Joint Committee on Consolidation Bills

Drafter's notes on the Sentencing Bill

Introduction

1 The Sentencing Bill and the Sentencing (Pre-consolidation Amendments) Act 2020 are the product of the Law Commission's Sentencing Code project, which considered the law of sentencing procedure and was part of the Commission's 12th programme of law reform. The Commission's final report on the project was published in November 2018, and included drafts of the two Bills.

2 The last consolidation of the law of sentencing procedure took place 20 years ago, when Parliament passed the Powers of Criminal Courts (Sentencing) Act 2000. Since then the law of sentencing procedure has been heavily amended, and is now spread across a number of different Acts. In addition to the 2000 Act, the Acts that now contain that law, or amendments of it, include the Criminal Justice Act 2003, the Criminal Justice and Immigration Act 2008, the Coroners and Justice Act 2009, the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Offender Rehabilitation Act 2014, the Anti-Social Behaviour, Crime and Policing Act 2014, the Criminal Justice and Courts Act 2015 and the Offensive Weapons Act 2019.

3 The current law of sentencing procedure is complex, difficult to find and difficult to understand, even for experienced judges and practitioners. The need for consolidation is urgent. An analysis conducted in 2012 of randomly selected cases in the Court of Appeal (Criminal Division) demonstrated that 95 of the 262 cases involved unlawful sentences. These were not sentences which were considered to be only of inappropriate severity, but cases in which the type of sentence imposed was simply wrong in law. More recently, an analysis of 52 cases listed in that court for a week in June 2019 found that 14 of the sentences contained some unlawful element.

4 The Sentencing (Pre-consolidation Amendments) Act 2020 addresses a number of technical problems with the existing law. The Sentencing Bill, which is the subject of these Notes, will consolidate into a single Act the law of sentencing procedure as amended by the Sentencing (Pre-consolidation Amendments) Act 2020. The main operative provisions of the Sentencing Bill are to be known as the Sentencing Code (see *clause 1(1)* of the Bill), and the intention is that future amendments of the law of sentencing procedure will be inserted in the Code, so that it will continue to be a comprehensive statement of that law.

5 The Sentencing Bill is passing through Parliament under the procedure for consolidation Bills.

Legislation consolidated by the Bill

6 The Sentencing Bill consolidates the law of sentencing procedure, which is the law that sets out what happens to an offender who is convicted of, or has pleaded guilty to, a criminal offence. The Code itself will contain the provisions on which a court needs to rely during the sentencing process, including those detailing the orders which a sentencing court may impose, the general legislative principles of sentencing, case-management functions such as committals from one court to another, and breaches of existing sentencing orders.

7 The Code does not generally include substantive criminal offences or the provisions about the maximum penalties for such offences. These are best thought of as substantive, as opposed to procedural, criminal law provisions. The usual drafting practice is for such provisions to be located in the legislation dealing with particular areas of law, which is where they will remain.

8 An example is the case of offences against the person: the offences themselves and the associated penalties are contained in the Offences against the Person Act 1861 and will remain there. But the provisions that require a sentencing court to treat as an aggravating factor the fact that an offence under the 1861 Act was committed against an emergency worker are procedural provisions on which the court will need to rely during the sentencing process. Those provisions are currently contained in the Assaults on Emergency Workers (Offences) Act 2018, and will be included in the Code as *clauses 67 and* 68.

9 Similarly, the provisions that require a court to treat as an aggravating factor the fact that an offence under the 1861 Act has a terrorist connection are currently contained in the Counter-Terrorism Act 2008 and will be included in the Code as *clause 69 and Schedule* 1.

