



**Law
Commission**
Reforming the law

The Sentencing Code Summary

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GLOSSARY

Bill

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

Clean sweep

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 This means that the old law which has been repealed must be 'saved' for certain older cases which may still be before the courts.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

Commencement

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

Commencement provisions

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

Committal for sentence

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

Consecutive/concurrent sentences

Where two or more sentences are imposed on an offender they can be imposed either consecutively or concurrently. Concurrent sentences are served simultaneously, for example two concurrent sentences of two years result in a total sentence of two years. Where

sentences are imposed consecutively, the offender will serve one sentence and then serve the next upon the expiry of the former. For example, two consecutive sentences of two years result in a total sentence of four years.

Consequential amendments

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

Consolidation Bills

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

Current law

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

Draft Sentencing Code

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

Group of Parts, Parts, Chapters

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

Index offence

The offence for which an offender is being sentenced.

Origins

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

Parliamentary Counsel

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

Parliamentary procedure

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

Pre-consolidation amendment ('PCA')

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

Pre-legislative scrutiny

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

Sentencing Code

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

Slip rules

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

Transitional provisions

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

Transition date

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

INTRODUCTION

- 1.1 Sentencing an offender who has pleaded guilty to, or been convicted of, a criminal offence is one of the main functions of the criminal courts. 1.2 million offenders were sentenced in the criminal courts of England and Wales in the year ending September 2016.¹ In the same year, 4,241 appeals against sentence were heard in the Crown Court.² The Court of Appeal (Criminal Division) received 4,072 applications for leave to appeal against sentence, each requiring the attention of a single judge on the papers.³ Leave to appeal against sentence was granted to be heard before the full court in 1,294 cases.⁴
- 1.2 The imposition of punishment following the conviction of a criminal offence has an impact on a large number of people either directly or indirectly and it is extremely important that the law governing sentencing procedure is clear and coherent. This is vital not only for offenders but also for the judiciary, the legal professionals who represent defendants and the prosecution, the victims and their families, and the wider public. Further, it is imperative for the smooth and efficient running of the court system that the law governing sentencing procedure is clear and coherent.
- 1.3 It is equally important that the law governing how sentences are imposed is transparent and accessible. It is fundamental to the rule of the law that the law is sufficiently clear to enable an individual to understand the potential consequences of their actions, and the penalty to which they may be liable. The ability to identify and understand the applicable law is integral not only to the maintenance of public confidence in the criminal justice system but also in ensuring that the defendant knows exactly why the sentence imposed upon them has been passed and whether they have any possible grounds of appeal.
- 1.4 The current state of the law means that it is simply impossible to describe the legislation governing sentencing procedure as clear, transparent, accessible or coherent. This is not only undesirable in principle but also has negative effects in practice, resulting in unnecessary errors and delays, all of which are costly.
- 1.5 In this introductory Chapter we explore the problems with the current law, and the scope and aims of the project and briefly describe the way in which we have set out to solve those problems.

THE PROBLEMS WITH THE CURRENT LAW

- 1.6 Owing to continual developments in penal policy over the past 30 years, there has been a deluge of legislation relating to sentencing. The proliferation, on an almost annual basis, of new variations and types of sentencing orders, combined with the way that the law is drafted and brought into force, has resulted in the legislation relating to sentencing

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

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

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

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

procedure being dispersed across dozens of different pieces of legislation with no clear and logical structure.

