



Bar Council response to the Law Commission's third consultative document on the Sentencing Code

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's third consultative document on the Sentencing Code, and the accompanying draft legislation.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. As we have indicated in responses to previous phases of this consultation process the Bar Council is supportive of this project.^{2,3} Both the draft code and accompanying consultation are impressive documents, testament to the hard work of the Law Commission over a number of years. Where appropriate, below we suggest ways in which the content and structure could in our view be improved. None of the comments below detract substantially from our overall view, which is that the project is well on track and should produce a practical, single source of sentencing legislation that will,

¹ <https://www.lawcom.gov.uk/project/sentencing-code/>

² Bar Council response to the Law Commission's Sentencing Procedure Issues Paper 1: Transition http://www.barcouncil.org.uk/media/405870/sentencing_procedure_-_issues_paper_1_-_transition.pdf, 18th August 2015

³ Bar Council response to the Law Commission's second consultative document on the New Sentencing Code http://www.barcouncil.org.uk/media/432630/bar_council_response_to_law_commission_sentencing_code_project-second_consultative_document.pdf, 7th April 2016.

in the words of the Law Commission, “act as the first and only port of call for sentencing tribunals. It will set out the relevant provisions in a clear and logical way, and ensure that all updates to sentencing procedure can be found in a single place.”⁴

5. Before answering the specific consultation questions, we set out below our views on a number of topics that fall outside easy classification as responses to the questions asked.

The continued role of the common law

6. In our response to the second consultative document, we said as follows:

“The most substantial and strategic topic that has yet to be grappled with in this consultation is the way in which case law is to be accommodated within [the Sentencing Code]. On the one hand a codification of statute, statutory instrument and statutory guidelines without any explanatory case law may fail to achieve the aim of [the Sentencing Code] as a comprehensive sentencing text. There are countless examples of judgments explaining opaque drafting, resolving statutory errors or contradictions and plugging lacunae. How could a court or practitioner expect to consult a comprehensive text without these resources? On the other hand, during the course of the exercise we have encountered principles purporting to be derived from case law that had been taken out of context, misconstrued or given undue prominence. Many principles that are cited during the sentencing exercise will be balanced with a competing principle, and it is one of the skills of a lawyer and judge to draw out those that are most relevant and distinguish those that do not bear on the matter in hand. We also encountered instances of omission where an explanatory authority might have provided assistance.

“In this phase of the consultation it is not clear to us how the case law is to be approached in the [Sentencing Code]. Undoubtedly the flow of authority from the Court of Appeal is unlikely to dry up after its initial publication. It is a matter that in our view requires urgent consideration. Our preliminary and tentative view is that, as a general proposition, we do not consider it appropriate to codify case law. However, because it will be undoubtedly helpful and in some instances essential to refer to case law which is of substantive importance in understanding the legislation, we consider that it could be cross referenced and contained within an annex to the [Sentencing Code].”

7. The position of the Law Commission is now clear – see §2.85 onwards:

The decision to enact the Sentencing Code as a consolidation has necessarily restricted our ability to codify certain aspects of sentencing law which are found in the common law [...] Any codification of the common law could not be achieved as part of any normal pre-consolidation amendment powers and would require a number of specific provisions in a Bill that would go beyond a consolidation. [...]

⁴ Quote From <https://www.lawcom.gov.uk/a-new-sentencing-code-for-england-and-wales/> when it was announced in July 2015.

8. We appreciate from the consultation paper that including direct signposts to common law rules is not thought possible, for various reasons - the most significant perhaps being that, unless it were drafted with vague language, a statutory provision referring to a common law rule would have the effect of codifying that rule, which would itself amount to a substantial change to the law which would not be possible to execute under the consolidation procedure. We also note that codification by signpost may have the effect of slowing or preventing the development of the law. If a case were to be superseded by new authority and the common law rule in that case ceased to be applicable, the signpost reference would need to be updated. There is no mechanism for future drafters to make that update, nor is there a process by which it would be brought to their attention. A common law signpost therefore introduces a risk that the Sentencing Code may fall into obsolescence. The Law Commission has therefore concluded:

"For these reasons, we will not be directly referring to common law rules in the Sentencing Code, even by way of nonspecific reference."

9. We understand and approve of this approach, subject to one caveat. Clause 1 of the Sentencing Code provides (insofar as is relevant):

(1) Parts 2 to 13 of this Act together make up a code called the "Sentencing Code".

...

(4) For other provision that may be relevant in relation to sentencing, see – (a) Criminal Procedure Rules, and (b) sentencing guidelines.

10. We are concerned that, read literally, this clause could be seen as implicitly precluding any reference to the common law in the sentencing exercise, which plainly is not the Law Commission's intention. This could be an issue in front of a tribunal who was unwilling to depart from what he/she saw as a strict injunction to consider only those matters referred to in clause 1 (*i.e.* the Sentencing Code, the Criminal Procedure Rules and sentencing guidelines).

11. We take the view that this risk could be eliminated relatively simply in one of two ways, either:

- i) by the addition to clause 1(4) of *"; and (c) the common law"*; or
- ii) by the addition of a new clause 1(5) – *"The Sentencing Code operates without prejudice to the common law"*.

The relationship between non-sentence disposals and the Sentencing Code

12. "Sentencing" is defined in §2.27 of the consultation paper as follows:

"We consider that "sentencing" is descriptive of the process by which a person is dealt with for an offence by the court in its response to a conviction, a special verdict or, in the case of a restraining order, even on acquittal."

13. That is expressed in the Sentencing Code (in clause 277) rather more generally:

"In this Code, except where otherwise provided, "sentence", in relation to an offence, includes any order made by a court when dealing with the offender in respect of the offence, and "sentencing" is to be construed accordingly."

