



**Law  
Commission**  
Reforming the law

# A New Sentencing Code for England and Wales Transition – Final Report and Recommendations

**50  
YEARS**

# **The Law Commission**

(LAW COM No 365)

## **A NEW SENTENCING CODE FOR ENGLAND AND WALES TRANSITION – FINAL REPORT AND RECOMMENDATIONS**

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

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# THE LAW COMMISSION

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The terms of this report were agreed on 10 May 2016.

**The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk/project/sentencing-code/>.**

# THE LAW COMMISSION

## A NEW SENTENCING CODE FOR ENGLAND AND WALES TRANSITION – FINAL REPORT AND RECOMMENDATIONS

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# THE LAW COMMISSION

## A NEW SENTENCING CODE FOR ENGLAND AND WALES

### TRANSITION – FINAL REPORT AND RECOMMENDATIONS

*To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice*

#### **PART 1**

#### **INTRODUCTION**

- 1.1 On 1 July 2015 we published an issues paper seeking consultees' views on an aspect of the Law Commission's project to codify sentencing procedure in a New Sentencing Code.
- 1.2 This report summarises the responses we received to that consultation, and lists the recommendations we make in light of those responses. We also set out in a little more detail some of the practical implications of the approach that we recommend.
- 1.3 Issues Paper 1 ("the IP") considered the important policy questions around transition from the current law to the New Sentencing Code. As we explained in that paper, our aim is to introduce the New Sentencing Code in the most effective way possible by minimising the need for complex transitional provisions while respecting the fundamental rights of those affected by the sentencing process.
- 1.4 Our provisional proposal involved what we described as a "clean sweep" approach to transition to the New Sentencing Code. Our starting point was that all cases in which conviction occurred after commencement of the New Sentencing Code would be sentenced under it, irrespective of the date of the commission of the offence.
- 1.5 To this starting point we added important qualifications in the interests of fairness and to protect the rights of the offender. In large part these were designed to respect the important principle that a person should not be given a more severe punishment, taken as a whole, than would have been available at the time of the offence(s) giving rise to the conviction.<sup>1</sup>

<sup>1</sup> This is a longstanding common law principle, the history of which is traced in B Juratowitch, *Retroactivity and the Common Law* (2008) ch 2. It is now to be found, amongst other places, in article 7 of the European Convention on Human Rights.

- 1.6 As will be seen in detail below<sup>2</sup> this central proposal received unanimous support from stakeholders across the spectrum of criminal justice professionals, judges, and government officials.
- 1.7 Before going on to analyse the responses to the consultation in detail in Part 3, we set out some of the background to this project. We conclude this first Part with a summary of the structure of this report.

## **BACKGROUND TO THE SENTENCING PROCEDURE PROJECT**

- 1.8 The sentencing procedure project is part of the Law Commission's 12th programme of law reform.<sup>3</sup> Our terms of reference as agreed with the Ministry of Justice are:

To consider the codification of the law governing sentencing procedure, understood as the process applicable from verdict to the end of the sentence imposed and to design a sentencing procedure Code, embodied in one Act with a clear framework and accessible drafting. Such a new Code will provide the courts with a single point of reference, capable of accommodating amendment and adapting to changing needs without losing structural clarity.

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

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

- 1.9 In other words, the aim of the project is to introduce a single sentencing statute that will act as the first and only port of call<sup>4</sup> for sentencing tribunals regarding the procedure to be followed at the sentencing hearing. It will set out the relevant provisions in a clear, simple and logical way, and will allow for all updates to sentencing procedure to be made in a single place.
- 1.10 This will represent a sharp contrast to the current state of the law in this area. The current law is an impenetrable thicket, contained in hundreds of separate provisions scattered across dozens of statutes. By way of illustration, our compilation of the present statutory material currently in force<sup>5</sup> extended to over 1300 pages, and it contained only the law relevant to sentencing exercises being

<sup>2</sup> Part 3.

<sup>3</sup> Twelfth Programme of Law Reform (2014) Law Com No 354.

<sup>4</sup> At least, as far as primary legislation is concerned.

<sup>5</sup> See para 1.35 and following below.

conducted today for recent offences. Many historic cases require reference to several different older sentencing regimes at the same time in addition to the 1300 pages of law in force for new offences. The provisions are often overlapping, technical and complex. They all have different commencement and transition dates, which are calculated from different points in the process (date of conviction, sentence and offence are three common ones). Regardless of whether the New Sentencing Code is shorter than the law currently in force, its value will be in bringing together the law from those hundreds of statutes and making it simpler and easier to use, as well as in making those older regimes redundant even for historic cases.

### **ILLUSTRATION OF THE TRANSITION PROBLEM<sup>6</sup>**

- 1.11 An example of the situation which can arise under the current law's approach to transitional arrangements is provided by the gradual contraction of the scope of free-standing attendance centre orders as an available sentencing disposal.<sup>7</sup> We will go through the changes chronologically and, whilst we have endeavoured to make this as clear as possible, the reader should be forewarned that it is incredibly complex.
- 1.12 Attendance centre orders (ACOs) were, along with much of the rest of sentencing law, consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 by the Law Commission. As enacted, section 60 of that Act provided a power for under-25s to be detained in attendance centres instead of prison for imprisonable offences or failure to pay fines. Section 60 came into force on 25 August 2000.
- 1.13 The provision was first amended by the Access to Justice Act 1999 (Transfer of Justices' Clerks' Functions) Order 2001/618, paragraph 5(4) of which altered the category of persons (within section 60(11)) under a duty to forward the ACOs to attendance centres and communicate the subject of the order: from the justices' clerk to the justices' chief executive. This change came into force on 1 April 2001,<sup>8</sup> and lapsed on 1 April 2005 on the repeal of the Access to Justice Act 1999, sections 90(2) and (3).<sup>9</sup> On the same date, paragraph 72 of Schedule 1 to the Courts Act 2003 came into force, further changing the category of person to be the "designated officer".<sup>10</sup>
- 1.14 A mere 3 days after that change, on 4 April 2005, section 60 was again amended by the bringing partially into force of paragraph 102 of Schedule 32 to the Criminal Justice Act 2003.
- 1.15 That paragraph made substantial changes to the section. It:

<sup>6</sup> The following passage would not have been possible without the late Dr David Thomas QC's commentary on the legislation at [2009](4) *Sentencing News* 7. As he put it: "Tracing the existing law relating to attendance centre orders is a task worthy of a novel by Dan Brown".

<sup>7</sup> It should be emphasised that this is not dealing with attendance at an attendance centre pursuant to a requirement under a community order or suspended sentence order.

<sup>8</sup> SI 2001/618, art 1.

<sup>9</sup> By Courts Act 2003, Sch 10 para 1.

<sup>10</sup> See Courts Act 2003 (Consequential Provisions) Order 2005/886; commencement in art 1 of that order.

- (1) changed certain statutory references in section 60;
- (2) confined the power to impose an ACO as a sentence for imprisonable offences to under 16s only;
- (3) confined the power to impose an ACO in lieu of imprisonment for default on payment of a fine or other monetary payments or “for failing to do or abstain from doing anything required to be done or left undone” to under 16s only;
- (4) lowered the maximum number of hours attendance specified in the order from 36 to 24 for 16 to 24 year olds; and
- (5) changed a reference to community order to read *youth* community order.

1.16 However, not all of these were actually commenced on 4 April 2005. Changes (1), (2) and (5) only were brought into force by Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005/950 (“Commencement Order No 8”), article 2 and Schedule 1 paragraph 42(34).

1.17 Even those provisions were not simply brought into force: paragraph 5(2)(b) of Schedule 2 to the same Order provides that the coming into force of change (2) is of no effect in relation to an offence committed before April 4, 2005. The effect of paragraph 5(2)(b) of Schedule 2 would have been that an ACO could be made in respect of an offender aged between 16 and 21 for an offence committed before 4 April 2005.

1.18 However, paragraph 12 of Schedule 2 to Commencement Order No 8 provides that until the coming into force of sections 177 and 180 of the Criminal Justice Act 2003 in accordance with article 2(2) of that Order, the provisions specified in paragraph 13 of Schedule 2 to that Order shall have no effect where a person aged 16 or 17 is convicted of an offence. Those specified provisions include change (2) listed in paragraph 1.15 above.<sup>11</sup> In order to interpret that change fully, it is necessary to have regard to article 2(2) of Commencement Order No 8, which provides that:

In so far as they apply when a person aged 16 or 17 is convicted of an offence, sections 177 and 179 to 180 of the Act and related provisions shall come into force on 4 April 2007.

1.19 As a result, change (2) came partially into force and was partially postponed.

1.20 The net effect of the amendments and of Commencement Order No 8 was supposed to be that ACOs could be made in respect of offenders between 18 and 21 convicted of offences committed before 4 April 2005 and in respect of offenders aged between 16 and 18 convicted of offences committed before 4 April 2007. ACOs could be made in respect of offenders under 16 convicted of offences irrespective of the date of the offence.

1.21 There then followed a sequence of further orders changing these dates. The first was the Criminal Justice Act 2003 (Commencement No 8 and Transitional and

<sup>11</sup> The change is from Criminal Justice Act 2003, Sch 32, para 102.

Saving Provisions) (Amendment) Order 2007/391, which substituted “4 April 2009” for “4 April 2007”. Next came the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) (Amendment) Order 2009/616, which substituted “4 April 2010” for “4 April 2009”. The net effect of all three Commencement No 8 orders was to put back the date for the commencement of the general community order provisions of the 2003 Act in relation to offenders between 16 and 18 from 2005 until 2007, then until 2009 and finally until 2010. For perfectly understandable reasons, until those provisions came into force, the ACO would not cease to exist for that age band. None of these commencement dates ever had any effect since the transition date was always postponed before being reached.

- 1.22 There was never any point in time at which the age limit for imposing an ACO as a sentence in its own right was fixed at 16, as had been intended by Criminal Justice Act 2003 Schedule 32 paragraph 102(2)(b). This is because section 60 in its entirety, and thus the ACO as a whole, was repealed by Criminal Justice and Immigration Act 2008 section 6(1), though to date the repeal has only been commenced in respect of ACOs as a sentence in their own right: see Criminal Justice and Immigration Act 2008 (Commencement No 13 and Transitory Provision) Order 2009/3074 article 2(f) repealing certain enactments mentioned in section 6(1) *except* ACOs, with article 2(u)(xix) repealing ACOs as standalone sentences from 30 November 2009.<sup>12</sup> It appears that they have been preserved for offences committed prior to that date by paragraph 1(1) Schedule 27 of the Act, which provides that the section 6(1) repeals do not have effect in relation to (a) any offence committed before they come into force, or (b) any failure to comply with an order made in respect of an offence committed before they come into force.
- 1.23 Changes (3) and (4) listed in paragraph 1.15 above from paragraph 102 of Schedule 32 to the Criminal Justice Act 2003 have still not yet been commenced, and the section they operate on has also been repealed with prospective effect only by the combined effect of the Criminal Justice and Immigration Act 2008 section 6(1) and Schedule 27 paragraph 1(1), both of which are also still yet to be commenced.
- 1.24 The purpose of the “clean sweep” approach advocated in the IP, unanimously supported at consultation and formally recommended in this report, is to avoid this sort of situation ever arising in the future. No matter how many amendments there are to a provision, it will be possible to say with confidence, by reference to only the Code itself, whether a particular sentencing power is in force at the date in question, and to whom it applies.

#### **THE CONSEQUENCES OF THE CURRENT CONFUSED STATE OF THE LAW**

- 1.25 The confused state of the current law has numerous negative effects in practice. It is extremely difficult even for an experienced judge to identify the correct sentencing powers applicable to any case. The impact of this is that judges spend more time on the sentencing process than ought to be needed, which adds cost and delay to sentencing determinations and can have knock-on effects on

<sup>12</sup> Criminal Justice and Immigration Act 2008 (Commencement No 13 and Transitory Provision) Order 2009/3074, art 2.

the punctuality of other trials. Practitioners are also forced to spend more time assisting the judge on these issues.<sup>13</sup>

- 1.26 The complexity also leads to error. That causes additional cost and delay, with additional court hearings under the “slip rule”<sup>14</sup> to remedy minor errors and more appeals to the Court of Appeal (Criminal Division) (“CACD”). These unnecessary appeals against sentence are expensive and time consuming, and delay other appeals.
- 1.27 An analysis of 262 consecutive sentencing cases in the CACD in 2012 showed that the complexity of the legislation is resulting in an extraordinary number of wrongfully-passed sentences: in 76 cases in the sample (29%), *unlawful* sentences were passed.<sup>15</sup> These were not sentences which the CACD thought required reducing (or increasing) on the basis that they were manifestly excessive (or unduly lenient),<sup>16</sup> but cases in which something about the sentence(s) originally imposed was wrong in law.<sup>17</sup> In addition, the complexity of the law is undoubtedly resulting in many inappropriate sentences and is influential in producing unduly lenient sentences.<sup>18</sup>
- 1.28 The complexity also impedes the rational development of the law. According to policy officials, the landscape has become so confused that they cannot always be confident when advising on the likely effects of proposed sentencing initiatives. Unintended consequences of new statutory procedures cannot reliably be identified and guarded against. The law has now reached the point at which it is difficult to see how the existing morass of legislation can effectively be amended.
- 1.29 This project, to remove the problems of the present law and address the systemic failings in the way sentencing legislation is created, was formally launched on 26 January 2015. As part of that launch, a number of leading figures in the criminal

<sup>13</sup> And practitioners in the criminal courts are of course normally funded from the public purse, whether via the Crown Prosecution Service or the Legal Aid Agency. Advocates owe a duty to assist the court in relation to sentence – see for example *Cain* [2007] 2 Cr App R (S) 25, [2006] EWCA Crim 3233, where Lord Phillips CJ observed at [1] that, given the complexity of sentencing law and the greater familiarity of the advocates with the facts of the case, “a judge relies on the advocates to assist him with sentencing”.

<sup>14</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 155, and Magistrates’ Courts Act 1980, s 142.

<sup>15</sup> R Banks, *Banks on Sentencing* (8th ed 2013), vol 1, p xii. Those 262 cases consisted of every criminal appeal numbered 1600 to 1999 in 2012, excluding “those not published, those relating to conviction, non-counsel cases and those that were interlocutory etc.”

<sup>16</sup> “Manifestly excessive” and “unduly lenient” are the two tests for the Court of Appeal interfering with a sentence on the basis that they conclude it is set at the wrong level, as opposed to on the basis of it being unlawful or wrong in some other respect. “Unduly lenient” is a statutory test in the Criminal Justice Act 1988, s 36, and “manifestly excessive” as a test derives from the CACD’s caselaw on sentence appeals – see eg *Nuttall* (1908) 1 Cr App R 180 or *Withers* [1983] Crim LR 339.

