt) for an application against sentence to the CACD to be considered by the Single Judge. This is some way in excess of the current 56 day limit during which the Crown Court might engage the "slip rule" in order to correct any minor error. An extension to 72 days appears reasonable.
>
> It is acknowledged that the present position of only permitting the Judge who imposed the sentence to vary it can create practical difficulties where, for example, sentences have been passed by Recorders who are not available to vary the sentence within the statutory time limit or where full-time Judges are on leave or undertaking other duties. There is clearly merit in relaxing the requirement, however in certain cases, it may be that the sentencing judge is best placed to deal with any variation or correction to the sentence imposed. In one recent case, section 236A CJA 2003 sentences had been imposed for a number of counts relating to historic sexual offending. The grounds of appeal stated that the sentences were manifestly excessive and did not challenge the lawfulness of the sentences. However, upon reviewing the case, it was not clear to the Registrar whether the complainant had been under 13 in relation to two incidents which had been reflected on the indictment by way of spanning counts. The matter was brought to the attention of the applicant's legal representatives who, following correspondence with the Crown,

decided to request that the matter was listed so that the Judge could review the sentence. At the slip rule hearing, further consideration of the evidence led to the Judge concluding that the complainant had not been under 13 at the time of the offending in the two counts and the unlawful section 236A sentences were replaced with determinate sentences. It was clearly more appropriate in the circumstances of this case for the original judge to make such a determination.

The proposal set out in question 63 does have the advantage that there is always a Resident Judge available (as, if absent, he must appoint a deputy): the difficulty is that the status of Resident Judge does not appear to be statutory. If it is considered to be inappropriate to confer this power on a Resident Judge, consideration could be given to conferring it on any High Court Judge or on a Presiding Judge of the Circuit. However, the proposed extension to the time limit may have the effect of alleviating the practical difficulties in securing the availability of the sentencing judge.

5.317 Her Majesty's Council of Circuit Judges were more circumspect, responding

Not necessarily. We sometimes encounter technical amendments (query whether the overlooked electronic tagging point qualifies as such an amendment) which require a Recorder to return to vary a sentence. Other amendments are of more substance (sentencing judge has passed a sentence in excess of the permitted maximum). Either way we believe the Resident Judge should have the power to direct how the amendment should be made and give directions for the same having consulted with the sentencer. Technology should mean it is most unlikely a Resident Judge would not be able to communicate with a Recorder or Circuit Judge within the appropriate period. Given that most cases are now on the Digital Case System in the Crown Court the first sentencing judge could hear submissions electronically and amend his sentence accordingly. The amendment could then be announced by the Resident Judge in open court. We do not support derogation from the principle of open justice even for technical corrections. In a case where the Resident Judge considers there should be a further hearing before the sentencing judge (e.g. where sentenced defendants make their views known on Facebook in a way which undermines the mitigation presented) then no doubt directions will be given for a second substantive hearing.

Consultation Events Feedback Summary

5.318 In order to gather input from as wide a range of stakeholders as possible, a number of consultation events were held during the consultation period,[21] including public question and answer sessions at 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), and Leeds University (21 November 2017). After the events in Birmingham, London, Manchester and Leeds, attendees were encouraged to fill in handwritten feedback forms, and this appendix summarises the feedback gathered from those forms, and sets out a selection of the additional handwritten comments we received as part of that exercise.

5.319 The forms asked attendees some questions about how effective they thought the event and presentations were, in order to help us improve and build upon good practice when designing and running future consultation events. The forms then asked attendees (having listened to the Law Commission's presentation and the ensuing discussion) three main general 'yes or no' questions on the sentencing code project, before inviting freehand comments. Those three questions asked (1) whether attendees agreed sentencing procedure law was too difficult (at present) (2) whether a single sentencing code was a good idea and (3) whether they supported the Sentencing Code proposals from the Law Commission.

5.320 Of those who filled in the relevant answer fields, across all four events, 87% thought that sentencing procedure law was too difficult, the other 13% disagreeing with that suggestion.

