

Title: Sentencing IA No: LAWCOM0059 RPC Reference No: Lead department or agency: Law Commission Other departments or agencies: Ministry of Justice	Impact Assessment (IA)			
	Date: 01/01/2016			
	Stage: Consultation			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
	Contact for enquiries: Sentencing@lawcommission.gsi.gov.uk			
Summary: Intervention and Options				RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£255.57m	£m	£m	Not in scope	Qualifying provision

What is the problem under consideration? Why is government intervention necessary?

The law governing sentencing procedure has undergone a substantial and significant degree of change over the past 30 years and has become overwhelmingly complex and disparate. The current provisions governing sentencing procedure run to over 1300 pages, with provisions contained in Acts as varied as the Company Directors Disqualification Act 1986 and the Dangerous Dogs Act 1991. In practice, many sentencing determinations require the judge to have reference to overlapping, technical and complex sentencing regimes alongside the current law. Practitioners and the judiciary reported to us that they find it complex and difficult to understand the current law. This leads to delay, costly appeals and the imposition of many unlawful sentences. Government intervention is required to simplify and streamline the law in this area so as to ensure that it is accessible and avoid undue errors and delays.

What are the policy objectives and the intended effects?

The policy objectives are:

- (1) to ensure the law in relation to sentencing procedure is readily comprehensible, and operates within a clear framework;
- (2) to increase public confidence in the criminal justice system;
- (3) to ensure the criminal justice system operates as efficiently as possible.

The intended effect of the changes are: to decrease unlawful sentences; ensure cost and court time savings; and promote clarity in the law.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing.

Option 1: Undertake a consolidation of the legislation governing sentencing procedure, and remove the need to make reference to layers of historical sentencing procedure by extending the newly consolidated law to all appropriate cases.

Our preferred option is Option 1 because this addresses all the problems identified in relation to the current state of the law and meets the identified policy objectives of the recommendations.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope?		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible _____ **Date** _____
SELECT SIGNATORY: _____ :

Summary: Analysis & Evidence

Policy Option 1

Description: Codification of sentencing legislation through the enactment of a new sentencing code

FULL ECONOMIC ASSESSMENT

Price Base Year 2016/17	PV Base Year 2016/17	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £180.89	High: £337.99	Best Estimate: £255.57

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Negligible	Negligible	Negligible
High	Negligible	Negligible	Negligible
Best Estimate	Negligible	Negligible	Negligible

Description and scale of key monetised costs by 'main affected groups'

Transitional Costs: Training – Judges and legal practitioners. Expected to be negligible as no new types of sentence or disposal are being introduced; Drafting the Sentencing Code has been on-going with completion scheduled on implementation – no additional costs; Guidance materials – on line updates as part of regular publication of change – negligible cost.

On-going costs: None identified

Other key non-monetised costs by 'main affected groups'

No non-monetised costs have been identified.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	£21.75	£180.89
High	0	£40.64	£337.99
Best Estimate	0	£30.73	£255.57

Description and scale of key monetised benefits by 'main affected groups'

Transitional benefits: None identified

On-going benefits¹: Streamlined new Sentencing Code enables the reduction in court time required for sentence hearings in Magistrates' courts [£17.97 million]/Crown Court [£5.11 million] per year[HMCTS]; Reduced advocacy costs in Magistrates' courts - £4.87 million per year [CPS]; Avoided/Shortened Crown Court appeals from Magistrates' courts - £0.56 million per year [HMCTS]; Avoided/Shortened Court of Appeal hearings from Crown Court - £0.15 million per year [HMCTS]; Reduced CPS costs in appeals - £0.07 million per year; Reduced legal aid [Magistrates appeals] - £0.24million per year [Ministry of Justice]; Reduced legal aid [Crown Court appeals] - £0.25 million per year [Ministry of Justice]; Reduced number of appeal applications, £0.04 million per year.

Other key non-monetised benefits by 'main affected groups'

Improved certainty in sentencing; Reduced build-up of back log in cases throughout the court system as cases are dealt with more swiftly, and fewer cases subject to appeal; Increased confidence in the legal system through reduced number of errors and notice of subsequent correction; Reduced resourcing of remedial measures due to sentencing errors – for example individual prisoner transport in Court of Appeal cases; Reduced number of training initiatives aimed at un-picking complex sentencing legislation.

Key assumptions/sensitivities/risks

Discount rate

3.5

Assumptions: 1. Future sentencing procedure legislation will be enacted by amendment to the Code and in a manner that retains the benefit of our new approach to transitional arrangements.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

¹ All indicated savings are best estimates

Evidence Base (for summary sheets)

Introduction

Technical Glossary

This impact assessment uses a number of technical terms in relation to the law on sentencing and accordingly it is useful to clearly define those technical terms that are used in this paper.

- **Commencement** – When legislation is enacted by Parliament it does not necessarily have effect as law immediately after being passed or made. Many legislative provisions have effect only when either an order is made to say the provisions have effect or after a period of time has passed. The coming into force of a legislative provision (its becoming law) is described as its commencement.
- **Commencement provisions** – Where legislation does not take effect as law immediately after being passed or made it normally contains a provision as to when, or in what circumstances, the other legislative provisions in that Act are to be commenced. This provision can either provide for the legislation to come into force automatically after a certain date, or after another event such as when a Statutory Instrument is made. The term “commencement provision” is used interchangeably to describe this general provision and any specific statutory instruments made under it.
- **Committal for sentence** – Where a magistrates’ court dealing with a particular case feels its powers to sentence are insufficient to reflect the seriousness of the offence, or where the offender in that case is already due to be dealt with in the Crown Court in respect of other offences, the magistrates’ court can transfer the case to be sentenced in the Crown Court using their powers in sections 3 to 4 of the Powers of Criminal Courts (Sentencing) Act 2000. In doing so the court must either commit the offender to custody or place them on bail, and the process is called committal for sentence.
- **Consecutive/concurrent sentences** – where two or more sentences are imposed on an offender they can be imposed either consecutively or concurrently. Concurrent sentences are served simultaneously. Where sentences are imposed consecutively the offender will serve one sentence and then subsequently serve the next.
- **Consequential amendments** – Often when substantial changes are made to the law, such as the introduction of a new type of sentence, there is a need for a number of other legislative provisions to be updated to reflect this change so that the law can continue to operate properly. These subsequent changes are known as consequential amendments.
- **Recidivist premiums** – Recidivist premiums are rules requiring the court to sentence an offence more harshly due to the offender having relevant previous convictions.
- **Slip rules** – The term slip rule(s) refers to the courts’ powers under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates’ Courts Act 1980 to alter previously imposed sentences to correct errors of fact or law.
- **Transition date** – The transition date is the date specified by transitional provisions before, or after, which the old or new law applies.
- **Transitional provisions** – When the law is changed by Parliament, transitional provisions provide for how the law should apply to cases that straddle the two regimes. These provisions ensure that there is a smooth transition between two different legal regimes, for example, making clear whether certain cases are dealt with under the old law, or the new law, potentially applying either with modification. The issue of transitional provisions is closely connected to commencement (see above) and the way in which new laws are given effect.
- **Operative law** – the term operative law is used here to describe legislation that has not only been enacted by Parliament, but has also been commenced so that it has become law and has legal effect.

