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LCCSA RESPONSE TO LAW COMMISSION CONSULTATION ON THE SENTENCING CODE

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has around 620 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

This response has been prepared by the following members of the LCCSA. If you have any queries about it, please contact:

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1. Yes, we believe that the draft sentencing code reflects the current law on sentencing.

2. We agree with the policy that the code should include all provisions of primary legislation imposing a duty on a sentencing court or those which provide a discretionary power. We agree that the orders described in paras 2.30-2.34 should be included in the code.

3. Yes.

4. In principle, this appears to be a sensible approach. We agree that a sentencing court should be directed that it must make at least one primary sentencing power when it deals with an offender for an offence and that it may make ancillary orders where appropriate.

   We are, however, concerned as to how and where these powers are included in the code. We agree these discretionary powers should be set out in a separate group of parts to the mandatory powers but urge that these discretionary powers are not to be presented in a table such as that which appears on pages 31-32 of the consultation paper. To do so may encourage sentencing courts to impose ancillary orders when not appropriate.

5. We understood that the criminal courts charge had been repealed but cannot find the legislation effecting this. We would be grateful for some clarity on this.

6. Yes.

7. Yes.

8. Yes. It appears sensible that all disposals available on a special verdict should be contained in one piece of legislation.

9. The signposting provisions appear useful and should be included in the code. We also agree that any amendments to the CrimPR or PD to reflect common law principles of sentencing should be signposted in the code.

10. Save for including youth specific sentencing provisions (subject to any anticipated reforms), we agree with the specified exclusions from the code.

11. It is difficult without practical experience of using the code in sentencing exercises to form a settled view on whether it is structured in the most efficient way possible.

    The disposal options must be ordered from least to most serious. This is the only way to properly reflect the general principle that the lowest justifiable sentence is imposed. To arrange the disposals from most to least serious could have the potential of increasing the level of sentences overall.

    Whilst not immediately attractive to a defence practitioner, we can see the merit in ordering suspended sentences after custodial sentences in the code.

12. Whilst we can see the force in this proposal, making no reference to the surcharge on sentence is likely to lead to confusion on behalf of defendants.

    For example, it is not unusual for a defendant appearing at the magistrates' court to be represented by the duty solicitor and be sentenced at their first appearance. They may not have an opportunity to discuss the outcome of the hearing and the sentence with the duty solicitor and may not understand that the surcharge has been imposed. This could lead to non-payment and subsequent collection proceedings.

    It cannot be beyond the combined skills of court staff, the judiciary and defence practitioners to ensure the correct surcharge is imposed. Our view is that a sentencing court should still make reference to the surcharge being imposed but need not make reference to the amount, unless making an order reducing that amount.

13. Yes this is a convenient way to bring to provisions together.

14. Yes we do, and we do think that the special offenders' provisions should be in the Code.

15. Yes regarding murder. The s.51 offences could be named specifically as genocide, crimes against humanity and war crimes rather than a collective term sought.

16. Yes – good opportunity for clarity.

17. Yes.

18. Yes.

19. Yes.

20. Yes.

21. We actually think that ‘notional determinate term’ is a better phrase than ‘appropriate custodial sentence’ as it encompasses more – but our views are not very strong on this point.

22. Yes, this is well drafted.

23. Yes, we agree that the benefit in creating an exhaustive Code to the extent possible outweighs the disadvantages noted.

24. Yes.

25. We agree that this is an area that could be revised and consideration given to this, especially in respect of the strict rules in relation to firearms offences.

26. We do not see an issue with this but do not have a strong view either way.

27. Could reproduce so all in one document. This could become confusing upon sentence especially for Magistrates, and unrepresented Defendants if they have to keep referring to several different documents.

28. We have no strong view either agree it would be helpful.

29. We believe that setting out the general powers of Magistrates can only be a good thing, however they are Lay men and women and we believe that simple basic language which is less confusing and repetitive is necessary to avoid misinterpretation

30. We hold no strong view about it being more accessible, but found it easy to follow and would hope pretty straight-forward with the headings for Magistrates and unrepresented Defendants to follow.

