

26 January 2017

Lyndon Harris,
The Law Commission
1st Floor, Tower,
Post Point 1.54,
52 Queen Anne's Gate,
London SW1H 9AG

sentencing@lawcommission.gsi.gov.uk

Dear Mr Harris,

The Sentencing Code: consultation response by the Howard League for Penal Reform

1. About us

- 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 12,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's work.
- 1.3 Since 2002 the Howard League has provided the only legal service dedicated to representing children and young people in custody. As well as our legal work, we have conducted public legal education and participation sessions with children and young people and consulted them on the issue of sentencing. In 2017, the Howard League published its research on sentencing young adults, *Judging Maturity*.
- 1.4 The Howard League has also published research on sentencing women and we support the parliamentary group on women and girls in the penal system.
- 1.5 We have drawn upon our lawyers' experience in practice, our direct work with children and young adults, and our policy expertise in this response.

2. Summary of key concerns

- 2.1 The limited aims of the proposed Sentencing Code represent a missed opportunity at a time when root and branch reform is sorely needed in light of exponential sentence inflation and an all time high prison population.

- 2.2 There is also real risk that the enactment of the Code, which seeks to set out the current law in a single Act, will prevent and stifle future debate and change in this important area given the huge pressures on the legislature at this time.
- 2.3 In the event that the Code does proceed, the full and final proposed Code ought to be subject to consultation by stakeholders and those most likely to be affected and it ought to be fully scrutinised in Parliament rather than rushed through.

3. **The limited aims of the Sentencing Code are a missed opportunity**

3.1 As the consultation document confirms the broad aims of the Sentencing Code are very limited, namely:

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

(page 9, paragraph 1.16 of the consultation)

3.2 Paragraph 1.19 states that ‘The Sentencing Code will not introduce any new substantive law or sentencing disposals and will not impact upon the sentences that are to be imposed for any offence.’ The consultation document lists the wide range of issues that have been excluded from the Code. These include the law relating to road traffic sentencing, confiscation, and the administration and enforcement of sentences (paragraph 1.51).

3.3 While we can see a clear benefit in codifying the law on existing sentences in order to minimise current errors and increase certainty and understanding of the parameters of sentencing, we also consider that the law around sentencing is in need of urgent and substantial reform. The consultation states that ‘the law is overwhelmingly complex’ (paragraph 1.9) but also acknowledges that it “is in need of reform” (para 1.14). Yet the proposed Code will neither fully deal with the complexity of the current framework as it will not codify the common law relating to sentencing, nor will it enact policy reform of the law in this area, as was originally contemplated as part of this project.

3.4 Sentence inflation in recent years is high. According to data from the Ministry of Justice (2017) the use of community sentences has halved in the last ten years, more than three times as many people were sentenced to 10 years or more in the 12 months to June 2017 than at the same time in 2007 and for more serious offences, the average sentence is nearly two years longer than 10 years ago. The prison population is at an all-time high and projected to increase further by 2022 (Ministry of Justice, 2017). Given that reoffending rates on release from prison remain stubbornly high, in our view it is essential that any sentencing reform stems the flow into prison. The Code will not achieve this. The proposed Code is not a criminal code, as envisaged by the late Professor John Smith, who produced a draft criminal code in 1985 which was adopted by the Law Commission in 1989. His criminal code sought to provide greater clarity and consistency in the criminal law, a single source for the major offences, the removal of many cumbersome old statutes and the introduction of statute into some areas that remain governed by the common law. Such a code would have provided an opportunity for genuine reform. The proposed Code is a missed opportunity.

4. The proposed Code is likely limit future debate on sentencing reform

- 4.1 Given the current pressures on the legislature, there is a real risk that the enactment of the proposed Code will potentially be used to curtail future debate and change in the field of much needed substantive sentencing reform. It will certainly stall discussion and debate until the proposed Code has been enacted, and possibly for the foreseeable future, on the basis that sentencing been dealt with through the enactment of the Code.

5. Insufficient scrutiny of and consultation on the full proposed Code

- 5.1 In the event that the Code proceeds, there is a risk that scrutiny will be inappropriately limited due to the special procedures invoked by virtue of its consolidating role. Paragraph 1.56 (page 17) proposes that the reforms will be enacted as a consolidation Bill in order to 'reduce the burden the Sentencing Code will have on valuable parliamentary time, and to maximise its prospects of enactment'. Paragraph 1.57 proposes that parliamentary scrutiny for the Sentencing Code will be provided by a Joint Committee of the two Houses and a consolidation bill will take up minimal time in the debating chambers of the Houses of Parliament.
- 5.2 Given that there may be no other substantive changes to sentencing law for some time, the Code ought to be scrutinised as fully as possible, even if only to ensure and increase public awareness and civil society engagement in sentencing.
- 5.3 It is also concerning that provisions relating to youth justice orders have also been excluded from the draft code under consultation based on "ongoing review of the Youth Justice System in England and Wales currently under consideration by the Government" (paragraph 1.52, page 16). However, we are not aware of any meaningful review of sentencing for children currently under way. If the Code is to proceed, it will be important for the provisions affecting children to be consulted upon. It is well established that decisions affecting children require anxious scrutiny and it is therefore inappropriate that sentences and orders affecting children have been omitted. We would very much like to be consulted on provision of orders for children in the proposed Code. The Howard League has a wealth of expertise on youth justice law and our lawyers have represented children and young people sentenced by the courts. We have consulted children and young people and conducted legal education and participation sessions on sentencing with young people in custody. We would value the opportunity to be properly consulted on provision for youth justice, given the implications for children. Consulting on the basis of 'placeholder headings' in the code for youth justice sentencing is not good enough.
- 5.4 We can see no evidence in the draft code that people who have been sentenced by the courts have been involved in the consultation process. There is also no evidence that members of the public have been consulted, despite the fact that one of the aims of the project was to 'increase public confidence in the criminal justice system' (paragraph 1.16 page 9). The Law Commission has consulted key stakeholders in Government, academia and the judiciary and held meetings with the sentencing Council, the Bar Council and the Law society among others (see paragraphs 1.30 and 1.31, page 12). Whilst their input may be immensely valuable, the input from people who will be directly affected by the proposed code, including victims and those sentenced by the courts, would have provided a different but none the less valuable perspective on the Code and its aims.

We would be happy to discuss any of these points with you in further detail.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Laura Janes', written in a cursive style.

Dr. Laura Janes
Legal Director