5.321 94% of those who responded to question (2) thought a single sentencing code a good idea, with the remaining 6% reserving judgment (none expressed the decided view it was a bad idea).

5.322 Similarly, 94% who responded to question (3) supported the Law Commission's proposals, with the remaining 6% reserving judgment until they had time to better consider the project's final output / see how it fared in practice.

5.323 We are grateful to everyone who took the time to attend these events and give their feedback, which allowed us to gather views from a wide range of individuals, including practitioners, academics, students, members of the judiciary and members of the public. A selection of the free-hand comments we received are set out below, divided by event. In most cases these are summarised, as it was not always easy to read every word of handwritten responses and attendees understandably often responded in note form.

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21 For a more complete list of the events held, see The Sentencing Code: Volume 1 (2018) Law Com No 382, Chapter 2.

NO 5 CHAMBERS, BIRMINGHAM

5.324 Ryan O'Donnell of the Public Defender Service, commended the idea of a simplified statutory process which would improve efficiency – of particular importance in the magistrates' court.

5.325 H.S. Dhami, Crown Advocate, thought that a single document / source would act as a reference point to minds and assist the court.

5.326 Martin Butterworth, counsel at Citadel Chambers and Recorder of the Crown Court commended the time saving potential of the Code.

5.327 Thomas Schofield, counsel at No. 5 Chambers, thought the schedule of historic maximum penalties for offences across time particularly helpful.

5.328 Michael Duck QC, leader of the Midland Circuit and counsel at No 5 Chambers, endorsed the project's aims in general terms, and agreed with the Commission's proposals for a single Code.

5.329 Dr Samantha Fairclough, of the University of Birmingham, thought that it "made perfect logical sense to consolidate the law in this way [which] will undoubtedly improve the efficiency and accuracy for practitioners (and teaching purposes!)"

5.330 Gary Garland, President of the Valuation Tribunal, was in favour of anything to improve the current situation in sentencing law, and considered "the sooner the better".

5.331 Rebecca Wade, counsel at St. Ives Chambers, felt that maximum sentences should be included within the Code and sentencing guidelines.

5.332 K. Hegarty, counsel at St Philips Birmingham, considered that the Sentencing Code would be a first step to sentencing reform.

5.333 Andrew Wallace, counsel at No 5 Chambers, expressed support for the Sentencing Code noting the benefits of anything which saves time and gives clarity and uniformity to the law.

CITY UNIVERSITY (LONDON)

5.334 Alexandra Marks, CCRC Commissioner and Recorder of the Crown Court, thought that it would be great to be able to look in one place and not to rely on the Sentencing Referencer, the project looks like an exciting and useful development, sentencing can be difficult as a Recorder who sits only occasionally and has to keep up with regular changes, especially when sentencing at the lower end of the seriousness spectrum, involving the complex array of non-custodial options.

5.335 Sandra Paul, a solicitor and partner at Kingsley Napley LLP, thought the Code had the potential to save "huge amounts of time".

5.336 Timothy Gascoine, a solicitor and Deputy District Judge, considered the Code project "ideal in principle" though reserved judgment on our ability to see it into practice.

5.337 Shenaiya Kharegat, a legal editor at Thomson Reuters, particularly commended the idea of a schedule giving users easy access to enacted but not yet commenced provisions in one place.

5.338 Alex Stein, counsel at No 5 Chambers, endorsed the Sentencing Code, noting that the current law is too complicated and a mess. He also felt it would be useful to have clear signposts to regulatory schemes relating to criminal and civil sanctions.

5.339 Danielle Cooper, sole practitioner, said that the Sentencing Code was a "no brainer".

5.340 Paul Donegan, solicitor advocate and partner at Taylor Haldane Barlex LLP, supporting the Sentencing Code, was of the view that codification of the law on sentencing would lead to simplification in applying the current law and for future amendments.

5.341 Briony Clarke, solicitor and partner at Taylor Haldane Barlex LLP, thought it was ideal to have all the law of sentencing in one place and in a format which is clear, but was disappointed that road traffic disposals were not included in the Sentencing Code.