31. We do not agree. Compensation Orders do have a punitive effect as they massively affect those on low incomes and benefits, even more so upon those committing crime to fund their lifestyles. Therefore the new power to impose unlimited orders should not be available retrospectively and applied to offences which pre-date the commencement of the removal of the limit upon compensation. If for example a

matter is one which is historic this could have a detrimental effect financially on Defendants/ Offenders being sentenced under the new regime. We are not therefore convinced that it can be safely implemented thereafter. We fear a possible flood of appeals, or Defendants/ Offenders being too afraid to appeal sentences etc bearing in mind the current funding issues with legal aid which mean that solicitors are increasingly unwilling to conduct appeal work under legal aid.

32. Yes we found the table helpful. We would suggest putting the offences into alphabetical order solely for the purpose of ease of reference

33. Theft offences – for example, items used when going equipped for theft and burglary. Wider fraud offences & tax evasion.

34. Nothing immediately jumps out at us, save for perhaps include all paras and schedules in the table for ease of reference to save all of the jumping around from one page/ document to another. We think that would make it easier to follow, especially in light of the rise in number of unrepresented Defendants before the Courts.

35. The main problem we envisage with the 'available requirement' concept is that if a particular AR is available in one piloted area which is not available in other areas there will be no structure/ clarity on sentence. For example, in some areas more lenient penalties may be available to some Defendants but not to all which may lead to grounds for appeal. Difficulties then arise with unrepresented Defendants given the current issues Practitioners face with the increasing volume of refusals by the Legal Aid Agency to grant Representation Orders in the Magistrates Courts for summary-only offences on the grounds that the “interest of justice test” is not met.

36. We are not convinced that this is an improvement on the current law; the table could be made a bit more user-friendly by incorporating all information necessary for the purpose of sentence as opposed to simply referring to various schedules. So, for example, it could set out the restrictions on availability of sentence/ obligations etc. Our concern again is the issue of not confusing Magistrates or indeed unrepresented Defendants as to what sentences are available to them and where to go to find all of the schedules etc.

37. Yes

38. Agree that it is appropriately structured and it is important to emphasise the difference between community orders and suspended sentence orders.

39. Yes.

40. Yes

41. Yes

42. Yes

43. Yes, we agree it is more important to ensure clarity in this area than be concerned about the length of drafting. It is an area of law in which errors are frequently made in our experience.

44. We agree there is merit in listing the different types of custodial sentence in ascending order because it will concentrate the mind of the sentencing court on whether the most severe type of sentence is required before considering whether or not the power to suspend should be utilised. In our experience, some sentencing courts have a tendency to treat a suspended sentence order as a type of community order.

45. Prefer the recommendation of paragraph 9.10 rather than using a catch-all term for all people over the age of 18. With the significant body of scientific research that shows that the brain is continuing to develop between the ages of 18 and 21 and should be treated differently from fully formed adults, it remains an important distinction that should continue as we do not yet know in which direction policy will move in relation to this age group in the future.

46. I think the benefits outweigh the disadvantages. It is important that such limitations on sentencing powers are readily accessible.

47. Yes

48. Agree that these sections should not be affected by the Sentencing Code because the mandatory nature of the sentence is decided by whether other criteria are met first. Once those criteria are met it is a mandatory sentence and should be untouched in the same manner as other mandatory sentences discussed earlier in the consultation.

49. Yes – it saves cross-referencing to dates, statutes and instruments.

50. Yes.

51. Yes, and we suggest that full use of technology is made to facilitate jumping around between sections and schedules (e.g. hyperlinks etc).

52. Yes. The benefit outweighs any potential disadvantage and the non-exhaustive nature as currently drafted looks clunky – s.233 reads more like a footnote that a section of an Act.

53. N/A

54. Yes we agree.

55. Yes.

56. Yes – the inconsistency in that it is not strictly sentencing is outweighed by the benefit of keeping restraining orders on conviction and acquittal together.

57. Agree that it should merely be signposted in the new Code.

58. It is helpful but doesn't look very modern. We think it would be better without the line down the middle and with fine lines separating the rows.

59. Yes.

60. Yes and yes.

61. No – it is sufficiently long for an error to be identified and the matter brought to the Court's attention. The desirability of this function must be balanced against defendants needing certainty as the slip rule does not always operate in their favour.

62. Again, no, as 56 days is sufficient to identify an error.

63. Yes.