- 1.7 As an illustration, we compiled the sentencing law in force as of August 2015. Our compilation was over 1300 pages long and contained provisions from Acts as varied as the Justices of the Peace Act 1361, the Company Directors Disqualification Act 1986 and the Dangerous Dogs Act 1991.⁵
- 1.8 Even our lengthy compilation document does not convey the true complexity and inaccessibility of the current law. This is because it only contained the current law relevant to sentencing recent offences. In cases which involve older offences, sometimes committed decades earlier, reference must be made to the historic sentencing regimes in place at the time the offence was committed, in addition to the current law. This historic legislation is often technical and complex, with its effect and operation being difficult to decipher. Sometimes even the existence of such laws is not readily apparent.
- 1.9 The consequence of this state of affairs is that the law on sentencing is overwhelmingly complex and difficult to understand for practitioners and judges, as well as lay people. The extraordinary number of statutory provisions relating to sentencing, and the lack of any over-arching structure within which they sit, means it is almost impossible to identify and navigate the relevant legislation. As such, it is difficult for the court to determine what powers are available, and what duties apply, without reference to a specialist research text. It is not simply that it is difficult to ascertain in which Acts and Statutory Instruments relevant provisions may be contained. Even once those Acts and Statutory Instruments have been identified, their provisions do not take any standard form. This makes it very difficult to understand their effect and how they operate alongside other provisions.
- 1.10 This complexity means that errors are frequently made when the courts impose a sentence. An analysis conducted in 2012 of 262 randomly selected cases in the Court of Appeal (Criminal Division) demonstrated that the complexity of the legislation is resulting in an extraordinary number of sentences that had been wrongfully-passed: there were 95 unlawful sentences in the sample.⁶ These were not sentences which were considered to be only of inappropriate severity, i.e. those which the Court of Appeal (Criminal Division) concluded ought to be reduced on the basis they were manifestly excessive or increased on the basis that they were unduly lenient, but cases in which the type of sentence(s) imposed was simply wrong in law.
- 1.11 Naturally these unlawful sentences should be rectified. Where such errors are identified, they may be corrected either by way of the “slip rule”⁷ or by an appeal to a higher court.

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

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

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

These additional court hearings mean increased cost to the criminal justice system and delays to other hearings. However in some cases, the errors are not noticed at all. In the 2012 study of 262 randomly selected cases in the Court of Appeal (Criminal Division) referred to above, some of the errors were not identified by either the parties involved in the case or the court, and spotted only by the study.⁸ This can lead to injustice which is even worse than simply the increased cost of rectifying errors of law.

- 1.12 Even where errors are not made, the complexity of the current law means that sentencing hearings place an unnecessary burden on the court system. Often sentencing hearings take an unnecessarily lengthy amount of time owing to the difficulties in identifying and understanding the applicable law. Not only does this cause undue cost and delay in relation to sentencing determinations but it can also have a knock-on effect on the expedition of other hearings.
- 1.13 All this lies against a backdrop of an over-worked and under-resourced Criminal Justice System where the average time from the charging of an offence, to its final disposal in the Crown Court is 245 days⁹ and the average waiting time for an appeal against sentence to the Court of Appeal (Criminal Division) is 5.7 months.¹⁰

THE PROJECT AND OUR TERMS OF REFERENCE

- 1.14 Given this background, it is not surprising that the need for the reform of the law of sentencing was endorsed in the strongest of terms when the Law Commission launched the Sentencing Code project in January 2015. The importance of the project was recognised by leading figures in the Criminal Justice System including the Lord Chief Justice, the Director of Public Prosecutions and the heads of both the solicitors' and barristers' professions.¹¹
- 1.15 The Sentencing Code project is part of the Law Commission's 12th programme of law reform.¹² Our terms of reference as agreed with the Ministry of Justice are:

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

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

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

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

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

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

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

THE AIMS OF THE PROJECT

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

- (1) to ensure the law relating to sentencing procedure is readily comprehensible and operates within a clear framework;
- (2) to increase public confidence in the Criminal Justice System; and
- (3) to ensure the Criminal Justice System operates as efficiently as possible.

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

A clear framework

1.18 Beyond simply bringing this body of legislation under one heading and clarifying and streamlining it, the project will also introduce a novel approach to dealing with changes to the law, which will substantially simplify the sentencing process in practice. The Sentencing Code will remove the need to make reference to historic law and transitional provisions¹³ by applying the current law to all offenders whose convictions occur after the Sentencing Code has come into force (except for where limited exceptions necessary to respect the fundamental rights of offenders apply).¹⁴ We are referring to this change as the "clean sweep".