Background

In the year ending September 2016 just over 1.2 million offenders were sentenced in the criminal courts² with a further 4,241 appeals against sentence heard in the Crown Court³ and 1,294 appeals against sentence heard in the Court of Appeal.⁴ These very substantial figures must be seen against a backdrop of an over-worked criminal justice system where the average waiting time for an offender whose case is committed to the Crown Court for sentence is 6.1 weeks,⁵ and 5.7 months for an appeal against sentence to the Court of Appeal.⁶

Over the past 30 years the law on sentencing procedure has become increasingly complex and distributed across ever more Acts. With continuing developments in penal policy the pace of legislative change in this area has been rapid. The introduction of a proliferation of new variations of sentencing order on an almost annual basis, combined with the current legislative practice of introducing such orders in free-standing legislation, has led to the law existing in dozens of different pieces of legislation with no clear structure. The statutory provisions regulating sentencing procedure in force in August 2015 that were applicable to modern offences ran to over 1300 pages.⁷ Further, many cases involving historic offences require reference to several different older and overlapping sentencing regimes alongside the modern law. The effect and operation of these regimes is often opaque and difficult to decipher, and even their presence is often not readily apparent.

As it stands even judges and practitioners find it exceptionally difficult to identify and understand the applicable sentencing procedural law for a given case. This causes frequent and unnecessary errors, requiring appeals or further hearings to rectify, as well as delaying the administration of justice and presenting rule of law concerns.

The Sentencing Code project launched as part of the Law Commission's 12th programme of law reform.⁸ The project aims to create a single sentencing statute, the Sentencing Code, which brings all of the existing legislation governing sentencing procedure into one place. It will also ensure the law is framed in clearer, simpler and more consistent language and has a logical structure, making the law more accessible for its users: the judiciary, practitioners and members of the public.

When the project was launched in January 2015 it was met with significant support, reflecting the wide-ranging agreement that the law in this area is in urgent need of reform. The Lord Chief Justice, the Director of Public Prosecutions and heads of the solicitors' and barristers' professions all voiced support of the project, as did Lord Justice Treacy the Chairman of the Sentencing Council. The Rt Hon Sir Brian Leveson, President of the Queen's Bench Division, in his January 2015 report, *Review of Efficiency in Criminal Proceedings*, also commended our decision to incorporate codification of the law and practice of sentencing into our work plan.

We have published two reports to date on this project, one on the issue of transition to the New Sentencing Code,⁹ and one on the current law relating to sentencing.¹⁰ Both received significant and wide-spread support from stakeholders on public consultation. Our key recommendations were that:

1. A Sentencing Code should be enacted that brings all of the primary legislative material with which a court might possibly be concerned during the sentencing process into a single place.
2. The Code should enact a "clean sweep" of the legislation, removing the need to make reference to historic law and transition provisions by applying the new law to all cases except for limited categories of exceptional case.

Responses on consultation were overwhelming positive to both of these recommendations with our "clean sweep" approach receiving explicit support in almost all responses and no dissent whatsoever. Strong support for the Code in general was also received from a number of key stakeholders including the Government, HM Council of District Judges, the Council of HM Circuit Judges and the Crown Prosecution Service.

The Code will bring all of the primary legislative material with which a court might possibly be concerned during the sentencing process into a single place. There are a few important caveats to this in that the decision was taken to

² Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q5.1A.

³ Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C12.

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

⁵ Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C8.

⁶ Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex B.

⁷ Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.

⁸ Twelfth Programme of Law Reform (2014) Law Com No 354.

⁹ A New Sentencing Code for England and Wales (2016) Law Com No 365.

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

exclude from scope the law relating to road traffic offences, confiscation proceedings and the administration and enforcement of penalties (with the exception of those relating to community orders and suspended sentences).¹¹

This impact assessment accompanies the Law Commission's final Consultation Paper and draft Bill for this project.

Problem under consideration

The law in relation to sentencing is overwhelmingly complex, and difficult to identify and understand, even for practitioners and judges. There are three key problems with the law in this area:

- The current law is contained in numerous provisions spread across a multitude of statutes leading to a lack of consistent structure, resulting in inconsistencies and conflicts as well as making it difficult to find the relevant law.
- Cases involving historic offences require reference to several different older overlapping, technical and complex sentencing regimes alongside the modern law.
- It can be very difficult to ascertain which legislative provisions have been commenced and the effect of transitional provisions.

This section will examine each problem in turn before looking at their impact as a whole.

The disparate sources of sentencing law

The legislation on sentencing is incredibly disparate as illustrated by our published compilation of the current law on sentencing.¹² The compilation contained the primary and secondary legislation in force relating to sentencing force in England and Wales on 31 August 2015, as well as including summaries of key pieces of the common law and relevant extracts from the Criminal Procedure Rules and Practice Direction 2015.¹³ The compilation ran to over 1300 pages long and contained provisions from Acts as varied as the Company Directors Disqualification Act 1986, the Dangerous Dogs Act 1991 and the Licensed Premises (Exclusion of Certain Persons) Act 1980.

This legislative disparity has led to two significant issues:

- an impenetrable legislative landscape; and
- undesirable legislative inconsistencies.

An impenetrable legislative landscape

The extraordinary number of statutory provisions relating to sentencing, and their lack of any over-arching structure means that without reference to a specialist research text it is almost impossible to identify the relevant law applicable in a given case. It is difficult even for judges and practitioners to determine what powers and duties apply. It is not simply that it is difficult to ascertain in which Acts and Statutory Instruments relevant provisions may be contained but also that within those Acts and Statutory Instruments there is a lack of any standard form which such provisions take, making it very difficult to understand their effect and how they operate alongside other provisions.

Undesirable legislative inconsistencies

The state of the law has also led to undesirable inconsistencies and conflicts between different pieces of legislation. Examples range from the minor, such as the different statutory definitions of what constitutes a "sentence",¹⁴ to the more serious. Section 83 of the Powers of Criminal Courts (Sentencing) Act 2000, for example, creates restrictions on imposing custodial sentences on persons not legally represented, however, the definition of custodial sentences omits extended sentences of detention imposed on those aged under 18 under section 226B of the Criminal Justice Act 2003 – it manifestly cannot be the intention of the provision that a court should be able to impose a serious extended sentence on a youth without them being legally represented but that is apparently what the provision provides.