10 Certain provisions about or related to sentencing are not being included in the Code:

- provisions about sentencing for road traffic offences will remain in the Road Traffic Offenders Act 1988;
- provisions about confiscation orders will remain in the Proceeds of Crime Act 2002;
- provisions about release will remain in Chapter 6 of Part 12 of the Criminal Justice Act 2003;
- provisions about orders under the Mental Health Act 1983 will remain in that Act;
- provisions about the powers of a court following a verdict of not guilty by reason of insanity, or where following a finding of unfitness to plead the accused has been found to have done the act or made the omission charged, which will remain in the Criminal Procedure (Insanity) Act 1964 and section 11 of the Powers of Criminal Courts (Sentencing) Act 2000.

11 The Bill also consolidates some powers to impose orders only partially, to the extent that the orders can be imposed by a sentencing court. The treatment of these provisions is explained in more detail at the appropriate point in these Notes, but they are—

- sexual harm prevention orders under section 103A of the Sexual Offences Act 2003;
- parenting orders under section 8 of the Crime and Disorder Act 1998.

Extent

12 Leaving aside its application for the purposes of the armed forces, the substantive provisions of the Bill extend only to England and Wales, with some exceptions which relate to the treatment outside England and Wales of sentences passed by a court in England and Wales. The principal exception is that the Bill consolidates provisions about the transfer to Northern Ireland and (except in relation to youth rehabilitation orders) Scotland of offenders who are subject to youth rehabilitation orders, community orders or suspended sentence orders.

13 The Bill will consolidate (and partially repeal) some provisions that also extend to Scotland or Northern Ireland, or both, but only so far as they extend to England and Wales, leaving them in place for Scotland or Northern Ireland. In summary those provisions are as follows, but their treatment in the consolidation is explained in more detail at the appropriate point in these Notes—

- sections 58 to 61 of the Criminal Procedure and Investigations Act 1996 (derogatory assertion orders)
- section 30 of the Counter-Terrorism Act 2008 (offences with a terrorist connection: aggravating factors)
- section 4A of the Misuse of Drugs Act 1971 and section 6 of the Psychoactive Substances Act 2016 (certain offences involving drugs or psychoactive substances: aggravating factors)
- sections 73 to 75 of the Serious Organised Crime and Police Act 2005 (reduction in sentence for assisting prosecution)
- section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 (minimum sentences and aggravating factors for certain offences involving firearms)
- sections 139 and 139A of the Criminal Justice Act 1988 (minimum sentences for certain offences involving offensive weapons).

The armed forces

14 Offences committed under service law (broadly speaking offences for which members of the armed forces are liable) are subject to a sentencing regime that operates a modified version of provisions of the law of England and Wales that applies in the civilian courts. *Schedules 25 and 26* to the Bill deal with the application of the Code to such offences. The extent of those provisions is discussed at the appropriate point in these Notes.

The clean sweep

15 The most significant problem addressed by the Sentencing (Pre-consolidation Amendments) Act 2020 is that changes to the law of sentencing procedure have often been commenced so that they do not apply to all cases. An example is section 189 of the Criminal Justice Act 2003, which enables the court to impose a suspended sentence of imprisonment. It was commenced so as to apply only in relation to offences committed on or after 4 April 2005 (see paragraph 5(2)(a) of Schedule 2 to the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (S.I. 2005/950)). The old law, in the form of section 118 of the Powers of Criminal Courts (Sentencing) Act 2000 (under which a suspended sentence is available only in exceptional circumstances), continues to apply to offences committed before that date.

16 This approach to commencement gives rise to issues of accessibility. It can be difficult to establish whether the new provision applies. Often it will be apparent only from annotations in commercial texts or on legislation.gov.uk that the new provision does not apply in all cases. And it may not be readily apparent from annotations of the new provision that there is an old provision that still applies, and what the text of that old provision is. This is one of the reasons why so many unlawful sentences are passed by the courts.

17 This problem is addressed by the "clean sweep", which is given effect to by section 1 of the Sentencing (Pre-consolidation Amendments) Act 2020, which modifies the effect of transitional and saving provisions that relate to legislation repealed by the Sentencing Bill (including orders and regulations under such legislation). These modifications come into force immediately before the Sentencing Bill, so the law on sentencing procedure that is consolidated by the Sentencing Bill will be the law as modified by the clean sweep.

