



## **Bar Council response to the Law Commission's second consultative document on the New 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 second consultative document on the New Sentencing Code.<sup>1</sup>
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. We reached the conclusion that one of the most important features of the New Sentencing Code (NSC) would be clarity of organisation. We understand that the focus of this phase of the consultation was not so much on how the NSC is to be laid out, but rather on whether the provisions identified were accurate, comprehensive, and appropriate for consideration in the NSC. 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 NSC does not simply become a list of provisions but features an intuitive system of classification that would best assist judges, practitioners and non-lawyers.
5. A positive aspect of this phase of the consultation is that it has thrown up examples of the unnecessary proliferation of legislation in a particular field – for example that of forfeiture. The need for consolidation of the criminal courts' powers of forfeiture is apparent on the face

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<sup>1</sup> Law Commission 2016 [second consultative document on sentencing code](#)

of this exercise, and it may be that matters of this nature could be brought to the attention of the legislature in advance of the NSC reaching its final form.

6. We took the view that in the NSC there is unlikely to be any need to include the history of the legislation cited, provided that its contents are accurate at the time of going to press and are updated when appropriate.

7. 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 NSC. 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 NSC 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.

8. In this phase of the consultation it is not clear to us how the case law is to be approached in the NSC. 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 NSC.

9. We note that amending secondary legislation is not always cited within the consultation document. This may be deliberate and as set out at §3 above it should not be necessary to set out the legislative history of a particular provision within the NSC. As will no doubt be appreciated this response has involved the work of a number of practitioners; some of whom set out the legislative history of a particular provision and others did not.

## **Part 1**

### **1.1.1 Adults (Aged 18+ at conviction)**

Note 2 omits: Amendments by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 [Sch.26 para.16\(2\)](#) (December 3, 2012) 2; Criminal Justice and Courts Act 2015 c. 2 [Sch.5 para.10\(2\)](#) (July 17, 2015) & Added by Criminal Justice and Courts Act 2015 c. 2 [Sch.5 para.10\(3\)](#) (July 17, 2015). Please also note prospective amendments inserted by Criminal Justice and Immigration Act 2008 c. 4 [Pt 2 s.9\(2\)\(a\)](#) (date to be appointed) & Criminal Justice and Immigration Act 2008 c. 4 [Sch.28\(2\) para.1](#) (date to be appointed).

## 1.2 Legal representation

Note 8 omits amendments by S.83(3)(aa) substituted for word by Criminal Defence Service Act 2006 c. 9 [s.4\(3\)\(b\)](#) (October 2, 2006); Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 [Sch.5\(1\) para.53\(2\)\(a\)](#); [Sch.5\(1\) para.53\(2\)\(b\)](#) & [Sch.5\(1\) para.53\(3\)](#) (April 1, 2013 subject to saving and transitional provisions as specified in SI 2013/534 regs 6-13).

### 1.3.1 Seriousness

Note 9 omits: Amendments by Coroners and Justice Act 2009 c. 25 [Sch.17 para.6\(2\)\(a\)](#) & (b) ^ 6(3) (August 15, 2010); substitutions by Armed Forces Act 2006 c. 52 [Sch.16 para.216](#) (October 31, 2009).

### 1.3.2 Racial/religious aggravation

Note 11 omits: amendment by Anti-terrorism, Crime and Security Act 2001 c. 24 [Pt 5 s.39\(3\)\(a\)](#); [Pt 5 s.39\(3\)\(b\)](#); [Pt 5 s.39\(3\)\(c\)](#); (December 14, 2001) [Pt 5 s.39\(4\)](#) (December 14, 2001)

s.28 Crime & Disorder Act 1998 - The version of the legislation within the consultation document contains incorrect brackets. It is assumed that “square brackets” which denote amendments to legislation will be removed from any final draft of the legislation. The brackets do not affect the meaning of the legislation.

### 1.3.3 Disability/sexual orientation or transgender identity

Note 13 omits amendments by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 [Pt 3 c.1 s.65\(3\)](#) (art.3); [Pt 3 c.1 s.65\(4\)\(a\)](#) ; [Pt 3 c.1 s.65\(4\)\(b\)](#) ; [Pt 3 c.1 s.65\(5\)\(a\)](#) ;[Pt 3 c.1 s.65\(5\)\(b\)](#) ; [Pt 3 c.1 s.65\(6\)](#) (December 3, 2012 subject to savings as specified in SI 2012/2906 art.3).

### 1.3.5 Terrorist connection

It would be useful to include scheduled offences within the body of codified legislation. We assume that the fact that the section is referred to means that the provision will be included.

### 1.4.1 General principles relating to secondary custodial sentences

No – Section as reproduced omits subsection 3 inserted by Criminal Justice and Courts Act 2015 c. 2 [Sch.5 para.15\(2\)](#) & [Sch.5 para.15\(3\)](#) (July 17, 2015)

The correct version is as follows:

*‘153 Length of discretionary custodial sentences: general provision*

*(1) This section applies where a court passes a custodial sentence other than one fixed by law or imposed under [[section 224A](#), [225](#) or [226](#)]*

*(2) Subject to the provisions listed in subsection (3), the custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.*

- (3) *The provisions referred to in subsection (2) are—*
- (a) [sections 1\(2B\) and 1A\(5\) of the Prevention of Crime Act 1953](#);
  - (b) [section 51A\(2\) of the Firearms Act 1968](#);
  - (c) [sections 139\(6B\), 139A\(5B\) and 139AA\(7\) of the Criminal Justice Act 1988](#);
  - (d) [sections 110\(2\) and 111\(2\) of the Sentencing Act](#);
  - (e) [sections 226A\(4\) and 226B\(2\) of this Act](#);
  - (f) [section 29\(4\) or \(6\) of the Violent Crime Reduction Act 2006](#).’

#### **1.4.2 The custody threshold**

Section as reproduced omits amendments to s.152(1) (b) and omits entirely s.152 (1A) as added by Criminal Justice and Courts Act 2015 c. 2 [Sch.5 para.14\(2\)](#) & [Sch.5 para.14\(3\)](#) (July 17, 2015).

The Correct Version is as follows:

‘152 General restrictions on imposing discretionary custodial sentences

(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one—

- (a) fixed by law, or
  - (b) falling to be imposed under a provision mentioned in subsection (1A).
- (1A) The provisions referred to in subsection (1)(b) are—
- (a) [section 1\(2B\) or 1A\(5\) of the Prevention of Crime Act 1953](#);
  - (b) [section 51A\(2\) of the Firearms Act 1968](#);
  - (c) [section 139\(6B\), 139A\(5B\) or 139AA\(7\) of the Criminal Justice Act 1988](#);
  - (d) [section 110\(2\) or 111\(2\) of the Sentencing Act](#);
  - (e) [section 224A, 225\(2\) or 226\(2\) of this Act](#);
  - (f) [section 29\(4\) or \(6\) of the Violent Crime Reduction Act 2006](#).’