The need to refer to historic sentencing regimes

¹¹ Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016) paras 2.8 to 2.16, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf. This is discussed in more detail in The Sentencing Code: Volume 1 – Consultation Paper (2017) Law Commission Consultation Paper No 232, chapter 2.

¹² Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.

¹³ Criminal Procedure Rules and Practice Direction 2015 only came into force October 2015 but were publicly available prior to that date and were thus included.

¹⁴ Compare section 142 of the Criminal Justice Act 2003 with section 150 of the Magistrates' Courts Act 1980.

It has become the norm for sentencing legislation to be commenced in an incremental manner and for the provisions to be introduced so that they only apply where certain events occur after their commencement date. Legislative provisions relating to sentencing often have different commencement and transition dates and therefore a user of the legislation must make reference to a range of operative dates, such as conviction, sentence and offence. As a result, many sentencing exercises involving historic offences require reference to many older sentencing regimes alongside the modern law.

A good example of this problem is the sentencing of dangerous offenders in historic sex cases. Most of the current dangerousness provisions – the discretionary life sentence under section 225 of that Act, and the extended sentence of imprisonment under section 227 of that Act - apply only to offences committed after 4 April 2005. The automatic life sentence for a second listed offence under section 224A of the Criminal Justice Act 2003 however applies only to an offence committed after 3 December 2012.

The dangerousness provisions also require that the offence for which the offender is being sentenced was listed in Schedules 15 or 15B of the Criminal Justice Act 2003 at the time the offence was committed. These both have been amended, and thus sentencing even for relatively recent historic cases requires reference to old versions of the legislation.

Sentencing becomes significantly more complex for offences committed pre 4 April 2005. For an offence committed after 30 September 1998 and before 4 April 2005 the courts must have recourse to their powers to impose a longer than commensurate sentence, or an extended sentence, under sections 80 and 85 of the Powers of Criminal Courts (Sentencing) Act 2000 or to impose an automatic life sentence under section 109 of the Powers of Criminal Courts (Sentencing) Act 2000.

Offences before 30 September 1998 require reference to other even older regimes. The difficulties in navigating these provisions have led produced a high volume of sentencing errors and the need for the publication of several specialist texts¹⁵ explaining their effect.

The opacity of commencement and transitional provisions

Many sections in statutes are never commenced despite being the frequent subject of amendment (some of which are commenced and some of which are not) or are only commenced for a limited set of circumstances (and this is not made clear on the face of the statute, only in the commencement provision). These provisions appear in the printed versions of the Acts as do the commenced provisions. Without recourse to expert assistance or online databases it is impossible to know what is in force. Even when it is clear that a provision is in force for certain cases it can be difficult to ascertain which cases these are, and how the modifications any transitional provisions provide operate on the effect of the provision. A good illustration of the serious problems which can be caused by these complex transitional arrangements is provided by the case of *R (Noone) v Governor of Drake Hall Prison & another*¹⁶ which we discussed in our first issues paper.¹⁷ The case concerned the application of the law on release from custody of prisoners serving consecutive sentences of imprisonment and when it reached the Supreme Court, the President, Lord Phillips noted that “hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions.”¹⁸

The impact of these problems

Ensuring the law is clear, certain and accessible is fundamental to the rule of law, which requires that the law be sufficiently clear to enable an individual to understand the potential consequences of their actions, and the scope and nature of the penalty to which they may be liable. The current state of the legislative landscape means that it is simply impossible to describe the law in this area as clear, accessible or certain.

The confused state of the current law also has negative effects in practice. It is extremely difficult even for an experienced judge to identify the correct sentencing procedure applicable to any case. The impact of this is that judges spend more time on the sentencing process than ought to be needed, which adds cost and delay to sentencing determinations and can have knock-on effects on the punctuality of other trials. Practitioners are also forced to spend more time assisting the judge on these issues: in *Noone* Mr Justice Mitting noted that it had taken almost five hours to explain the statutory provisions in question to him, a High Court judge.¹⁹

¹⁵ Such as HHJ Patricia Lees and Eleanor Laws QC, *The Sexual Offences Referencer* (2nd edn, 2014) and HHJ Peter Rook and Robert Ward, *Rook & Ward on Sexual Offences: Law and Practice* (5th edn, 2016).

¹⁶ [2010] UKSC 30, [2010] 1 WLR 1743.

¹⁷ Sentencing Procedure Issues Paper 1: Transition (2015), paras 2.4-2.7. Available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf>.

¹⁸ [2010] UKSC 30, [2010] 1 WLR 1743 at [1].

¹⁹ *R (Noone) v Governor of Drake Hall Prison & another* [2008] EWHC 207 (Admin), [2008] ACD 43 at [1].

This complexity leads to error. That causes additional cost and delay with additional court hearings under the “slip rule” to remedy minor errors²⁰ and more appeals to the Court of Appeal (Criminal Division) (“CACD”). These unnecessary appeals on sentence are expensive and time consuming, and delay other appeals. An analysis of 262 randomly selected sentencing cases in the CACD in 2012 showed that the complexity of the legislation is resulting in an extraordinary number of wrongfully-passed sentences: there were 95 unlawful sentences passed in the sample. These were not sentences which the CACD thought required reducing on the basis they were manifestly excessive, but cases in which the type of sentence(s) imposed was wrong in law. In addition, the complexity of the law is undoubtedly resulting in many inappropriate sentences and is influential in producing unduly lenient sentences.

Further, the complexity 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. We have now reached the point at which it is difficult to see how the existing morass of legislation can effectively be amended. Further where it is amended with the complexity of the law, consequential amendments to relevant sentencing legislation are often missed.

Rationale for Intervention

The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and re-distributional reasons (e.g. to reallocate goods and services to the more needy groups in society).

The lack of an over-arching structure and the opacity of the law has made it difficult to navigate the law efficiently. Incomplete information has been applied and this has contributed to sentencing errors. Errors lead to the avoidable waste of resources as additional resources are required to correct the initial mistake. The problem is further exacerbated by the already considerable demands on the court system which have led to a growing back log of cases. These failings result in significant economic costs for the state, and individual defendants in addition to the emotional distress. As well as harm to the operations of efficient justice there is the potential for loss in public confidence in the law more broadly.

Statutory intervention is required because it is the only way to resolve the problems under consideration.

Without reform these problems will only continue: sentencing law will only become increasingly more disparate as new sentencing statutes create new sentencing procedures and judges and practitioners will have to refer to increasingly complex historic regimes as well as attempt to make sense of complicated transitional arrangements. Left alone sentencing will then continue to be impenetrable to the lay user, and unnecessarily difficult to understand and apply for practitioners.