<sup>17</sup> Robert Banks’ table of why each sentence was unlawful can be found on his website here: [http://www.banksr.co.uk/images/Other%20Documents/Unlawful%20Orders/2012%20\(11\)%20Sentencing%20illegals%20Sorted%20by%20error.pdf](http://www.banksr.co.uk/images/Other%20Documents/Unlawful%20Orders/2012%20(11)%20Sentencing%20illegals%20Sorted%20by%20error.pdf) (last visited 9 May 2016).

justice system endorsed our view that the current landscape of sentencing law and procedure is highly complex and expressed strong support for simplification and consolidation in this area.<sup>19</sup>

1.30 For example, the Lord Chief Justice stated that:

...the Law Commission's project to codify sentencing law is a valuable and long-overdue stepping stone in the process of the rationalisation and clarification of the criminal law. The law on sentencing is highly complex and contained in a dizzying array of separate but overlapping sources. For that reason sentencing procedure represents an obvious candidate for consolidation and simplification.<sup>20</sup>

1.31 The Director of Public Prosecutions also highlighted the value of the New Sentencing Code for victims and witnesses:

For a victim or witness the court process can seem very daunting and people can often be discouraged from being part of proceedings as they are either worried about the length of time it may take or because they do not understand the process they are about to go through.

Whilst sentencing is only one stage of a trial, it is vital that the public are able to understand the process. This new Code takes the needs of all court users on board and will provide a clear framework for each part of the sentencing procedure, this will allow the public to gain a greater level of understanding of the sentencing process, and hopefully ease some of their concerns.

The introduction of this single sentencing code should go a long way to increase clarity and transparency, improving the service provided to the public and their confidence in the sentencing process.

1.32 The project is limited to reform of the law in England and Wales; it has no application to Scotland or Northern Ireland.<sup>21</sup>

<sup>18</sup> Informal consultation with the Attorney General's Office suggests that errors due to the current complexity of the law can cause unduly lenient sentences, and also that in the course of reviewing sentences for undue leniency, many other legal errors in sentences are often revealed.

<sup>19</sup> Including The Rt Hon the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales; Alison Saunders CB, Director of Public Prosecutions; Lord Justice Treacy, Chairman, Sentencing Council; Alistair MacDonald QC, Chairman (2015), Bar Council; and Andrew Caplen, President (2014-15), The Law Society.

<sup>20</sup> All comments from the launch of the project are available together with all publications to date and further information about the project on our website at <http://www.lawcom.gov.uk/project/sentencing-code/>.

<sup>21</sup> Although see, for example, the transfer regime under the Crime (Sentences) Act 1997, Sch 1, para 6(1)(a) under which "restricted transfer" offenders who are transferred across borders remain governed by the sentencing law of the jurisdiction which imposed the sentence.

## STRUCTURE OF THE PROJECT

1.33 In the IP, we stated that this large and ambitious project would involve three consultative phases. This remains our intention, but we have adapted the content of those phases somewhat in light of shifts in the government's plans and on reflecting on our own progress. The updated structure of the project is as follows:

- (1) **Phase 1:** Transition to the New Sentencing Code, and consultation on the scope and comprehensiveness of our compilation of the current law.
- (2) **Phase 2:** Consultation on the appropriate structure for the Code and on the draft New Sentencing Code itself.
- (3) **Phase 3:** Securing and preserving the coherence and comprehensiveness of the Code.

### *Phase 1*

1.34 With the publication of this report, the transition element of phase 1 is complete. Phase 1's other element, a consultation on the current law,<sup>22</sup> ran from 9 October 2015 to 9 April 2016.

1.35 Our compilation of the current law is an attempt to bring together, organised by theme, all of the current primary legislation governing sentencing, with short extracts from some common law and other guidance (guidelines, practice directions and so on) where these are central to the law in a particular area. It will be unsurprising for those with knowledge of the current law of sentencing to learn that the document runs to over 1300 pages. The purpose of our consultation on the current law document, in addition to illustrating the problems generated by the sheer volume of the existing law on this topic, was to receive consultees' views on three key questions:

- (1) Is the document comprehensive? In other words, have we missed any statutory provisions, or are there entire areas, types of sentencing order etc. which are not reflected in the document but which consultees believe should properly fall within the remit of the New Sentencing Code?
- (2) Is the document over-inclusive? In other words, are there provisions included in the document that deal with an area of law that consultees consider should properly fall outside the scope of the New Sentencing Code?
- (3) Are there errors in the document, for instance provisions that have been repealed or amended?

1.36 We encouraged all with a particular interest in the law and practice of sentencing to help us to improve the law by engaging with the consultation, by looking over the index to the document (which is fully electronically navigable) and looking in

<sup>22</sup> Sentencing Law in England and Wales: Law Currently in Force (2015). Available as a full, electronic .pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.

detail at any sections in which they have a particular interest or expertise with the above questions in mind.<sup>23</sup>

### **Phase 2**

- 1.37 Work on phase 2 of the project is already well under way. The crux of phase 2 will be the publication of a draft version of the New Sentencing Code in 2017 for public consultation. Given the volume of the current law, the draft Code will inevitably run to hundreds of clauses. Parliamentary Counsel are already engaged in the drafting process, but the drafts will be revised and improved following responses to the current law consultation and our informal consultation on the appropriate structure for the code.
- 1.38 That informal consultation will mainly take the form of work with the judiciary and practitioners to ensure that the sequence and structure of the Code are as user-friendly as possible. We are, as part of that exercise, considering whether the publication of innovative guidance notes, diagrams or charts along with the Bill might assist, and we are making active use of such tools during our conversations with stakeholders.
- 1.39 Having received and digested the responses to our full consultation, our target is to publish a finalised version of the draft New Sentencing Code in 2018.

### **Phase 3**

- 1.40 Whilst we await and process responses to our full consultation on the draft New Sentencing Code, we will also explore ways to avoid the replication in future of the present confused state of the law. Previous attempts at consolidation of sentencing law and procedure have been frustrated by being rapidly overtaken by further legislation on the same topic.
- 1.41 In Phase 3 we hope to engage consultees in a discussion about how the fate of the Powers of Criminal Courts (Sentencing) Act 2000 might be avoided. We will make efforts to encourage those engaged in legislating in this area to in future make changes to sentencing law and procedure *that take effect as amendments of the New Sentencing Code*, rather than in successive separate pieces of free-standing legislation. We have already begun actively to engage Parliamentarians on this issue, and have found them receptive,<sup>24</sup> in recognition of the scale of the current problem as described above.

## **IMPLEMENTATION OF THE NEW SENTENCING CODE**

- 1.42 We have been in detailed discussions with Parliamentary Counsel and Government about what the most appropriate vehicle for the implementation of the New Sentencing Code might be.

<sup>23</sup> Whilst the consultation period has now formally closed, the document is still available on our website, and we will continue to take account of any comments received about the document's accuracy or completeness where we can. Comments can be sent to [sentencing@lawcommission.gsi.gov.uk](mailto:sentencing@lawcommission.gsi.gov.uk).

<sup>24</sup> See eg the Law Commission's evidence to the Justice Select Committee on 2 March 2016 at Questions 26, 62, and 65 (asked by Alex Chalk MP) - <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-law-commission/oral/29997.pdf> (last visited 9 May 2016).

- 1.43 Our current preferred approach, taking into account the technical nature of much of the subject matter and the acute pressures on parliamentary time, is for the Code to be enacted as a consolidation, taking advantage of the special procedure for consolidation Bills, including scrutiny provided by a joint Committee.<sup>25</sup>
- 1.44 However, as we explain above, our project goes beyond mere consolidation. In order to accommodate the changes we will be making that are not mere consolidation, we would also need to include a small number of clauses in a Bill to be enacted before the consolidation. These clauses will provide for the changes to the law of sentencing in advance of the consolidation process: they simply facilitate the consolidation. The sequence of events is important. These pre-consolidation changes would be commenced only immediately prior to the consolidation taking effect.
- 1.45 One method of changing the law prior to a consolidation would be by use of a “pre-consolidation amendment power”, which is a power given to the Lord Chancellor to make minor changes to the law to produce a satisfactory consolidation.<sup>26</sup>
- 1.46 The other necessary step to implementing the Code, to run in parallel to this, would be a provision to implement this paper. That would be done by enacting another clause in the same programme Bill as the pre-consolidation amendment power to give general effect to the transitional recommendations contained in Part 4. The few cases where we recommend that the general transitional principle should not apply would be excluded from the effect of this provision.
- 1.47 The combined effect of all this would allow the New Sentencing Code to be simpler and more comprehensible than the current law, as well as bringing all of the current law together in one place. These two processes enable the changes to the current law which are required in order to disapply the existing morass of complex transitional provisions, thereby effecting the recommendations in this paper (the “clean sweep” approach).

## **STRUCTURE OF THIS REPORT**

- 1.48 This report is structured as follows:
- (1) **Part 1:** this introduction.
  - (2) **Part 2:** summary of the discussion and consultation questions in the IP
  - (3) **Part 3:** analysis of responses to the IP.

<sup>25</sup> The Joint Committee on Consolidation, &c., Bills. For more information, see <http://www.parliament.uk/business/committees/committees-a-z/joint-select/consolidation-committee/> (last visited 9 May 2016).

<sup>26</sup> Such powers commonly accompany a large exercise in statutory consolidation, see for example the NHS Reform and Health Care Professionals Act 2002, s 36. They are exercised by the Lord Chancellor, but the draft Statutory Instruments to make the changes are conventionally published prior to enactment of the power in order to provide guidance on how the power granted is intended to be used.

- (4) **Part 4:** the recommendations we make following consultation.
- (5) **Part 5:** some practical implications of the clean sweep approach.
- (6) **Part 6:** list of recommendations.
- (7) **Appendix A:** illustrative diagram to be read with Part 5.
- (8) **Appendix B:** list of consultees.

## **PART 2**

# **SUMMARY OF THE DISCUSSION AND CONSULTATION QUESTIONS IN THE IP**

### **INTRODUCTION**

- 2.1 In this part we provide a summary of the discussion and consultation questions from the IP, to set the analysis of responses to those questions (in part 3 below) in context.

### **THE PROBLEM**

- 2.2 We began the IP by noting the consensus amongst those involved in the current system of criminal justice and sentencing that the law governing sentencing procedure is highly complex, which is causing serious difficulties in practice.
- 2.3 One cause of this complexity is the sheer volume of legislative provisions governing sentencing, together with the fact that these are found across many different pieces of legislation. It is our aim to codify and simplify the law in this area to help remedy that situation.
- 2.4 However, another principal cause of the current complexity is the fact that, when frequent changes are made to sentencing law, they are often brought into force some time after they first appear on the statute book, or are only brought into force for a certain class of case or purpose at a particular time. This leads to complicated transitional arrangements<sup>1</sup> which often make it difficult to know, for any particular sentencing exercise, which of a number of sets of provisions governing the same subject matter should be referred to.
- 2.5 A good illustration of the serious problems which can be caused by complex transitional arrangements is provided by the case of *R (Noone) v Governor of Drake Hall Prison & another*<sup>2</sup> which we referred to in the IP.<sup>3</sup> That case concerned the application of the law on release from custody of prisoners serving consecutive sentences of imprisonment, in particular the question of when they became eligible for early release on electronically monitored home curfew. Sitting in the High Court, Mr Justice Mitting commented:

Section 174(1)(b)(i) of the Criminal Justice Act 2003 requires a court passing sentence to explain to an offender in ordinary language the effect of the sentence. This requirement has been in place since 1991. These proceedings show that, in relation to perfectly ordinary consecutive sentences imposed since the coming into force of much of the Criminal Justice Act 2003, that task is impossible. Indeed, so impossible is it that it has taken from 12 noon until 12 minutes to 5, with a slightly lengthier short adjournment than usual for reading purposes, to explain the relevant statutory provisions to me, a professional Judge.

<sup>1</sup> Like the attendance centre ones analysed at 1.11 and following, above.

<sup>2</sup> [2010] UKSC 30, [2010] 1 WLR 1743.

The position at which I have arrived and which I will explain in detail in a moment is one of which I despair. It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory provisions what a sentence means in practice. That is the effect here...<sup>4</sup>

- 2.6 When the same case reached the Supreme Court on appeal, the President, Lord Phillips, stated simply that:

Hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions.<sup>5</sup>

- 2.7 The then Lord Chief Justice, Lord Judge, went further, declaring that:

[The problem] is not the mere number of statutes, but their increasing bulk. Many of them are “enormous”. Indeed they are. And that is not the end of the difficulties. Ill considered commencement and transitional provisions, which have to negotiate their way around and through legislation which has been enacted but which for one reason or another has not or will not be brought into force, add to the burdens...

...Elementary principles of justice have come, in this case, to be buried in the legislative morass...It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date.<sup>6</sup>

- 2.8 The effect of such complex transitional arrangements is that sentencing judges and all other court users need to know (or have ready access to) various different sets of rules and procedures which apply to the same subject matter, depending on the precise date of the offence or the date of some other procedural milestones in the case.

- 2.9 In other words, sentencing judges and practitioners need to be familiar with various different historic formulations of the sentencing law which governs the same subject and have all of these readily available to them. This puts significant pressure on the limited time and resources available to the courts and to practitioners, and leads to error.<sup>7</sup>

<sup>3</sup> At IP para 2.4.

<sup>4</sup> [2008] EWHC 207 (Admin), [2008] ACD 43 at [1].

<sup>5</sup> [2010] UKSC 30, [2010] 1 WLR 1743 at [1].

<sup>6</sup> [2010] UKSC 30, [2010] 1 WLR 1743 at [78] and [86].

<sup>7</sup> See para 1.26 above.

## **THE PROPOSED SOLUTION**

2.10 The solution to this problem of complexity which we provisionally provided in the IP was twofold:

- (1) gathering together all of the provisions governing sentencing procedure in a single place; and
- (2) insofar as it is consistent with established legal principles and fundamental rights, to apply the New Sentencing Code to all cases falling to be sentenced after the date of the commencement of the Code, thereby sweeping away layers of historic sentencing procedure stretching back for decades.<sup>8</sup>

## **LEGAL PRINCIPLES RELATING TO RETROACTIVITY**

2.11 Having set out the problem, and outlined the proposed solution, the IP then turned to a detailed discussion of the legal principles relating to non-retroactivity, both in terms of the common-law interpretive presumption<sup>9</sup> and the narrower specific human rights protections against retroactive criminalisation and retroactive heavier punishment<sup>10</sup> (as enshrined, for example, in article 7 of the European Convention on Human Rights (ECHR)).

2.12 For present purposes, the following summary of the common law position will suffice:

- (1) Retroactive law in this context refers to law which purports to apply to events which pre-date the commencement of the law as though it were the law at the time of those past event(s).
- (2) It is a principle of the common law that it should develop in such a way as to ensure that those who have arranged their affairs in reliance on a decision of the courts should not find that their plans have been retrospectively upset.
- (3) A yet more powerful principle of interpretation applies when considering all statutory law, which requires the courts to presume that statutes are not intended to have retroactive effect unless that intention is expressed clearly and unambiguously in the Act. This principle is both a recognition of a general healthy attitude of suspicion towards retroactive law<sup>11</sup> and recognition that retroactive law will on occasion be necessary and desirable, as long as careful thought has been given by Parliament to its retroactive application.<sup>12</sup>

<sup>8</sup> Subject to some minimal record of historic sentencing maxima, perhaps in tabular form, which would always need to be retained for a generation: see below para 2.15.