14. We are of the view that this strains the natural use of the words "*sentencing*" (and, by implication, "*sentence*") beyond the point of utility. We are concerned to ensure that orders which are not at present considered to be sentences – for example, bindovers and restraining orders made upon acquittal – are not elided with sentences. The distinction between a sentence and other orders which bring criminal proceedings to an end might be thought to be merely semantic, but in our view it is important that those who are not convicted of a criminal offence should not be stigmatized by the imposition of a "*sentence*".
15. While we understand that the Law Commission's remit does not extend beyond the codification of "*sentencing*" procedure, we do not feel that the merits of including non-sentence disposals outweigh the disadvantages of bending the language in this way.
16. On the other hand, there is considerable force in the suggestion that such orders ought to be included – or at least referred to – in the Sentencing Code, given its aim of being a single reference point for sentencing tribunals, practitioners and the layperson. It may be possible to include *reference to* the (limited number of) types of orders which can be made by a criminal court *otherwise than upon conviction* to be included within the Sentencing Code.
17. While opinion is divided among those who have contributed to this response, there is strong support for the view that such orders should at least be signposted within the Sentencing Code, provided that this could be done while making reference to their special status as orders made at the conclusion of criminal proceedings other than upon conviction. For example, restraining orders on acquittal could feature in the table at Chapter 3 of Part 11 rather than as clause 257.

Retroactivity

18. Certain aspects of the Sentencing Code require careful consideration with reference to Article 7(1) of the ECHR, the relevant part of which provides:

"Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

19. The essence of Article 7 is usually expressed as follows, that a penalty for criminal conduct must not be aggravated "*retrospectively*". In this context, that means that the penalty imposed on the offender must not be more severe than the one provided by law when the offence was committed. This is, of course only the *minimum* level of protection required by Article 7, and the ECHR is not the only source of protection against retroactivity.

20. This topic was explored at length in the Law Commission's first consultative document (primarily in Parts 3 & 4), both through the prism of the common law and with reference to Article 7 of the ECHR. In our response to that document, we said:

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

21. As the scope of the Sentencing Code is restricted to procedural matters (rather than, for example, prescribing, still less altering, maximum sentences applicable for specific offences) the clean sweep approach does not generally give rise to concerns about compliance with Article 7 compliance. Such concerns do, however, arise in the specific areas discussed below.
22. A specific question is raised in the consultation about retroactivity in the context of compensation orders (Q31). However, given the significance of this issue of principle and the importance of the clean sweep approach to the Sentencing Code, we considered it appropriate to respond in full as part of our overarching review of the Sentencing Code. We also considered that for ease of reference a brief overview of the relevant law would assist, although for a fuller discussion of the issues we can hardly do better than to commend the Law Commission's own first consultative document.

The general principles

23. The House of Lords has held (in the *Utley*⁵ line of cases) that what is required in order for Article 7 to be complied with is merely that the penalty actually imposed was no heavier than that which *could* have been imposed on the offender at the time at which the offence was committed. The court is not, therefore, required *"to attempt to divine what sentence a court would have passed if sentencing at the time of commission of the offence"*.
24. However, that decision, which related to altered licence regimes for offenders made subject to sentences of imprisonment, can be contrasted with the *Welch* line of jurisprudence, which may be more directly relevant to the particular position of compensation orders.
25. In *Welch v. UK*⁶, the ECtHR found a breach of Article 7 following the imposition of a confiscation order imposed pursuant to the Drug Trafficking Offences Act 1986. The operative provisions of the 1986 Act had come into force after the offences in question had taken place. The ECtHR held that the confiscation order was a penalty within the autonomous meaning of Article 7 and that, having been applied retrospectively, amounted to a breach of the Convention. What is significant for present purposes is that Mr. Welch received a custodial sentence of 22 years for the offences, the maximum sentence available to the court being life imprisonment. The Court nonetheless found

⁵ [2004] 1 WLR 2278

⁶ (1995) 20 EHRR 247

that he faced “*more far-reaching detriment*” as a result of the confiscation order than that to which he was exposed at the time of the commission of the offences for which he was convicted, and Article 7 was therefore infringed.

26. The fact that the Court found the retrospective confiscation order amounted to a breach of Article 7, despite a more severe custodial sentence than that actually imposed having been available, suggests that each *type* of penalty imposed should be considered in isolation. This was not an issue that arose directly in *Uttley*, which post-dated *Welch*. However, in her judgment in *Uttley*, Baroness Hale acknowledged that the focus of Article 7 is not limited to the sentence prescribed by the law which creates the offence, but can also require consideration of additional penalties applied to that offence by other legislation. Lord Phillips included a similar caveat in his judgment, noting that the decision in *Welch* concerned “*a discrete penalty*”, which was not the case in *Uttley*.
27. While in rare circumstances it would be possible for a court to sentence an offender by way of compensation order alone, it is in our experience far more usual for such an order to be ancillary to the primary sentence imposed. Accordingly, the focus of the court in *Welch* appears more directly relevant to the position of compensation orders than that in *Uttley*.

Non-punitive purpose

28. The particular issue presented in Q31 focuses on the (non-punitive) purpose of compensation orders. The wider question that arises is effectively whether, in order for Article 7 to be complied with, it is enough that an order which retrospectively increases the sum that an offender is liable to pay upon conviction is not intended to be punitive?
29. Put another way, may an order that is not intended to be punitive nonetheless amount to a “*penalty*” within the terms of Article 7? Our view is that it may.
30. We draw some support for this view from *Valico S.r.l. v. Italy*⁷, in which the ECtHR decided, *inter alia*, that an administrative fine imposed for a breach of planning permission, which had both a preventive and a punitive function, amounted to a “*penalty*” within the “*autonomous*” meaning of that term under Article 7. The predominantly punitive purpose of the order was not the determining factor upon which the Court reached this conclusion. Factors identified as being of relevance to the question of whether Article 7 applied included:
 - (i) the aim and nature of the measure;
 - (ii) its severity;
 - (iii) domestic classification; and
 - (iv) the procedure by which the order was imposed.