1.19 The Sentencing Code will not introduce any new substantive law or sentencing disposals and will not impact upon the sentences that are to be imposed for any offence. It will neither alter the maximum sentences available for an offence, nor will it increase the scope of minimum sentencing provisions. Crucially, the Sentencing Code will not

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

¹⁴ Such as where applying the current law to the offender would result in an offender being subject to a penalty greater than the maximum that was available at the time of the offence, or a minimum sentence, or 'recidivist premium' (a provision requiring the court to treat the offender more harshly if the offender has previous convictions), that has come into force since the offence was committed. This is discussed in more detail at para 3.83 of the main consultation paper.

curtail existing judicial discretion in sentencing and will not replace the sentencing guidelines or alter or limit the work of the Sentencing Council. It is not intended or foreseen that implementation and application of the Sentencing Code will have any impact on the prison population. Her Majesty's Prison and Probation Service do not envisage any effect on probation resources.

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

Readily comprehensible and clear law

- 1.21 The introduction of the Sentencing Code will provide the law governing sentencing procedure with a clear and coherent structure, as well as re-stating the law in a more certain and accessible manner. It will ensure that judges are aware of all their relevant powers and duties and the full menu of options they have in addressing offending behaviour.
- 1.22 The Sentencing Code will also re-state the law using modern language, as well as gender-neutral drafting. Streamlining changes will be made to provide added consistency and clarity to the law, and errors and omissions in the current law will be corrected. A guiding principle in the drafting has been a focus on certainty. Sometimes making the effect of the law clearer and more certain has required provisions to be drafted in a longer form, or split into multiple provisions and where this is necessary, we have done so.
- 1.23 By removing the need to make reference to historic legislation, the Sentencing Code will also greatly aid the transparency of the law. No longer will courts have to make reference to historic versions of legislation, and decipher opaque transitional provisions. For all offenders convicted after the commencement of the Sentencing Code the courts will, by virtue of the clean sweep, need to have reference only to the Sentencing Code itself. Even where exceptions to the clean sweep apply, the Sentencing Code will replicate those historic provisions in the Sentencing Code itself, making clear to which cases they apply – avoiding the need for users to make reference to, and identify, complex transitional provisions. This represents a considerable departure from current practice and is a change we consider will have a significant impact.

Public confidence in the law

- 1.24 Public confidence is harmed when sentencing decisions are routinely unlawful, unduly lenient or otherwise inappropriate because of the incomprehensible nature of the current law. The Sentencing Code would help to reduce these occurrences and thus improve public confidence in the system.
- 1.25 Similarly public confidence is harmed when the process of sentencing, and the law applicable to it, is inaccessible and incomprehensible. As Alison Saunders, the Director of Public Prosecutions, noted at the launch of this project:¹⁵

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

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

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

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

Improving efficiency

- 1.26 By providing greater certainty and clarity to the law, the Sentencing Code will help practitioners and judges to identify and understand the relevant law more efficiently. This will not only reduce the risk of error, and therefore the number of appeals necessary to correct such errors but it will also help to reduce the amount of court time necessary for sentencing.
- 1.27 This will free up court resource for other hearings and help reduce the significant delays currently plaguing the criminal court system: the current average waiting time from charge to final disposal of the offence in the magistrates' courts is 55 days¹⁶ and in the Crown Court 245 days.¹⁷
- 1.28 Our best quantified estimate of the net financial benefit of the enactment of the Sentencing Code is £255.57 million over ten years.¹⁸

A HISTORY OF THE PROJECT TO DATE

- 1.29 Although the publication of this consultation paper marks the beginning of the formal consultation stage of the project, we have sought the views of certain stakeholders since the project commenced in January 2015. The primary purpose of this has been to inform our work in relation to the structure of the draft Sentencing Code and to consider various methods of drafting which could be used.

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

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

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

- 1.30 We have participated in and conducted roundtable events with key stakeholders in Government¹⁹ and academia;²⁰ a number of roundtable events with members of the judiciary, including groups of District Judges;²¹ and visits to a number of Crown Court centres across England and Wales.²² This has given us a good starting point from which we can launch the full consultation and we are grateful for the input those groups have had.
- 1.31 We are grateful to have been regularly invited to participate in meetings with the Sentencing Council, the Law Reform Committee of the Bar Council and the Criminal Law Committee of the Law Society. We have also been invited to discuss the project with Treasury Counsel at the Central Criminal Court, the Criminal Appeal Office, the Crown Prosecution Service and numerous barristers' chambers. The input we have received from these meetings has been immensely valuable.
- 1.32 Before this main consultation exercise began, we conducted two more specific consultations:
- (1) An issues paper seeking consultees' views on the transition to the Sentencing Code (discussed at paragraph 1.35 below); and
 - (2) The compilation of the current law on sentencing procedure referred to in paragraph 1.7 above which asked for consultees' views on the scope and content of the current law (discussed at paragraph 1.41 below).
- 1.33 Each of these exercises involved the publication of 2 documents: an initial consultation paper and a subsequent report summarising consultees' responses and making recommendations or drawing conclusions. Both received significant and widespread support from stakeholders.