5.342 Peter Rowlinson, an LLM student at City (University of London), thought that the case made by the Law Commission in the transparency, usability and efficiency that would result from the consolidation of the law was compelling.

5.343 Andrew Mooney, solicitor advocate at EBR Attridge LLP, supported the idea of a single, thorough and accessible Code, and enquired as to whether sections 71 to 75 of the Serious Organised Crime and Police Act 2005 were to be included.

5.344 Christopher Bates, a pupil at Lamb Buildings, was of the view that anything that codifies what is a complex system of law is a good idea, although expressed concern that the use of the consolidation procedure will attract media controversy.

5.345 Andrei Kerkache, caseworker at Stuart Miller LLP, opined that the streamlining of sentencing provisions would not only save costs but would clarify the law for both users and the public.

MANCHESTER UNIVERSITY

5.346 Robert Dudley, counsel at Exchange Chambers, thought particularly useful aspects of the Code would be (i) its capacity to act as a single reference point and (ii) the clean sweep policy.

5.347 Alex Kingston, a student at the University of Manchester, considered that simplifying sentencing and providing it with more structure would improve the legal system as a whole.

5.348 Dr Kate Cook, senior lecturer at Manchester Metropolitan University, endorsed the Sentencing Code as a pragmatic solution, although sought more discussion on the impact of the Code on historic offenders.

5.349 Beth Walker-Frost, a student at Liverpool John Moores University, supported the proposals, citing the focus on drafting with the user in mind, the simplification of sentencing it would provide, and its lack of interference with judicial discretion.

LEEDS UNIVERSITY

5.350 Lydia Bleasdale, Associate Professor at Leeds University, commending the project, expressed “interest in how you might effect the cultural change necessary to ensure the Code becomes the vehicle for all future amendments”.

5.351 Christopher Lee, a student at the University of Law, Leeds, was of the view that the clarity offered by the proposed Sentencing Code would assist with the speed and accuracy of sentencing, which he felt was self-evidently a good thing.

5.352 Mukhriz Bin Mat Rus, doctoral researcher at the University of Leeds, cited the cost savings in his endorsement of the Sentencing Code.

5.353 Chung Hye-In, doctoral researcher at the University of Leeds, felt that while the Code was very radical, it was still manageable and to be supported, noting in particular that the Code does not affect the severity of sentences.

5.354 Edmund Hall, a senior crown prosecutor at the Crown Prosecution Service, supported the Code, seeing it as ideally being a move towards a unified Criminal Code.

5.355 A J Vickers, a solicitor at Cartwright King LLP, commended the Code, saying that the presentation had convinced him it was a logical idea.

Detailed comments of the Registrar of Criminal Appeals on the structure of the law concerning road traffic sentencing disposals

In addition to the comments made by the Registrar of Criminal Appeals which are set out above, the Registrar went onto make the following detailed observations:

> "There are other points to be highlighted following from this:-
>
> The obligation (or discretion) to endorse and impose penalty points under ss.28 - 30 RTOA 1988 are not signposted, neither is disqualification under the 'totting' procedure under s.35 RTOA 1988, nor the mandatory extended retest requirement under s.36 RTOA 1988.
>
> There are also varying minimum periods of disqualification to be imposed under RTOA 1988, depending on the specific offence and/or previous driving record. No such minimum periods are prescribed in the PCCSA 2000 or draft Sentencing Code.
>
> Section 124 currently states *"See Part 3 of the RTOA 1988 for sentences* ***available*** *on conviction of certain road traffic offences, in particular…"* It is our view that this signposting is insufficient and should be redrafted to include more detail. In addition to signposting that sentences are 'available' under the RTOA 1988, it should be made specifically clear that many sentences are **obligatory** for certain road traffic offences.
>
> Consideration should be given to signposting to Schedule 2 RTOA 1988, and possibly even to sections other than the necessary ss.28 - 30, 34, 35, 36 mentioned above. For instance, s.47 RTOA 1988 places a duty on a court considering its powers under ss.34, 35, 44 of the RTOA 1988 to state the grounds for not disqualifying or endorsing, or disqualifying for a short period than would otherwise be required.
>
> The case for stronger signposting can also be made by the fact that in Schedule 12, Part 1, Section 18 of the draft Bill, there are included 3 specific offences under the RTA 1988 as specified violent offences, therefore a judge considering dangerousness under the Sentencing Code would be assisted by better signposting to the correct legislation ~~for~~ then going on to consider the obligatory disqualification/endorsement etc for that very same offence.
>
> The mandatory extended disqualification periods under ss.35A & 35B could also be signposted as the Code only includes the provisions currently under s.147A PCCSA 2000.
>
> It should be highlighted that in addition to 'road traffic offences' specifically charged under the Traffic Acts, where the offence of manslaughter is committed by the driver of a motor vehicle, disqualification from driving for minimum period of 2 years and endorsement are **compulsory**, and until the offender passes the appropriate driving