⁷ Decision no. 70074/01, 21 March 2006

31. It was observed by the Court that the fine could not be converted into a prison sentence in the event of non-payment (which distinguishes it from a compensation order) and that it had been imposed on objective grounds without the need to establish any *mens rea*. However, the Court concluded that “*these factors were not decisive with regard to the “criminal” nature of the offence*”.
32. Similarly, in *Welch* the ECtHR found the confiscation order to amount to a “*penalty*” for the purposes of Article 7, despite the UK Government’s submissions that its purpose was as “*essentially a confiscatory and preventive measure*” rather than being punitive.⁸
33. Accordingly, we take the view that whether or not the order imposed is intended to be punitive is not of itself determinative of the issue of whether Article 7 applies.
34. While compensation orders may not be intended to be punitive, they are likely to be experienced as punitive, with a severe impact in some cases. Compensation orders are also, of course, imposed through the required procedure for a criminal penalty (akin to a fine), and as with any other sentence follow the offender’s conviction for a criminal offence. And default may lead to imprisonment, in much the same way as for non-payment of a fine imposed upon conviction.
35. The relevance of this is apparent when one considers the precise situation contemplated in Q31 – the removal of the £5,000 maximum on compensation orders imposed in the Magistrates’ Court for offenders over 18.⁹ Although the sentencer is required to consider a defendant’s means, the reality is that many people ordered to pay compensation will experience it punitively, and for some offenders it will be by far the most substantial part of any sentence imposed by the court – for example, the Court of Appeal has previously upheld a compensation order that required the offender to sell their family home.¹⁰ Accordingly, whether the intention is that a compensation order be punitive, that will be its likely effect, and sometimes a severe one.
36. Furthermore, there are numerous offence-creating provisions which grant a power to make financial orders against offenders – which would include the power to impose compensation orders - with no corresponding power of imprisonment. Examples include careless driving (s.3 of the Road Traffic Act 1988), throwing of missiles and indecent or racist chanting at a designated football match (ss.2 & 3 of the Football (Offences) Act 1991), touting both of tickets and for hire car passengers (ss.166 & 167 of the Criminal Justice and Public Order Act 1994), and low level public order offences (s.5 of the Public Order Act 1986). For such offences, an unlimited compensation order may well be the heaviest penalty available to the court. In at least those (and

⁸ See the discussion of *Welch* at §4.10ff in the Law Commission’s first consultative document.

⁹ In force from December 11th 2013 as a result of the Crime and Courts Act 2013, amending s.131 of the Powers of the Criminal Courts (Sentencing) Act 2000 by the addition of a new s.1(A1) that limits the £5,000 cap on compensation orders to offenders aged under 18.

¹⁰ *R. v. McGuire (David)* (1992) 13 Cr.App.R.(S.) 332.

comparable) situations, the imposition of a compensation order in excess of the previous statutory maximum would clearly infringe Article 7, even on the limited, *Uttley*-based, reading of the protection it affords.

37. For all the reasons set out above, it is our view that to impose a compensation order that exceeded the maximum such order available for the offence at the time when it was committed could amount to a breach of Article 7. We therefore take the view that offenders should be protected from the retroactive effect of the amended s.131 PCC(S)A by disapplying the clean sweep approach in relation to this provision.¹¹

Other aspects of the Sentencing Code which potentially raise Article 7 concerns

38. There are two other areas in which we have some concerns as to whether Article 7 has been given its full effect:

- i) the extension of the maximum duration of a curfew from 12 to 16 hours;¹²
- ii) the imposition of the surcharge and criminal courts charge.¹³

39. In relation to curfew orders, the point here is a practical one. In any case in which a curfew order is imposed, a custodial sentence (which is undeniably a heavier penalty) could have been imposed. So, applying the *Uttley* line of authority, Article 7 would not be infringed. However, as noted above, *Uttley* does not prohibit the consideration of discrete sentences when evaluating an Article 7 infringement. And the use of the word “*imposed*” in Article 7 suggests a focus on the act of the court in sentencing the offender, rather than a merely theoretical analysis of the position.

40. With our collective experience of the practice of sentencing we remain uneasy about the suggestion that an offender who receives a curfew term that could not have been imposed at the time that he committed the offence has not received a heavier penalty than that applicable at the time of the offence. The line between immediate custody and a suspended sentence / community order containing a curfew element tends in practice to be a relatively firm one. Courts not infrequently impose the maximum non-custodial restriction on liberty that their powers allow.

41. The intention is that the Sentencing Code does not alter the sentence to be imposed. The reality however is that an offender who now receives the new maximum curfew order is highly unlikely to have been sentenced to immediate imprisonment for want of the availability of an extra couple of hours’ restriction on a curfew order. Accordingly, he will in practice have been dealt with more harshly than he could have been dealt with at the time at which he committed the offence.

¹¹ We note in passing that it does not appear that the transitional provisions bringing the new s.1(A1) currently incorporate such protection, but neither is it apparent that the operation of the amendment was intended to be retrospective in effect. The very fact that Q31 is asked, of course, indicates that the position is presently unclear.

¹² By virtue of s.71(2) of the Legal Aid Sentencing and Punishment of Offenders Act 2012, which amended s.204(2) of the Criminal Justice Act 2003.

¹³ See Chapters 3 & 4 of Part 3 of the draft Sentencing Code.

42. While perhaps not expressly prohibited by the *Utley* line of authority, such a situation should in our view be avoided if possible.
43. In relation to the surcharge and criminal courts charge, we take a similar view to that in relation to compensation orders, for essentially the same reasons. As noted below, we consider it important that the amount of the surcharge (and any similar order) is stated in open court.
44. Finally on this topic, regardless of whether the various situations considered above amount to infringements of Article 7, we are concerned that the prospect for any such retroactive increase in the penalty in fact imposed is kept to the minimum necessary to ensure the proper functioning of the Code, and to accord with the common law principle against retroactivity.
45. The remedy would be simple in each case: a table of “before and after” provisions, with relevant start and end dates, as per fines (see clause 84). This would render the sentencing exercise only marginally more complicated than if the clean sweep were applied, and the limited extra burden on the sentencing tribunal is in our view a reasonable price to pay in order to avoid the risk of unfairness.

Power to amend the Sentencing Code

46. While the relevant provisions do not presently appear in the draft Sentencing Code, we note from §3.89 of the consultation paper the proposal that the insertion of commencement dates should be permissible under s.104 of the Deregulation Act 2015, which provides as follows:

104 Power to spell out dates described in legislation

(1) A Minister of the Crown may by order made by statutory instrument –

(a) replace a reference in legislation to the commencement of a provision with a reference to the actual date on which the provision comes into force;

(b) replace a reference in legislation to the date on which any other event occurs with a reference to the actual date on which that event occurs.