18 The effect is that the Code will apply to sentencing for any offence of which a person is convicted after the Code has come into force, even if the offence was committed before the Code came into force. This will remove the need to refer to the old law and consider the effect of commencement and saving provisions.

19 The clean sweep does not apply to cases in which it would result in a more severe penalty than the maximum which could have been imposed at the time of the offence, or in which the application of the clean sweep would result in an offender being subject to a minimum sentence which did not apply at the time of the offence. This is done by the exclusions in section 1(4) of and Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020, and those exclusions are reproduced in the Code by provisions which limit the application of the provisions in question expressly state to which cases to which they apply: see (for example) the references to 22 January 2004 in *paragraphs 1 and 2 of Schedule 20*, which reproduce the effect of the clean sweep exception in paragraph 32 of Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020 for minimum sentences for offences under section 5(1) and (1A) of the Firearms Act 1968.

20 It is also possible for regulations under section 1 of the Sentencing (Pre-consolidation Amendments) Act 2020 to create new exceptions to the clean sweep. Draft regulations, the Sentencing (Pre-consolidation Amendments) Act 2020 (Exception) Regulations 2020, have been laid before Parliament to create an exception to the clean sweep for the increase in the surcharge under the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2020, to which it would otherwise have applied.

Human rights

21 There are some cases in which the application of the clean sweep without exceptions would have resulted in a more severe penalty than the maximum which could have been imposed at the time of the offence. This would have been a breach of Article 7 of the European Convention on Human Rights and of the common law principle against retroactive punishment. In order to avoid such a breach of Article 7, exceptions have been included in section 1(4) of and Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020 and the draft regulations under section 1 of that Act and are reflected in the Code (unless they apply only to secondary legislation).

22 There are also some cases in which the application of the clean sweep would have resulted in an offender being subject to a minimum sentence which did not apply at the time of the offence. The Law Commission took the view that although this would have been

permissible under Article 7 of the Convention and the common law principle against retroactivity, it would be unfair for the clean sweep to apply in these cases. As a result, further exceptions have been included in Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020 and are restated in the Code.

23 Government lawyers have assessed the provisions within the Code for compatibility with the European Convention on Human Rights. The Government is satisfied that the Sentencing Code and its provisions are compatible with the Convention. A section 19(1)(a) statement has been signed by Lord Keen, and a supporting memorandum has been published by the Ministry of Justice.[1]

Commencement

24 The Sentencing Bill as introduced provides that in general it will come into force on 1 October 2020, by virtue of *clause 416*. Where a court deals with a person who has been convicted of an offence, the Code will apply in all cases where the conviction is on or after that date. Cases where the Code applies only in relation to offences committed after a particular date will be identified by specific provision to that effect in the Code.

25 The legislation restated in the Bill will be amended by Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020 immediately before the Bill comes into force; the Bill will consolidate it as amended.

26 *Schedule* 22 to the Bill reproduces enactments that are not currently in force. They will remain in that Schedule until they come into force, as a result of which the body of the Code will at any time contain only provisions that are in force. This will reduce the risk of practitioners and judges seeking to apply provisions that are not in force.

27 *Clause 419* restates paragraph 134 of Schedule 2 to the Sentencing (Pre-consolidation) Amendments Act 2020. It will allow regulations to amend the Code, and other legislation, to specify relevant commencement information when provisions contained in *Schedule* 22 come into force or powers to make amendments of the Code contained in *Schedule* 23 are exercised. This will ensure that where amendments to the Code made by or under those Schedules do not apply to all cases, the cases to which they do apply can be made clear on the face of the Code. This will ensure that a consistent approach to specifying commencement information is maintained in the Code, and by making the application of new provisions of the Code clear will reduce the risk of the courts passing unlawful sentences.