Policy Objectives

- **To ensure the law in this area is readily comprehensible, and operates within a clear framework.** The proposed reforms would make the law easier, for both professionals in the criminal justice system and lay users, to understand. It would also allow for a more logical development of the law by allowing policy officials and drafters to more easily ascertain the impact of legislative changes.
- **To increase public confidence in the criminal justice system.** Public confidence is harmed when sentencing decisions are routinely unlawful, unduly lenient or otherwise inappropriate because of the incomprehensible nature of the current law. The reforms proposed here would aim to reduce these occurrences and thus improve public confidence in the system. In commenting at the outset of the project the Director of Public Prosecutions further noted that by providing the public with a greater level of understanding in the sentencing process the project may ease some of their concerns in this area.
- **To ensure the criminal justice system operates as efficiently as possible.** Clarification and simplification of the law of sentencing will help reduce the number of appeals and help practitioners identify the relevant law more efficiently. These changes will not only lead to substantial savings but will also help reduce the amount of court time necessary for sentencing, a matter of significant concern when the

²⁰ Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 142 of the Magistrates’ Courts Act 1980, give the Crown Court and magistrates’ courts respectively the power to rectify mistakes and make minor alterations to imposed sentences. These powers are colloquially known as the “slip rule” and in the Crown Court must be exercised within 56 days from the imposition of sentence.

average waiting time for a Crown Court trial in Q1 2016 was 20.1 weeks for an offence triable-either way and 21.3 weeks for indictable only offences.

Scale and Scope

An introduction to sentencing

Sentencing can broadly be defined as the process by which the criminal courts impose criminal sanctions on an offender in response to their conviction or plea of guilt.²¹ The range of sanctions available to the courts is now very significant ranging from the imposition of imprisonment and fines to community based sentences such as community orders or suspended sentence orders which are served in the community and include requirements to either undertake or desist from specified actions at specified times or the various types of behaviour orders which are ancillary to the main punishment but require offenders to desist from certain behaviours. Some of the types of sentence available are complex and technical as is the effect of, and restrictions on, imposing certain types of sentence as a package.

Cases are sentenced in both the magistrates' courts (including the youth court) and the Crown Court. The magistrates' courts deal with less serious criminal offences and accordingly have more limited sentencing powers. Offenders are usually sentenced in the same court in which they were convicted or plead guilty before, but can where the magistrates' courts sentencing powers are insufficient be committed up to the Crown Court, or in some situations remitted to a different court for sentence.

Appeals against sentences imposed by the magistrates' courts are heard by the Crown Court and appeals against sentences imposed by the Crown Court are heard by the Court of Appeal.

The enforcement and review of imposed sentences is largely dealt with in the magistrates' courts but certain hearings are heard in the Crown Court.

The scale of sentencing

On average 1.22 million offenders are sentenced in the criminal courts per annum.²² This figure however includes summary-motoring offences to which the Sentencing Code will not apply – the decision having been made to exclude road traffic from its scope, the law on sentencing road traffic offending being conceptually different and self-contained in the Road Traffic Offenders Act 1988.

On average 740,000 offenders are sentenced in the criminal courts each year in circumstances to which the Sentencing Code would apply:²³ it is estimated that 88,800 [about 12%] of these are sentenced by the Crown Court and 651,200 [about 88%] by the magistrates' courts each year.²⁴ It is noted that these proportions are fairly constant over time.

Appeals

Over the last five years on average 5,200 appeals against sentence from the magistrates' court are heard in the Crown Court²⁵ per annum.

Over the last five years on average a further 1,600 appeals against sentence are heard in the Court of Appeal per annum,²⁶ and 4,600 applications for appeals against sentence received.²⁷

Breach and enforcement Hearings

²¹ Nicola Padfield, Rod Morgan and Mike Maguire, 'Out of court, out of sight? Criminal sanctions and non-judicial decision-making' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th ed 2012).

²² Figures rounded to the nearest ten thousand. Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q5.1A.

²³ Figures rounded to the nearest ten thousand. Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q5.1A.

²⁴ Percentage taken from this year and applied to five year averages. Ministry of Justice, *Criminal Justice Statistics Quarterly: September 2016* (16 February 2017) table Q4.4.

²⁵ Average taken over the last five years and rounded to the nearest hundred. Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C12.

²⁶ Average taken over the last five years and rounded to the nearest hundred. Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex D.

²⁷ Average taken over the last four years and rounded to the nearest hundred. Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex F.

There are also a variety of breach, and enforcement hearings relating to imposed sentences each year. While most of these are outside the scope of the New Sentencing Code, and will be unaffected by its introduction the Code consolidates and amends the law governing the enforcement and breach of community orders and suspended sentences.

On average 24% of community orders terminate early due to a failure to comply with community requirements or the conviction of a further offence and 29% of suspended sentence orders are terminated early for the same reasons.²⁸

We estimate that these necessitate at minimum an additional 9000 sentencing hearings annually, predominantly in the magistrates' courts.²⁹

The cost of sentencing hearings

Costs associated with sentencing fall within the following four categories:

1. The Courts;
2. The Crown Prosecution Service [CPS]
3. Legal Aid; and
4. Probation.

The Courts

Costs incurred in sentence hearings are restricted to requisite staffing within the magistrates' court, Crown Court and Court of Appeal. Table 1 refers to costs during the time the magistrates' court and Crown Court is in session.

Table 1: Average hourly cost of a sentence hearing in the magistrates' court and Crown Court, 2016/17

Court	Hours per sitting day	Estimated hourly cost of sitting*	Average sentence hearing time
Magistrates'	5 hours	£230	0.6 hours
Crown	5 hours	£320	0.9 hours
Court of Appeal	N/A	N/A	N/A

*Rounded to nearest £10

Magistrates' Courts and the Crown Court

The average judicial and staff cost per sitting day in the magistrates' courts is about £1150³⁰ and in the Crown Court it is £1570.³¹ A sitting day in both courts averages 5 hours giving an hourly cost of about £230 and £320 in 2016/17 prices for the magistrates' courts and Crown Court respectively.

The average hearing time for a sentence in the Crown Court is 0.9 hours.³²

The average hearing time for an appeal against sentence from the magistrates' court to the Crown Court is 0.6 hours.³³

²⁸ Ministry of Justice, *Offender Management Statistics Quarterly: July to September 2016* (26 January 2017) table 4.11.

²⁹ Ministry of Justice, *Offender Management Statistics Quarterly: July to September 2016* (26 January 2017) tables 4.3 and 4.11.

³⁰ Her Majesty's Courts and Tribunal Services Annual Report and Accounts 2013-14 (24 June 2014) page 7.

³¹ Her Majesty's Courts and Tribunal Services Annual Report and Accounts 2013-14 (24 June 2014) page 7.

³² We are grateful to the Ministry of Justice for making this data available to us.

