



## **Bar Council response to the Law Commission's fourth 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 fourth consultative document on the Sentencing Code (*"Disposals relating to children and young persons"*) and the accompanying draft legislation.

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. This is the fourth significant consultation paper that has been produced by the Law Commission as part of their work on the Sentencing Code. In our response to each of the previous three papers (which can be found on the Bar Council website) we have made plain our approval of the scheme in principle, as well as of the approach taken by the Law Commission to this significant project. We repeat that approval here. The Sentencing Code will clarify both the principles which underpin the criminal sentencing regime, and the procedures which govern it, to the benefit of judges, practitioners, victims of crime and convicted defendants, and the wider public.

5. Where appropriate, we have offered observations based on our collective knowledge and practical experience of sentencing law and procedure, and sought to direct attention to areas of the proposed Sentencing Code which are in our view capable of improvement.

### *Retroactivity*

6. One aspect of the project to which we devoted particular attention in our response to the third consultation (hereafter “our third response”) was the issue of retroactivity.<sup>1</sup> Our analysis of the applicable law led us to express concerns about the application of the clean sweep to certain provisions, for example those extending the maximum duration of a curfew order, or increasing the maximum level of compensation payable, between the date of the commission of the offence and the date of sentence. We expressed ourselves as being “uneasy” about the adoption of a strict *Utley*-based approach to retroactivity, and suggested that in cases where the maximum level of a discrete sentence (e.g. a curfew order) is increased between the date of commission of an offence and the date of sentence, the lower maximum should be applied. We pointed out that a simple “before and after” table with relevant start and end dates would remedy any potential breach of the common law principle against retroactivity.

7. This issue achieves a sharpened focus in the present consultation, because the youth sentencing regime has proven itself to be particularly susceptible to amendment.

8. In this regard, we are somewhat concerned at the proposed change in the current position for re-sentencing an offender for a breach of a youth rehabilitation order that does not result in a fresh conviction (see paras. 2.5-2.19, and in particular para. 2.19 and the table at p16 of the consultation paper). Requirements under a youth rehabilitation order can include the restriction of liberty under a curfew, and other punitive measures such as unpaid work (if the defendant is 16 or 17), prohibited activity requirements and exclusion requirements. Accordingly, our view is that the application of the clean sweep to these orders is capable of breaching the principle against retroactivity.

9. We respectfully refer the Law Commission to the extended survey of the law concerning both Article 7 and the common law principle against retroactivity which is contained within our third response, and invite renewed consideration of the principles and observations we there set out.

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<sup>1</sup> See paras. 18-45 of our third response.

10. This bears in particular on Questions 6, 7 & 8 below, as well as on the proposed amendment to the current position relating to curfews imposed as part of youth rehabilitation orders in Northern Ireland (paras. 2.83-2.86 of the consultation paper).

#### *Warrants, remands and adjournments*

11. We note with approval the proposal set out in the table at para. 2.39, for the reasons given by the Law Commission (in particular at para. 2.40). We note that this will require an amendment to the current law, but take the view that the significant benefits that will accrue from the proposed amendment – not least in terms of compliance with the general policy on managing young offenders in the criminal justice system – fully justify such a change.

### **Response to the Consultation Questions**

12. Below we set out our response to the specific questions asked.

#### **Consultation Question 1.**

**Do consultees agree that the draft provisions in Appendix 2 reflect the current law in relation to sentencing orders concerning the sentencing of children and young persons, bearing in mind the pre-consolidation amendments that have been proposed, and the effect of the clean sweep?**

13. We have not, given the necessarily limited time available to respond to this consultation, been able to devote sufficient time to answer this question. However, the relatively limited occurrence of errors, omissions and duplication which we identified in our response to the second consultation provides reassurance that the contents are likely to be both comprehensive and accurate.

#### **Consultation Question 2.**

**Do consultees agree with the proposed structure of the clauses relating to referral orders (clauses 80 to 105 and Schedules 3 and 4)?**

14. Yes, subject to the following observations:

15. First, re: clause 115(1), as suggested in our third response<sup>2</sup>, we consider that this might be more simply drafted as follows:

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<sup>2</sup> See para. 92, in answer to Q29, re: what was then clause 80.