<sup>9</sup> Part 3 of the IP.

<sup>10</sup> Part 4 of the IP.

<sup>11</sup> See B Juratowitch, *Retroactivity and the Common Law* (2008).

<sup>12</sup> Taken from para 3.23 of the IP.

- (4) On occasion, a distinction has been found by the courts between “substantive” and “procedural” law. One significance of this distinction is that the interpretative presumption against retroactivity is said to apply less powerfully to procedural changes, although still in a way which guards against injustice.
- 2.13 A piece of legislation such as the New Sentencing Code may therefore perfectly properly be given retroactive effect, as that term is defined here, as long as careful thought is given to the need for this<sup>13</sup> and the intention that it have such effect is expressed clearly and unambiguously.
- 2.14 As to the significance of human rights law in this context, in summary we noted the significant limitation provided by the prohibition on “a heavier penalty be[ing] imposed than the one that was applicable at the time the criminal offence was committed”<sup>14</sup> and we explored in some detail how this prohibition had been interpreted in practice.<sup>15</sup> In essence we accepted the central importance of this limitation to our proposed clean sweep approach and the remainder of the IP dealt with the implications of this prohibition for our proposed clean sweep approach to the introduction of the New Sentencing Code.

#### **THE BASIC LIMITATION PROVIDED BY THE PRINCIPLE AGAINST HEAVIER RETROACTIVE PUNISHMENT**

- 2.15 One implication of article 7 and the principle of non-retroactivity more generally will be the necessity for judges to continue to refer to the maximum sentences available for offences at the time they were committed. This will obviously only be relevant in the small minority of sentencing exercises in respect of offences committed some time earlier, under an earlier legal regime (“historic sentencing exercises”).<sup>16</sup>
- 2.16 We do not generally envisage that the New Sentencing Code will contain reference to the particular maximum sentences or tariffs or sentencing ranges for different offences (these will continue to appear in the offence-creating provisions themselves, and in sentencing guidelines, as they do under current law). However, there will be exceptions, such as mandatory sentences which do appear in the sentencing legislation. We also envisage the New Sentencing Code setting out an exhaustive list of the available types of sentencing disposal and providing a framework for their imposition.

<sup>13</sup> See our statement of the problem we are seeking to address in this project at para 2.4 and following, above.

<sup>14</sup> Extract from article 7 ECHR, which reads in full: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

<sup>15</sup> See paras 4.9 – 4.44 of the IP.

<sup>16</sup> In this age of electronic legal databases, this should (and indeed does at present) provide no insurmountable obstacle in those relatively rare instances of historic sentencing exercises. We would provisionally propose the drafting of an authoritative tabular presentation of the most common offences with their historic sentencing maxima over the last generation (whether as a schedule to the Code or elsewhere).

2.17 The obligation of Government ministers to ensure that legislation introduced by Parliament is ECHR compliant<sup>17</sup> would clearly make it likely that any legislative change with the effect of simply increasing a maximum penalty would be enacted only with prospective effect. Further, the obligation of the courts as public authorities to respect ECHR rights<sup>18</sup> provides an independent legal safeguard against the possibility of a sentence being imposed which offended against this principle, to the extent that the New Sentencing Code allowed for the possibility of a heavier sentence than that available historically.<sup>19</sup>

#### **A 'SAFETY VALVE'**

2.18 We explained in detail in the IP<sup>20</sup> that it is only where a prison sentence is available for an offence that the court has power to impose a non-custodial sentence other than a fine. It follows that in any case where a community penalty is imposed on an offender under the Code the historic maximum sentence would necessarily have been a custodial penalty. Therefore, both legally and as a matter of principle, a heavier penalty was available at the time of the offence than any new type of community-based sentence, and no objection arises to any change in the community sentence regime since the date of the offence.<sup>21</sup>

2.19 Where the historic maximum sentence took the form of a financial penalty, the New Sentencing Code will provide that only a financial penalty can be imposed. This can be any of the new forms of financial penalty available under the New Sentencing Code, up to the value of the historic maximum fine applicable at the date the offence was committed.<sup>22</sup>

2.20 A sentencing judge who is considering imposing only one form of penal element to the sentence (whether custodial, community-based or financial) need therefore only be armed with the New Sentencing Code and a statement of the historic maximum penalty in order to be confident that the sentence passed is lawful.

<sup>17</sup> Human Rights Act 1998, s 9.

<sup>18</sup> Human Rights Act 1998, s 6.

<sup>19</sup> One example, as discussed in more detail below at para 2.28 and following, would be where the code introduced a new type of penalty to be retroactively available which, though not in itself incompatible with article 7, could be combined with some other penalties also available to the court to create a total sentence which is arguably heavier than the historically available maximum combination.

<sup>20</sup> Save for historic fineable-only cases prior to 2008, on which see the discussion in fn 12 to IP para 5.9. This rule also does not apply to certain youth non-custodial penalties: in such cases the slip rule could be applied to avoid unfairness, although the courts are unlikely to engage in a detailed weighing of the relative penal weight of different orders of this kind, given their overtly rehabilitative focus.

<sup>21</sup> See IP para 5.8 and fn 10 to it, and para 2.33 below.

<sup>22</sup> Note that, for offences committed after 12 March 2015, no fine limit now applies in magistrates' courts for offences with a maximum penalty expressed as "level 5" or "£5,000", with certain exceptions. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA), s 85, and SIs 2015/504 and 664. In general, changes to magistrates' powers to fine (including this) operate prospectively only – see eg LASPOA s 87(7). This does not pose difficulties in practice because of the strict time limits for bringing proceedings in the magistrates' courts – six months in the majority of cases (Magistrates' Courts Act 1980, s 127). We are not currently aware of any limited fines in the Crown Court, so we think no issues of retrospectivity in uprating can arise – Criminal Law Act 1977, s 32.

Provided it is no greater than the maximum available at the date of the commission of the offence, it is lawful irrespective of what form it takes.

- 2.21 Where the issue becomes more complex is where the sentencing judge is considering imposing a combination of different penal elements in a single sentence.
- 2.22 We have emphasised that it is our intention that the New Sentencing Code contains the sole and authoritative list of all available *types* of sentencing disposal as a matter of the law of England and Wales. However, it will not contain maximum sentences or guidelines on the degree of punishment (such as amount of fine, length of imprisonment and so on) unless these are fixed by law, as with mandatory minimum sentences or the standard level fines in magistrates' courts.
- 2.23 Looking to the future, once the New Sentencing Code has been enacted, were an entirely new type of sentencing disposal to be introduced, by amendment of the Code, it might be suggested that the application of such a sentence type in response to an offence which predated its introduction was in itself objectionable. In his judgment in the House of Lords in *Utley*, Lord Rodger made the following remark, in the course of rejecting the suggestion that the change to the release conditions in that case constituted heavier punishment than was available at the time of the commission of the offence:

If legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether [article 7] was engaged, even where the maximum sentence had been life imprisonment at the time of the offences. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed.<sup>23</sup>

- 2.24 This example is a particularly vivid (albeit hypothetical) one, and clearly involves the introduction of a new sentence type which is potentially more onerous for the offender than anything available at the time the offence was committed (not least because it would be imposed in addition to an existing available type of punishment).
- 2.25 Of course, one option would be for any new types of sentencing disposal which are inserted into the New Sentencing Code by subsequent legislation to make clear on their face in the Code that they are being prospective only in their application, with the commencement date being clearly expressed in the Code itself. However, though a significant improvement on the current law, this would still, to some extent, undermine the clarity of the approach we are advocating in this paper. Our intended level of clarity would be best achieved by having a single sentencing code which is applicable to all sentencing hearings conducted after its commencement, subject to amendment from time to time. The clean sweep approach not only avoids bringing transitional problems into the Code, but insulates the Code from future transitional difficulties.

<sup>23</sup> [2004] UKHL 38, [2004] 1 WLR 2278 at [43].

- 2.26 Consider a case in which an offender is being dealt with under the Code and since the commission of his or her offence the Code has been amended by the introduction of a new sentence type. In article 7 terms, the application of such a new sentence *type* would only be objectionable if the effect of its application, in combination with any other sentencing disposals applied, was to create a heavier penalty than the maximum available at the time of the commission of the offence. It can readily be seen that this would by no means necessarily be the effect of the retroactive application of a new type of sentencing disposal. For instance, the application on its own of a new type of community sentence involving an electronic monitoring element, perhaps requiring the offender to remain within particular geographical areas at particular times of day for a year (for example, between home and work) would not on any sensible view appear to offend against article 7 if applied retrospectively in respect of an offence for which there was a maximum sentence of 5 years' imprisonment available at the time of commission.
- 2.27 Although the common law interpretative principle of non-retroactivity would apply, it could be readily rebutted by unambiguous statutory language, and the courts would not be likely to strive for a strained contrary interpretation where the effect of the retroactive measure did not appear to be detrimental to the offender.
- 2.28 The more difficult question arises where the sentence imposed involves the combination of multiple penal elements, such as a type of sentencing disposal which was available at the time of commission, and within the historic sentencing range, in combination with a new type of penalty, which is being retroactively applied.

**Example 1** D commits a high value sophisticated theft in 2016, for which the maximum sentence at that time is 7 years' imprisonment. D initially escapes the notice of the police. In 2018, the government of the day introduces a new regime permitting the confiscation and sale of a convicted defendant's property to raise money for large compensation payments to victims' organisations. In 2019, D is intercepted by the police, and in 2020 is convicted by a jury and sentenced to 5 years' imprisonment and the seizure and sale of much of his property, to the value of £700,000, is ordered under the new regime introduced in 2018.

- 2.29 In deciding whether the imposition of this sentence is article 7 compliant it is necessary to decide whether a 5 year sentence of imprisonment combined with the £700,000 order is a heavier penalty than the historically available maximum of 7 years' imprisonment, combined with any other historically available sanctions which could have been imposed in combination at the time of commission (for

instance a fine would historically have been available in combination with imprisonment).<sup>24</sup>

2.30 Ultimately, difficult or borderline cases may arise in this very small minority of cases requiring historic sentencing exercises where the judge feels that a combination of penalties is necessary. In such rare cases, a “safety valve” test may be necessary, ensuring that the general policy of enacting clean, swift and straightforward changes to the New Sentencing Code does not create a risk of infringing the article 7 rights of convicted defendants in historic cases.

2.31 As to the wording of such a “safety valve” test, inspiration might be provided by a provision which already exists in English and Welsh sentencing law in the form of section 11(3) of the Criminal Appeals Act 1968. This section governs the Court of Appeal’s powers to substitute a different sentence on appeal, and provides that:

The Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.

2.32 This provision was interpreted in *Waters and Young*<sup>25</sup> as requiring the court to act such that “no ordinary person would consider that the appellants are [on appeal] being dealt with more severely”. In that case, the imposition by the Court of Appeal of an immediate prison sentence which was entirely subsumed by time served on remand (and hence did not require the appellants to spend any further time in custody) rather than the suspended sentence with requirements imposed by the judge, was held to be consistent with that safeguard.

2.33 We suggested that a similar “safety valve” test could be applied when considering whether the default position, which will be the retroactive application of the New Sentencing Code, including the full list of available penalties, offends against article 7 and corresponding common law rights. The sentencing court (and appellate courts on appeal) should ask whether the total penalty which it is considering imposing for the offence(s) before it, taken in the round, would be considered by an ordinary observer as a heavier one than the maximum which could have been imposed for the offence(s) at the time of commission.<sup>26</sup>

2.34 Even where the court is dealing with a historic sentencing exercise,<sup>27</sup> only in the minority of such cases, where a sentence containing multiple penal elements is being considered, will it be necessary to consider the safety valve test. For all other cases, the court can be satisfied that the sentence it imposes from the full menu under the New Sentencing Code will be compliant with the principle of non-retroactivity, simply by reference to any historic maximum sentence.

<sup>24</sup> This power is less likely to be exercised since confiscation regimes were introduced. An example from before confiscation regimes is *Fox* (1987) 9 Cr App R (S) 116, where Lord Lane CJ in the Court of Appeal upheld a sentence of 5 years and a fine of £16,000 in a drugs matter even where that fine was in excess of D’s estimated £9,000 gain from the Class A drug smuggling.

<sup>25</sup> [2008] EWCA Crim 2538. See also *Grahn* [2012] EWCA Crim 2629, and *Price* [2013] EWCA Crim 1283, [2014] 1 Cr App R (S) 36.

<sup>26</sup> The full step-wise approach we propose for structuring this enquiry is set out below at para 4.9.

<sup>27</sup> See para 2.15 above.

- 2.35 In that small minority of cases where the court does impose multiple penal elements in a sentence, but satisfies itself that the effect is no more severe than would have been possible at the time of the commission of the offence, then the article 7 principle will not be infringed. The clear statutory language of the New Sentencing Code which provides for the retroactive application of the full list of penalties which it contains to cases can be safely followed. The common law interpretative presumption, though engaged, would be rebutted by the clear statutory language, and there are excellent reasons of principle (in the huge gains of certainty and consequent benefits in rule of law terms which this entails) for legislating in this way in this area.
- 2.36 By contrast, if the answer to the “safety valve” question is that the effect of the proposed sentencing package is more severe than the historic maximum, then the sentencing court should avoid deploying that particular combination of sentencing disposals, in recognition of its obligations under common law and human rights law.
- 2.37 After concluding our discussion of a possible “safety valve” as summarised above, we asked the following question:<sup>28</sup>

Consultation Question 1: Do consultees agree that a safety valve of this kind is necessary, and if so with the step-based decision making framework?<sup>29</sup>

#### **PROCEDURE FOR CHALLENGING A SENTENCE WHICH FALLS FOUL OF THE PRINCIPLE AGAINST HEAVIER RETROACTIVE PUNISHMENT**

- 2.38 Having set out our proposal relating to a “safety valve” process, the IP went on to propose that an offender should be permitted to return to the sentencing tribunal which dealt with the original sentence to ask the court to amend that sentence to respect the rule against heavier retroactive punishment. In many such cases, where the historically available maximum had not been brought to the sentencing tribunal’s attention, or the tribunal had proceeded on the basis of an error, this could be rectified quickly and without contention.
- 2.39 In pursuing an application under this expedited procedure, the defendant’s rights to pursue a substantive appeal against sentence to the Court of Appeal would be unaffected. We asked the following question:<sup>30</sup>

Consultation Question 2: Do consultees agree that an expedited procedure, akin to the slip rule, would be desirable to allow an offender, or another party who noticed a possible oversight, to amend the sentence on the basis that it infringed the principle against retroactive heavier punishment?

<sup>28</sup> IP para 5.30.

<sup>29</sup> Which appears in this paper at para 4.9 below with minor modifications to improve readability.