Transition

- 1.34 When changes are made to the law on sentencing they are often made only prospectively. Transitional provisions frequently ensure that the new law applies only where the offence (for example) was committed after the change was made. This means that in cases involving offences committed before the new provisions came into

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

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

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

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

force, historic versions of the law apply. It is often unclear when this is the case. In addition, identifying the applicable law and how it operates can be difficult. In *R (Noone) v Governor of Drake Hall Prison & another*, Mr Justice Mitting noted that it had taken almost five hours of court time to explain to him the effect of the transitional provisions in question.²³ When the case reached the Supreme Court, Lord Phillips stated that “hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions.”²⁴

- 1.35 On 1 July 2015 we published an issues paper.²⁵ This considered the crucial policy question of how the transition from the current law to the Sentencing Code would operate. In particular, it examined the problems caused by the current approach to transition in sentencing law.
- 1.36 The issues paper considered how we could introduce the Sentencing Code in the most effective way possible. Our aims were to ensure maximum legal certainty and transparency by minimising the use of complex transitional provisions whilst also respecting the fundamental rights of those affected by the sentencing process.
- 1.37 Subsequently, on 20 May 2016, we published our final recommendations on the transition to the Sentencing Code.²⁶ Our key recommendations were as follows:
- (1) A Sentencing Code should be enacted that brings all of the primary legislative material with which a court might be concerned during the sentencing process into a single enactment.
 - (2) The Sentencing Code should effect a “clean sweep” of the legislation, removing the need to make reference to historic law and transitional provisions by applying the current law to all cases except where limited exceptions necessary to respect the fundamental rights of offenders apply.²⁷
 - (3) The Sentencing Code should apply to all cases where the offender was convicted after its coming into force, no matter when the offence was committed.
- 1.38 We made these recommendations on the basis that consultees were overwhelmingly in favour of them. In particular, our “clean sweep” approach received universal support. Strong support for the Sentencing Code in general was received from a number of key stakeholders including the Government, HM Council of District Judges, the Council of HM Circuit Judges and the Crown Prosecution Service. While the “clean sweep” approach is contrary to the normal presumption against retroactivity, for the reasons set

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

²⁴ [2010] UKSC 30, [2010] 1 WLR 1743 at [1]. More examples are provided at para 3.2 of the main consultation paper.

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

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

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

out in our issues paper,²⁸ and following support on consultation, we are confident that it is not only lawful, but desirable.

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

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

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

Current Law

- 1.41 On 9 October 2015 we published our compilation of the law relating to sentencing as it was on 1 August 2015.²⁹ This compilation ran to over 1300 pages and was the first time, of which we are aware, that a comprehensive, thematic compilation of the law has been published. This compilation was subject to public consultation and scrutiny for 6 months. We were especially grateful to the Crown Prosecution Service, who provided the current law document to Crown Advocates for use when preparing sentences for hearing as well as undertaking a detailed review of the work for errors and omissions. We are also grateful to the Bar Council, whose members provided particularly detailed notes on a significant proportion of the document.
- 1.42 On 7 October 2016 we published our interim report on our compilation of the legislation currently in force.³⁰ Subject to a few minor corrections, consultees agreed that the compilation was accurate and comprehensive. Our compilation of the current law, combined with consultees' answers to the questions we asked relating to the appropriate scope of the Sentencing Code (what the Sentencing Code should, and should not, include), then formed the basis of our instructions to Parliamentary Counsel in drafting the Sentencing Code itself.