³³ We are grateful to the Ministry of Justice for making this data available to us.

The Court of Appeal

There is, unfortunately and rather surprisingly, very little data available with regard to the cost of an appeal from the Crown Court to the Court of Appeal held by the Court of Appeal Office and Her Majesty's Courts and Tribunals Service. The hourly cost of a single judge, however, is about £130.³⁴

All appeals to the Court of Appeal are considered and prepared by the Registrar of Criminal Appeals, and his Office, and whether leave to appeal should be granted is considered by a single judge on the papers. We are grateful to the Registrar's Office for providing us with the average amount of core reading time necessary for a case, and the average length of a hearing.

Legal aid

Magistrates' courts

Litigators and advocates are not paid separately by legal aid in the magistrates' courts. The fixed hourly rates for preparation is £49.70 and for advocacy £62.35.³⁵

Crown Court

The average fee paid to an advocate for a sentence in the Crown Court is £101 and the average fee paid to an advocate for a committal for sentence from the magistrates' court is £152.³⁶

The fixed fee payable to litigators for a committal for sentence from the magistrates' court is £232.98.³⁷ Litigators are not paid separately for sentence and there is no data from which average fees can be extracted, it is thus assumed that the fixed fee payable for deferred sentence hearings of £155.32³⁸ is representative of the average cost to legal aid of sentencing, such hearings being substantially similar in practice.

Appeals from the Magistrates' courts to the Crown Court

The average case cost in legal aid of an appeal from the magistrates' court to the Crown Court is £330. We are grateful to the Legal Aid Agency for providing us with these figures.

Appeals from the Crown Court to the Court of Appeal

The average case cost to legal aid of an appeal from the Crown Court to the Court of Appeal is £760. We are grateful to the Legal Aid Agency for providing us with this figure, with the caveat that the cost to legal aid of an appeal to the Court of Appeal may in fact be greater than the figure estimated as the volume figures from these appeals are taken from the payment transaction volumes: they are predicated on the assumption that each transaction represents a case but as they may in fact get more than one bill for a case the true figure is likely to be higher.

Probation

The court must, unless it considers it un-necessary in the circumstance, obtain a pre-sentence report when it is considering imposing a custodial or community sentence.³⁹ These reports are prepared by probation and aim to assist the court in determining the most suitable method of dealing with an offender. Probation staff are also often involved in giving evidence in breach hearings.

The average hourly cost for the National Probation Service for a sentence is £27.28, with each sentence on average costing £97.39 and requiring 3.57 hours of staff work.⁴⁰

³⁴ See Ministry of Justice Judicial Fees for 1st April 2016 - Hourly fee for a retired Lord Justice sitting in the Court of Appeal.

³⁵ Criminal Legal Aid (Remuneration) Regulations 2013/435, sch 4, para 5.

³⁶ These figures have been obtained from the newly proposed Advocates' Graduated Fee Scheme which has been assessed by the MoJ as cost neutral: Ministry of Justice – it has been assumed they represent an average of the current cost. *Reforming the Advocates' Graduated Fee Scheme* (5 January 2017) 44; Ministry of Justice, *Reform the Advocates' Graduated Fee Scheme: Impact Assessment* (5 January 2017) 14.

³⁷ Criminal Legal Aid (Remuneration) Regulations 2013/435, sch 2, para 19.

³⁸ Criminal Legal Aid (Remuneration) Regulations 2013/435, sch 2, para 19.

³⁹ Criminal Justice Act 2003, s 156.

⁴⁰ This figure is taken from data made available to us by Her Majesty's Prisons and Probation Service.

Performance indicators

Delays

The criminal justice system is experiencing chronic problems caused by delay. This is true with sentencing as with trials. These delays are not only harmful to public confidence in the criminal justice system, but also the efficient administration of justice. Delays are caused by a backlog of hearings and inefficiency in the sentencing process. Increased efficiency would reduce delays and allow for more court time to be used for other purposes.

The average waiting time for a sentence committed from the magistrates' court to the Crown Court is 5.8 weeks.⁴¹

Appeals

The average waiting time for an appeal from the magistrates' court to the Crown Court is currently 9 weeks.⁴²

The average waiting time from entering an appeal against sentence to the Court of Appeal to the appeal being disposed of by the full court is 5.7 months.⁴³

Errors

The complexity of sentencing legislation leads to errors requiring additional court hearings under the slip rule and appeals. 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 95 cases in the sample (36%), unlawful sentences were passed.⁴⁴ These were not sentences which the CACD thought required reducing (or increasing) on the basis that they were manifestly excessive (or unduly lenient), but cases in which something about the sentence(s) originally imposed was wrong in law. In addition, the complexity of the law is undoubtedly resulting in many inappropriate sentences and is influential in producing unduly lenient sentences.⁴⁵ Informal consultation with circuit judges revealed that they considered that this error rate (36%) has not materially changed since.

Policy options

Option Description

The following options have been considered:

Option 0: do nothing

Option 1: undertake a consolidation of the legislation governing sentencing procedure, and remove the need to make reference to layers of historical sentencing procedure by extending the newly consolidated law to all appropriate cases.

Option 0: do nothing

Under this option the legal landscape would remain unchanged. The key features and associated problems of the current law are summarised in the table below.

Table 2: Option 0: Current Law and associated problems

Key feature	Associated problem
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⁴¹ Figures taken from 2016 Q2, the most recent quarter from which non-provisional figures available. Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C8.

⁴² Figures taken from 2016 Q2, the most recent quarter from which non-provisional figures available. Ministry of Justice, *Criminal Court Statistics Quarterly: September 2016* (15 December 2016) table C8.

⁴³ Court of Appeal (Criminal Division) Annual Report 2015-16 (7 February 2017) Annex B.

⁴⁴ 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."

⁴⁵ 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.

<p>The law is to be found in hundreds of separate provisions scattered across dozens of statutes, many of which do not immediately seem relevant to sentencing.</p>	<ul style="list-style-type: none"> • It can be difficult for practitioners and judges to identify the sentencing provisions applicable to a case resulting in costly errors, delays and appeals. • The law lacks coherent structure and language leading to frequent irregularities and conflicts. Unintended consequences of new statutory procedures cannot reliably be identified and guarded against. • There is a lack of transparency as to the law applicable to an offender during the sentencing process, harming public confidence in the system and the rule of law.
<p>Historic cases require reference to several different older sentencing regimes as well as the current law.</p>	<ul style="list-style-type: none"> • Practitioners and judges have to ascertain which law was applicable at the time of the offence: a task made difficult by the complex commencement and transition provisions, and the nature of the law that frequently points to different dates
<p>Sentencing law is frequently amended and characterised by complex commencement and transition provisions.</p>	<ul style="list-style-type: none"> • It can be difficult for practitioners and judges to identify what the correct law applicable to a case is, resulting in costly errors, delays and appeals. • There is a lack of transparency as to the law applicable to an offender during the sentencing process, harming public confidence in the system and the rule of law.