<sup>30</sup> IP para 5.38.

## **FURTHER LIMITATIONS TO THE CLEAN SWEEP APPROACH?**

- 2.40 Having established the necessity to keep the sentence imposed within the historically available sentencing range, and the processes which might best achieve that, the IP went on to consider further miscellaneous categories of case which might necessitate further qualification to the general clean sweep approach.
- 2.41 Most notable in this context were a discussion of changes to the law on the “recidivist premium” (the extent to which previous convictions push up the sentencing level for a new offence) and changes to prescribed minimum sentencing regimes.
- 2.42 We provisionally concluded that:
- (1) provisions on this topic can be consolidated in a way which requires a court to take into account previous convictions which pre-date the change; but
  - (2) such provisions should only be applied to sentencing exercises where the *index offence* post-dates the change, because this ensures that offenders were able to know the potential outcomes of their offending when committing their offences.
- 2.43 In this context, “index offence” means the offence giving rise to the sentencing exercise.
- 2.44 In either case, the effect of our provisional conclusions (1) and (2) above is that the judge can apply the law as it appears in the Code on these subjects to any case which comes before the court after the Code is brought into force, including where this requires the court to consider previous convictions which pre-date the Code coming into force, *as long as the offence that is being sentenced was itself committed after the coming into force of the provision which introduces the mandatory minimum sentence*.
- 2.45 These provisional conclusions were discussed at length in the IP,<sup>31</sup> and were reached partly because prescribed sentencing regimes exclude the court’s discretion, thus eliminating the court’s ability to take into account features of a case which flow from the historic nature of the sentencing exercise. A further rationale is that it is only on this approach that the offender can have known, at the time of committing the offence for which they are now being sentenced, that the prescribed sentencing regime will apply to them if convicted.<sup>32</sup>
- 2.46 We asked the following question:<sup>33</sup>
- Consultation Question 3: Do consultees agree that it would be compliant with article 7 and common law rights to apply new laws on prescribed minimum sentencing and recidivist premiums to all cases where the index offence post-dates the change in the law?

<sup>31</sup> At para 5.63 and following.

<sup>32</sup> See further para 3.41 and following, below.

<sup>33</sup> IP paras 5.74 and 7.2(3).

## **THE STAGE FROM WHICH TO INTRODUCE THE NEW SENTENCING CODE**

- 2.47 We concluded the IP by asking consultees about the cut-off stage we could use from which the New Sentencing Code would apply. It is in the nature of the clean sweep approach that the purpose is to apply the Code insofar as possible to all sentencing exercises conducted after it is brought into force. However, this leaves the narrow but important question of what procedural milestone is to be used for identifying the point at which a sentencing exercise begins. Should the Code apply to any case where the offender was arrested after the date of implementation, or charged, convicted, or sentenced after that date?
- 2.48 We argued that neither arrest nor charge represent suitable candidates for a certain and relatively consistent stage of the proceedings to use as the trigger for transition to the New Sentencing Code.
- 2.49 The same objection does not apply to conviction, as this occurs on a readily identifiable date (the date the guilty plea is entered or a guilty verdict is returned). We considered whether there was a disadvantage to using the date of conviction for transitional purposes as compared with the date of the commencement of the sentencing hearing, on the basis that to do so creates a slightly longer transitional window. This is because for the class of case where conviction had occurred but the sentencing process had not yet begun, the New Sentencing Code would save the old law (which the Code would repeal for other purposes). This would require continuing availability of and familiarity with the old law for as long as it took for this class of case to pass through the system.
- 2.50 This would not be a large problem, as there is not generally a long delay between conviction and sentence (the majority of delays in the criminal process occur earlier). Sentence is often passed on the day of conviction, or a matter of only weeks thereafter to allow for a short adjournment to gather more information for a pre-sentence report.
- 2.51 More importantly, at informal consultation with experts, we found it difficult to identify a reliable and consistent milestone from which it could be said that a sentencing hearing had commenced (and which would hold true in all cases) other than the date of conviction itself.
- 2.52 Whilst it is our policy to seek to apply the New Sentencing Code insofar as possible to all sentencing hearings which take place after its commencement, we therefore provisionally consider that the only reliable way to achieve this is to use the date of conviction as the trigger for the application of the New Sentencing Code.
- 2.53 We asked the following question:<sup>34</sup>

Consultation Question 4: Do consultees agree that the New Sentencing Code should apply to all cases in which conviction takes place after its commencement?

<sup>34</sup> IP para 6.21.

# **PART 3**

## **ANALYSIS OF RESPONSES**

### **INTRODUCTION**

- 3.1 We received 23 responses to the consultation.<sup>1</sup> Many of these were from representative organisations,<sup>2</sup> between them speaking for almost all of the criminal legal sector. Given the technical nature of the questions asked, the small number of individual responses is not surprising. The responses are analysed in further detail below, both in relation to the general principle expressed in the paper and the specific consultation questions asked. However, in general terms, there was the same overwhelming support for the project that we received at the project's launch and have continued to receive at meetings with stakeholders since then.

### **GENERAL PRINCIPLE**

- 3.2 Universally, the responses supported the aim of creating the New Sentencing Code.
- 3.3 The Crown Prosecution Service ("CPS") said:

The CPS supports the Law Commission's project to codify sentencing procedure in a new sentencing procedure code.

We agree with the observations made in Part 2 of the paper regarding the overly complex law governing sentencing procedure, which result in inefficiencies, delay, increased hearings and appeals. Given the limited time and resources available to all those who participate in the criminal justice system, the Law Commission's initiative to address this problem is most welcome.

- 3.4 Lord Justice Treacy, chairman of the Sentencing Council, wrote:

<sup>1</sup> List of consultees in Appendix B.

<sup>2</sup> Such as the Bar Council, the Law Society, the Council of HM Circuit Judges, HM Council of District Judges (Magistrates' Courts), and the Crown Prosecution Service.

These new proposals are a welcome step on the way to much needed organisation and clarification of procedural sentencing provisions. To have the relevant law collated permanently in a single place will save judges and practitioners from wasting valuable time, provide certainty and accuracy and reduce or avoid errors and appeals. Equally important these proposals may make the law more accessible to non-professional users. The existing presumption that the law is deemed known to all has become an unsustainable fiction in an era when the current statutory arrangements are not infrequently impenetrable to seasoned professionals. It is to be hoped that a scheme of standardised transitional and commencement provisions can be devised so that there is a single comprehensible regime in place rather than the sort of “hell” referred to by Lord Phillips.<sup>3</sup> An essential part of this will be the capacity for the statute to be updated promptly and for such updates to be readily available. The onset of digitalisation should facilitate this process. It is no longer acceptable that the principal Governmental website legislation.gov.uk should continue to contain health warnings to the effect that the legislation displayed is not up to date.

- 3.5 The Government, in a joint response signed by Andrew Selous MP, Minister for Prisons, Probation and Rehabilitation, wrote:

I should start by reiterating our support for this project. As the consultation paper makes very clear the law on sentencing has over the years become extremely complex and is often unclear, not only to the general public but to legal practitioners and even senior members of the judiciary. It is of concern to the Government that this complexity is leading to errors during court hearings which not only have a cost but impact on the proper imposition of sentences and public confidence in the criminal justice system.

- 3.6 HM Council of District Judges (Magistrates’ Courts) told us that:

We agree that the existing provisions are overly complex and at times uncertain. Whilst we appreciate that it is an important but enormous undertaking, we believe there are significant long term benefits to judges, barristers, solicitors, the general public and all others engaged in the Criminal Justice System.

- 3.7 Finally, His Honour Judge Andrew Goymer, writing on behalf of the Council of HM Circuit Judges, said:

We would like to pay tribute to the detailed and comprehensive analysis of the legal issues in the consultation...

<sup>3</sup> We interpret this as a reference to Lord Phillips, then-President of the Supreme Court, saying that “Hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions” in the sentencing case *R (Noone) v Governor of Drake Hill Prison* [2010] UKSC 30 at [1]. See further para 2.5 and following above.

## **CLEAN SWEEP APPROACH**

3.8 The responses were also overwhelmingly positive about the general principle of a “clean sweep” approach to the legislation, with explicit support in almost all of the responses and no dissent whatsoever.

3.9 As outlined above,<sup>4</sup> our proposal differs from the traditional approach to transition in sentencing law because historically there has been nervousness about infringing principles of non-retroactivity. In the IP, we argued that this was unjustified and that a bolder and simpler approach could be taken. Professor Andrew Ashworth QC, a leading academic in the field of sentencing, criminal law and human rights, told us that:

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

3.10 Consultees not only thought our proposed “clean sweep” approach was possible, but they also thought it was desirable, for the reasons outlined in the IP.

3.11 The Bar Council said that:

We agree with the Law Commission’s analysis of Article 7 rights and the principle of non-retroactivity (see §4.43). We agree therefore that, provided the Article 7 rights of offenders remain protected, the NSC should represent a ‘clean sweep’ so that sentencing options are included within a single document and apply from a particular point.

## **CONSULTATION QUESTION 1: SAFETY VALVE**

3.12 This question, set out at paragraph 2.37 above,<sup>5</sup> asked whether a safety valve test of the kind we set out is necessary in the context of a “clean sweep” approach, and if so, whether consultees agreed with our step-wise process set out at paragraph 4.9 below.

3.13 None of the responses to this question disagreed with the safety valve test we had set out in the issues paper. However, a small number of responses questioned whether it was necessary to state such a test in legislation, though they did not question our analysis of the safety valve test itself.

3.14 Robert Banks<sup>6</sup> thought that having the test on the face of the Code might clutter the legislation, and some of the group responding on behalf of the Bar Council said:

<sup>4</sup> See para 2.11 and following, above.

<sup>5</sup> From IP para 5.30.

<sup>6</sup> In his and Lyndon Harris’ joint response – Lyndon Harris did not agree with these comments.

We question whether an explicit safety-valve test as a mandatory part of the sentencing process is necessary. We suggest that sentencers can be relied upon to consider Article 7 and the principle of non-retroactivity without prompting.

- 3.15 It is certainly true that in the majority of cases, sentencers would remember to apply general rules of law applicable in the case before them. However, making clear how our three-stage test applies in practice on the face of the statute would remind all sentencers to use it. It would also make the law more accessible to non-lawyers, since by including it expressly in the Code we can help to ensure that all sentencing law can be found in one obvious place. The remainder of the Bar Council respondents agreed, saying:

Whilst a safety-valve test may not be necessary it may be desirable and sentencers should ask themselves whether they are imposing an overall sentence which is heavier than that which could (not necessarily would) have been imposed for the offence at the time of commission. In those circumstances we agree with the step-based decision making framework as set out in §5.26.

- 3.16 The Government response suggested a middle way by using guidance or procedural rules:

We accept the argument that there may be some circumstances where a final review is required particularly in regard to sentences with multiple punitive elements. We accept that such cases will be rare and usually involve historical offences. We note the current increase in historical offences and the possibility of new types of penal elements of a sentence in the future for example in the use of new technology. We therefore suggest that the final review need not be a legislative requirement but be contained in guidance or procedure rules to avoid the restatement in legislation of ECHR rights.

- 3.17 The remainder of the consultation responses were wholly in favour of the approach we adopted. For example, Professor Barry Mitchell wrote:

My view is that it is necessary and that it should not have any really prejudicial effect on simplicity. It seems to me that judges should invariably take this final step, having analysed the nature and extent of the criminality, to ensure they have considered all relevant factors and criteria, and thus satisfy themselves that they've come to the appropriate conclusion.

- 3.18 District Judge Margot Coleman, writing on behalf of HM Council of District Judges (Magistrates' Courts) said:

We believe that for public confidence it would be better to include a safety valve than not. Sentencing judges are well aware of the article 7 protection but the statutory inclusion of such a provision would make the new Code transparent and certain to the general public. The test would amount to a principled and methodical approach to retroactivity and we endorse the commission's approach.

## **CONSULTATION QUESTION 2: SLIP RULE, OR LIKE PROCEDURE**

- 3.19 This question, at paragraph 2.39 above, asked whether “consultees agree that an expedited procedure, akin to the slip rule, would be desirable to allow an offender, or another party who has noticed a possible oversight, to amend the sentence on the basis that it infringed the principle against retroactive heavier punishment”.
- 3.20 This question caused some confusion amongst consultees. Many thought we were asking whether there ought to be a procedure running alongside the standard “slip rule”,<sup>7</sup> whereas we had intended to ask whether the slip rules *or* something similar could or should be used to amend sentences which violated the safety valve test.
- 3.21 We also asked whether this ought, in most cases, to be the normal procedure, instead of dealing with it at the sentencing hearing. This would enable the parties to only argue the issue once they had fully researched it, ensuring an efficient use of court time. After considering responses from consultees, we consider that the parties ought to be able to research these matters in advance of the sentencing hearing itself, and as such we will not be recommending a special procedure for considering potential retroactivity issues at a later date.
- 3.22 As a starting point, it should be noted that there was general support for the idea of having a quick and efficient means of resolving any safety valve disputes. The Serious Fraud Office “...agrees that the safety valve test would benefit both the defence and the prosecution. An expedited procedure, akin to the slip rule, would provide a mechanism for swift and efficient resolution and would be a practical way of resolving any issues”. Similarly, the National Bench Chairmen’s Forum wrote that “this approach seems a sensible way of dealing with a limited issue”.
- 3.23 We have extracted a representative selection of responses to draw out the four remaining themes of the responses received to this question.

### **Support for avoiding appeals to the Court of Appeal (Criminal Division)**

- 3.24 The Crown Prosecution Service said:
- As the Paper points out, the introduction of an expedited procedure avoids the alternative route of a slow and costly full appeal to the Court of Appeal (or Crown Court).
- 3.25 Similarly, the London Criminal Courts’ Solicitors’ Association said:
- We support the use of an expedited procedure in the Crown Court as this will be much quicker and more efficient than taking the matter to the Court of Appeal with its notorious backlog.

<sup>7</sup> The rule allowing courts to amend sentences to correct mistakes after passing them. HM Council of District Judges (Magistrates’ Court) pointed out on consultation that it is really slip rules (plural), since there is one for the Crown Court and one for magistrates courts, contained in Powers of Criminal Courts (Sentencing) Act 2000, s 155, and Magistrates’ Courts Act 1980, s 142, respectively. We gratefully adopt this terminology.

- 3.26 The Bar Council agreed with the desirability of expedition, but had a further suggestion:

We agree that an expedited procedure, akin to the slip-rule, could be desirable in those circumstances...in order to avoid court time being dominated by slip-rule applications we would propose that the initial application be in writing. The other party could be invited to respond and if necessary a hearing listed.

#### **The existing slip rules being sufficient**

- 3.27 As pointed out above, we did not intend to come to any firm conclusion on this issue in the IP. However, many consultees interpreted our question as asking about a new and additional rule, for example, the Bar Council's response says "although the current slip-rule may provide the necessary protection".