47. We take no issue with this proposal on a practical level, but it is imperative that the continued importance of Article 7 (and/or the related common law rule against retrospectivity which will remain regardless of the status of the ECHR in the domestic arena) is recognized when such amendments are made. The authors of the Sentencing Code have been scrupulous in attempting to ensure compliance with this principle, and we trust that the Secretary of State will adopt a similarly careful approach to any future amendments, in particular where e.g. mandatory minimum custodial terms, extended sentences or increases in the courts’ powers to make financial orders are under consideration.

Response to the Consultation Questions

48. Below we set out our response to the specific questions asked, organized by Chapter as per the consultation paper.

Chapter 1 - Introduction and Summary

Q1 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?

49. The Bar Council responded in detail to the second consultative document, which sought to collate all extant sentencing provisions. We have not specifically repeated that exercise in formulating our response to the draft Sentencing Code. We note that certain provisions relating to sentencing have been deliberately omitted from the Sentencing Code, in addition to the common law, as considered above. However, subject to that and to the various matters covered below, we consider that the Sentencing Code does, accurately, reflect current law on sentencing, insofar as it is intended to do so.
50. As with our proposal in relation to the common law, we consider that it may be helpful to somehow identify which areas e.g. Animal Welfare Act 2006 (§1.54 of the Consultation), road traffic offences, or the provisions of the Sexual Offences Act 2003, have been deliberately excluded. We acknowledge, however, that this may not be practicable.

Chapter 2 - Scope and Structure of the Sentencing Code

Q2 Do consultees approve of the policy we have adopted with regard to the inclusion of provisions in the Sentencing Code?

51. Generally, yes. We agree, for example, that confiscation is ripe for reform and too big a topic to easily include in the Sentencing Code. We welcome the observations in the Law Commission's 13th Programme referring to ongoing work in relation to the Proceeds of Crime Act 2002 (POCA). We also note Clause 115 – signposting the confiscation provisions of POCA – of which we approve.
52. Subject to the concerns expressed in paras 12-17 above, we also agree that reference to non-sentencing disposals has real practical benefit and should reduce the risks of unlawful orders being made in sentencing exercises that are not often before the courts.

Q3. Do consultees agree with the above categorisation of sentencing powers? This categorisation is designed to assist in ensuring that the Bill is structured in the most effective manner. It will dictate whether provisions are placed in the Third Group of Parts “primary sentencing powers” or the Fourth Group of Parts “further powers relating to sentencing”.

53. These questions refer to the distinction identified between “*primary sentencing orders*” and “*further orders relating to sentencing*”. We consider that to be a helpful distinction. It may be, however, that the language describing the latter could be simplified – for example to “*ancillary sentencing orders*” or “*secondary sentencing orders*”.
54. There appears to be one error concerning the powers available on special verdicts. A finding of unfitness and a special verdict of insanity should not be conflated. The available powers are different depending upon the finding. Where an individual is found “not guilty” by virtue of insanity then a restraining order s.5 PHA 1997 is available as an order “on acquittal” see *R v AJR* [2013] 2 Cr App R 12. Restraining orders under s.5 PHA 1997 are not, however, available when an individual is found to have done the act following a finding of unfitness because a finding that someone “did the act” is neither a conviction nor acquittal: s.4A Criminal Procedure (Insanity) Act 1964; *R v Harold Chinegwundoh* [2015] 1 Cr. App. R. 26.
55. Our view is that the layout of the Third Group of Parts is capable of improvement, as to which see below (Q11).

Q4. Further to the above proposal, do consultees believe that it would be useful to include provision directing the court that in every case in which it deals with an offender for an offence, it must always make at least one “primary sentencing powers” order, and may make appropriate additionally orders from the “further powers relating to sentencing”?

56. Yes, we believe that this would enhance the clarity of the sentencing exercise and should eliminate the possibility of courts failing to make any of the primary sentencing orders.

Q5. Do consultees approve of those matters which we have included within the Sentencing Code? Do all of them belong in the Sentencing Code?

57. Generally, yes, subject to the observations regarding non-sentence disposals made above.

Q6. We propose that absolute discharges available on a special verdict should be redrafted in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

58. Yes.

Q7. We propose to recast provisions relating to hospital orders available on a special verdict in the Criminal Procedure (Insanity) Act 1964, thereby removing the need to apply the modifying provisions in section 5A of that Act. Do consultees agree?

59. Yes.

Q8. Do consultees agree that those disposals available on a special verdict should all be contained in the Sentencing Code?

60. Yes.

Q9. Do consultees approve of the approach we have taken with regard to signposting provisions? Are these useful? Do they make the Sentencing Code more comprehensive?

61. Yes. We consider signposting to be a helpful innovation. Using this technique it should be possible to ensure that the Sentencing Code is comprehensive while at the same time remaining manageable and easy to navigate.

Q10. Do consultees approve of the decisions we have taken with regard to excluding certain provisions from the Sentencing Code? Is there anything which consultees believe necessarily must form part of a functioning and coherent Code?

62. We agree that appeal against sentence is best excluded from the Sentencing Code. The law in this regard is clearly and accessibly set out in statute. As appeal is a distinct issue arising out of sentence, as opposed to concerning sentencing *per se*, it can be dealt with separately thereby reducing the scope of the already extensive Sentencing Code.

63. We also agree that the following aspects of sentencing should, generally be excluded from the Sentencing Code:

- i) specific maximum sentences;
- ii) the constitution of the Sentencing Council (as we suggested in our response to phase 2 of the consultation process);
- iii) sentencing for Road Traffic offences generally;
- iv) confiscation;
- v) administrative provisions concerning release on licence and parole / probation regimes generally.

64. In relation to (v) above, we are mindful of the benefits of keeping the parole regime (which takes effect outside the criminal courts system) separate from the sentencing regime. Similar considerations apply to other post-sentence regimes, e.g. recall to prison for breach of licence conditions. We therefore agree that administrative provisions concerning release on licence, recall, parole and probation regimes (save for breaches of community or suspended sentence orders) can properly be excluded from the Sentencing Code.

65. We would however suggest that room is found in the Sentencing Code for certain provisions governing the operation of a sentence, such as s.256AA of the Criminal Justice Act 2003, which provides for a mandatory extended period of supervision upon release for all offenders sentenced to a term of imprisonment of between 1 day and 2

years. The operation of s.256AA is an inevitable part of the sentencing process and as such ought to be incorporated into the Sentencing Code.¹⁴

66. In relation to this question, see also our answers to Q61-63 re: the inclusion of the “*slip rule*” provisions in the Code.