Note 19 omits amendment by Criminal Justice and Immigration Act 2008 c. 4 [Sch.4\(1\) para.79\(2\)](#) ; [Sch.4\(1\) para.79\(3\)](#) (November 30, 2009: substitution has effect on November 30, 2009 as specified in SI 2009/3074 subject to transitory, transitional and savings provisions as specified in 2008 c.4 Sch.27 paras 1(1) and 5).

#### **1.4.3 Community sentences**

Note 20 omits; additions by Criminal Justice and Immigration Act 2008 c. 4 [Sch.4\(1\) para.73\(2\)\(b\)](#); c. 4 [Sch.4\(1\) para.73\(3\)](#) (November 30, 2009: insertion has effect on November 30, 2009 as specified in SI 2009/3074 subject to transitory, transitional and savings provisions as specified in 2008 c.4 Sch.27 paras 1(1) and 5) & Crime and Courts Act 2013 c. 22 [Sch.16\(1\) para.3](#) (December 11, 2013).

#### **1.6 Totality**

Note 24 omits: amendment by Criminal Justice and Immigration Act 2008 c. 4 [Sch.4\(1\) para.79\(2\)](#) (November 30, 2009: insertion has effect on November 30, 2009 as specified in SI 2009/3074 subject to transitory, transitional and savings provisions as specified in 2008 c.4 Sch.27 paras 1(1) and 5).

## 1.7 Disparity

See observations on case law above.

### 1.8.1 Formal agreements

See observations on case law above.

The case law cited is *R v King* (1985) 7 Cr App R (S) 227. The full citation for *R v A and B* is [1999] 1 Cr App R (S) 52 23 April 1998. The principles to be applied from *Warren and Beeley* [1996] 1 Cr App R (S) 233 were set out & applied by the Lord Chief as follows:

*The relevant principles were these:*

(1) Sentences were routinely discounted to reflect pleas of guilty, a practice recognised by [Criminal Justice and Public Order Act 1994, s.48](#). A defendant who indicated an intention to plead guilty at an early stage would ordinarily earn a greater discount than a defendant who pleaded guilty at a late stage in the proceedings.

(2) Defendants who co-operated with the prosecuting authorities, not only by pleading guilty but by testifying or expressing a willingness to testify, or making a witness statement which incriminated a co-defendant, would ordinarily earn an enhanced discount on their sentences, particularly where their conduct led to the conviction of a co-defendant or induced a co-defendant to plead guilty.

(3) It had been the long standing practice of the courts to recognise by a further discount the help given and expected to be given to the authorities in the investigation, detection, suppression and prosecution of serious crime (see [Sinfield \(1981\) 3 Cr.App.R.\(S.\) 258](#); *King* (1985) 7 Cr.App.R.(S.) 277; and [Sivan \(1988\) 10 Cr.App.R.\(S.\) 282](#)). The extent of the discount would ordinarily depend on the value of the help given or expected. Value was a function of quality and quantity. Where by supplying valuable information to the authorities, a defendant exposed himself or his family to personal jeopardy, it would ordinarily be recognised in the sentence passed. It was important that information should be given in the form indicated in the decided cases.

(4) If a defendant denied guilt but was convicted and sentenced following a contested trial without supplying valuable information before sentence or expressing willingness to do so, the Court of Appeal, Criminal Division would not ordinarily reduce a sentence to take account of information supplied to the authorities after sentence (see [Waddingham \(1983\) 5 Cr.App.R.\(S.\) 66](#); *Debbag and Izzett* (1991) 12 Cr.App.R.(S.) 733; and [X \(1994\) 15 Cr.App.R.\(S.\) 750](#)). The reason for this rule was clear. The Court of Appeal, Criminal Division was a court of review; its function was to review sentences imposed by courts of first instance, not to conduct a sentencing exercise of its own from the beginning. It ordinarily relied entirely, or almost entirely, on material before the sentencing court. A defendant who denied all guilt and withheld all co-operation before conviction could not hope to negotiate a reduced sentence in the Court of Appeal by co-operating after conviction. In such a situation the defendant must address representations to the Parole Board or to the Home Office.

(5) There was one partial exception to this general rule. It sometimes happened that a defendant pleaded guilty and gave help to the authorities, for which credit was given when sentence was passed. It might

*be that the value of the help given was not at that stage fully appreciated, or that the help given thereafter greatly exceeded, in quality or quantity or both, what could reasonably be expected when sentence was passed, so that the credit given did not reflect the true measure of the help received by the authorities (see Lowe (1978) 66 Cr.App.R.(S.) 122 and [Sehitoglu and Ozakan \[1998\] 1 Cr.App.R.\(S.\) 89](#)). In such cases the Court should and did review the sentence passed, adjusting it if necessary to reflect the value of the help given, and to be given, by the defendant.*

### **1.8.2 The “text” regime**

See observations on case law above.

### **1.9 Prevalence of the offence in the locality etc.**

See observations on case law above.

### **1.10 Duty of Secretary of State to publish information about sentencing**

We do not think this should be included in the NSC because it is not a sentencing provision.

### **1.11 The age of the offender**

The correct reference is CYPA 1963 (not 1964). The commencing SI was 1963/2056

## **Part 2**

### **2.1.2 Youths (aged under 18)**

*R v Robson* [2007] 1 Cr App R (S) 54 should be noted as stating that the age of the offender (at least dangerous offenders) for sentencing purposes is that at conviction not committal.

#### **2.1.8.1 Committals**

*R v North Sefton Magistrates’ Court, ex parte Marsh* (1995) 16 Cr App R (S) 401 and *R v Eastleigh Magistrates’ Court Ex parte Sansome*, [1999] 1 Cr App R (S) 112 may helpfully be added to footnote 75 as explaining the position more clearly than *Ex parte Pemmant* alone by indicating that the court should ‘think carefully’ before deciding whether to accept jurisdiction for this reason..

Consideration should be given to the addition of *R v Wirral Magistrates’ Court, ex parte Jermyn*, [2001] 1 Cr App R (S) 137 in which it was held that the decision to commit doesn’t require reasons to be given.

### **2.2.1 Goodyear indications**

Additional guidance in sentencing indications can be found in *A-G Reference (No. 80 of 2005)* EWCA Crim 3677.