- 3.28 Professor Peter Hungerford-Welch agreed, saying

I would also argue that there is no need to make specific provision for an application for reconsideration of a sentence. In those rare cases where the principle of non-retroactivity would prevent the application of a provision in the new sentencing statute to the case at hand, there is no difference between that error and any other error of law which would trigger the power to seek a variation of the sentence<sup>8</sup> (with the possibility of an appeal against sentence if the request for variation is unsuccessful).

- 3.29 The Government response reads:

We agree that it is important that clear cut errors can be corrected via an expedited process other than a formal appeal. It is also important that other parties can draw the attention of the court to any errors, for example, as the prison service currently do when they receive offenders into custody. We do however consider that the current slip rule and the procedure rules (the section 155<sup>9</sup> power is provided for by CrimPR (2015) 28.4) can deal with the majority of clear cut errors including those where for example a sentence exceeded the maximum penalty. Where the case involved a more substantial issue than an error in the imposition of the sentence we would consider an appeal against sentence as the most appropriate way to resolve that issue.

- 3.30 Lord Justice Treacy likewise was firmly of the opinion that the existing procedures were sufficient:

Since the existing slip rule which carries a fairly generous time for reflection will in any event remain in place, there is no justification for providing for some additional provision in this respect.

<sup>8</sup> I.e. an application of the slip rules.

<sup>9</sup> Powers of Criminal Courts (Sentencing) Act 2000. (Footnote ours.)

### **Time limits and slip rules**

3.31 Lord Justice Treacy continued by saying:

Moreover to provide this additional route to return to the original sentencer without limitation of time would run counter to the practice of the Court of Appeal Criminal Division which requires cases to be brought to it in good time and which will, if there is delay, decline to extend time.

3.32 On the subsidiary issue of time limits under the slip rule in the Crown Court, on which the current rules are very strict, Lyndon Harris and Robert Banks in their joint response felt that:

...there is no need for two types of slip rule. In any event the slip rule should be amended to permit all sentences which are unlawful to be amended by the sentencing tribunal without limit of time.

3.33 Paul Keleher QC, responding on behalf of 25 Bedford Row, agreed with this sentiment, saying (whilst agreeing with our proposals):

As a matter of interest, is there any particular need to apply a strict time limit, as with the slip rule? It is a regrettable fact that it is not uncommon for the recognition that an unlawful or inappropriate sentence has been passed to dawn some time after the expiry of 28 days.

### **Slip rules as the preferred route for applying the safety valve test?**

3.34 We did not state in the IP whether we were proposing that anyone who thought the safety valve would apply to their case had to come back to court under the slip rules or whether we thought it would just be a common way of dealing with safety valve issues (this latter option would be because it is unlikely advocates would be able to formulate a fully-reasoned argument on the historical state of sentencing law “on the hoof” at the sentencing hearing).

3.35 Professor Andrew Ashworth QC thought that:

It could be used in cases where there is a slip by the court, but its primary use would be as a step in the sentencing process for historic cases with more than one sentence/order (see para. 7.2).

3.36 Lord Justice Treacy similarly thought that the safety valve’s primary role would be as a step in the process:

Parties to historic cases ought, if competent, to be alive to the potential sentencing complications which surround such cases. It runs counter to what we are seeking to achieve in the criminal justice system to give them the luxury of applying their minds to the matter at some later stage.

3.37 The Magistrates’ Association, conversely, said that:

The MA welcomes the principle of an expedited procedure to allow a sentence to be amended if it is found that it amounts to a heavier punishment than would have been available at the time of the offence.

3.38 Likewise, the Council of HM Circuit Judges said that:

We approve of the proposed sentencing procedure to be adopted for historic offences where there is a risk of breaching the rule against retrospective penalties.

### **CONSULTATION QUESTION 3: MANDATORY MINIMUM SENTENCES AND RECIDIVIST PREMIUMS**

3.39 This question, at paragraph 2.46 above, asked whether consultees agreed that in order to comply with rights against non-retroactive punishment, prescribed sentencing regimes<sup>10</sup> and recidivist premiums<sup>11</sup> could only apply where the index offence<sup>12</sup> was committed after those provisions were commenced.

3.40 All but one response to this question was in agreement with the suggestion. The dissenting opinion was from Paul Keleher QC on behalf of 25 Bedford Row, who thought that prescribed sentencing regimes ought to apply only where all offences are committed after the date of commencement. This is the case for some of the prescribed sentencing regimes under the existing law, such as three years' imprisonment for a third domestic burglary under section 111 of the Powers of Criminal Courts Sentencing Act 2000. That provision requires both previous domestic burglaries to have been committed after a specified date.

3.41 The position of 25 Bedford Row puts them in contradiction to the present law (which they acknowledge), since more recent prescribed sentencing regimes<sup>13</sup> take the approach we suggest, being concerned only with whether the index offence was committed after commencement. The rationale for this approach is that an offender could have known, at the time of committing the offence for which they are now being sentenced, that the prescribed sentencing regime will apply to them if convicted.

3.42 This latter analysis is one that Professor Peter Hungerford-Welch agreed with:

This is consistent with the requirement that an offender should know the possible consequences of their offending at the time they commit the offence.

3.43 Similarly, the CPS thought that case-law supported our approach:

<sup>10</sup> The preferred term for mandatory minimum sentences for reasons set out in para 5.59 of the IP.

<sup>11</sup> The treatment of previous convictions as a specific aggravating factor.

<sup>12</sup> The offence for which the offender is currently being sentenced.

<sup>13</sup> Such as Criminal Justice and Courts Act 2015, s 28, which provides for minimum 6 month sentences for second occurrences of certain knife crimes.

We also agree that this may be achieved by applying the new law only where the index offence post-dates the change in the law. As argued at paragraph 5.61, there is support for this approach in the Strasbourg Court's ruling in *Achour v France* (2007) 45 EHHR 2 and in the Court of Appeal's ruling in *Offen & Others* [2001] 1 Cr App R 24: in such circumstances the offender could have discovered, had he or she made enquiries, before the moment when the index offence was committed, what the effect of a previous criminal record would be on sentencing liability for a further offence. The principle against retroactivity is therefore not breached.

- 3.44 The Bar Council was slightly more cautious, but still ultimately came down in favour of our approach:

Every case would need to be considered on its own facts but in principle we consider that it would be compliant with article 7 and common law rights to apply new laws on prescribed minimum sentencing for recidivists to all cases when the index offence post-dates the change in the law.

**CONSULTATION QUESTION 4 – SHOULD THE CODE APPLY TO ALL CASES WHERE CONVICTION POST-DATES COMMENCEMENT?**

- 3.45 This question, set out at paragraph 2.533 above, was asking consultees not about the overarching “clean sweep” principle but instead the narrower question about the point in the criminal process from which the clean sweep should apply. Our general principle, as stated above, is that the Code should apply to all sentencing exercises which post-date commencement of the Code. However, we argued in the IP that the only firm definition of the start of the sentencing process was the moment of conviction, whether this was by guilty plea or guilty verdict (and not, for example, the date of charge or arrest).

- 3.46 Almost all of the responses to this question were in agreement with our approach.

- 3.47 The CPS fully supported this argument:

The CPS agrees that conviction appears to be the most appropriate stage from which to introduce the new Code, as the date on which it occurs is readily identifiable, in contrast with the date on which other stages in proceedings occur.

The Issues Paper explains that informal consultation has revealed difficulties with using other stages in proceedings for fixing a definite point in time for transitional purposes: neither arrest nor charge provide a certain and consistent stage of the proceedings to use as a trigger for transition to the new Code; similarly, it is difficult to identify a reliable and consistent milestone from which it could be said that a sentencing hearing had commenced.

By contrast, conviction occurs on a readily identifiable date: the date of the guilty plea or guilty verdict.

3.48 The panel drafting the Bar Council's response were split on this question. In support of our argument, they put forward the view that defendants ought to have sentencing law fixed at the point in time that they enter a guilty plea on advice. As against our position they suggest that multiple sentencing exercises could be carried out in the same hearing with different dates of conviction, either for the same or different offenders. This would arise when a defendant entered mixed pleas on different counts and/or different defendants in the same case entered different pleas. This group of members suggested that using the sentence date means you never need to think about two regimes simultaneously (although of course what they mean by sentence date is the very challenge we were trying to address).

3.49 Some of the authors of the Bar Council's joint response wondered if a solution is to apply the sentencing law in force at the date of sentence as a default position, but to allow the judge to instead opt to apply the law to the date of conviction. A reason for doing this might be, for example, because a proposed sentence type that is recommended in a report ordered on conviction, or a sentence type which is deferred at the date of conviction, is later abolished before sentence is finalised.<sup>14</sup>

3.50 The only wholly dissenting response was from Professor Peter Hungerford-Welch, who said:

I would suggest that thought should be given to setting the relevant date, for the purposes of the new sentencing statute, as being the date when sentence is passed, since that is the date when the sentencing powers are actually being exercised.

3.51 However, as mentioned above, he was very much in the minority. Other supporters of our position included Lord Justice Treacy:

I agree that the new Sentencing Code should in general apply to all cases in which conviction takes place after its commencement. Given the alternative points in the criminal process which might have been selected, date of conviction provides the greatest certainty. The proposed Code after all seeks certainty above all else.

3.52 The Law Society were also in support:

[The Criminal Law Committee] agreed with the paper's conclusion that the best solution to the problems around the transition to a new sentencing code would be for the code to apply to, and govern, all sentencing decisions taken after its introduction regardless of the date of the offence.

<sup>14</sup> The Supreme Court currently has a case pending on the most lenient penalty rule ("*lex mitior*") – *Docherty*, on appeal from [2014] EWCA Crim 1197. We may deal with this point more fully in a later publication once the case has been decided. However, if the most lenient penalty principle is held to be a part of the law of England and Wales, this does not have any particularly problematic implications for this project, for the reasons we explained in the IP at paras 6.3 – 6.8.

3.53 His Honour Judge Graham Knowles QC, whilst supporting our provisional proposal, made a very valid point about certainty of dates, to which we shall return:<sup>15</sup>

Whilst I agree that the New Sentencing Code should apply to all cases in which conviction takes place after its commencement, some further clarification will be needed of what should count as “conviction” in cases where a defendant is convicted of different counts, or on different indictments or charges, on different days, and cases where co-defendants are convicted on different days.

3.54 The Government response was also broadly in support of our position:

We agree with the proposed “clean sweep” approach whereby the sentencing code would apply to anyone sentencing after the code comes into force. We also agree that date of conviction could be an appropriate and practical point to anchor the application of the code, but we note the complexity of saving a different regime for those people who are convicted before the code comes into force, but sentenced afterwards.

<sup>15</sup> See para 4.20 below and fn 10 to that paragraph.

## **PART 4**

# **RECOMMENDATIONS IN LIGHT OF RESPONSES**

- 4.1 This part will outline our recommendations in view of the consultation responses analysed in Part 3 above.

### **THE MAIN THRUST OF OUR POLICY – A CLEAN SWEEP APPROACH**

- 4.2 Unsurprisingly, in light of the wholly positive consultation responses set out in Part 3 above,<sup>1</sup> we are fortified in our confidence that the clean sweep approach to transition to the New Sentencing Code is the correct approach.
- 4.3 We therefore continue to believe, as a starting point, the New Sentencing Code should apply to all cases where conviction takes place after its commencement.
- 4.4 As to the use of the date of *conviction* as the correct stage in the process to fix upon as marking the beginning of the sentencing exercise, and what exactly this means, see paragraph 4.17 and following below.

### **CONSULTATION QUESTION 1 - A SAFETY VALVE?**

- 4.5 Consultees all agreed that a “safety valve” should apply to the scheme under the New Sentencing Code. There were only 3 responses which dissented in whole or in part from a perceived suggestion that it might be in the Code, and only on the basis that they believed that the safety valve ought to be left to the general law, not that it was wrong or that it should not apply at all.
- 4.6 Such a test is designed to guard against the possibility that the retroactive application of the Code could offend against the fundamental rights of the offender (including common law rights and rights under article 7 ECHR). It would only apply in the very rare cases we set out in the IP: first, it is only applicable in historic contexts, which is to say cases where the offence was committed before the commencement of the relevant provisions. Secondly, the safety valve only applies where the overall penalty the offender is given is heavier than that which was available at the time of the commission of the offence. This can only arise when judges start considering combined sentences towards the top of the historically available range, which will inevitably be only in a very small percentage of cases.

<sup>1</sup> At para 3.8 and following, above.

**Example 2** The New Sentencing Code is introduced in 2019. D committed an offence of indecent assault against a close family member in 1972 which does not come to light until 2020 when a complaint is made by the victim. D attends the police station, accepts responsibility in interview, and pleads guilty in court. Sentencing D later in 2020, the court has recourse to the procedures in the New Sentencing Code and the full range of sentencing options it contains. The judge decides that only an immediate sentence of imprisonment would be appropriate in D's case. Before finalising the sentence, the judge applies the safety valve test, ensuring that the period of imprisonment imposed falls within the historically available range at the time the offence was committed (in this case, up to 2 years' imprisonment).

- 4.7 Having an explicit provision would ensure that, in the rare cases where it can even theoretically apply, sentencers do in fact turn their minds to this issue. The rarity of the test's application could be an argument for making the test explicit, since it may not always be at the forefront of sentencers' minds. However, whether the test can or should be in the Code (as opposed to in the Explanatory Notes or the Criminal Procedure Rules/Criminal Practice Direction or purely as part of the general law) is something which is a matter for Parliamentary Counsel, and will be resolved by the time of the publication of the draft Code next year. We would also hope that the more logical and user-focused way in which the Code will be structured compared with the current law would improve courts' confidence that they have systematically and exhaustively applied the relevant provisions. Certainly, since our view is that what is described here as a "safety valve" merely reflects the existing law, we think it would apply in relation to the New Sentencing Code whether specifically enacted or not.
- 4.8 **We recommend that a court sentencing under the Code (and an appellate court on appeal) should ask whether the total penalty which it is considering imposing for the offence(s) before it, taken as a whole, would be more severe than the maximum which could have been imposed for the offence(s) at the time of commission.** However, we make no recommendation as to what form that instruction to the sentencing court to consider the test should take.
- 4.9 In structuring this inquiry, we suggest the following steps could assist:
- (1) Is this a case where the justice of the case demands a sentence, in respect of any single offence, with more than one penal element (for example, a sentence of imprisonment *and* a financial sanction, or an ancillary order which is penal in nature)?
  - (2) **If no**, then impose a single penal element to the sentence in respect of each offence and check against the historic maximum penalty.
    - (a) If the historic maximum is a period of imprisonment, then any non-custodial sentence, or any custodial sentence up to the historic maximum, will be lawful.

(b) If the historic maximum is a fine, then only a financial penalty up to this level should be imposed. That would complete the sentence and the judge need go no further.

(3) **If yes**, then go to (2).

(4) Impose that combination of the sentencing options available under the New Sentencing Code which meets the justice of the case and proceed to (3).