Q11. Do consultees approve of the way in which the Sentencing Code has been structurally organised? Is it in the most efficient possible layout? Are the available disposal powers correctly ordered?

67. In our response to the second phase of the consultation, we said as follows:

“... one of the most important features of the [Sentencing Code] would be clarity of organisation. We understand that the focus of this phase of the consultation was not so much on how the [Sentencing Code] is to be laid out, but rather on whether the provisions identified were accurate, comprehensive, and appropriate for consideration in the [Sentencing Code]. Once that exercise has been completed however, it would, in our view make sense to take some time to consider how the material can best be organised, so that [Sentencing Code] does not simply become a list of provisions but features an intuitive system of classification that would best assist judges, practitioners and laymen.”

68. Currently, the structure of the Third Group of Parts is, in our opinion, capable of improvement. In particular, we believe that it would be helpful to judges and practitioners if those sentences which relate only either to adults or to young offenders were separated. We propose an order along the following lines: (it is more the sequence than the numbering that we are focusing on here)

Part V Primary sentences available for all offenders

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

Part VI Primary sentences only available for adult offenders

- Financial penalties (where adult-only)
- Non-custodial disposals
- Custodial disposals¹⁵
 - o General provisions
 - o Life sentences / effect of life imprisonment
 - o Dangerous offenders

¹⁴ If included, *quaere* whether the clean sweep should be disappplied in relation to this provision. The current position in law is that s.256AA does not apply in respect of offences committed before its coming into force (1st February 2015). It has some of the characteristics of a penalty (imposition upon conviction for a criminal offence being chief among them) but is primarily rehabilitative in nature, is automatically imposed and is not particularly severe in its impact, and has more in common with the *Utley* line of authority concerning early release provisions and licence regimes.

¹⁵ Opinion is divided on whether these should be structured in ascending or descending order of seriousness (see Q44 below) but a logical order should be applied.

- Extended sentences
- Suspended sentences

Part VII Primary sentences only available for young offenders

- Financial penalties (only available in the case of young offenders)
- Fines
- Non-custodial disposals
- Custodial disposals¹⁶
 - U/18
 - U/21

Part VIII Ancillary / secondary orders

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

Part IX – sentence administration

- Various

Chapter 5 - General Provisions

Q12. Do consultees support our conclusion that the statutory surcharge should be an automatically imposed consequence of conviction? There would be no need for the court to make any reference to the surcharge, save for in those cases where the offender had limited means to satisfy other financial orders.

69. No. This proposal fails to account for the fact that litigants in person, who make up an increasing number of defendants appearing before the criminal courts, will not have a legal representative on hand to clarify, following the hearing, not only the nature of the primary sentence that was imposed, but the full extent of the financial liabilities to which the defendant was made subject. We therefore take the view that the level of the surcharge ought to be articulated by the court in all cases, and that the Sentencing Code should require this. We also suggest that the level of the surcharge be set out in the Sentencing Code, with “*before and after*” provisions as with fines (see clause 84) if increased over time, as discussed above in the context of retroactivity generally.

Q13. Do consultees think that the introduction of a definition of mandatory sentence requirements in place of individual lists of such provisions is helpful?

70. Yes. By collating in one place all the instances where a mandatory sentence must be imposed, s.274 ensures that all such instances are clearly visible to CJS users and avoids the risk of any being overlooked. Any amendment introducing a new mandatory sentence can be easily added to this section to the same effect. However,

¹⁶ In either descending or ascending order of seriousness, as per adult offenders.

reference, in s.274(1)(a), to mandatory sentences which are externally “fixed by law” perhaps weakens the accessibility of this reform – see the comments in response to Q16 below.

Q14. Do consultees consider that the proposed definition of mandatory sentence requirements is correct? Do they consider that special custodial sentences for offenders of particular concern under section 236A of the Criminal Justice Act 2003 should be included?

71. To the first of the two questions asked, our view is that the proposed definition is correct.
72. However, we take the view that s. 236A CJA 2003 ought not to be so defined. It is not a mandatory sentence *per se*, as the sentencing tribunal retains a discretion not to impose a custodial sentence, and even when imposed the appropriate custodial term is a matter for the court’s discretion. This section is only mandatory in that it imposes, under s. 236A(2)(b), “a further period of 1 year for which the offender is to be subject to a licence”. While this aspect is indeed mandatory, it is somewhat exceptional, and might risk confusion if included in a list of mandatory sentences.

Q15. Do consultees agree that the only offence for which the sentence is “fixed by law” is murder? If so, how would they describe offences like those under section 51 of the International Criminal Court Act 2001?

73. Yes, to the first question.
74. Genocide, crimes against humanity and war crimes under s. 51 ICC Act 2001 are defined in Schedule 8, Articles 6-8, of that Act. Each includes a variety of actions amounting to the offence in question, of which “killing” is only one. Section 53(5) provides that a person convicted of “an offence involving murder ... ” shall be dealt with “as for an offence of murder ... ” As the sentence is defined with reference to the sentence applicable to murder, we take the view that the offences of genocide, crimes against humanity and war crimes do not *themselves* attract sentences which are fixed by law: if murder ceased to attract a mandatory life sentence, so would genocide, crimes against humanity and war crimes which involved murder.

Q16. If consultees agree that the only offence for which the sentence is “fixed by law” is murder, do they agree that the term “fixed by law” should be replaced with a description of the order, namely “the mandatory life sentence for an offence of murder” (or something similar)?

75. We agree that the term “fixed by law” may be unnecessarily oblique for non-professional CJS users. Replacing it with a form of words that would allow / require a court to say “the offence is murder and as such carries a mandatory life sentence” would improve clarity and accessibility. However, the direct insertion of “the mandatory life sentence for an offence of murder” into clause 274(1)(a) would not make grammatical sense as the clause is presently drafted.

76. It is also worth bearing in mind the possibility in future of primary legislation being enacted to create further sentences that are fixed by law, and accordingly the need for this provision to be amended at that time. An alternative to the present clause 274 that would more easily allow such a development could look like this:

“274 Mandatory sentences

(1) For the purpose of this Code, where a court is dealing with an offender for an offence, a mandatory sentence requirement applies in relation to the following offences:

(a) murder, which requires a mandatory life sentence to be imposed; ...”