NEXT STEPS

- 1.43 This consultation paper is an important milestone for the project as it contains a draft version of the Sentencing Code. We have produced introductory commentary to each

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

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

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

of the Sentencing Code's main Parts to highlight and explain the various decisions we have made in the course of drafting. In addition, throughout this consultation paper we ask a number of consultation questions. The aim of these questions is to assist us in improving the Sentencing Code and we thank consultees in advance for taking the time to submit responses to them.

- 1.44 Over the course of a six month consultation period, the draft Sentencing Code will be available for public pre-legislative scrutiny. Over the course of this consultation period we will host a number of consultation events with judges, academics and practitioners and hope to receive detailed comments on the structure and content of the draft Sentencing Code.
- 1.45 This consultation will also be accompanied by what we have termed "embedding work". Previous attempts at the consolidation of sentencing law, such as the Powers of Criminal Courts (Sentencing) Act 2000, have been frustrated by being rapidly overtaken by other legislation. While this paper is subject to consultation we will be working closely with Parliamentary stakeholders, and those responsible for the drafting of legislation, to emphasise the benefits of the Sentencing Code remaining the main source of legislative sentencing material, and that amendments should be enacted in a way that retains the benefit of our new approach to transitional arrangements.
- 1.46 We will also be working with other key stakeholders to ensure that the Sentencing Code is understood and well presented. It must work efficiently alongside the Sentencing Council Guidelines and the Criminal Procedure Rules. We will be working closely with The National Archives to ensure that the Sentencing Code is digitally displayed in an appropriate manner that reflects and complements its novel structure. This may involve the use of innovative display tools allowing users simultaneously to view complementary external material. We will also be continuing to work with the Judicial College, the Criminal Appeal Office and the representative professional bodies to ensure that training is in place to familiarise the judiciary and practitioners with the Sentencing Code.
- 1.47 Once this consultation period ends, we will publish the final version of the Sentencing Code. This final version will incorporate the comments consultees have made on the draft Sentencing Code and will be accompanied by a final report. This will, we anticipate, be published in spring 2018.
- 1.48 Our intention is for the Sentencing Code to be enacted as a consolidation Bill. Our report will form the basis of the work of the consolidation committee in enacting the Sentencing Code into law. We explain how this process operates at paragraph 1.56 below.

THE SENTENCING CODE

- 1.49 Chapter 2 of this consultation paper explores the scope (what is included in the Sentencing Code, and what is not) and structure of the Sentencing Code.
- 1.50 The Sentencing Code will contain all those provisions of primary legislation which a Court conducting a *sentencing exercise* would *need* to exercise its functions properly. This includes those provisions which impose a duty on the court or on a court officer, in addition to those which provide the court with a discretionary power.

- 1.51 In the course of drafting we have taken the decision to exclude from the scope of the Sentencing Code the law relating to road traffic sentencing, confiscation, and the administration and enforcement of sentences. While some of these areas may be ripe for reform we have regarded them as separate exercises. This is because they constitute distinct and self-contained bodies of law. In particular, while those provisions relating to the administration and enforcement of sentence were initially part of our Terms of Reference with the Ministry of Justice for this project, it was quickly recognised that to include all such provisions within the Sentencing Code would be such an enormous task that we could not achieve it in the time-frame of this project with the resources available. The construction of the Sentencing Code is a time-sensitive exercise. Consolidation of the existing law of sentencing procedure has had to be completed within a limited time-frame not least to avoid being overtaken by new legislation. This time constraint has meant that, given limited resources and access to parliamentary counsel, a more restrictive approach was suitable. This approach to scope was consulted on as part of our consultation on our compilation of the current law relating to sentencing and respondents unanimously endorsed it.³¹
- 1.52 Owing to the ongoing review of the Youth Justice System in England and Wales currently under consideration by the Government and in the interests of using resources most effectively and avoiding any duplication, those provisions relating to specific youth justice orders have been excluded from the draft Sentencing Code. We do intend, however, to include these orders in the final version of the Sentencing Code when any reform proposals from government are clear. Where these specific youth justice orders have been omitted from the draft Sentencing Code, we have included placeholder headings to indicate where these provisions will be found in the final Sentencing Code.
- 1.53 In relation to some specific areas of law, we have considered it undesirable to transpose provisions from the current law into the Sentencing Code because of the undesirable impact it would have on that other area of law.
- 1.54 By way of example, the Animal Welfare Act 2006 contains provisions that relate to offenders who have been convicted of certain animal cruelty offences. These provisions give the court the power to make disqualification, destruction and deprivation orders. If these provisions were to be transposed into the Sentencing Code, they would be severed from the distinct and self-contained body of law to which they rightly belong in the Animal Welfare Act 2006. In addition, if the user were to find these provisions in the Sentencing Code, he or she would potentially be unaware of additional non-sentencing measures remaining in the 2006 Act. More unhelpfully still, the user who expects to find the power where it logically belongs in the 2006 Act would instead find only a gap in consequence of the provision having been transposed into the Sentencing Code.
- 1.55 To mitigate the effects of being unable to incorporate every provision within the Sentencing Code, the draft Sentencing Code includes what we have termed 'signposts'. These draw the user's attention to those powers which may be found outside the Sentencing Code. This ensures that without disrupting the coherence of other areas of