Practitioners may be helped by recording in this section that the Court of Appeal is not bound by sentence indications on unduly lenient references: *A-G Reference (No. 40 of 1996)* [1997] 1 Cr App R (S) 357.

### 2.2.6 Specific sentences of sentencing orders

*R v Majury* [2007] EWCA Crim 2968 helpfully provides guidance of the effect of some of the committal powers under CJA 2003.

### 2.3.3 Bases of Plea

In *A-G Reference (No. 81 of 2000)* [2001] 2 Cr App R (S) 16 and *A-G Reference (No. 58 of 2000)* [2001] 2 Cr App R (S) 19, the Court of Appeal commented on the undesirability of accepting a basis of plea which didn't reflect the evidence and restricted the sentencing options of the judge. These may helpfully be added to the first paragraph in this section.

Though perhaps a niche point, *R v Lunnon* [2005] 1 Cr App R (S) 24 indicates that where appropriate the prosecution should bear in mind whether it will be asking for a confiscation inquiry before accepting a basis of plea.

### 2.3.4 Dispute as to factual basis for sentencing: Newton Hearings

Though perhaps obvious it may be worthwhile stating the principle that the judge should direct him / herself in accordance with the normal criminal standard of proof: *R v McCreath* (1983) 5 Cr App R (S) 460.

## Part 3

### 3.1.5.12 Assistance given by an informant

It may be helpful to make reference to the sentencing principles set in *R v P*, *R v Blackburn* [2008] 2 Cr App R (S) 5.

### 3.1.4.6 Effect of the order

At the conclusion of the passage dealing with section 25(2) the words "Duties of the responsible officer etc" appear. They do not reflect the words of the statute, nor do they appear to add anything.

### 3.3.1.1.1 Power to order fines

Criminal Justice Act 2003 ("CJA 2003") s.163, add "for an offence other than one **for which the sentence** is fixed by law or a statutory sentence".

Note on Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012") s.85(1), add "Schedule 2 amends certain provisions **relating to** those offences to be punishable on summary conviction by a fine or maximum fine of an amount specified or described".

### **3.3.1.1.2 The standard scale**

Footnote 593 should note that this version of the legislation results in part from amendment (Criminal Justice Act 1991 s.17).

### **3.3.1.1.5 Payment by instalments and allowing time for payment**

Following CJA 2003 s.165 'Remission of Fines', for the sake of completeness, this part may benefit from the inclusion of Magistrates' Courts Act 1980 ("MCA 1980") s.85 (Power to Remit Fine) (as amended by Anti-social Behaviour, Crime and Policing Act 2014 s.2).

### **3.3.1.1.6 Prison in default term**

Powers of Criminal Courts (Sentencing) Act 2000 ("PCC(S)A 2000") s.139(5) – substitute "... (2) above shall not being to run until after the end of the first-mentioned term" for "(2) above shall not **begin** to run until after the end of the first-mentioned term".

Unlike other paragraphs throughout the document, full stops have not been included at the end of the paragraphs relating to s.133(4) and (5) MCA 1980.

Paragraph 3 and the Schedule of SI 2015/796 have been repealed by the Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015/1970, regulation 2, which came into force on 24th December 2015. This has in effect abolished the Criminal Courts Charge. The reference to s.82(1A)(a) MCA 1980 is therefore no longer suitable for codification.

At s.82(5)(b) brackets have been used thereby according with how the section appears in the Act. However, brackets have been removed in preceding and subsequent sections (relating to the same Act and section) referenced within the Code.

Footnote 605 should note that this version of the legislation results in part from amendment (Tribunals, Courts and Enforcement Act 2007 sch.13 para.48).

CJA 2003 s.258 – this version of the legislation results in part from amendment (LASPOA 2012 s.117(6), sch.17 para. 2 and 3, sch. 20 para. 8)

CJA 2003 s.258 – this version of the legislation results in part from amendment (The Serious Crime Act 2015 s.10(3)).

### **3.3.1.1.7 Power of Crown Court to order search of persons before it**

Footnote 606 should note that this version of the legislation results in part from amendment (DVCVA 2004 sch.10 para. 53 / Criminal Justice and Courts Act 2015 sch.12 para. 10 / Prevention of Social Housing Fraud Act 2013 sch. para.10).

Unlike other paragraphs in this section, s.142(2) does not have a full stop at the end of the paragraph.

### **3.3.1.1.8 Interaction with other sentencing orders**

Confiscation Orders, POCA 2002 s.13(2)(a) – given that the section referenced in the Sentencing Code does not go on to list s.13(2)(b), it may be that (a) can be deleted.

Full stops are missing from the end of the paragraphs at ‘Discharges’ and ‘Confiscation Orders’.

### **3.3.1.1.10 Enforcement and collection of fines**

PCC(S)A 2000 s.140(4) is not necessarily a comprehensive reproduction of the section found within the Act.

### **3.3.1.2.1.2 Consent**

The heading is mistakenly numbered 3.1.2.1.2.

### **3.3.1.2.2.1 Availability**

*R. v Aubrey-Fletcher ex parte Thompson* (1969) 53 Cr. App. R. 380 (LCJ) – “The order may be made at any time during the proceedings.” add at the end of this sentence, “if it emerges that there might be a breach of the peace in the future”.

### **3.3.1.2.2.2 Power**

Given the use of the phrase “any other person” within the Code, MCA 1980 s.115(1) may read better if the following addition (as is presented within the legislation) was made – “power of a magistrates’ court **on the complaint of any person** to adjudge any other person to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour towards the complainant shall be exercised by order on complaint”.

### **3.3.1.2.2.5 Procedure etc. in criminal proceedings**

The principles found in *DPP v Speede* (there is no requirement that a complaint be made) and *R. v Aubrey Fletcher* (the order may be made at any time during the proceedings) have already been set out in a preceding ‘Bind overs’ section.

Direction J.5 has already been set out in full in a preceding ‘Bind overs’ section.

Justices of the Peace Act 1968 s.1(7) has already been set out in a preceding ‘Bind overs’ section.

### **3.3.1.2.2.7 Interaction with other sentencing orders**

PCC(S)A 2000 s.19(1) has already been set out in a preceding ‘Bind overs’ section.

### **3.3.1.2.2.8 Appeals**

Magistrates' Courts (Appeals from Binding over Orders) Act 1956 – unlike other sections of the Act which have been set out within the Code, s.1(2) provides only an outline of the content of s.1(2) (as opposed to either an exact or edited version of the provision).

### **3.3.1.2.2.9 Breach**

The Code fails to reference MCA 1980 s.120(1A) directly under s.1 (and despite the fact that s.120(2) states “if, in any other case falling within subsection (1) (see s.120(1A) for the context) ...”).