Q17. Do consultees agree that section 142 of the Criminal Justice Act 2003 (the purposes of sentencing) should be amended so that it applies “subject to” mandatory sentencing requirements, rather than being completely disapplied in such cases?

77. Yes. Even where provisions require a mandatory minimum sentence for a specified offence, general principles of sentencing still apply in determining to what extent, if at all, a sentence should surpass the minimum. Furthermore, almost all of the mandatory sentence provisions feature a caveat making the imposition of such a sentence subject to (for example) “*the interests of justice*” or “*exceptional circumstances*”. If the sentencing tribunal finds that the interests of justice / exceptional circumstances as applicable require it to disapply the mandatory sentence, s.142 again comes to the fore.

Q18. Do consultees consider that the signposts provided by clause 55 (the purposes of sentencing in relation youths) are a useful addition?

78. Yes. It is important that this distinction is contained within the Sentencing Code. The signposts at clause 55 usefully remind all users of the overarching aim of the youth justice system.

Q19. Do consultees agree with our decision to leave out of the Sentencing Code those provisions relating to the establishment and role of the Sentencing Council?

79. Yes. We consider it sufficient to point the user to where the provisions can be found.

Q20. Do consultees agree that the phrases “guideline category starting point” and “non-category starting point” provide greater clarity than the references to the “sentencing starting point” and “appropriate starting point” contained in section 125 of the Coroners and Justice Act 2009?

80. Up to a point. We agree with Hallett LJ in *R v Bush*,¹⁷ that “sentencing starting point” is potentially confusing in the context. We agree that the term “guideline category starting point” – or, perhaps, simply “guideline starting point” – would provide greater clarity.
81. However, “non-category starting point” is not necessarily an improvement. When those words are substituted in the provision, the sentence contains 3 negatives and lacks clarity. It would in our view be clearer left as “appropriate starting point”.

Q21. Do consultees agree with the proposed replacement of the phrase “notional determinate term” with the term “appropriate custodial term” in clause 58?

82. Yes, we agree it more effectively and accurately reflects the required determination. The term is also easier for the lay person to understand.

Q22. Do consultees consider that the replacement of the list of provisions in section 156(1) of the Criminal Justice Act 2003 (duties when forming specific opinions), with signposts to the duty in all the qualifying provisions is helpful?

83. We agree that the use of signposts is helpful here. However, reference to the list as a whole, perhaps in a separate schedule, may assist.

Q23. Do consultees think that the scope of the Sentencing Code should include all mandatory aggravating factors including section 29(11) of the Violent Crime Reduction Act 2006 and section 4A of the Misuse of Drugs Act 1971?

84. Yes.

Q24. Do consultees believe that the duty to treat previous convictions or the fact that the offender was on bail at the time of the offence, as aggravating factors under section 143 of the Criminal Justice Act 2003 should be amended, in line with the other duties to treat facts as aggravating factors, to include a duty to state in open court that the court has done so?

85. Yes, an aim of the Sentencing Code is legal clarity and an accurate and transparent sentencing process. The obligation on the court to treat a factor as aggravating where reasonable to do so is accompanied by an obligation to say that it has done so, save (presently) in relation to section 143. This duty should extend to section 143 and accordingly the suggested pre-consolidation amendment makes sense.

Q25. Do consultees think that it would be desirable in principle if section 144 of the Criminal Justice Act 2003 was amended so that a reduction for guilty plea could allow a court to impose a sentence less than that required by either section 51A(2) of the Firearms Act 1968 (the minimum sentence for certain firearms offences) or section 29(4) or (6) of the Violent Crime Reduction Act 2006, provided that the sentence imposed was not less than 80% of the required sentence for an offender

¹⁷ [2017] 1 Cr App R (S) 49

where the offender is over 18? We emphasise that this is not a change that we could make as part of this project but it could form part of a package of recommendations in our final report which go beyond the Sentencing Code as initially enacted.

86. Yes. Currently, under section 51A(2) of the 1968 Act the court can reduce the sentence where there are exceptional circumstances. It seems right that credit is given for a guilty plea in cases where the correct starting point is at the statutory minimum level to coincide with the general principle that a guilty plea should receive credit. This avoids the need to point to some “*exceptional circumstance*” in order to reach the correct and proper sentence. It would be both fairer and clearer for the courts to be required to adopt a consistent approach with the way in which other statutory minimum sentences are treated (three-strike residential burglaries for example).

Q26. Do consultees agree that the benefits of restating the definition of specified prosecutor from section 71 of the Serious Organised Crime and Police Act 2005 outweigh the administrative disadvantages and the risk that a prosecutor is not specified under one of the two versions?

87. Section 73 deals with a person who provides assistance to the specified prosecutor as mitigation. The definition of specified prosecutor given in section 71 would be relevant to this matter: an obvious benefit of providing a definition in the Sentencing Code is that users will not have to make reference to provisions elsewhere. We agree that this benefit outweighs the potential (and relatively limited) administrative burden in updating the Sentencing Code when a fresh prosecutor is so designated.

Chapter 6 – Financial orders and orders relating to property

Q27. We welcome consultees’ views on the balance that the draft Sentencing Code strikes by including some general provisions on fines, but generally excluding provisions relating to the fine levels and maximum fines for particular offences.

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

Q28. Do consultees find the table showing the summary fines levels over time in clause 84 helpful? Could it be improved?

90. The table in clause 84 is unlikely to be referred to in practice on more than a very few occasions, given its focus on offences committed between 1983 and 1992. We doubt

that very many such offences which may now come before the courts are likely to result in a financial penalty, given the statutory time limits for prosecuting summary-only offences (for which most fines imposed by reference to the standard scale would be imposed). However, the layout is clear, accessible and self-contained, so it is probably worth retaining for those rare instances when such a case does fall to be sentenced.

91. See also our comments above (in the section dealing with retroactivity) in relation to the adoption of a similar table for compensation orders / the surcharge.

Q29. Do consultees find the new clause 80 which sets out the general power of the Magistrates' Court to impose fines helpful?

92. A new provision such as clause 80 could be helpful, but we wonder whether it could be more simply drafted as follows:

"If the relevant offence provision provides that a person convicted of that offence is liable to a fine, a magistrates' court dealing with an offender for that offence may impose a fine of a particular amount."