Option 1: undertake a consolidation of the legislation governing sentencing procedure, and remove the need to make reference to layers of historical sentencing procedure by extending the newly consolidated law to all appropriate cases.

Under this option, a new Sentencing Code will be enacted. The Sentencing Code will bring all of the existing legislation governing sentencing procedure into one place. It will also ensure the law is framed in clearer, simpler and more consistent language, which can be systematically updated in the future to accommodate inevitable legislative changes. This will result in a more streamlined and logical structure long term.

The Code will be enacted in the form of a consolidation. This will allow the (inevitably lengthy) Bill to take advantage of the special procedure for consolidation Bills. This procedure takes up minimal time in the debating chambers of the Houses of Parliament, with parliamentary scrutiny instead provided by an expert committee.⁴⁶

The Code will go beyond consolidation by including reforms such as those in the transition report.⁴⁷ The conclusion of that report (which was strongly supported during the Law Commission consultation) is, in summary, that the Code will apply to all sentencing exercises in which conviction takes place after its commencement. Limited exceptions to this will be created – particularly where that is necessary to avoid any risk that a more severe penalty might be imposed than the maximum which could have been imposed at the time of the offence. Exceptions also apply where new laws on prescribed minimum sentencing and recidivist premiums have come into force after the commission of the offence – to ensure there is no unfairness to defendants, nor any breach of human rights obligations.

From the introduction of the Code, only in exceptional cases will judges and practitioners have to refer to, and decipher, complex historic sentencing regimes. This will be a fundamental change from the present position where they routinely have to engage in such archaeology. These significant innovations, which go beyond consolidation of existing primary legislation, will be introduced by two clauses to be included in a Bill which precedes the main consolidation. These clauses will implement the recommendations of the transition report, effecting the “clean sweep” approach.

⁴⁶ The Joint Committee on Consolidation Bills. For more information, see <http://www.parliament.uk/business/committees/committees-a-z/joint-select/consolidation-committee/> (last visited 19 October 2016).

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

The Bill will also include the standard “pre-consolidation amendment powers” necessary to affect any consolidation of the law. These pre-consolidation amendment powers will necessarily be limited in their scope, and will allow minor changes to be made to streamline the law and make it easier to understand. The choice of a consolidation procedure maximises the prospects of implementation for the Sentencing Code. It does however result in some limitations on the ability to codify existing common law.

Box 1: Alternative policy that was considered

When this project was launched we considered that the Sentencing Code might be implemented as a Ministry of Justice Programme Bill. This would have allowed for greater codification of the common law principles of sentencing alongside the consolidation of the statutory materials. However, given the size of the Bill and considering the significant pressures currently on parliamentary time, the political landscape and the cost and length of the project, this was not an option for implementation that was ultimately pursued.

We continue to explore ways of achieving further reform to the law of sentencing. This might be achieved, for instance, by taking broader powers to change the law in the preceding Bill, or through other mechanisms for reform which might run in parallel with, or follow immediately on from, the main consolidation Bill.

Key stakeholders

The key stakeholders are:

- The Ministry of Justice
- HM Courts and Tribunals Service.
- Members of the Judiciary
- Legal practitioners, and their representative bodies: the Law Society and the Bar Council
- The Crown Prosecution Service
- The Sentencing Council
- The National Archives
- Defendants and members of the public will generally be affected by these reforms.

The public consultation process

To date we have conducted two public consultation exercises in the course of this project. On 1 July 2015 we published our issues paper on the process of the transition to the Sentencing Code,⁴⁸ and on 20 May 2016 following extremely positive consultation responses to our issues paper, we published our formal recommendations on transition to the New Sentencing Code.⁴⁹ This report analysed the responses to our proposed ‘clean sweep’ approach to sentencing law, which received wide-spread support from leading academics, including Professor Andrew Ashworth QC, practitioners and their representative bodies, and the judiciary alike.

In parallel to our work on transition, on 9 October 2015, we published our second consultation paper: Sentencing law in England and Wales: Legislation currently in force.⁵⁰ This 1300 page document was intended to create a single consolidated and complete statement of the current primary legislation governing sentencing, accompanied by common law extracts, secondary legislation and other guidance where necessary. The document represented, for the first time that we are aware of, a comprehensive compilation of the law, thematically arranged to assist readers. We sought consultees’ views as to whether the document was comprehensive, whether it included any areas unsuitable for codification in the New Sentencing Code, and whether there were any errors in our understanding of the current law.

We published a short interim report on the current law document on 7 October 2016, summarising the responses we received to that consultation, the corrections to the current law document we made, and providing an update on

⁴⁸ Sentencing Procedure Issues Paper 1: Transition (2015), available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf>.

⁴⁹ A New Sentencing Code for England and Wales (2016) Law Com No 365.

⁵⁰ Sentencing Law in England and Wales: Legislation Currently in Force (2015), available as a full electronic .pdf and in individual parts from <http://www.lawcom.gov.uk/project/sentencing-code/>.

the progress of the project.⁵¹ The current law document, and the responses of consultees were invaluable in informing the drafting of the Code. We were especially grateful to the Crown Prosecution Service, who provided the current law document to Crown Advocates for use when preparing sentences for hearing as well as undertaking a detailed review of the work for errors and omissions, and the Bar Council, whose members provided particularly detailed notes on a significant number of parts of the document.

The drafting of the Code has also been informed by informal consultation with members of the judiciary. From December 2016 to April 2017 we met with 60 District Judges from the South-Eastern Circuit and with judges sitting at the Central Criminal Court, Oxford Crown Court, Manchester Crown Court (Crown Square) and Winchester Crown Court to discuss the structure of the Code and gain an insight as to how they conduct sentencing exercises, and the issues they often face in practice.

Costs and benefits analysis

This impact assessment identifies both monetised and non-monetised impacts on individuals, groups and organisations in England and Wales likely to arise from the implementation of our proposed reform. The aim of the document is to arrive at an appreciation of the overall impact to society of implementing our proposed policy. The costs and benefits of each option are compared to the “do-nothing” option 0.

Challenges for quantifying costs and benefits: significant non-monetisable benefits

Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are significant benefits of our proposed reforms which are impossible to quantify sensibly in monetary terms. These include:

- The positive benefits of adopting modern drafting language in the Sentencing Code.
- The positive benefits to the rule of law a clear, and structured, Sentencing Code will create.
- The positive benefits to the public confidence in the administration of justice in reducing the waiting time for a sentencing hearing.

When calculating the net present value (“NPV”) for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in years 0, 1 and 2, and ongoing costs and benefits accrue in year 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2016/17 prices, and have been uprated using the GDP deflator.