MCA 1980 s.116(3) has been repealed by the Courts Act 2003 s.109(1)(3), sch.8, para.236(3) and sch.10.

### **3.3.1.3.1 Availability and types of order**

PCC(S)A 2000 s.150(1) is set out under three successive headings in varying levels of detail.

### **3.3.1.4.2 Making the order**

Footnote 645 should note that this version of the legislation results in part from amendment (LASPOA 2012 sch.24, paras. 19(a)(b) and Criminal Justice and Courts Act 2015 sch.5 para.4).

PCC(S)A 2000 s.12(1) is set out under four (almost) successive headings.

PCC(S)A 2000 s.12(1A) has already been set out in a preceding ‘Bind over (parents/guardian)’ section.

PCC(S)A 2000 s.14(3), add “without prejudice to subsection (1) and (2) (effect of conviction for which a person is discharged), the conviction of a defendant discharged absolutely or conditionally **under section 12 above** shall in any event be disregarded for the purposes of an enactment etc.”.

### **3.3.1.4.4 Interaction with other sentencing orders**

Footnote 656 should note that this version of the legislation results in part from amendment (CJA 2003 sch.32 para.54 and Road Safety Act 2006 s.11).

### **3.3.1.5 Parenting orders / parental orders**

In all sections of this Sentencing Code there will of course be some degree of repetition. However, there is a significant degree of repetition in this section as a result of the fact that it focusses mostly on two sections of the Crime and Disorder Act 1998. (See 3.3.1.5.1.2 below). As a result, this section may benefit from amalgamating successive identical parts.

### 3.3.1.5.1.1 General

S.8(4): A semi-colon should replace the comma after the word “order” and before the word “and (b)”.

S.8(8)(bb): remove the unnecessary bracket after “a person nominated by [”.

Footnote 676 should note that this version of the legislation results in part from amendment (CJA 2003 sch.34 para.2(4)).

### 3.3.1.5.1.2 Determining whether and order can / should be made

S.8(3) – “implementing such orders are available in the **area** in which ...”.

S.8(6)(a) states “in a case falling within paragraph (a), (aa) or (b) **of s.8(1)**”. S.8(6)(b) and (c) may also benefit from the insertion of “of s.8(1)”.

S.8(6)(c) – “the commission of any further offence under **the** Education Act 1996 ss.443 or 444”.

Footnote 678 should note that this version of the legislation results in part from amendment (Anti-Social Behaviour Act 2003 pt.9 s.85(8)).

### 3.3.1.5.1.3 Making the order

Duty to explain the order, s.9(3)(b) – remove the word “below”.

S.8(7A) – “a counselling or guidance programme which a parent is required to attend under s.8(4)(b) may **be or** include a residential course ...”.

Footnote 683 should note that this version of the legislation results in part from amendment (CJA 2003 sch.34 para.2(3)).

### 3.3.1.5.1.6 Appeals

CDA 1998 s.10(2) – second use of the word “appeal” should be singular.

For the sake of completeness, CDA 1998 s.10(3) may benefit from the inclusion of “any order the county court or the Crown Court made on an appeal under subsection (1) above shall, **for the purposes of subsections (5) to (7) of section 9 above**, be treated as though it was made by the court from whence the appeal was brought”.

Footnote 691 should note that this version of the legislation results in part from amendment (Serious Organised Crime and Police Act 2005 sch.10(1) para.3(2) and the Anti-social Behaviour, Crime and Policing Act 2014 sch.11(1) para. 25(2)).

Footnote 692 should note that this version of the legislation results in part from amendment (Constitutional Reform Act 2005 sch.4(1) para.277(3)).

### **3.3.1.5.2.1 Power and types of order**

Footnote 695 should note that this version of the legislation results in part from amendment (Domestic Violence, Crime and Victims Act (“DVCVA”) 2004 sch.10 paras.51(2) and (3) and the Criminal Justice and Immigration Act 2008 sch.4 para.57(a)).

### **3.3.1.5.2.3 Fixing the level of fine etc**

Footnote 701 should note that this version of the legislation results in part from amendment (DVCVA 2004 sch.10 para.52(2)).

Footnote 702 should note that this version of the legislation results in part from amendment (DVCVA 2004 sch.10 para.52(3)).

### **3.3.1.5.2.4 Orders made against local authorities in respect of a child / young person in respect of whom they have responsibility**

The heading is mistakenly numbered 3.1.5.2.4.

PCC(S)A 2000 s.137(8)(b) – square brackets do not need to be inserted. They exist in the Act to illustrate a textual amendment.

### **3.3.1.6.1 General**

“(S. News 2009 (4 (Nov), 7)” – there appears to be an unnecessary bracket at the start of “Nov”.

### **3.3.1.6.3 Making the order**

Given that PCC(S)A 2000 s.60(3) has been summarised in this Sentencing Code, the use of the pronouns “he” and “his” at s.60(3)(a) and (b) respectively, appear to make little sense.

### **3.3.1.6.6 Breach, revocation and amendment**

In accordance with the format adopted throughout (most of) this Sentencing Code (as well as for ease of reference), at PCC(S)A 2000 sch.5 para.7(2)(a) and (b), the following additions may be helpful:

“(a) paras.2(1)(b), 3(1) and 4(3) **of Schedule 5 of the PCC(S)A 2000** shall each have effect in relation to the order as if the words “, for the offence in respect of which the order was made,” and “for that offence” were omitted; and (b) paras.2(5)(b) and 3(3)(b) **of Schedule 5 of the PCC(S)A 2000** (which relate to custodial sentences for offences) do not apply”.

Footnote 718 should note that this version of the legislation results in part from amendment (CJA 2003 sch.32(1) para.126(a) and DVCVA 2004 sch.5 para.6(3)).

Footnote 719 should note that this version of the legislation results in part from amendment (CJA 2003 sch.32(1) para.126(b) and DVCVA 2004 sch.5 para.6(4)).

In accordance with the format adopted throughout (most of) this Sentencing Code (as well as for ease of reference), at PCC(S)A 2000 sch.5 para.3(1), the following additions may be helpful:

- i) Para 3(1) "... virtue of para.2(1)(c) **above** the defendant appears before the Crown Court and it is proved to the satisfaction of the court: (a) that he has failed without reasonable excuse to attend as mentioned in para.1(1)(a), or (b) **above** that he has committed such a breach of rules as is mentioned in para.1(1)(b) **above** ..."; and
- ii) Para 3(3) "... in dealing with a defendant under para.3(1) **above**, the Crown Court ..."