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

law, the Sentencing Code is comprehensive and that users of the Sentencing Code can be confident that they are aware of all of the relevant legislative provisions.

Consolidation

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

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

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

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

1.59 The Sentencing Code is not, however, a *mere* consolidation of the law on sentencing. As we have already explained, it will go beyond mere consolidation by implementing the “clean sweep” of historic legislation, reflecting the recommendations made in the transition report.³⁵ This will significantly simplify the sentencing process in practice, resulting in increased efficiency and fewer errors.³⁶ Further, the Sentencing Code will make a number of streamlining changes in the interests of clarity and certainty. For example, it will improve the language used throughout the law and for the first time create a coherent structure.

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

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

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

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

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

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

such powers will be limited to minor streamlining and tidying changes that are in the interests of the consolidation of sentencing law.

THE DRAFT SENTENCING CODE

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

1.62 There are three appendices to this consultation paper:

- (1) Appendix 1: a table explaining the pre-consolidation amendments that have been made in the draft Sentencing Code.
- (2) Appendix 2: the draft Sentencing Code.
- (3) Appendix 3: the draft clauses necessary to make pre-consolidation amendments.

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

- (1) Introductory provisions and overview
- (2) Provisions applying to sentencing Courts generally
- (3) Disposals
- (4) Further powers relating to sentencing
- (5) General Provisions

Part 1: Introductory provisions and overview

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

Parts 2 to 4: Provisions applying to sentencing Courts generally

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

- 1.66 Part 3 contains the provisions governing sentencing procedure: powers to order information and reports; the power to make derogatory assertion orders;³⁷ the duty to order payment of a surcharge;³⁸ the duty to order payment of a criminal courts charge;³⁹ and the duties to explain and give reasons for the sentence imposed.
- 1.67 Part 4 contains the provisions relating to the exercise of the courts' discretion when sentencing: the purposes of sentencing; the application of Sentencing Guidelines; the information to be taken into account; and the assessment of the seriousness of an offence for the purpose of sentence.
- 1.68 Parts 3 and 4 are discussed in chapter 5 of the Consultation Paper – General Provisions.

Parts 5 to 10: Sentencing Powers

- 1.69 Part 5 contains the powers of the court to make absolute or conditional discharges in respect of an offence.⁴⁰ Only minor streamlining changes have been made to the law consolidated in this Part and there is accordingly no accompanying commentary.
- 1.70 Part 6 provides a placeholder for the courts' powers to make referral orders for offenders aged under 18, and for the power to make orders requiring an offender's parents to enter into recognizances. These are youth justice system disposals, and as noted above, due to constraints of resource and the likelihood of impending review these provisions have not yet been re-drafted in the draft Sentencing Code. This part, labelled "orders relating to conduct", also includes a signposting provision to orders made under the Street Offences Act 1959.
- 1.71 Part 7 contains the powers of the court to make financial orders and orders relating to property. This includes the powers of the court to order payment of fines; to impose compensation orders; and to make orders forfeiting or depriving the offender of property. We have included here a placeholder for the inclusion of restitution orders,⁴¹

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

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

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

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

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

although these provisions have not yet been included in the draft Code. This Part is discussed in chapter 6 of the Consultation Paper – Fines and Financial Orders.