*“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.”*

Secondly, we wonder whether the provisions dealing with youth rehabilitation orders might be better re-ordered in the following sequence: 164, 168, 165, 166, 169, 167.

### Consultation Question 3.

**Do consultees consider that the substantial re-drafting of sections 137 and 138 of the Powers of Criminal Courts (Sentencing) Act 2000 makes the effect of the law clearer?**

16. Yes.

### Consultation Question 4.

**Do consultees agree with the decision to re-draft the provisions relating to parenting orders made under section 8(1)(c) and (d) of the Crime and Disorder Act 1998 in the Sentencing Code, rather than to signpost them?**

17. Yes. However, we consider that civil parenting orders should be signposted (but not reproduced) within the Sentencing Code.

### Consultation Question 5.

**Do consultees agree that parenting orders made by virtue of section 8(1)(d) of the Crime and Disorder Act 1998 constitute sentences for the purposes of section 108 of the Magistrates’ Courts Act 1980 and section 9 of the Criminal Appeal Act 1968?**

18. Yes, we agree with the conclusion of the Law Commission that parenting orders imposed under section 8(1)(d) are clearly “sentences” for the purposes of appeal provisions, for the reasons set out below:

#### Section 108 Magistrates’ Court Act 1980

19. Parenting orders are plainly neither an order for the payment of costs (section 108(3)(b)) nor an order imposed under the Animal Welfare Act 2006 (section 108(3)(c)). Furthermore, the discretion that a sentencing court has to impose a parenting order (“if in the proceedings the court is satisfied that the relevant condition is fulfilled, it may make a parenting order”) means that section 108(3)(d) Magistrates’ Court

Act 1980 does not bite, either. On this basis, parenting orders are “sentences” for the purposes of section 108 Magistrates’ Court Act 1980, and are therefore appealable to the Crown Court under that section.

Section 9 Criminal Appeal Act 1968

20. Parenting orders are also seemingly sentences for the purposes of the appeal provisions contained in section 9 Criminal Appeals Act 1968, by virtue of the definition of “sentence” provided by section 50 of the same legislation; they are plainly an order “imposed by a sentencing court when dealing with an offender”. Although they are not included in specific statutory examples, there does not appear to be any basis for distinguishing them from the examples given. Furthermore, the analogy drawn by the Law Commission to the now-repealed ASBOs and financial orders seems a reasonable one.

**Consultation Questions 6, 7 & 8.**

**Do consultees have any comments on the re-structuring of the provisions relating to reparation orders?**

**Do consultees have any comments on the structure of the re-drafted provisions relating to youth rehabilitation orders?**

**Do consultees have any views as to the re-drafting of the provisions concerning the requirements capable of being imposed under a youth rehabilitation order?**

21. Broadly speaking, we consider the redrafting and restructuring of the provisions referred to in these three questions to be an improvement. Where, however, the application of the clean sweep would result in the availability of heavier maximum penalties than those in force at the date of the commission of the relevant offence, we refer to our observations concerning retroactivity above and in our third response.

**Consultation Question 9.**

**Do consultees agree with the decision to amend paragraph 10(4) of the Criminal Justice and Immigration Act 2008 so that any subsequent amendments to the level of fine that can be imposed for a breach of a youth rehabilitation order may have effect in relation to any conviction on or after that amendment?**

22. We agree that where a conviction for a breach of a youth rehabilitation order takes place before the date of the increase in fine level but the sentence is imposed after that date, the lower maximum should be applicable. We note with approval the

change that this will effect from the position that presently pertains under s.84 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

23. Further, however, while we take the view that where a breach of an order occurs after an increase in the maximum level of fine for a breach, it does not offend Article 7 / the common law principle against retroactivity for the higher maximum to be applicable. However, where the *breach* is committed before the increase, but the *conviction* post-dates it, we consider that the retroactivity principle would be infringed were the higher maximum sentence to be available to the court.