Footnote 720 should note that this version of the legislation results in part from amendment (CJA 2003 sch.32(1) para.126(c)).

PCC(S)A 2000 sch.5 para.3(3) may read more fluently and in accordance with the Act if put in the following way:

**"When in the Crown Court**, any question whether there has been a failure to attend or a breach of the rules shall be determined by the court and not by the verdict of a jury".

PCC(S)A 2000 sch.5 para.5(1) – sub-section (a) should be moved onto another line in order to mirror the layout of sub-section (b).

### **3.3.2.1.2 Requirements which may be included in a community order**

**CJA 2003 s.210 (1) (d)** remove square brackets and footnote. Amended by Offender Rehabilitation Act 2014 Sch 4(1) §4 (June 1, 2014)

**CJA 2003 212A** Repealed as of 1 January 2016

### **3.4.2.3 Disqualification following conviction for indictable offence**

Under the section headed "Interpretation" paragraph 2(2)(aa) which was inserted by the Small Business, Enterprise and Employment Act 2015 [Sch.7\(1\) para.4\(3\)](#) has been omitted. This adds "in relation to an overseas company not falling within paragraph (a), the High Court or, in Scotland, the Court of Session, or".

### **3.4.6.14 Case Law**

This paragraph does not represent a direct quote from the headnote. It could be better expressed as a summary.

### **3.4.7.7 Interaction with other sentences**

The relevant excerpt of R v Smith, under "Life Sentences" should read (amendments in bold): "The usual rule ought to be that an indeterminate sentence needs **no** SOPO, at **least** unless there is some very unusual feature which means that such an order could add something useful and did not run the risk of undesirably tying the hands of the offender managers later."

### **3.4.11 Hygiene Prohibition Orders**

The heading should read “Food **Safety and** Hygiene (England) Regulations....” (amendment in bold).

#### **3.4.14.1 General**

The last line should read “MSA 2015” (Modern Slavery Act 2015) rather than “MSA 215”.

#### **3.5.1.1.1 General**

While the cases of *Copley* and *Dorton* are correctly summarised, it is submitted that neither ought to be included in the NSC. Whilst the principle in *Copley* is undoubtedly right, to elevate it to the status of a provision in the SC may in our view risk its over-emphasis at the expense of other important principles, for instance that voluntary reparation ought to attract a discount on sentence. This is a mitigating factor specifically included within the SGC’s Definitive Guideline for Burglary Offences (which *Copley* concerned), and it is on one view difficult to reconcile Lane LJ’s *observation* (as his Lordship himself described it) with the modern approach to reparation as captured by the SGC’s guidelines. As for the case of *R v Dorton*, in my view to include this within the SC could risk undue elevation, and also potentially conflict with the treatment of voluntary reparation, and the discount it should attract, in accordance with modern sentencing practice.

#### **3.5.1.1.2 Availability and Power to Order**

“, and subsequently amended” should be added to footnote 1288

s.130(2) PCC(S)A – a provision mentioned in subsection (2ZA) should have the following additional citation: “Words substituted by the Criminal Justice and Courts Act 2015 c.2 Sch. 5 para. 6(2) (in force 17.6.2015)”

s.130(2ZA) should have the citation: “Added by the CJCA 2015 c.2 Sch. 5 para. 6(3) (in force 17.7.15)”

s.130(2A) should have the citation: “Added by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 c.10, Pt.3, c.1, s.63(1) (in force 3.12.12)”

“, and subsequently amended” should be added to footnotes 1290-1293

#### **3.5.1.1.3 Motor vehicle exception**

“, and subsequently amended” should be added to footnotes 1294-1296

#### **3.5.1.1.4 Deciding whether or not to make an order**

*R v James* is incorrectly summarised; the existing text in the draft consultation response reflects what was merely a submission made by counsel in the case. We suggest the following summary:

*“The Court concluded that where a court was of the opinion that a complete reconciliation between the parties would present a complex and difficult task, but that the calculation of the minimum loss arising was a comparatively simple task, and it would be in the interest of justice to make a compensation order in the sum representing the minimum loss arising, it should make such an order rather than decline on grounds of complexity.”*

#### **3.5.1.1.5 Fixing the amount**

The reference to the Magistrates’ Court Sentencing Guidelines on p.708 should be to pages 166 and 167.

“, and subsequently amended” should be added to footnotes 1297-1298

#### **3.5.1.1.6 Effect of compensation order on damages awarded in civil proceedings**

We question the need to include this provision in the NSC. “, and subsequently amended” should be added to footnote 1299.

#### **3.5.1.1.7 Interaction with other sentencing orders**

(1) In our view *R v Holmes* does nothing more than re-iterate the principle that a compensation order should be made with due consideration of a Defendant’s means. There is a risk that were this elevated to a provision of the NSC, it could be misconstrued as fettering a court’s power to make compensation orders in cases where disqualification orders are also made. We suggest that this principle, which is really no more than a cautionary observation that a Defendant’s means may be affected by orders of the Court made at the same time as making an order for compensation, might best be captured by a “note” or other guidance to the NSC that the assessment of a Defendant’s means should take account of the future effect of any ancillary orders such as disqualifications.

(2) s.13(3) – delete superfluous “(“ before “an order under section 21A”.

Footnote 1300: add “and the Criminal Justice and Courts Act 2015, c.2, Sch.12, para.11 (in force 13.4.15) and the Counter-Terrorism Act 2008 c.28 Sch.3, para. 7(2) (in force 18.6.2009)”.

s.12(7) PCC(S)A (p.711) add “in this section” after “nothing”

s.161(A)(3)(b) CJA 2003 - delete superfluous “and”

Footnote 1303: add “and subsequently amended”

Footnote 1304: substitute “Commencement 1<sup>st</sup> April 2007 as inserted by DVCVA c.28 Sch.10 para. 49 and subsequently amended”.

#### **3.5.1.1.8 Review of compensation orders**

Footnote 1306: add “and subsequently amended”.

#### **3.5.1.1.9 Appeals**

Correct the reference to s.132(1) (currently reads 32(1))

Footnote 1309: add “and subsequently amended”

Footnote 1311: substitute “Added by DVCVA 2004, c.28 Sch.10 para.49 (in force 1.4.07) and subsequently amended.