Q30. Do consultees find the new streamlined compensation order provisions more accessible?

93. Yes.

Q31. Do consultees agree that the removal of the limit on compensation orders can safely be retrospectively applied to offences which pre-date its commencement, as an example of the 'clean sweep' in operation, given that the purpose of a compensation order is not punitive in its aims and therefore Article 7 is not engaged.

94. See the discussion above in the context of retroactivity generally.
95. We note that there are certain safeguards built into the existing framework when compensation orders are considered, including the requirement to conduct a detailed means enquiry and a necessary link between the order and the harm caused by the predicate offence.
96. However, we take the view that the clean sweep should not apply to the provisions in question, as, regardless of the fact that compensation orders are not punitive in their aims, we consider:
- a) that a compensation order is capable of being considered a "penalty" within the autonomous meaning of that concept in Article 7(1) ECHR; and
 - b) that both Article 7 and the common law principle against retroactivity ought to protect offenders from retrospective removal of the limit on confiscation orders imposed in the Magistrates' Court.

Q32. Do consultees agree that the table in clause 113 providing a non-exhaustive list of signposts to other conviction forfeiture powers is helpful?

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

Q33. Can consultees offer other suggestions for inclusion in the table in clause 113?

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

Chapter 7 - Community Orders

Q34. Do consultees consider that the material relating to community orders in the draft Sentencing Code has been structured appropriately? Could any improvements be made to the layout of this part?

99. See generally our answer to Q11 and the suggested re-organization of the Third Group of Parts set out there, in particular the separation of penalties available for adults and young offenders.
100. Further, and specifically:
- i) For clarity, Clause 128(1) could perhaps be improved by including the words “*non-custodial*” before “*order imposing one or more community order requirements*”;
 - ii) We suggest that clause 129 follows 134, so that the power to make community orders containing particular “*available requirements*” comes before the table setting out those requirements;
 - iii) We approve of the removal of the provisions dealing with revocation and re-sentence to Schedule 4, as identified in clause 147.

Q35. Do consultees agree that the use of the concept of an “available requirement” [clause 134] has improved the clarity of the law?

101. Yes, with one caveat. We are concerned that the current drafting of this chapter, and in particular clause 134, may possibly restrict the ability of court centres to try out

new rehabilitative programmes, for example the Choices and Consequences (“C2”) Programme operated in Hertfordshire.¹⁸ If there is any risk of such valuable local initiatives being compromised by the ways in which these provisions are currently drafted, we would value the opportunity to provide further input.

102. If thought necessary, it would no doubt be possible for such local initiatives to be recognized in legislation (ideally by way of statutory instrument) and incorporated into the provisions of the Sentencing Code. For example, by the addition of a clause 134(3):

“(3) Sub-section (1) of this section does not apply where a court makes a community order which imposes a community order requirement that has been approved by the Secretary of State.”

103. If required, a comparable provision could also be incorporated in Part 5, Chapter 5, which dealing with suspended sentence orders.

Q36. Do consultees agree that the use of the table showing the available community requirements is an improvement over the current law?

104. Yes. But note our concerns re: the implications of the increase in the courts’ powers to impose a curfew requirement, which are dealt with above in the section on retroactivity.

Q37. Do consultees agree that the streamlining changes to the court’s powers to revoke and resentence community orders have improved the consistency and clarity of the law?

105. Yes. Our concerns relating to compliance with Article 7 are moderated in relation to the process of revocation and resentencing by the fact that to become subject to these provisions the offender will have committed another offence / breached their existing community order in some way. They will also have been warned in open court that a possible consequence of so doing would be a custodial sentence. Accordingly, the imposition of a more onerous community order requirement than would have been available at the date of the original sentence does not raise quite the same concerns as those relating to the initial sentence.

Chapter 8 - Suspended Sentence Orders

Q38. Do consultees believe that the material relating to suspended sentence orders in the Draft Code is appropriately structured? Can they suggest any ways in which it might be improved?

106. Generally, yes. But see our comments in relation to Q34 and the ordering of the community requirements table *vis-a-vis* the power to impose an available community

¹⁸ <https://www.herts.police.uk/Information-and-services/About-us/C2-Programme.aspx>

requirement. For the same reasons as those given above, we would suggest that clause 201 should follow clause 204.

Q39. Do consultees consider that the table in clause 201 setting out the restrictions and obligations in relation to the imposition and availability of community requirements is helpful?

107. Yes.

Q40. Do consultees believe that the substantial rearrangement of paragraphs 8 to 12 of schedule 12 to the Criminal Justice Act 2003 in paragraphs 10 to 21 of schedule 10 clarifies the powers of the magistrates' courts and Crown Courts where an offender serving a suspended sentence order is before them?

108. Yes.

Q41. Do consultees think that the re-ordering of schedule 13 to the Criminal Justice Act 2003 in schedule 11 improves the clarity and accessibility of the law?

109. Yes.

Q42. Do consultees agree that the introduction of the phrases SSSO and NISSO in schedule 11 is useful?

110. Yes.

Chapter 9 - Custodial Sentences

Q43. Do consultees agree that it is desirable to split the provisions relating to specific custodial sentences into three age groups, under 18, 18 to 20 and 21 and over, and to group the clauses for each age group together?

111. Yes. Grouping provisions by availability rather than disposal type makes more sense when one considers that the exercise of researching, making submissions and determining sentence in a particular case is necessarily offender-specific. See above (Q11) for general comments re: structure.

Q44. Do consultees consider that the provisions relating to the different variations of custodial sentence should be arranged in ascending, or descending, order of severity?

112. As noted above in relation to the structure of the Third Group of Parts (Q11), opinion is divided on this point. In favour of the descending order approach is the fact that, once the tribunal is within the range of custodial sentences, it makes sense to dismiss those options which are not open to the court first – for example, dangerousness needs to be considered (and if necessary dismissed) in qualifying cases

before a determinate sentence may be imposed. Similarly, if a mandatory life sentence is required to be imposed, lesser sentencing powers are irrelevant.

113. On the other hand, as a court is required to pass the minimum sentence commensurate with the seriousness of the offence (pursuant to s.152 of the Criminal Justice Act 2003, reflected in clause 160(2) of the draft Sentencing Code) there is some sense in the ascending approach, starting with a SSO, which is practically the next step up from a community order, and the lowest sentence that can be imposed once the custody threshold is crossed.