test under ss.28, 34 & 36 RTOA 1988, even though the offence is not one charged under the Traffic Acts."

The Bar Council's suggestion for the improvement of the structure of the third group of parts in the Code

Part V Primary sentences available for all offenders

- Absolute / conditional discharge

- Any others common to all offenders (e.g. financial orders where powers do not vary depending on the age of the offender)

Part VI Primary sentences only available for adult offenders

- Financial penalties (where adult-only)

- Non-custodial disposals

- Custodial disposals

o General provisions

o Life sentences / effect of life imprisonment

o Dangerous offenders

o Extended sentences

o Suspended sentences

Part VII Primary sentences only available for young offenders

- Financial penalties (only available in the case of young offenders)

- Fines

- Non-custodial disposals

- Custodial disposals

    o U/18

    o U/21

Part VIII Ancillary / secondary orders

- Orders available for both adult and young offenders

- Query inclusion of a clause setting out that *“save where identified, all ancillary orders are available for young offenders”* or a schedule of available ancillary orders for young offenders

- Orders only available for young offenders

Part IX – sentence administration

- Various

Specific suggestions for additional forfeiture powers to be signposted in the Code

The Law Society:
"Legislation creating powers of forfeiture:
1. TRADE MARKS ACT 1994, SECTION 97
2. COPYRIGHT DESIGNS AND PATENTS ACT 1988 - Section 108 — Order for delivery up in criminal proceedings.
3. ENVIRONMENTAL PROTECTION ACT 1990 - Section 33 offences: forfeiture of vehicles
4. HEALTH AND SAFETY AT WORK ETC ACT 1974 section 42— Power of court to order cause of offence to be remedied or, in certain cases, forfeiture.
5. CONSUMER PROTECTION ACT 1987 Section 16 — Forfeiture: England and Wales and Northern Ireland.
6. FOOD SAFETY ACT 1990 Section 9 — Inspection and seizure of suspected food.
7. LICENSING ACT 2003 - Section 128 Personal Licenses
Section 147B Order suspending a licence in respect of offence under section 147A of persistently selling alcohol to children
…
8. TOBBACO - Children and Young Persons Act 1933, Children and Young Persons (Protection from Tobacco) Act 1991, Children and Families Act 2014 and the Children and Young Persons (Sale of Tobacco) Order 2007.
…
Health Act
Fireworks
Housing Act
There are also powers given to the FSA, DWP, and ICO giving them such powers."

The Bar Council:
"Certain powers under which forfeiture orders are commonly made can be found in the Trade Marks Act 1994 and Consumer Protection Act 1987. We take the view that these provisions ought to be incorporated if a non-exhaustive list that extends beyond mandatory forfeiture orders is included."

The Crown Prosecution Service:
"Just one matter that was not on the statute books at the time of publication of your consultation paper: section 18 of the Cultural Property (Armed Conflicts) Act 2017."

The Registrar of Criminal Appeals:
"Convictions under s.92 Trade Marks Act 1994 almost inexorably lead to the making of a confiscation order (of the offending goods/items). As such, it is submitted that orders for forfeiture made under s.97 of the 1994 Act may merit inclusion in clause 113."

The London Criminal Courts' Solicitors Association:

"Theft offences – for example, items used when going equipped for theft and burglary. Wider fraud offences & tax evasion."