Footnote 1313: add “and subsequently amended”

#### **3.5.1.2.1 Making the order**

Footnote 1314: add “and subsequently amended”

#### **3.5.1.2.2 Appeals**

Footnote 1322: substitute “Substituted by the Criminal Justice Act 1988 (c.33), s.170, Sch. 8, para. 16, Sch. 15, para. 28 and subsequently amended”

#### **3.5.2.2 Making the order**

s.10(3) (p.721) should refer to “sections 132 to 134”

#### **3.5.3.1 Duty to impose surcharge**

Footnote 1336: add “and subsequently amended”

#### **3.5.3.3.3 Offence (or one of multiple offences committed before 1 September 2014**

Header should read “Offence (or one of multiple offences) committed **after** 1 September 2014”

#### **3.5.4.1 Introduction**

The Criminal Procedure Rules 2015 may be noted to have been in force from 5<sup>th</sup> October 2015.

Throughout this section, there are lower case letters appearing in the text with no obvious meaning. For example, Rule 45.1(1) reads “Part II of the Prosecution of Offences Act 1985(a) and Part II, IIA or IIB of The Costs in Criminal Cases (General) Regulations 1986(b)”.

It is unclear whether (a) and (b) are intended to refer to citations elsewhere in the document, or whether there has been a formatting error in reproducing the text of the Rules. Similar lettering appears throughout the reproduction of Rule 45.1, and the rest of the section.

### **3.5.4.2 Criminal Procedure Rules**

Rule 45.1(1) is repeated in this section when it has already been set out in full in the preceding section.

Lowercase letters seem to appear randomly in the text as in the preceding section.

Rule 45.9 (p.741) “in that application specify-” should form a new sub-paragraph (c), rather than following on from (b)(iv) as it presently does.

### **3.5.4.3 Interaction with other sentencing orders**

This section has been accurately reproduced, but as at 4<sup>th</sup> January 2016, amendments are pending, according to Westlaw.

Add to footnote 1345 “, and by the Criminal Justice and Courts Act 2015 (13<sup>th</sup> April 2015) and the Counter-Terrorism Act 2008 (18<sup>th</sup> June 2009)”

The reference to s.12(7) PCC(S)A on p.747 is incorrect. This should be a reference to s.12(8), and should read “Nothing in this section shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of an offence, from [...] b) making an order for costs against the offender”.

The case referred to on p.747 is incorrectly cited. The correct name of the case is “*R v Northallerton Magistrates’ Court ex parte Dove*”.

#### **3.5.4.4.1 General**

Lower case letters appear in error it seems at CPR 45.4(6) as reproduced on p.748.

#### **3.5.4.4.3 Power to order**

s.16(4) on p.751 – the reference to (a) is incomplete and may be removed.

Footnotes 1351 and 1352 should note that there have been subsequent amendments to the legislation to which each refers.

### **3.5.4.5 Divisional Court, Supreme Court**

Whilst the relevant sections of the legislation have been correctly reproduced as currently in force, Footnotes 1353, 1355 and 1356 should indicate that these versions have come about in part as a result of amendment.

Reg 4A (p.755) – note that “legal costs” is defined in s.16A(10) of the POA 1985.

#### **3.5.4.6 Private prosecutor's costs (central funds)**

The reference to the CCC(G)R 1986 duplicates the earlier reference at 3.5.4.4.2

Footnote 1359 should note that this version of the legislation results in part from amendment.

Footnotes 1361 and 1362 should note that this version of the legislation results in part from amendment.

#### **3.5.4.7 Prosecution costs (paid by defendant)**

Remove the (a) from 45.5 Note b on p.758

Footnote 1367, 1368, 1372, 1373 and 1376 should note that this version of the legislation results in part from amendment.

s.18(6) POA is reproduced twice (p.760 and 761)

CPR 45.6 accurately reproduces that rule from the CPR 2015. It is unclear what the significance of the reference to the CPR 2014 above this is (p.761)

#### **3.5.4.9 Criminal Court charges**

The various sections of the legislation dealing with the Criminal Courts Charge have been accurately reproduced.

However, Reg.3 and Schedule 1 of SI 2015/796 (reproduced at 3.5.4.9.3) have been repealed by the Prosecution of Offences Act 1985 (Criminal Courts Charge) Amendment Regulations 2015/1970 reg.2, which came into force on 24<sup>th</sup> December 2015. This has in effect abolished the Criminal Courts Charge. The various sections under 3.5.4.9 are therefore no longer suitable for codification.

#### **3.5.5 Preventative orders (financial reporting orders)**

The reference to "serious crime order" should be a reference to "serious crime prevention order".

##### **3.5.6.1.4 Offenders aged under 18**

It should be noted that whilst s.131 has been correctly reproduced in the form currently in force, this version has resulted from amendments not reflected in the footnotes.

##### **3.5.6.1.6 Review of orders**

It should be noted that whilst s.133 has been correctly reproduced in the form currently in force, this version has resulted from amendments not reflected in the footnotes.

s.133(3) has been incorrectly reproduced. Whilst the sense is correct, the text of the legislation is split into sub-paragraphs.

s.4(12) has been duplicated – it appears in section 3.5.6.1.4

### **3.5.6.1.7 Appeals**

s.4(12) has been duplicated – it appears in section 3.5.6.1.4

It should be noted that whilst s.132 has been correctly reproduced in the form currently in force, this version has resulted from amendments not reflected in the footnotes.

### **3.6.1.2 Making the order**

We suggest also citing *Di Matteo* (at 3.6.1.2) in which the failure to properly enquire into financial circumstances led to the quashing of an order, and *Tans Berckz BVBA v. North Avon Magistrates' Court and Swindon Magistrates' Court* 176 JP 2 for the reasons cited in Archbold at 5-735

We suggest citing *Pemberton* 4 Cr App R (S) 328 – the court should not make an order unless there there is adequate supporting evidence.

### **3.6.1.5 Interaction with other sentencing orders**

It may be helpful to cross-reference to section 27 of the Misuse of Drugs Act 1971 (albeit dealt with in substance below)

### **3.6.1.6 Property in the possession of the police**

It is unclear that it would be of any use for these powers to be the subject of a sentencing code. Section 144 relates to dealing with property that is the subject of an order under section 143; section 1 of the 1897 Act relates to property that has not been the subject of any order in criminal proceedings and section 2 to property that has not been the subject of any order at all. They have nothing to do with sentencing law. The logic at 3.6.3 for disregarding the Police (Property) Regulations Act 1997 appears to apply *mutatis mutandis* to these powers.

### **3.6.2 Forfeiture**

Section 97 of the Trade Marks Act 1994 and section 114A of the Copyright, Designs and Patents Act 1988 have both been omitted, with no obvious rationale.

#### **3.6.2.1 Drugs**

We suggest also citing:

- *Beard* [1975] Crim LR 92 – anything includes money

- *Marland and Jones* 82 Cr App R 134 – the payment of cash into a bank account for safe keeping by the authorities does not prevent a forfeiture order in respect of it

### **3.6.2.2 Firearms**

Section 52(4) is a non-sentencing power of forfeiture and thus seems outside the scope of the code.