24. This situation is unlikely to occur frequently, as convictions for breaches of such orders typically take place relatively shortly after the breach in question. However, where there are a series of discrete breaches of requirements which, taken together, lead to a conviction, there may be a gap of some weeks or even months between the first breach and the conviction. Accordingly, provision ought to be made in order to avoid a situation where offenders are liable to a greater financial penalty than the applicable maximum at the time of the breach. As set out in our third response, a “*before and after*” table could easily be included where required (and repealed after its period of utility, which given the limited duration of youth rehabilitation orders would be only a matter of a couple of years after each increase).

#### **Consultation Question 10.**

**Do consultees have any comments on the revised structure of the provisions concerning detention and training orders?**

25. While we understand the logic of the present structure of the Third Group of Parts, we suggest that it might be more user-friendly to adopt a more age-centric model, as set out in broad terms in para. 67 & 68 of our response to the previous consultation. Each court sentencing a particular defendant will of course only be concerned with the provisions applicable to that defendant, and it would therefore make sense to keep all sentences which are only available for defendants in a particular age bracket together.

#### **Consultation Question 11.**

**Do consultees consider that section 101(4) of the Powers of Criminal Courts (Sentencing) Act 2000 serves a useful purpose in light of section 101(5) of that Act, or do they think it should be repealed?**

26. Yes, our view is that s.101(4) does indeed serve a useful purpose. It is not merely a pedagogical provision – rather, it prescribes a limit to the maximum custodial term which can be imposed on a defendant aged under 18. It is therefore a

far more essential provision than one that acts primarily as a safeguard against any breaches of the prescribed maximum.

27. If, therefore, only one of these two related provisions were to be retained, our view is that it should be s.101(4) rather than 101(5). We do not find the reasoning to the contrary (set out at para. 2.93 of the consultation paper) persuasive. In the limited number of situations in which a court was faced with the situation posited by the Law Commission – the need to sentence an offender who was already subject to detention and training orders totalling 22 months - the seriousness of any new offence could quite easily be marked by the imposition of a *concurrent* sentence of the appropriate term. That course would have the additional benefit of doing away with the artificiality and confusion inherent in the imposition of a sentence which the offender will not in fact have to serve. In line with the fundamental objective of the Sentencing Code - to bring clarity where there was confusion - it seems to us that would be the more suitable amendment than the repeal of s.101(4).

28. We note the observation that the existence of s.101(5) removes the need for an appeal or slip rule hearing to correct any errors made when imposing sentences which are in fact in breach of s.101(4). We are however confident that the clarity of the Sentencing Code ought to reduce the need for such hearings in any event.

29. Care also needs to be taken as s101(7) refers back to ss101(4) and (5) separately and distinctly in the situation when a young person is serving a DTO and has been released from detention but is under the supervision element, and is then sentenced to a new DTO. Basically, if the offender has already been released from detention, but is still under supervision, when a new DTO is imposed then the previous period of detention is disregarded for the purpose of the 24 month limit. Thus, that new DTO can be for 24 months.

#### **Consultation Question 12.**

#### **Do consultees agree with the decision to disapply the clean sweep in relation to clause 240(1)?**

30. Yes. First, we agree with the inclusion of this provision in the Sentencing Code, for the reasons given in para. 2.94 of the consultation paper. Secondly, and in answer to the specific question asked, we also agree with the decision to disapply the clean sweep, for the reasons given by the Law Commission in 2.95, and in line with our position on retroactivity.

Consultation Question 13.

**Do consultees agree with the decision to re-draft sections 104, 104A, 104B and 105 of the Powers of Criminal Courts (Sentencing) Act 2000 in a Schedule to the Sentencing Code, in line with the approach taken to other provisions relating to breaches of orders?**

31. Yes.

*For further information please contact:*

*Natalie Darby, Head of Policy: Regulatory Issues and Law Reform*

*Bar Council*

*289-293 High Holborn, London WC1V 7HZ*

*Email: [NDarby@BarCouncil.org.uk](mailto:NDarby@BarCouncil.org.uk)*