Consultation

28 In the course of the Sentencing Code project the Law Commission carried out four

1.https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/871323/sentencing-bill-echr-memorandum.pdf

separate consultation exercises and published:

- an issues paper seeking views on the transition to the Sentencing Code (July 2015);
- a consultation on the Commission's compilation of the law relating to sentencing in force in England and Wales (August 2015);
- a report setting out final recommendations on the transition to the Sentencing Code (May 2016);
- an interim report on the Commission's compilation of the law relating to sentencing in force in England and Wales (October 2016);
- the "main" consultation paper and draft Sentencing Code (July 2017);
- a further consultation on disposals for children and young persons, and updated Sentencing Code (March 2018);
- a final report including drafts of the Sentencing (Pre-consolidation Amendments) Bill and the Sentencing Bill (November 2018).

29 In addition, the National Archives hosted the Sentencing Code on legislation.gov.uk so that consultees could use the Code as they would if it was an enacted piece of legislation.This allowed consultees to use the Code as if in court, and to interact with it in a manner that is difficult when produced as a pdf. This was the first time that legislation.gov.uk had hosted a draft Bill.

30 During the consultation period the Commission attended or organised a number of public consultation events and spoke to more than 1,400 people. Public presentations and question and answer sessions were held in every Circuit in England and Wales with academics, practitioners and members of the public.

31 Discussions with the judiciary played a key part in informing the initial decisions as to the structure of the Sentencing Code, and has resulted in a structure which aims to mirror the sentencing process itself, and which the Commission considers to be logical and user-friendly.

32 Consultees were overwhelmingly in favour of the Commission's recommendations, in particular the clean sweep, which will remove the need to refer to historic law and transitional provisions except where limited exceptions necessary to respect the fundamental rights of offenders apply.

General comments

References to provisions of the Sentencing Bill

33 References in italics in these Notes are references to provisions of the Sentencing Bill.

"Available"

34 The Code uses the expression that a particular order is available to a court dealing with an offender where the circumstances are such that the court has power to impose the order. The Code sets out separately statutory constraints which affect the way in which the court exercises that power.

Powers to make orders restated as powers to make regulations

35 All powers of the Secretary of State or Lord Chancellor to make orders made by statutory instrument have been restated in the Bill as powers to make regulations made by statutory instrument, in reliance on section 105(1) of the Deregulation Act 2015, which provides that—

> "(1) Any provision that may be made by order, regulations or rules made by statutory instrument may be made by any other of those forms of legislation made by statutory instrument."

36 Since the enactment of that Act it has been conventional for powers to make subordinate legislation to take the form of powers to make regulations.

Secondary legislation restated in the Bill

37 The Bill re-enacts legislation that has been amended by orders and regulations. Of these, only the following effected changes of sentencing policy—

a. the Referral Orders (Amendment of Referral Conditions) Regulations 2003 (S.I. 2003/1605);
b. the Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010 (S.I. 2010/197).

38 All other amendments, and prospective amendments, by secondary legislation of provisions being consolidated in the Code, and that are reflected in the Bill, are either transitory or saving provisions or consequential on other changes, principally—

a. petty sessions areas becoming local justice areas;
b. changes to probation service arrangements conferring functions on officers of providers of probation services;
c. changes to arrangements for health care and registration of treatment practitioners;
d. the United Kingdom's exit from the European Union.

39 No question of the validity of any of these instruments has arisen in the consolidation process and it is not considered necessary to preserve any right to challenge their *vires*.

40 *Schedule 25* will insert into the Armed Forces Act 2006 provision about custodial sentences for offenders aged 18 to 21 that will correspond to provisions of the Code and will replace provision currently contained in the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 (S.I. 2009/1059) which applies provisions that are being rewritten in the Code. *Paragraph 13 of Schedule 27* preserves that status of the provisions deriving from paragraphs 5 and 7 of that order; these are the only ones rewritten in the Code that could conceivably give rise to a *vires* challenge.