### **3.6.2.4 Obscene publications**

These powers relate to a non-criminal process of seizure and forfeiture. They have nothing to do with sentencing law. We repeat the reasoning at 3.6.1.6.

### **3.6.2.8 Immigration offences**

There is a header marked 'Power to extend to islands' under which no content has been inserted. Is this intended to include reference to the Immigration (Isle of Man) Order and the Immigration (Jersey) Order?

### **3.6.4.1 Deprivation and disposal**

The powers of destruction in sections 37 and 38 of the AWA are sufficiently similar to the power of deprivation in terms of their effect on the owner that it seems arguable they should be also included in this part.

#### **3.8.1.2.1 Power to make the order**

Note 1673 omits Amended by Anti Social Behaviour, Crime and Policing Act 2014 Pt 7 s.106(3), May 13, 2014; Note 1674 omits Amendments by Dangerous Dogs Amendment Act 1997 s.1(2) June 8, 1997 & Anti Social Behaviour, Crime and Policing Act 2014 Pt 7 s.107(3), May 13, 2014; Note 1675 omits amendment by Dangerous Dogs Amendment Act 1997 s.1(3) June 8, 1997' Note 1676 omits amendment by Dangerous Dogs Amendment Act 1997 s.1(5) June 8, 1997; Note 1679 omits amendment by Courts Act 2003, Sch 8 para 353(a) April 1<sup>st</sup> 2005.

#### **3.8.3.1 Post conviction orders**

Notes 1690 & 1691 omit amendment by Anti Social Behaviour, Crime and Policing Act 2014 Pt 7 s.106(3) & s.107(3) respectively, May 13, 2014; Notes 1692 & 1693 omit amendment by Dangerous Dogs Amendment Act 1997 s.1(3) & s.1 (4) respectively June 8, 1997. Note 1696 omits amendments by Courts Act 2003 c38 Sch 8 para 353 (a) April 1, 2005.

#### **3.8.3.3 Stand-alone orders**

Note 1699 omits amendment by Anti Social Behaviour, Crime and Policing Act 2014 Pt 7 s.107(4), May 13, 2014.

### **3.8.4.1 Stand-alone orders**

DDA s.4B(1), 4B(2) & 4B(2A) is covered in §3.8.3.3.

### **3.8.4.2 Post conviction orders**

Notes 1711 & 1713 omit amendments by Dangerous Dogs Amendment Act 1997 s.1(3) & s 1(4) respectively June 8, 1997.

Post-conviction deprivation orders under s.33 Animal Welfare Act 2006 have been omitted. They provide for an order for deprivation & disposal of an animal and its dependent offspring.

#### **3.9.1.1.1 General (status of notification)**

We take the view that expressions such as “*notification is not part of the sentence*” are not suitable for codification. They do not represent the law, they describe it. As such, while they might form part of an explanatory note, they ought not in my view to be included in the NSC.

By way of General note concerning notification there perhaps ought to be harmonization of the descriptions between notification regimes relating to sexual offences and terrorism – so for example:

- 3.9.1.1.2 and 3.9.1.2.2. should have the same titles in the NSC
- 3.9.1.1.3 and 3.9.1.2.4 should have the same titles in the NSC
- and so on.

#### **3.9.1.1.7 Breach**

Section 91(4) of the Sexual Offences Act 2003 has been erroneously included as a duplicate s.92(4) in the Law Commission’s paper.

#### **3.9.1.1.8 Certificates of conviction under Shc 3**

See note above.

#### **3.9.1.2.4 For how long do the notification provisions apply?**

Section 53(3) of the Counter-Terrorism Act 2008 has not been properly reproduced, and sections 53(4) and (5) have been omitted.

### **3.9.2.1 Introduction**

As noted in the consultation paper, there are three ways in which a person can be barred. Although (as noted, again) only one of these arises during the sentencing process, given the intention of this project (to bring together all aspects of the sentencing process so as to make the law more accessible) it may be worth including all three types of barring within the NSC rather than separating the other two barring methods and placing them elsewhere.

Further, re: the comprehensiveness of this part, ss.5 & 6 have not been included. It is not entirely clear why. This may be an omission.

### **3.9.2.6 Duty of the court to tell the defendant he/she is barred**

Paragraphs 24(2) to (7) have not been included in this section, although paras. 24(4) and (7) are included in 3.9.2.8. This may be an error / omission.

### **3.9.2.7 The trigger offences ‘the “prescribed criteria”**

Paragraphs 2(b) to (d), and 4(b) to (d) of Sch.1 to SI 2009/37 might not need to be included, as they relate to Scotland and Northern Ireland. Similar parts of paragraph 1 have not been included.

### **3.11.1 Guardianship orders**

Section 37(1): as amended by the Criminal Justice Act 2003, Schedule 23(1), paragraph 38(a), in force 4<sup>th</sup> April 2005.

Reference to section 37(4) (need for written or oral evidence of the approved clinician or some other hospital manager) is omitted. This is only included at 3.11.2.1.

#### **3.11.2.1 Powers of the court**

Section 37(1) is reproduced again (also appears at 3.11.1 above)

Section 47, C(S)A 1997: The latest version has been in force since 31<sup>st</sup> October 2009 (not 1<sup>st</sup> October 1997, per footnote 1836).

Section 37(3), MHA 1983 is reproduced again (also appears at 3.11.1 above)

Section 38(2), MHA 1983: Latest version has been in force since 1<sup>st</sup> January 2010, words substituted by the Legal Services Act 2007.

Section 37(4), MHA 1983: Various amendments, but latest version in force since 17<sup>th</sup> July 2015.

#### **3.11.2.2 Making the order**

Section 39, MHA 1983: Various amendments, but latest version in force since 1<sup>st</sup> April 2013.

#### **3.11.2.3 Effect of hospital order**

Section 40(1), MHA 1983: as amended by the Mental Health Act 2007, Schedule 2, paragraph 7(3), in force 3<sup>rd</sup> November 2008.

### **3.11.3.2 Making a restriction order**

Section 41, MHA 1983: Various amendments, but latest version in force since 3<sup>rd</sup> November 2008, as amended by the Mental Health Act 2007.

### **3.11.3.3 Power of Secretary of State in relation to restriction orders**

Reproduces sections 42(1) and (2) set out at 3.11.3.2 immediately above.