(5) Before finalising the sentence, check the historic maximum penalty and ask the “safety valve” question:

Is the total penalty which the court is considering imposing for the offence, taken as a whole, more severe than the maximum which could have been imposed for the offence at the time of commission?

#### **CONSULTATION QUESTION 2 - A SLIP RULE?**

4.10 Consultees agreed with our policy position that whenever appropriate the courts should be able to rectify sentencing mistakes under the New Sentencing Code. This is a reflection of the current law, and would include mistakes caused by the failure properly to apply the safety valve principle at the initial sentencing hearing.

4.11 However, as explained in more detail above, many consultees pointed out that a separate “slip rule” for this purpose was unnecessary, since the existing provisions,<sup>2</sup> or redrafts thereof in the New Sentencing Code, should be capable of accommodating such rectification.

4.12 We therefore make no particular recommendation under this head, but will ensure that the New Sentencing Code includes re-drafted provisions consolidating the existing “slip rule” procedures, in such a way that sentencing errors (including “safety valve” test errors) can continue to be rectified through this route. By providing a simple route to rectify errors, Court of Appeal time and resources are safeguarded. As at present, the availability of appeal to the Court of Appeal (or to the Crown Court, from the magistrates’ court<sup>3</sup>) would not be precluded by exercise of the slip rule powers.

#### **CONSULTATION QUESTION 3 - PRESCRIPTIVE SENTENCING REGIMES AND RECIDIVIST PREMIUMS**

4.13 This question asked about an exemption from the general clean-sweep principle for these particular categories of sentence. Fewer specific responses were received to this question than the others, perhaps because it was of a particularly technical nature.

4.14 Only one of the 13 consultees responding to this question disagreed (Paul Keleher QC of 25 Bedford Row), and that disagreement necessarily meant

<sup>2</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 155, and Magistrates’ Court Act 1980 s 142.

disputing the validity of some prescribed sentencing regimes under the current law.<sup>4</sup> In summary, the objection was that the exemption we were recommending for this category of sentencing regime was insufficiently broad. In the view of the opinions of the rest of consultees, and the current legal position, we are satisfied that we should only require the index offence to post-date the change in the law, rather than all offences which the prescribed sentencing regime or recidivist premium depends on. This is still consistent with the important principle that offenders should be able to know the potential implications of their criminal behaviour at the time they commit their offences.

- 4.15 Therefore, in light of the agreement of the rest of our consultees with our provisional proposal in the issues paper on this subject, and by way of a partial exception to the general “clean sweep” approach: **we recommend that new laws on prescribed minimum sentencing and recidivist premiums be applied only to cases where the index offence post-dates the change in the law.**
- 4.16 Prescribed sentences and recidivist premiums are two instances where we recommend that the general retroactive effect of the Code should not apply. This is not to say that they are the only instances where the Code will sometimes preserve old sentencing regimes. This could occur for other reasons as well, such as when we perceive that imposing the new regime on all cases would breach the principle that the offender will never be subject to more punishment than that which was available at the time of the commission of the offence. Some examples of this are considered below.<sup>5</sup>

#### **CONSULTATION QUESTION 4: SHOULD THE CODE APPLY TO ALL CONVICTIONS FROM THE DATE OF COMMENCEMENT?**

- 4.17 This is a far narrower question than it might at first appear – as we have already mentioned,<sup>6</sup> all consultees who expressed a view agreed with our clean sweep approach, so this question is merely about what precisely that means. What needs to be established is the single point in the process at which the sentencing law is taken for a given exercise. This is different to the existing law, where each aspect of sentencing law being used in a case must be looked at individually to see whether it applies to the offender. The provisions at present all apply from different dates, and whether an offender falls within a particular regime also depends on whether that date is taken as being at the time of the offence, the conviction or the sentencing exercise.
- 4.18 As explained in the IP, there are several possible points at which the sentencing law could be fixed for the purpose of a sentencing exercise under the clean sweep approach. The question is which – the candidates are as follows, in

<sup>3</sup> From where appeal to the High Court is also possible, either directly or after appeal to the Crown Court – for further information, see chapter 2 of *The High Court’s Jurisdiction in Relation to Criminal Proceedings* (2010) Law Com No 324, HC 329.

<sup>4</sup> See paras 3.40 and 3.41 above.

<sup>5</sup> See Part 5.

<sup>6</sup> See para 3.8 and following and para 4.2 and following, above.

decreasing order of transitional period (the period of time from implementation of the Code for which the old law must be used):

- (1) **Offence** – this is incompatible with the clean sweep approach of looking at the law now when sentencing for an old offence, since the transitional period will be many decades.<sup>7</sup>
- (2) **Arrest** – this is not a certain enough point in the process to use, since police may de-arrest and re-arrest defendants many times in an investigation, and if the defendant has attended court on the basis of a written summons and requisition, then they will not ever have been arrested in the process.
- (3) **Charge** – this suffers from the same problems as arrest: defendants may be charged several times, so it is unclear which date to use.
- (4) **Conviction** – this has the advantage of being a certain point in time (at least in relation to each offence).<sup>8</sup>
- (5) **Sentence** – this is clearly the most relevant date to use, and has the advantage of having the shortest transitional period – but when does this date occur in the process?

4.19 We are keen to minimise the transitional period as much as possible, since this is the problem the IP aimed to address in the first place – the need to look back to many different versions of very old law for different purposes in many cases. This would suggest the date of sentence is the best date for us to choose.

4.20 Ultimately, however, we were persuaded to a different view by arguments made to us that “the date of sentence” lacked certainty, as a sentencing hearing can stretch across days or even weeks or months (where it is adjourned part-heard). Whilst the date of a particular sentence being handed down is certain, this date could often be too late: it is critical that a judge knows what law of sentencing will apply at the point when he orders (for instance) a pre-sentence report,<sup>9</sup> even though the sentence may not be handed down until weeks later. Similarly, in a sentencing exercise spanning a number of days with a number of different offences and offenders involved, the judge will need to know what law to apply to the whole exercise on day one, even if no sentences are handed down until day five. We believe that the date of conviction is meaningfully a more objective position than the date of sentence, as the former is well used and understood in both statute and procedure rules, whereas the latter is not. By date of conviction,

<sup>7</sup> As recent experience with historic sexual abuse cases has shown, prosecutions can be successfully brought many years after the events to which they relate. Should this date be adopted, regard would have to be had to the old law for many decades to come, which would defeat the object of this paper.

<sup>8</sup> It being possible to be convicted at different times in the same case for different offences. For example, a guilty plea entered to some charges on an indictment at the start of a trial could be months before the guilty verdicts are brought in by the jury on the remaining counts.

<sup>9</sup> Since what law applies determines the source of the judge’s power and/or obligation to order such a report, what the report must cover and so on.

we mean the date on which a guilty verdict is returned by the jury or magistrates, or a guilty plea is entered.<sup>10</sup>

- 4.21 This conclusion does mean that there will not be an overnight transfer between sentencing different versions of sentencing law: anyone whose sentence is deferred for a report, or who pleads guilty and then proceeds to trial on other charges, will still be sentenced under old sentencing law. But in most cases of either occurrence, the transitional period will be a matter of weeks. This means that at the introduction of the Code it will be only a limited inconvenience for sentencers (who are in any event already familiar with the present law), and such inconvenience is in any event a small price to pay for a cleaner, simpler Code to apply to all cases thereafter.
- 4.22 After the coming into force of the Code, sentencing law will inevitably not remain static. When it is amended, subject to certain very limited exceptions, we hope that such changes will be brought into effect for all future sentencing exercises begun after the date of commencement of the changes. We also hope that a culture will develop whereby there are a small number of fixed commencement dates each year for amendment of the Code. This is already the case in relation to the Criminal Procedure Rules.<sup>11</sup> This would mean that *in relation to those changes only* for a few weeks each year sentencers must have regard to the preceding edition of the Code. We envisage that the Code will be regularly republished, with dates of application made clear, to avoid many of the issues on transition which presently plague sentencing courts.
- 4.23 Even in the rare cases of those limited exceptions to the general principle of retrospective effect of the Code, it is intended that both the “old law” and the “new law” will be in the Code, with their dates of application on the face of the provisions. This will make applying different laws to different cases considerably simpler than at present, with a further attendant fall in errors compared to today. This applies equally to the Code’s introduction and to later amendments to the Code.
- 4.24 **We recommend that the New Sentencing Code and later versions of it should apply to all sentencing exercises in which conviction takes place after commencement of the Code or that version of it.**

<sup>10</sup> That is to say, the first meaning of the word explained by the House of Lords in *S (An Infant) v Recorder of Manchester* [1971] AC 481 by Lord Reid at p 488. That case was about the magistrates’ power to allow a guilty plea to be withdrawn, which would be terminated by “conviction” – in that context, the House of Lords said conviction had its other meaning, namely sentence being passed. Lord Upjohn at p 506 supports this by quoting Patterson J in *Stonnell* (1845) 1 Cox CC 142 as saying that “till judgment there is no perfect conviction”, where “judgment” is used in its old sense of “sentence”.

<sup>11</sup> This is generally the way in which the current Criminal Procedure Rules are amended: in 2015 amendments came into force on 2 February, 6 April (SI 2015/13) and 5 October (SI 2015/1490). The first set of 2016 amendments came into force on 4 April: SI 2016/120.

## **PART 5**

# **PRACTICAL IMPLICATIONS OF THE CLEAN SWEEP APPROACH**

- 5.1 In this final chapter we will explore some of the implications of our recommendations to assist readers in understanding how they will affect the law in practice.
- 5.2 Whilst it is not possible to list in the abstract all of the ways in which the clean sweep approach will affect the way cases will be dealt with differently once the New Sentencing Code is introduced, this chapter is designed to illustrate some of the main implications of the approach.

### **THE CENTRAL CASE: A NEW SENTENCING LAW WHICH POST DATES THE COMMISSION OF THE OFFENCE BUT WHICH PRE-DATES CONVICTION**

- 5.3 The most straightforward case in which the clean sweep approach will apply to improve the simplicity and clarity of the law is the situation in which there is a change to the law of sentencing which post-dates the commission of the offence but pre-dates the conviction.
- 5.4 This type of case is represented by both case 1 and cases 2a & 2b on the diagram at Appendix A. We return to the remainder of this diagram in more detail at para 5.20 below.
- 5.5 These cases illustrate the scenarios where the offender is sentenced on the same day as the conviction (case 1) and where there is a period of adjournment between conviction and the sentencing hearing, for example for the preparation of a pre-sentence report (cases 2a & 2b). Both of these scenarios are everyday occurrences in the criminal courts. As follows from our discussion in the IP and the recommendations flowing from it in this paper,<sup>1</sup> in all three cases the sentencing law which applies is that which was in force at the date of conviction. This is because whilst we would like the New Sentencing Code to apply to all sentencing hearings after implementation, it is difficult to define the start of the “sentencing hearing”. For reasons considered above,<sup>2</sup> the date of conviction is the start of the sentencing process, and we consider it to be the only firm point in the process to which we can “anchor” a commencement date.
- 5.6 In these most straightforward cases there is a change in the law which comes after the offence is committed but before the conviction and, but for the changes made in connection with the Code, would not apply to the case. This is a relatively common fact pattern, given that the law of sentencing is subject to continual change and many offences do not give rise to a prosecution until months or years after their commission. To illustrate this we reiterate an example we used in the consultation document:

<sup>1</sup> For our recommendations, see Part 4, above.

<sup>2</sup> See para 4.17 and following, above.

**Example 3** The New Sentencing Code is brought into force in 2019. In 2020 D is convicted of a number of offences of indecent assault on a woman over 13 committed in 1975. The maximum sentence for that indecent assault in 1975 was 2 years' imprisonment. The judge sentencing D in 2020 would conduct the sentencing hearing under the New Sentencing Code, and could have recourse to all of the sentencing options in it, including types of penalty introduced after 1975. However, the judge would have to ensure that the total penalty imposed was not heavier than 2 years' imprisonment in respect of each offence.

- 5.7 Example 4 shows the benefits of our new approach in not having to look back to old sentencing law provided the case does not fall into that very small transitional class:

**Example 4** As a young adult D plays a minor role in a high value commercial robbery in 1964 and flees the UK shortly afterwards. At the time of this offence, the principal sentencing disposals available to a criminal court were limited to periods of imprisonment and fines. In 2019 the New Sentencing Code is brought into force, reflecting the whole law of sentencing in force at that time, including Community Orders and Suspended Sentence Orders. In 2020 D returns to the UK in order to be reunited with her family in her old age, and to receive medical treatment. On her arrival in the UK D hands herself into the authorities. She is remanded in custody and pleads guilty to the offence of robbery at a court hearing shortly thereafter. D is sentenced under the New Sentencing Code, and notwithstanding that it was not an available disposal at the time of her offence she receives a suspended sentence of imprisonment with electronically monitored curfew and unpaid work requirements. Since that is a penalty less than the maximum available at the date of the commission of the offence, there is no retroactivity problem.

- 5.8 Because under our recommendation the law which applies to the sentencing exercise is that at the date of conviction, rather than at the moment of the sentence being imposed, there will remain a class of transitional cases, both on the initial introduction of the New Sentencing Code, and on future amendment of the Code. This class will be made up of cases where the conviction pre-dates the introduction (or subsequent amendment) of the Code, but the sentence has not yet been imposed at the time the Code is introduced (or changed). In other words, those few cases where the change to the law falls within the period of adjournment for sentencing. This is illustrated in example 5:

**Example 5** The New Sentencing Code is brought into force in 2019. In spring 2020, D commits a common assault in a pub brawl. He pleads guilty on 1 July, but his case is adjourned for 3 weeks for the completion of a pre-sentence report. On 15 July, alcohol and abstinence monitoring requirements are introduced throughout England & Wales through a change in the Code. However, when D falls to be sentenced on 21 July, it will be under the Code as it was when he pleaded guilty, so when the magistrates impose a suspended sentence they may only make use of the community requirements in force as of 1 July 2020.

- 5.9 For this class of case it will remain necessary to refer back to the law before the introduction (or amendment) of the Code. However, this class will be very small: the majority of cases are sentenced on the date of conviction, and even in those cases where there is an adjournment, the length of such an adjournment is usually no more than three weeks for the preparation of a full pre-sentence report to assist with sentencing.
- 5.10 Case 2b in Appendix A illustrates the precise scope of the transitional class: there, the Code is introduced prior to conviction, so the sentencing exercise takes place under the Code. However, a relevant amendment<sup>3</sup> is made to the law in the two months between conviction and sentence. This second amendment does not apply to this sentencing exercise: the sentencing process has already started, and the law was fixed at the start of it. Therefore, the outcome is identical to that in the alternative scenario of case 2a, where the law remained unchanged between conviction and sentence.<sup>4</sup>
- 5.11 For the vast majority of cases, however, the transitional window for the courts moving to the New Sentencing Code (or for transitioning to an amended version of the Code in future) will be only weeks in duration. This is to be contrasted by the numerous different parallel transitional arrangements which currently exist for all of the changes to sentencing law which have occurred over the last generation, many of which continue to remain relevant, even decades on.