- 1.72 Part 8 contains the provisions relating to the power to disqualify an offender from driving, disqualify an offender from owning certain animals and disqualify an offender from being the director of a company.
- 1.73 Part 9 contains the provisions relating to the courts' powers to impose community sentences. The scope is primarily those provisions relating to the imposition of community orders. Although the orders specific to the youth justice system – youth rehabilitation orders – have not yet been included in the Draft Code, a placeholder has been provided. This Part is discussed in Chapter 7 of the Consultation Paper – Community Orders.
- 1.74 Part 10 contains the provisions relating to the courts' powers to impose custodial sentences. This includes those general provisions governing the imposition of a custodial sentence; the different variations of custodial sentence available for those aged under 18, 18 to 20, and 21 and over; the minimum sentence provisions applicable to certain offences; the effect of life sentences; and sentence administration.
- 1.75 Part 10 also contains the provisions relating to the powers of the court to suspend a custodial sentence so that it only takes effect on the commission of a further offence, or when requirements attached to its suspension are breached.
- 1.76 Those provisions relating to the powers of the court to suspend custodial sentences in Part 10 are discussed in chapter 8 of the Consultation Paper – Suspended Sentence Orders. Those other provisions in Part 10 are discussed in chapter 9 of the Consultation Paper – Custody.

Parts 11: Further powers relating to sentencing

- 1.77 Part 11 contains those provisions relating to other ancillary orders. These include the power to make criminal behaviour orders,⁴² restraining orders (following an acquittal and a conviction) and other behaviour orders.⁴³
- 1.78 This Group of Parts is discussed in chapter 10 of the Consultation Paper – Ancillary orders.

Parts 12 to 14: General provisions

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

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

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

provide such assistance, or subsequent to sentence, has agreed to provide such assistance.

- 1.80 Part 12 also contains the provisions relating to recognizances,⁴⁴ and miscellaneous provisions relating to sentencing: including the power to alter a Crown Court sentence under the “slip rule”⁴⁵ and for the Secretary of State to make rules relating to community orders and suspended sentence orders.
- 1.81 Part 13 contains those provisions relating to the interpretation of the Sentencing Code. Part 14 contains procedure governing rules made under the Sentencing Code, powers to amend it, and transitional provisions and consequential amendments.
- 1.82 As technical Parts there is no accompanying commentary dedicated to either parts 13 or 14, although discussions in chapters 3 and 4 of this consultation paper touch on Part 14.

CONSULTATION

- 1.83 Consultation on the draft Sentencing Code will be open for a six-month period, closing on 26 January 2018. We invite consultees to scrutinise closely the draft Sentencing Code, checking for any errors or omissions. We also encourage readers to engage with the accompanying consultation paper and the questions it contains. We do not expect that any one consultee will engage with the reading and commenting on the whole draft Sentencing Code but would encourage consultees to engage with any specific areas with which they have a particular interest or expertise. Comments on the wording of the new drafting, the structure of the draft Sentencing Code, and its contents are all welcome. We would remind consultees however that it is outside the remit of this project to make substantive policy changes to the law on sentencing.
- 1.84 Consultation responses should be provided:
- (1) By email to: sentencing@lawcommission.gsi.gov.uk; or
 - (2) By post to: Lyndon Harris, Law Commission, Post Point 1.54, 1st Floor, the Tower, 52 Queen Anne’s Gate, London SW1H 9AG.
- 1.85 We may publish or disclose information you provide to us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.
- 1.86 If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all

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

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

circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

Consultation Question 1.

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

THE CRIMINAL TEAM MEMBERS WORKING ON THE PROJECT

- 1.87 The following members of the criminal law team have worked on this consultation paper at various stages: Jessica Ugucioni (team manager); Paul Humpherson (team lawyer); Lyndon Harris (team lawyer); Karl Laird (team lawyer); Vincent Scully (research assistant); Sebastian Walker (research assistant) and Harry O’Sullivan (research assistant).
- 1.88 We are grateful to the Office of the Parliamentary Counsel who have been responsible for preparing the draft Sentencing Code.