### **3.11.4.2 Making the order**

Duplicates section 39, MHA 1983 set out at 3.11.2.2

### **3.11.5.1 Making the order**

Duplicates section 38(1) set out immediately above at 3.11.4.5

### **3.11.5.3 After the order has been made**

Duplicates section 38 set out at 3.11.5.1

### **3.11.6.3 Remand for medical treatment**

Section 36(8) duplicated.

### **3.11.9 Appeals**

*R v Jones*: The publicity issue is not the ratio of the case. The focus of the case is that, where no hospital place was available, and it was accordingly impossible to make a hospital order, prison is the proper sentence and for that reason no useful purpose is served by an appeal. This case has not been cited in any other reported authority.

*R v Beesley*: The Court was satisfied that section 23 must 'strictly apply', but this is not the ratio of the case. This case concerned the dangerousness provisions, and the Court held that, as those provisions require the court to take into account all information, section 23 could not constrain the court from receiving further information about an offender where it was right to do so.

### **3.11.10 Interpretation of MHA 1983 part 3**

Section 55, MHA 1983: Various amendments, but latest version in force since 1<sup>st</sup> January 2010.

## **3.12 Judge recommending licence conditions**

Section 238(1) of the CJA 2003 has been accurately quoted here and is suitable for codification. The extract from NOMS PI 07/2011 (which has in any event expired) is not something that would seem to be susceptible to codification, although it is a useful explanatory note.

## **Part 4**

### **4.1 Statutory provisions of the council**

There may be no need to include provisions creating the Sentencing Council, or those governing its functions (Parts 4.1.1 and 4.1.3). A simple introductory paragraph / explanatory note to the guidelines section of the NSC would probably suffice. The contents of parts 4.1.2 and 4.1.4 should however remain.

#### **4.2.1 Duty to follow sentencing guidelines**

Section 125(2) of the CJA 2009 has been included twice, and s.125(4) not at all. This appears to be an error.

#### **4.2.2 Duty to have regard to sentencing guidelines**

Articles 7(3) and (4) of SI 2010/816 have been omitted. This may be an error.

### **4.4 Functions / powers of the Secretary of State and the Lord Chancellor**

It is not necessary to include these provisions in the NSC.

## **Part 6**

### **6.1.1 Right of Appeal**

We question whether an appeal against a costs order made against either a legal representative (wasted costs) or against a third party should be within the ambit of the code. By contrast to a costs order against a defendant it does not form part of a sentence.

### **6.1.2 Abandonment**

Whereas the costs consequences of an abandoned appeal may be considered as much an aspect of sentence as a costs order imposed on conviction, we question whether the provisions relating to the abandonment of an appeal should be within the ambit of the code. Perhaps all that need be referred to is the part of this section, currently italicised, drawing attention to the costs provision.

### **6.1.3 Applications, time limits and appeal notices**

We regard the rehearsal of the procedural requirements for an appeal in a sentencing code to be unnecessary. While such material will be an essential element of text on appeals generally, we believe that for the judiciary and practitioners enquiring into the courts' sentencing powers and duties on appeal it is otiose. We recognise that both sentencing and procedural matters are often contained within the same legislative provision or section. However in our view one of the aims of the code should be to separate the former into a single consolidated resource on

sentence. Forms, time limits, notices and the like can found in separate texts such as procedure rules.

#### **6.1.5 The hearing**

Likewise we do not regard consider it to be necessary for the sentencing code to include the procedural arrangements for the hearing of an appeal.

#### **6.2.2 Specific sentencing orders**

Generally we think that the Code should list the appealable sentences comprehensively and thus include those which are both obvious and uncontroversial such as imprisonment.

Restitution order and footnote 2040. We do not think that *R v Thebith* suggests that a restitution order is not part of the sentence and cannot be appealed. The case concerned an order that was wrongly imposed, the trial judge confusing restitution with compensation, and it merely noted that the common law position before the introduction of the statutory provision.

#### **6.2.5 Applications and time limits**

As already discussed, we think that the procedural requirements for an appeal should be contained in a separate text, albeit it may be desirable to reference them in the sentencing code.

#### **6.2.6 Powers of the single judge**

Similarly the provisions relating to the procedural or administrative powers of the single judge can be distinguished from those relative to sentence. Accordingly the powers under s31(2) CAA 1968 such as to give leave, extend time and direct video link can properly be omitted whereas those concerning sentence such as the renewal of a hospital order or the suspension of a disqualification are plainly relevant.

#### **6.2.7 Powers of the Registrar**

Our response to procedural provisions is as above.

#### **6.2.8 Procedural directions**

Our response to procedural provisions is as above.

#### **6.2.11 Pre-appeal matters**

The areas touching sentence are the provisions relating to appeals encompassing all sentences: s11(2) (2A) and (2B). It seems to us that the remainder of this paragraph concerns procedural matters.

#### **6.2.12 Evidence**

As with procedural matters, there is no need to include provisions concerning the calling of evidence on appeal such as the grounds for admissibility. In any event these are principally directed towards appeals against conviction.

#### **6.2.13 The hearing**

The constitution of the court and presence of the applicant or appellant are not necessary for inclusion in the sentencing code. The powers of the court in s11(3) CAA 1968 are obviously fundamental. Although those in respect of confiscation, s11(3A) et seq, are found in the same section, given that confiscation is beyond the ambit of code, we question the necessity of reciting those powers beyond perhaps an incidental reference.

#### **6.2.14 Transcripts**

We do not think it necessary to include provisions concerning transcripts, the powers to order them and the costs of so doing in a sentencing code.

#### **6.2.17 Sentencing powers of the Court of Appeal otherwise than on appeal against sentence**

We think that a footnote should point out that where a conviction for which a sentence was passed is quashed but another, in respect of which no separate penalty was imposed, stands, the Court of Appeal may impose a penalty notwithstanding it is not strictly a sentence in substitution of another sentence: *R v Dolan* 62 Cr App R 36.

### **6.3 From the Court of Appeal**

In respect of appeals to the Supreme Court, we wish to make the same points concerning the need to include procedural matters as those made in relation to appeal to the Crown Court. We consider the code can properly be confined to sentences that may be appealed, the powers of the Supreme Court to quash, vary, re-sentence or remit, and the practical effect of such orders.

#### **6.4.4 The hearing**

In the context of double jeopardy we consider it may be appropriate to include a statement reflecting its limited application, such as 'The principle of a reduction on grounds of double jeopardy is likely to be confined to narrow circumstances such the substitution of a custodial sentence for a non-custodial sentence, where the defendant was young or immature, or where the offender had already been or was about to be released: *A-G Reference (No 45 of 2014)* [2014 EWCA] Crim 1566.'

**Bar Council**  
**7 April 2016**

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