#### **THE CENTRAL CASE: EXCEPTIONS**

- 5.12 As can be seen from chapter 2 above, consultees strongly agreed with us that there were some narrow situations in which changes to sentencing law post-dating the commission of the offence should not be applied in a later sentencing exercise.

#### **Increase in maximum penalties, including new indeterminate penalties**

- 5.13 The clearest example of such an exception is where there has been an increase in the maximum period of imprisonment or maximum fine for an offence which post-dates the offence. Any such increase should be disregarded when dealing with the offender in such a situation:

<sup>3</sup> Such as the introduction of a new community requirement which can be attached to a community order or a suspended sentence order.

**Example 6** The fine cap of £5,000 for most cases dealt with in the magistrates' court was removed in 2014 (when changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 were brought into force) leaving the magistrates' fining power unlimited for most cases. When the New Sentencing Code is brought into force in 2019 it will codify the law at that date. In 2020 D is convicted of a summary offence committed in 2013.<sup>5</sup> When sentencing D to a fine in 2020, the court will use procedure in the New Sentencing Code, but will disregard the increased powers which were brought into force in 2014, considering only a fine up to the level of £5,000.

- 5.14 We further noted that any future introduction of an indeterminate sentence of imprisonment, or the rolling out of life sentences to new offences, would inevitably have the potential to constitute a heavier penalty where there was a (determinate) maximum period of imprisonment available at the time of the commission of the offence. Any such changes in future should therefore also be enacted prospectively only, in the sense of being limited in their application to offences committed after the commencement of that change and the New Sentencing Code would reflect that on its face to assist sentencers and the public in understanding the effect of the law.
- 5.15 The same is not true of an extended sentence of imprisonment (such as are currently available under section 226A of the Criminal Justice Act 2003 for example) where it is possible to state a latest possible release date. The retroactive application of such sentences to offences committed before their introduction is unobjectionable so long as the latest possible release date under such a sentence falls within the historic maximum period of imprisonment available.<sup>6</sup>

#### **Prescriptive sentencing regimes and the recidivist premium**

- 5.16 Another narrow exception to which we drew attention in the consultation document and with which consultees agreed<sup>7</sup> was the application of new prescriptive sentencing regimes. In such cases we expressed the provisional view that new prescriptive sentencing regimes should be limited in their

<sup>4</sup> So if a new community order requirement had been introduced in the interim period, it would be unavailable at sentencing.

<sup>5</sup> The offence in this example is one to which the normal 6 month time limit for proceeding with summary-only offences does not apply. Examples of offences in this category include several different health and safety offences, however they are not common, which is why the number of cases in this category will be very small.

<sup>6</sup> For discussion and defence of this view, with which no issue was taken on consultation, see IP paras 5.42 – 5.50 and para 2.15 and following above.

<sup>7</sup> See paragraph 3.39 and following above.

application to cases where the commission of the index offence<sup>8</sup> post-dates the introduction of the new regime. Again, we reiterate an example we used at consultation which was endorsed by consultees:

**Example 7** Both A and B have a single previous conviction for robbery dating back to 2010, for which they each received short prison sentences. Both in 2010 and in 2020 the maximum sentence for robbery is life imprisonment. On 1 January 2020 A commits a second robbery offence. On 1 March 2020, a change to the Code is brought into force prescribing a minimum 5 year prison sentence for a second robbery offence. On the 1 May 2020, B also commits a second robbery offence. Both A and B are arrested by the police in June 2020, and both are tried and convicted of their offences in December 2020. Both fall to be sentenced in January 2021.

It could be argued that imposing the prescribed “two strike” 5 year prison sentence in the case of either A or B is permissible in article 7 terms, as it falls well within the maximum offence range at the time each of them committed their offences in 2020. However, even if such a sentence is within the letter of article 7 as currently interpreted by the courts, there are rule of law objections to the imposition of the prescribed sentence in the case of A. At the time A committed the second offence the new law was not in force, and A would have had no warning of the prescriptive 5 year sentence which would follow (and which would have the effect of eliminating the possibility of any sentence below that of 5 years, which would otherwise have been within the available range of punishments at the time A committed his offence.) By contrast in B’s case, when the prescriptive sentencing law had been brought into force before the commission of B’s second offence, no such objection exists.

5.17 As discussed in the IP (paragraphs 5.58 – 5.63), this exception applies not only to the *introduction* of prescribed minimum sentences, but also more generally to *changes* to the law regarding the recidivist premium (in other words, the extent to which previous offending is considered to aggravate the seriousness of a later offence). Changes to the law which have the effect of making previous convictions a more significant aggravating factor in general terms, even without specifying a mandatory custodial term for a subsequent offence, should arguably be introduced with prospective effect only.<sup>9</sup> The New Sentencing Code could

<sup>8</sup> For prescriptive sentencing regimes which apply only to repeat offending (e.g. 6 months’ imprisonment or more for a second offensive weapon offence under the parts of the Prevention of Crime Act 1953, s 1, introduced by the Criminal Justice and Courts Act 2015, s 28(2)), “the index offence” refers to the offence which triggers the prescribed minimum sentence irrespective of the date of the earlier offences taken into account.

<sup>9</sup> This will obviously be a matter for the consideration of the Ministry of Justice in the future, but this is our view based on the discussion in the IP and consultees’ responses to it.

easily accommodate such a change, showing the classes of case to which the new approach would apply on the face of the Code where it deals with the effect of previous convictions on sentence.

### **MORE COMPLEX CASES: OFFENDERS WHO RETURN TO COURT AFTER THE INITIAL SENTENCING HEARING**

- 5.18 In addition to the above implications of the clean sweep which were all foreshadowed in the IP, we have considered some further, more complex, fact patterns which were not explicitly dealt with in that paper. All of these scenarios involve the application of the same basic principle, but to situations in which the offender returns to court at some stage(s) after the initial sentence is imposed.
- 5.19 It is helpful to work through some of these fact patterns with the use of examples to illustrate how the clean sweep approach would work in practice, where more complex and challenging factual situations of course can and do arise.
- 5.20 A diagrammatic representation of these discussions is provided by cases 3 and 4 of Appendix A; we recommend reading the text which follows in this section alongside that diagram. Cases 1 and 2 are already referred to at paragraph 5.3 and following above, and are both examples of the simplest 'central cases' which were the focus of the IP. The remainder of this chapter is dedicated to the more complicated fact patterns represented by cases 3 and 4.

#### **Case 3: Breaches of order**

- 5.21 In certain cases an offender is brought back to court again after the initial sentence is imposed because he or she has breached one or more of the terms of a non-custodial sentence. The options for the court in such circumstances are generally either to amend the terms of the sentence in some way, but allow it to continue, or to re-sentence the offender for the initial offence in some different way, in light of his or her unwillingness or inability to comply with the terms of the sentence initially imposed.
- 5.22 This situation creates an additional level of complexity, as not only is there the potential for the law of sentencing to have changed between the commission of the offence and the initial sentence<sup>10</sup> (as in the central cases) but also for a change between the initial sentence and the breach of order. In such a case, what powers should be available when the court is considering what to do in response to a breach of order?
- 5.23 Our clean sweep approach advocated in the IP and strongly endorsed by consultees militates in favour of the simplest answer. In this context, the simplest answer is that where the court has powers to re-sentence those powers should be the same as those which would be available under the law in force at the date on which the court is making its decision, namely the date on which the re-sentencing for breach occurs.
- 5.24 Were the position otherwise, the court would be left with the difficult and unsatisfactory task of referring back to different powers provided by the law

<sup>10</sup> Which we are fixing for these purposes as the date of conviction: see para 4.174.17 and following, above.

governing old types of sentence (which are no longer in force except for these residual cases), when dealing with breaches of such sentences. In some cases, this could require the court to look back at different rules governing sentences that have not been available on fresh conviction for many years.<sup>11</sup> This is not merely a theoretical concern: there are in practice examples of offenders being brought back on breach many years after the order's imposition.

- 5.25 For the same reasons as those put forward (and accepted by consultees<sup>12</sup>) in the central case for fixing the date of sentence as at the date of conviction, we consider it appropriate to fix the index date for determining the court's powers of re-sentence (or amendment) for breach at the date on which the breach is proved or admitted. This is because it is otherwise impossible to define what the date of re-sentence actually is, just as it is with the original sentencing exercise unless the date of conviction is chosen. For re-sentence, as with sentence, the breach could be proved on the same day that the replacement sentence is handed down, or it could be adjourned, usually (again) only for a matter of weeks.
- 5.26 We conclude that the powers available to a court when re-sentencing for breach of an old order should be the same as those in force on the date the breach of order is proved or admitted. This is subject to the same "safety valve" limitation that no graver penalty can be imposed than that available at the time the original offence was committed.
- 5.27 In the case of adding a requirement to a community order, this is uncontroversial, since a prison sentence would always have been available, which is always a graver form of punishment.<sup>13</sup> This scenario is illustrated by Example 8, below.

**Example 8** In March 2018 D is convicted of a number of offences of theft and receives a community order of 2 years' duration under the Criminal Justice Act 2003, with requirements to complete unpaid work and be excluded from a zone within the city centre where the offences were committed. In June 2018 the law governing community orders is changed to add new requirements, including a power for the court to order that a defendant's movements be monitored by a GPS tagging system. The New Sentencing Code is brought into force in January 2019, replacing the provisions of the 2003 Act governing community orders and

<sup>11</sup> In fact it is possible in theory that a court might have to look back a generation: an offender could be summonsed for breach of order during the currency of the order, but fail to appear, and then be arrested years later and produced for the breach of order to be dealt with. Similarly, in the case of Criminal Justice Act 2003 community orders involving an unpaid work requirement, the order continues to subsist until the unpaid work is completed (s200(3)). This brings about the possibility, in theory, that an offender could be returned to court for breach of the order many years after it was imposed, and long after such orders ceased to be available as a fresh disposal (and, consequently, long since courts have ceased to be familiar with them).

<sup>12</sup> See para 3.45 and following, above.

<sup>13</sup> See IP para 5.8 and fn 10 to that paragraph.

reflecting the law as at the date of its introduction, including the GPS tracking power. In February 2019, D breaches his community order by failing to attend his unpaid work appointments and entering the exclusion zone. He is returned to court and admits the breach of the terms of his order in March 2019. The court allows D to remain on a community order, but adds a GPS tracking requirement to that order.

#### **Case 4: Re-sentencing where a further offence occurs during the currency of a non-custodial sentence**

- 5.28 Another situation in which an offender might be brought back to court following the initial sentence being imposed is when he or she commits a further offence. In such a case, if a non-custodial sentence was imposed for the first offence and that sentence is still ongoing at the time conviction for the further offence, the court will have to decide what to do about the pre-existing sentence.
- 5.29 The court in such a case, in addition to sentencing the offender for the further offence, will usually have a power to re-sentence the offender for the first offence.<sup>14</sup> Such power might be exercised in recognition of the fact that the offender's further offence during the currency of the first sentence represents a failure to comply with the purpose of that first sentence (a clear example might be breach of a conditional discharge).
- 5.30 Alternatively, a court might exercise the power to re sentence for the first offence simply because the sentence being handed down for the second offence is inconsistent with the first sentence being allowed to continue (e.g. where the second offence results in a custodial sentence, which makes continuation of a community order imposed for the first offence impossible).
- 5.31 As in case 3 above, an additional level of complexity is involved compared with the central case, as not only is there the potential for the law of sentencing to have changed between the commission of the offence and the initial sentence<sup>15</sup> (as in the central cases) but also for a change between the initial sentence and the conviction for the subsequent offence (when the question of re sentencing the first offence will arise). As in case 3 above, a question arises: what powers should be available when the court is considering what to do about the sentence for the first offence?
- 5.32 Contenders would appear to include, at the least: the powers<sup>16</sup> available under the law at the time the first offence was committed; the powers available under the law at the time of conviction for the first offence; and the powers available

<sup>14</sup> For example, under Part 5 of Schedule 8 to the Criminal Justice Act 2003.

<sup>15</sup> Which we are fixing the date of (for these purposes) as the date of conviction: see para 4.17 and following above.

<sup>16</sup> The phrase 'the powers available under' is used here to describe the substance of those powers, not their source, since, whilst our policy is that the outcome should be the same, in certain cases of breach of old orders the technical source of that same outcome may remain the old law, as saved and amended by provisions of the Code.

under the law at the time of the conviction for the second offence (when the question of re-sentencing arises).

- 5.33 As with case 3 above, the clean sweep approach militates in favour of the simplest answer: that the powers available should be the same as if the law applied was that in force on the date the court is making its decision, namely the date on which the conviction for the subsequent offence occurs.<sup>17</sup>
- 5.34 As with all of cases 1 – 3, the same powers apply to the entire sentencing exercise in case 4, that being those powers which would be available under the law in force as at the date of the further conviction, subject only to the usual safety valve (see paragraph 4.5 and following, above). That is so irrespective of the fact that the sentencing exercise might involve both sentencing the further offence, and re-sentencing for the earlier offence. It is also the case irrespective of the fact that the law might have changed at any time between the original offence and the conviction for the further offence.
- 5.35 However, an additional consideration arises in this case that did not arise in any of cases 1 – 3 which flows from the fact that the sentencing exercise in case 4 involves two or more separate offences, committed on separate dates. This consideration relates to the application of the safety valve, in order to ensure that the punishment imposed does not exceed the maximum available at the time of the commission of the offence. Whereas the same single (later) date can be taken in identifying the powers available to the court for the entire sentencing exercise (both to sentence for the further offence and any re sentencing for the original offence) separate dates must be borne in mind when applying the safety valve, namely the dates of each of the separate offences.
- 5.36 To summarise, the practical implications of the clean sweep approach in case 4, the powers available for the entire sentencing exercise<sup>18</sup> are those available under the law in force at the time of the conviction for the further offence. When applying the safety valve test, the sentence imposed in respect of each offence should be compared with the maximum sentences which were available for those separate offences on their respective dates of commission.
- 5.37 An example may assist to make the discussion in this section clear.

<sup>17</sup> And therefore the date on which the question of sentencing for that subsequent offence (and resentencing for the original offence) first arises.

<sup>18</sup> Both the sentence for the second offence, and any re-sentencing for the first offence where the sentence for that offence is ongoing at the time of conviction for the second offence.

**Example 9** In October 2018, D is convicted of a fraud offence and receives a community order of 18 months' duration with requirements of unpaid work and an electronically monitored curfew requirement. In December 2018, D wounds a person V with a glass in the course of a fight outside a nightclub. In January 2019 the New Sentencing Code is brought into force: the New Sentencing Code will apply to all cases in which conviction post-dates its commencement. In March 2019 D is apprehended by the police for his involvement in the fight in December, and in May 2019 D pleads guilty to one count of causing grievous bodily harm with intent in respect of the April incident. On the day of his guilty plea in May 2019, the Crown Court Judge sentencing D proceeds directly to sentence. The judge sentences D under the New Sentencing Code to a 4 year prison sentence for the assault offence, and re-sentences him in respect of the fraud offence to a concurrent term of 6 month's imprisonment, having revoked the community order. In each case, the judge checks separately that the sentence imposed falls within the historic maximum available at the time of the offences respectively (October 2018 for the fraud, and December 2018 for the assault causing grievous bodily harm).