Option 0: Do nothing (base case)

The “do-nothing” option is compared against itself and therefore its costs and benefits are necessarily zero. It should be noted though that were option 0 to be taken, the key features, and associated problems of the law (outlined in Table 1 above) will continue and this will continue to have a long term cost for the state.

Option 1: Undertake a codification of the legislation on sentencing, and enact a ‘clean sweep’ of the law on sentencing: removing historic law and extending the current law to all appropriate cases.

Costs

Transitional costs

1. Training

The new Sentencing Code does not introduce new types of sentence nor is it in any way intended to impact on the prison population. It will create law which is easier to find, understand and apply. The Sentencing Code

⁵¹ Sentencing Law in England and Wales: Legislation Currently in Force – Interim Report (2016), available at http://www.lawcom.gov.uk/wp-content/uploads/2016/10/Sentencing_Interim_Report_Oct-2016.pdf.

consolidates existing law using clearer, simpler and more consistent language. Discussions with Judicial College have confirmed that the Sentencing Code will not require any specific training sessions and that training costs will be absorbed into their normal budgeting. It is hoped that long-term the simplification of sentencing law achieved by the introduction of the Sentencing Code will mean less resource is required to train judges and practitioners on the effect of sentencing law.

2. Drafting

The Sentencing Code has been drafted as part of the Law Commission's work on the project, and is thus already an absorbed cost.

3. Guidance materials

It is expected that there will be negligible costs associated with the regular public advice of changes to existing procedure/legislation. These will be for the most part available on-line.

On-going costs

None identified

Benefits

Transitional benefits

None identified

On-going benefits

Monetised benefits

1. Court time savings from the reduction in time required for sentence hearings

HMCTS

The clarity and certainty brought to the law by the new Sentencing Code will mean that it is much easier for judges, and advocates, to ascertain and apply the law. It is envisioned that this will translate into more efficient sentencing hearings. However, given the backlog in cases and the significant demand for resources this is likely to translate into speedier case conversion rather than actual cash conversion. See table 3 below:

Table 3: Savings from reduction in average sentence hearing time [£ million]

	Low estimate	Best estimate	High estimate
Number of offenders	700,000	740,000	780,000
Savings in Magistrates' Courts ⁵²	£12.75	£17.97	£23.68
Savings in Crown Courts ⁵³	£3.63	£5.11	£6.74
CPS Savings	£3.46	£4.87	£6.42
Total savings	£19.84	£27.96	£36.84

Assumptions:

⁵² The hourly sitting cost for a magistrates' court is about £230.

⁵³ The hourly sitting rate in the Crown Court is about £320.

- Average number of sentence hearings 740,000 ⁵⁴ [best estimate], +/- 5% for high/low estimate
- Proportional allocation between the Crown/magistrates' remains constant over time
- Percentage reduction in sentence hearing time is 15% - 25%⁵⁵ [20% best estimate]
- CPS savings only apply to the magistrates' courts where advocates are paid an hourly rate rather than fixed fees as in the Crown Court
- Average sentence hearing time for appeals in the Crown Court (from the Magistrates' Courts) are used as the proxy for average sentence hearings in the Magistrates' courts as they are generally a full re-hearing
- Legal aid fees are used as a proxy for CPS costs in the absence of the availability of CPS figures

2. Reduction in Legal aid expenditure

The reduction in the time spent on sentence hearings has the favourable knock-on effect on the average case cost in legal aid. See table 4 below:

Table 4: Reduction in legal aid expenditure through reduced hearing times [£ million]

	Low estimate	Best estimate	High estimate
Number of offenders in magistrates' court ⁵⁶	616,000	651,200	686,400
Percentage decrease in magistrates' court hearing time	15	20	25
Percentage receiving legal aid	30	40	50
Magistrates' court savings	£1.04	£1.46	£1.93

Assumptions:

- Hourly cost of legal aid representation is £62.35
- 25% - 15% [20% best estimate] reduction in sentence hearing length
- 30% - 50% [40% best estimate] of sentences in the Magistrates Courts receive legal aid⁵⁷

3. Reduction in number/length of sentence appeals

HMCTS

The simplification and streamlining of sentencing procedure legislation impacts directly on the reduction in sentencing errors. Currently about 30 percent of sentence appeals are estimated to result from unlawfully imposed sentences. Savings derive from the reduction in court staffing costs and also through reduced appeals from the Magistrates to the Crown Court and from the Crown Court to the Court of Appeal. See table 5 below:

Table 5: Reduction in number/length of appeals from Magistrates and Crown Court [£ million]

	Low estimate	Best estimate	High estimate

⁵⁴ See scale and scope section for actual scale of sentencing – numbers rounded to nearest 10,000.

⁵⁵ This percentage is informed by consultation with Crown Court and High Court Judges from a sample of Courts across the country as to what a realistic reduction would be.

⁵⁶ Based on proportional breakdown in offender allocation of convictions

⁵⁷ Many cases in the magistrates' court either do not qualify for legal aid due to means testing, or legal aid is not applied for.

No. of Appeals from Magistrates' Courts to Crown Court	4,900	5,200	5,500
No. of Appeals from Crown Court to CACD	1,500	1,600	1,700
Total Appeals	6,400	6,800	7,200
Revised Percentage error	15	10	5
Magistrates' Court savings	£0.26	£0.36	£0.46
Crown Court savings	£0.07	£0.15	£0.31
Total savings	£0.48	£0.71	£1.04

Assumptions:

- +/- 10% in number of appeals from the magistrates' court to the Crown Court and from the Crown Court to the Court of Appeal
- Savings from appeals from Crown Court are limited to Judges' hearing time only
- For each Court of Appeal hearing there is the reading time required of 1 judge estimated at 0.5 hours plus hearing time of 2 [low], 3 [best] and 5 [high] judges' sitting
- 25% - 15% [20% best estimate] reduction in sentence hearing length
- Percentage point reduction in error term from 30% to 15% [low], 10% [best], 5% [high]
- Judges' hourly rates for sentence appeal hearings is about £130⁵⁸

4. Reduction in advocacy costs of appeals

By reducing the number of appeals against sentence, there is a reduction in the costs borne by the CPS. See table 6 below:

Table 6: Reduced CPS costs [£ million]

	Low estimate	Best estimate	High estimate
No. of Appeals from Magistrates' to Crown ⁵⁹	4,900	5,200	5,500
No. of Appeals from Crown to CACD ⁶⁰	1,500	1,600	1,700
Total appeals	6,400	6,800	7,200
Magistrates' Court savings	£0.05	£0.07	£0.09

Assumptions

⁵⁸ See Ministry of Justice Judicial Fees for 1st April 2016 - Hourly fee for a retired Lord Justice sitting in the Court of Appeal.