114. We have no clear preference as to the order, provided that a logical structure is adopted.

Q45. Do consultees believe that either a “catch-all term” to cover all custodial sentences, or removing the distinction between a sentence of imprisonment or detention in a young offender institution, with the one sentence simply being served in a different place depending on age, might be desirable?

115. Yes. This is a simple reform that would reduce confusion between the various types of custodial disposal – each of which is defined by the essential feature of deprivation of liberty. That said, choosing the term may be fraught with difficulty, as “custody” applies to pre-trial detention as well as that post-sentence, whereas “imprisonment” is only (properly) used at present to denote custody following sentence.

Q46. Do consultees consider that the benefits of re-drafting sections 132 and 133 of the Magistrates’ Courts Act 1980 into the Sentencing Code outweighs the potential disadvantages?

116. Yes. However, we query whether s.158(2) ought to appear before s.153 in the Sentencing Code, it being a general *de minimis* provision.

Q47. Do consultees agree that the re-drafting of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 makes the provision easier to follow and apply?

117. Up to a point. But it could be improved by, for example, including reference in clause 169(2) (and in clause 171) to a separate schedule containing the relevant provisions, as has been done with clause 169(1).

Q48. Do consultees agree that the clean sweep should not apply to sections 225 or 226 of the Criminal Justice Act 2003?

118. Yes. The distinction with s.226A – in which the existing law provides for extended sentences to be imposed either before or after the commencement of the relevant provisions - is properly made in the drafting.¹⁹

Q49. Do consultees agree that the approach taken in the re-drafted version of schedule 9 of listing the cut-off date for the offence in column 2 is useful?

119. Yes. This is a very good idea.

Q50. Do consultees agree with the approach taken in splitting up schedule 15 to the Criminal Justice Act 2003 into three schedules: one for non-sentencing purposes, one for the purposes of references to specified offences and one for the purposes of life sentences under the re-drafted versions of sections 225 and 226 of the Criminal Justice Act 2003?

120. Yes. It is somewhat cumbersome to navigate these provisions, but that is not the fault of the Law Commission and in any event this is a definite improvement on what went before.

Q51. Do consultees find the signposts to the definitions of “specified offence” and “serious offence”, as well as the test of dangerousness, helpful?

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

Q52. Do consultees think that all minimum sentence provisions listed in paragraph 9.41 should be re-drafted in the Sentencing Code?

122. Yes.

Q53. If not, which provisions should be re-drafted in the Sentencing Code, and which ought to be left in their current locations?

123. N/A.

Q54. Do consultees agree that we have included all the provisions relating to the administration of sentence that a court needs to be aware of when sentencing to properly exercise its functions?

124. Yes.

Chapter 10 - Further Powers Relating to Sentence

¹⁹ We consider that it may not be strictly accurate to describe sentences imposed under ss.225 / 226 as being “*mandatory*”, but that does not affect our answer to this question.

Q55. Do consultees agree that the orders included in clause 262 are those which a sentencing judge needs to be aware of? Are there some which ought to have been included which are not, or some which are included which should be omitted?

125. It may also be worth signposting powers under the Licensing Act 2003 to e.g. remove a Designated Premises Supervisor or make a closure order. While not common in the Crown Court, they are relatively widely used in the Magistrates' Court.

Q56. Do consultees agree that restraining orders on acquittal belong in the Sentencing Code?

126. Only if they are appropriately identified as being non-conviction disposals, and preferably by way of signpost rather than inclusion in the Sentencing Code itself. See our comments in the overview above.

Q57. Do consultees agree with the decision to signpost, but not to re-draft, Sexual Harm Prevention Orders? If the view is that they should be re-drafted into the Sentencing Code, do consultees consider that this justifies splitting the versions available on application and the variations available to a sentencing court and splitting schedule 3, re-drafting it in the Sentencing Code for the purpose of Sexual Harm Prevention Orders and leaving in the Sexual Offences Act 2003 for the purpose of notification?

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

Q58. Do consultees think that the format of the table of signposts in clause 262 is helpful? Could it be improved?

128. It is certainly helpful. It may perhaps be clearer if the description is placed in the first column and the provision in the second.

Q59. Do consultees agree that sentences imposed by the magistrates' courts take effect from the beginning of the day on which they are imposed (unless otherwise directed), and that section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended to them to make this clear?

129. Yes. It might also be worth making specific mention of s.133 of the Magistrates' Courts Act 1980 which allows Magistrates' Courts to direct that a sentence run consecutively to one already being served (though NB not one from which the defendant has been released – s.265 CJA 2003).

Q60. Do consultees agree that the Crown Court can only direct that a sentence takes effect other than on the day it is imposed by imposing it consecutively on the expiry of another sentence, or minimum term, from which the offender has not already been released? If so, do consultees consider that it would be desirable to formally codify this position?

130. Yes (and see our answer to the previous question). It would be desirable to codify this position.

Q61. Do consultees agree that the 56 day limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 should be extended? How long should any limit be?

131. No. While it is conceivable that such an extension may result in some efficiency savings, avoiding minor errors identified after 56 days having to be rectified in the Court of Appeal, that benefit would be outweighed by the reduction in certainty that such an extension would create. Tipping the balance in favour of retaining the present position is our view that it is relatively unlikely that errors would come to light over two months after sentence, having not been noticed before.

Q62. Should the time limit on the Crown Court's ability to alter previously imposed sentences under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 be longer for the correction of errors of law than for the amendment of sentence for other reasons?

132. No. This would be to invite confusion and uncertainty and could, for example, lead to argument about whether an amendment was one of law or fact.

Q63. Do consultees agree that the requirement that the alteration of sentence must be conducted by the same judge who imposed the original sentence should be removed, in favour of a provision which allowed the resident judge of the Crown Court centre in question to make the alteration in circumstances where it is not reasonably practicable for the original judge to sit inside the 56-day period?

133. Yes. This would help to avoid some (though probably quite few) unnecessary appeals where an error was noticed towards the expiry of the 56-day period but the sentencing judge was unavailable. We note the Law Commission's acknowledgement that primary legislation would be required to achieve this.