## PART 6

# LIST OF RECOMMENDATIONS

- 6.1 **Recommendation 1:** We recommend that a court sentencing under the Code (and an appellate court on appeal) should ask whether the total penalty which it is considering imposing for the offence(s) before it, taken as a whole, would be more severe than the maximum which could have been imposed for the offence(s) at the time of commission.<sup>1</sup>
- 6.2 **Recommendation 2:** We recommend that new laws on prescribed minimum sentencing and recidivist premiums be applied only to cases where the index offence post-dates the change in the law.<sup>2</sup>
- 6.3 **Recommendation 3:** We recommend that the New Sentencing Code and later versions of it should apply to all sentencing exercises in which conviction takes place after commencement of the Code or that version of it.<sup>3</sup>

(Signed) DAVID BEAN, *Chairman*  
NICK HOPKINS  
STEPHEN LEWIS  
DAVID ORMEROD  
NICHOLAS PAINES

MATTHEW JOLLEY, *Acting Chief Executive*  
10 May 2016

<sup>1</sup> Para 4.8.

<sup>2</sup> Para 4.15.

<sup>3</sup> Para 4.24.

## APPENDIX A: DRAFTING IMPLICATIONS OF CLEAN SWEEP APPROACH

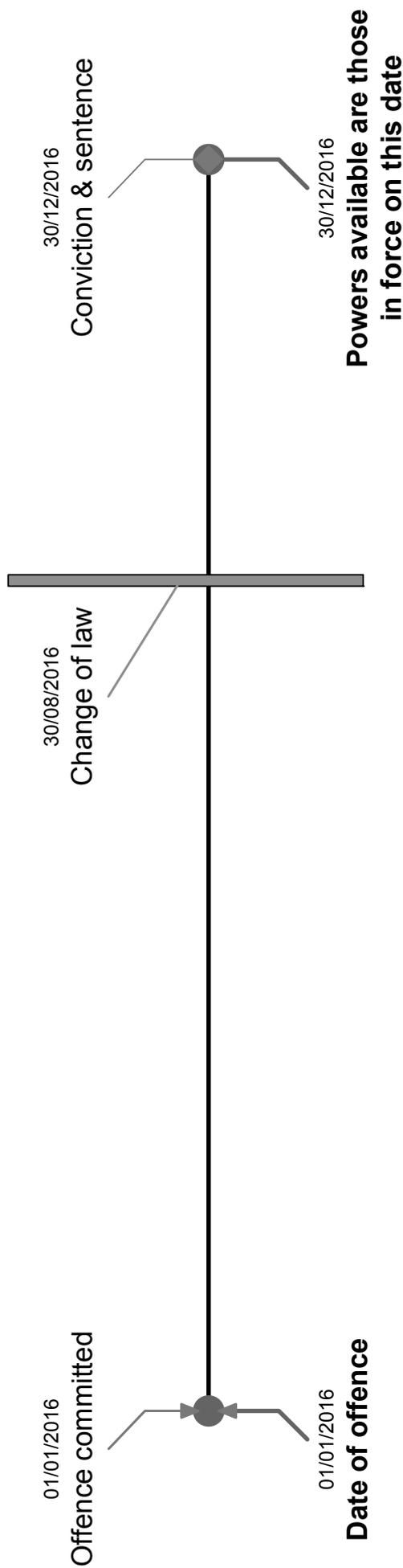
This appendix is designed to illustrate the practical outcomes in various scenarios, should our recommendation for a “clean sweep” approach to transition in sentencing law be adopted. It should be read alongside Part 5.

The **date of offence** is the date of the commission of the offence for which the offender is being sentenced in the exercise we are looking at.

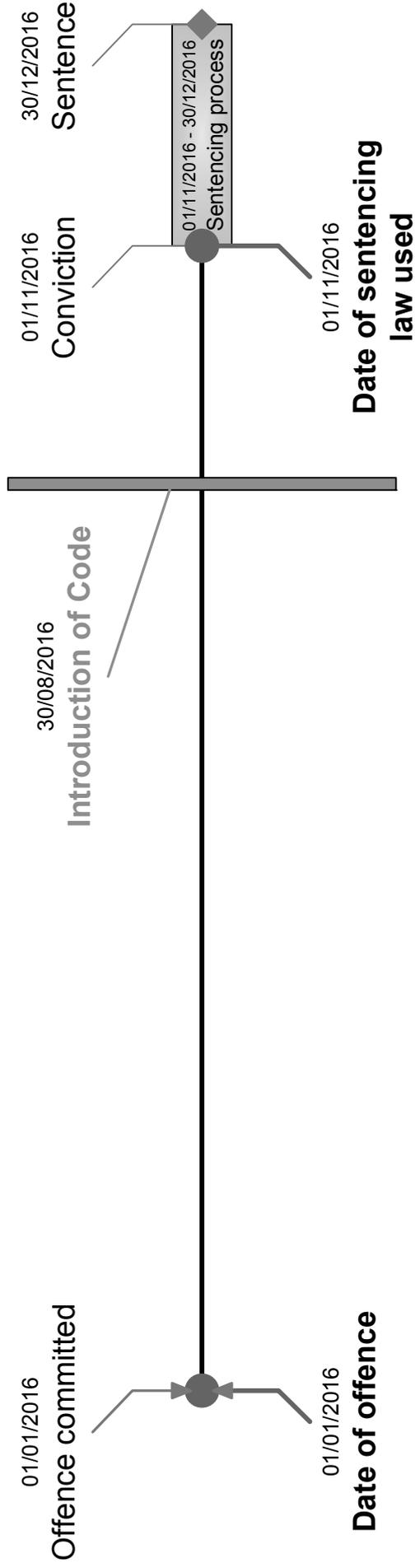
**Powers available are those in force on this date** means that this is the date by reference to which the powers available to the court in a particular sentencing exercise are determined. That is to say, changes before this point are to be taken into account (except where the safety valve test applies or the Code says that they are not to be for other reasons) but changes after this point are always irrelevant. This is because the sentencing exercise is considered to have started at this date. Generally, this date is the date of conviction.

The transition model explained in this paper is designed to work for both the introduction of the Code and for later amendments to it, so where one or the other is specified in the following examples, it is for illustrative purposes only.

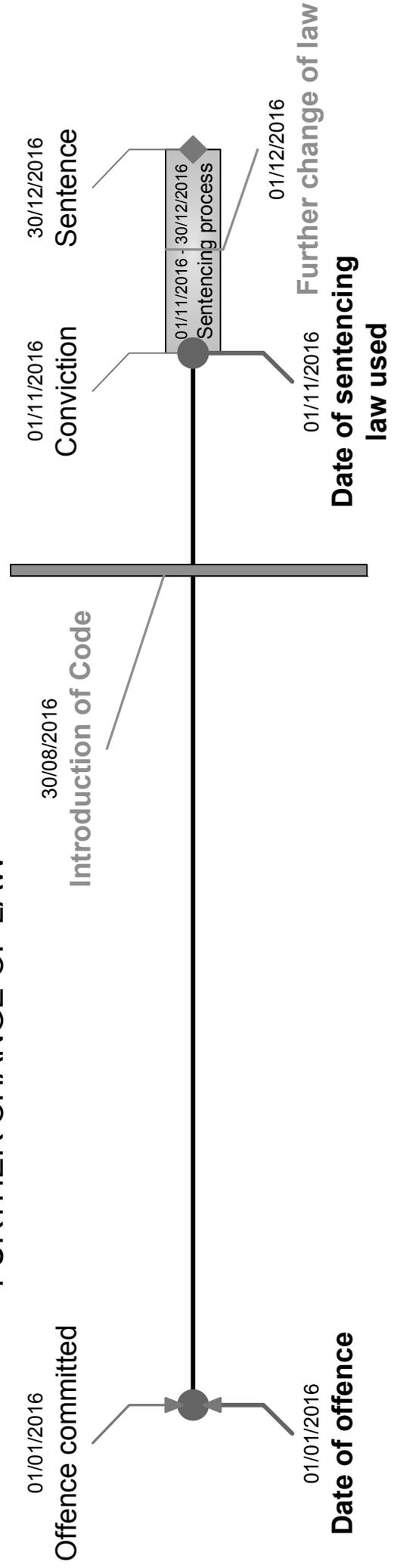
### CASE 1: SENTENCE ON DAY OF CONVICTION



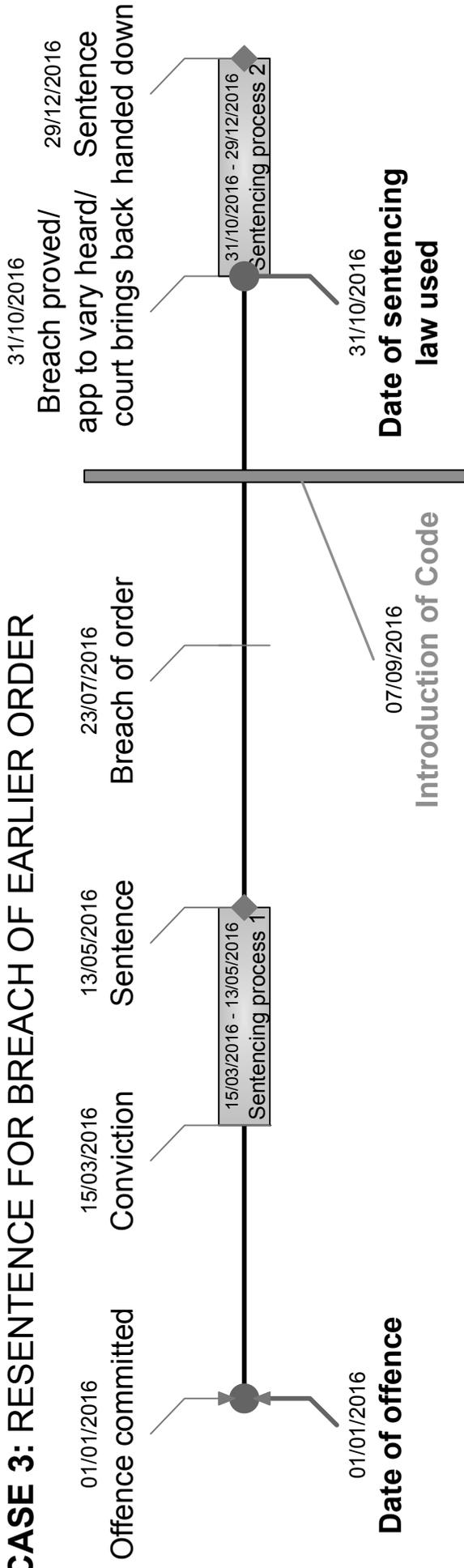
**CASE 2A: SENTENCE PASSED 2 MONTHS AFTER CONVICTION**



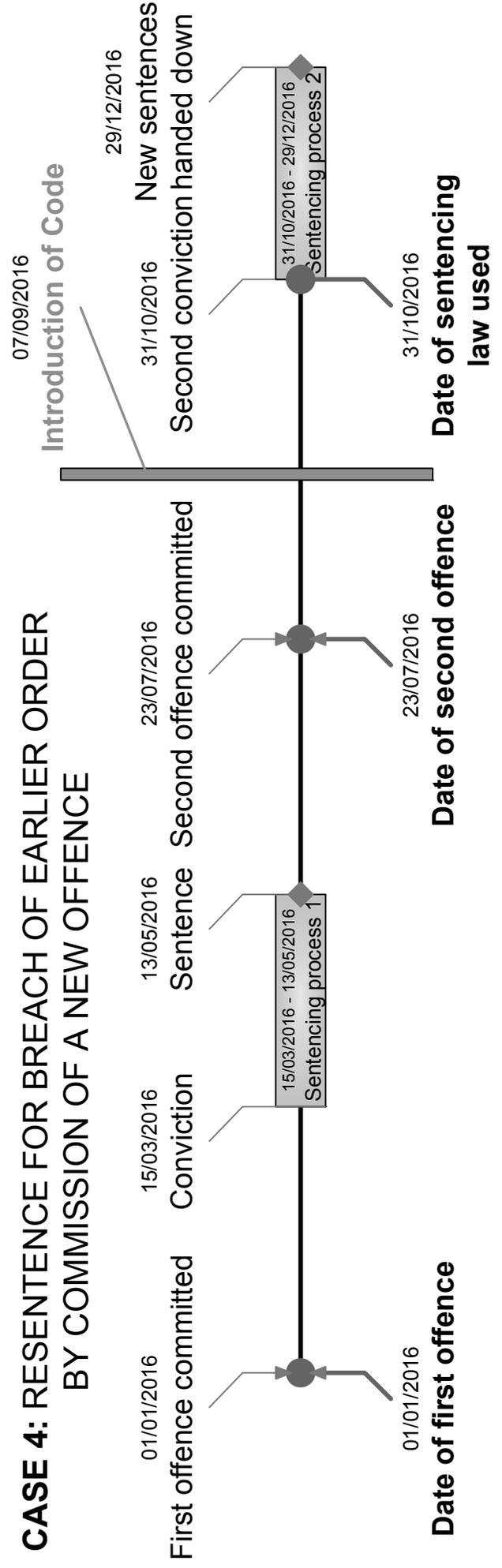
**CASE 2B: SENTENCE PASSED 2 MONTHS AFTER CONVICTION & FURTHER CHANGE OF LAW**



### CASE 3: RESENTENCE FOR BREACH OF EARLIER ORDER



### CASE 4: RESENTENCE FOR BREACH OF EARLIER ORDER BY COMMISSION OF A NEW OFFENCE



## **APPENDIX B**

### **LIST OF CONSULTEES**

Professor Andrew Ashworth QC, All Souls' College, Oxford

Robert Banks, editor, *Banks on Sentence*, and Lyndon Harris (joint response)

Professor Judge Michael Bohlander, University of Durham and Extraordinary Chambers in the Courts of Cambodia

Simon Creighton, Bhatt Murphy LLP

Dr Susan Easton, Brunel University

The Rt Hon The Lord Faulks QC, Minister of State for Justice

Lyndon Harris, editor, *Current Sentencing Practice* and *Criminal Appeals Reports (Sentencing)*

Professor Peter Hungerford-Welch, City Law School

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HHJ Graham Knowles QC

Professor Barry Mitchell, Coventry University

Nicola Padfield, Fitzwilliam College, Cambridge

Lord Justice Treacy, Chair, Sentencing Council

Bar Council

Council of HM Circuit Judges

Crown Prosecution Service

Government response

HM Council of District Judges (Magistrates' Courts)

Law Society

London Criminal Courts Solicitors' Association

Magistrates' Association

National Bench Chairmen's Forum

Serious Fraud Office

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