⁵⁹ The average cost of legal aid per case appealed from the Magistrate to the Crown Court is about £330.

⁶⁰ The average cost of legal aid per case on appeal from the Crown Court to CACD is about £770.

- Percentage reduction in sentence hearing time is 15% - 25%⁶¹ [20% best estimate]
- Percentage point reduction in error term from 30% to 15% [low], 10% [best, 5% [high]
- Legal aid costs are used as a proxy for CPS costs in the absence of the availability of CPS figures
- The Crown is rarely represented in the Court of Appeal in relation to appeals against sentence - but to the extent it occasionally occurs these figures thus represent an under-estimate of the saving.

5. Reduction in legal aid expenditure required in sentence appeals

Sentencing appeals incur legal aid costs. The reduction in the number of appeal hearings translates into reduced legal aid expenditure. See table 7 below:

Table 7: Reduced legal aid expenditure from reduction in number of appeals⁶² [£ million]

	Low estimate	Best estimate	High estimate
Appeals from Magistrates' to Crown ⁶³	4,900	5,200	5,500
Appeals from Crown to CACD ⁶⁴	1,500	1,600	1,700
Total appeals	6,400	6,800	7,200
Magistrates' savings	£0.15	£0.24	£0.37
Crown Court savings	£0.17	£0.25	£0.33
Total savings	£0.32	£0.49	£0.70

Assumptions:

- Avoided cases translate into reduced legal aid expenditure - Percentage point error reduction from 30% to 15% [low], 10% [best], 5% [high]
- 60 – 80% [70% best estimate] of appeals from the Magistrates to the Crown Court receive legal aid⁶⁵
- All appeals to the CACD receive the full allocation of legal aid

6. Reduction in the number of Appeals applications

Not all applications to the Court of Appeal are given leave, however, all applications are read by a single judge on the papers. The benefits of the new Sentencing Code in terms of clarity and simplicity will help to ensure that appeal applications are not brought by advocates that are a result of a mistake in their understanding of the law. The current proportion of avoidable errors is estimated be about 30 percent. See table 8 below

Table 8: Reduction in number of appeal applications [£ million]

	Low estimate ⁶⁶	Best estimate	High estimate
Number of appeal applications	2,800	3,000	3,200

⁶¹ This percentage is informed by consultation with Crown Court and High Court Judges from a sample of Courts across the country as to what a realistic reduction would be.

⁶² Appeals rounded to the nearest 100.

⁶³ The average legal aid fee per case appealed from the Magistrate to the Crown Court is about £330.

⁶⁴ The average legal aid fee per case on appeal from the Crown Court to CACD is about £770.

⁶⁵ An appropriate percentage reflects discussions with the Legal Aid Agency

⁶⁶ Low estimate adjusted down [from 5% of best estimate – 3,000] to provide greater range.

New percentage error	15	10	5
Total savings	£0.03	£0.04	£0.05

Assumptions:

- Limited to applications that do not progress to a full hearing
- Reading time of a single judge is avoided

Non-monetised benefits

7. Improved certainty

8. It is critical to both the administration of justice, and the rule of law, that the law be sufficiently clear to enable an individual to understand the potential consequences of their actions, and the scope and nature of the penalty to which they may be liable. The law of sentencing procedure as it stands simply cannot be described as intelligible or clear. The introduction of the new Sentencing Code will significantly improve the certainty and accessibility of the law for experienced practitioners and members of the public alike.
Reduced build-up in back log

By reducing the length of the average sentencing hearing the Code will help to reduce the considerable delays that currently face cases in the magistrates' courts and Crown Court – allowing for trials and sentencing hearings alike to be heard more promptly and more swiftly.

9. Increased confidence in legal system

Without public confidence, the sentencing system struggles to achieve legitimacy. A lack of legitimacy is damaging not only to the sentencing system, but to the criminal justice system as a whole. The reduction in the numbers of errors, alongside a more efficient sentencing system, brought by the Code will contribute to an increased public confidence in the legal system.

10. Reduced related ad hoc expenditure

Currently errors in sentencing impose significant costs at disparate points throughout the criminal justice system. For example whilst prisoners may be transferred in large numbers from the magistrates' court and the Crown Courts – this does not happen in Court of Appeal cases where an individual is transported with the same security detail and with the significantly greater average cost.

Table 9: Option 1 summary – Annual costs and benefits, £million

	Low estimate (£million)	Best estimate (£million)	High estimate (£million)
COSTS			
<i>Transitional</i>			
None identified	0	0	0
<i>Ongoing</i>			
None identified	0	0	0
BENEFITS			
<i>Transitional</i>			
None identified	0	0	0

<i>Ongoing</i>			
Reduced Sentence hearing time – HMCTS Savings [Mags]	£12.75	£17.97	£23.68
Reduced Sentence hearing time – HMCTS Savings [CC]	£3.63	£5.11	£6.74
Reduced Advocacy cost [Mags]	£3.46	£4.87	£6.42
Shortened Sentence Hearings – Legal Aid Savings [Mags.]	£1.04	£1.46	£1.93
Avoided/Shortened Appeals – Legal Aid Savings [Mags.]	£0.15	£0.24	£0.37
Avoided/Shortened Appeals – Legal Aid Savings [CC]	£0.17	£0.25	£0.33
Avoided/Shortened Appeals – Mags in CC	£0.40	£0.56	£0.73
Avoided/Shortened Appeals – CC in CACD	£0.75	£0.15	£0.31
Reduced No. of Appeals – CPS Savings	£0.05	£0.07	£0.09
Reduced No. of Appeal applications – Avoided reading	£0.03	£0.04	£0.05
Total ongoing benefits	£21.75	£30.73	£40.64
Net Present value - 10 years	£180.89	£255.57	£337.99

The costs associated with Option 1 are negligible. While the Code is being drafted by a full-time parliamentary counsel, supported by the Law Commission that cost has been absorbed as part of the Law Commission's project and no additional implementation costs arise. The most significant benefit is the impact on court backlogs. The reduction in sentence hearing times directly impacts on the court system freeing up resources to deliver about £18 million per year in efficiency savings.

Specific Impact Assessments

Equality:

We have undertaken an equality impact assessment for this project and do not consider that the reform will have any particular equality impacts. The project is primarily a simplification and procedural exercise and no changes are being made to sentences to be imposed. Some marginal positive effects may arise from making the law significantly clearer.

Health:

We do not expect for this project to have any particular impact on health and wellbeing – the project changes only the procedure relating to sentencing, streamlining and simplifying it, and not the disposals to be introduced. There will be some very marginal employment effects as a result of avoiding unnecessary appeals but it is not expected that this will have a significant effect on any individual.

Justice:

The impact of our proposals on the justice system has been assessed throughout the impact assessment.