Obsolete terms not rewritten in the Bill

Local probation boards

41 Section 11 of the Offender Management Act 2007 abolished local probation boards and

replaced them with probation trusts established under section 5 of and Schedule 1 to that Act.

42 The provisions about probation trusts and abolishing local probation boards were brought into force at different times for different areas, by the Offender Management Act 2007 (Commencement No. 2 and Transitional Provision) Order 2008 (S.I. 2008/504), the Offender Management Act 2007 (Commencement No. 4) Order 2009 (S.I. 2009/547) and the Offender Management Act 2007 (Commencement No. 5) Order 2010 (S.I. 2010/191), which brought section 11 of the Offender Management Act 2007 into force "to the extent that [it was] not already in force".

43 Not all references to local probation boards and their officers have been consequentially repealed, possibly because of the phased commencement. Because all local probation boards have ceased to exist, there is no-one to whom a reference to an officer of a local probation board can refer, and any such references that survive in the provisions being consolidated have not been reproduced in the Bill.

Remand centres

44 Under section 43(1)(a) of the Prison Act 1952 as substituted by the Criminal Justice Act 1982, the Secretary of State could provide remand centres for the detention of 14 to 20 year olds committed in custody for trial or sentence. Section 59 of the Criminal Justice and Court Services 2000 was to repeal section 43(1)(a) of the Prison Act 1952, but has never been brought into force.

45 However, section 43 of the Prison Act 1952 has been substituted by section 38(1) of the Criminal Justice and Courts Act 2015. As substituted, it allows the Secretary of State to provide young offender institutions, secure training colleges and secure colleges for persons aged under 18, or who were under 18 when convicted or remanded.

46 Section 38(1) of the Criminal Justice and Courts Act 2015 was brought into force by the Criminal Justice and Courts Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Order 2015 (S.I. 2015/778) on 20 March 2015 except that the order did not bring into force the power to provide secure colleges for males under 15 or women.

47 As a result of section 38 of the Criminal Justice and Courts Act 2015 and that commencement order, the Secretary of State no longer has power to provide remand centres in England and Wales and there are no such centres.

48 Therefore the following provisions do not restate existing references to remand centres—

a. *clause 68(3),* which restates the definition of "custodial institution" in the Assaults on Emergency Workers (Offences) Act 2018; the reference to a remand centre is not needed;

b. *clause 72(9)(b),* which rewrites the definition of "custodial institution" in section 6(10) of the Psychoactive Substances Act 2016 for England and Wales; the reference to remand centres in that definition no longer applies in England and Wales;

c. *clause 276,* which restated section 95 of the Powers of Criminal Courts (Sentencing) Act 2000 (place of detention for offenders sentenced to custody for life);

d. *clause 271(2),* which restates section 98(2) of the Powers of Criminal Courts (Sentencing) Act 2000 and allows offenders sentenced to detention in a young offender institution to be detained in a remand centre.

Comments on specific provisions of the Bill

Clause 11: powers of court dealing with offender following deferment order

49 *Clauses 10 and 11* restate sections 1C and 1D of the Powers of Criminal Courts (Sentencing) Act 2000 (deferment of sentence for an offence). Section 1C(3)(b) provides that where a magistrates' court deferred sentence but the Crown Court deals with the offender for it, having convicted the offender of another offence, it cannot pass a sentence that could not be passed by a magistrates' court. But that result is achieved anyway by section 1D(2)(a), which provides that the power to deal with the offender for the original offence is power to do so in any way in which the court which deferred sentence could have dealt with the offender for it, and is restated at *clause 10(2).* Accordingly section 1C(3)(b) is not restated.

Clauses 18 and 19: committal for sentence on indication of guilty plea where offender sent for trial for related offences

50 Subsection (2) of section 4 of the Powers of Criminal Courts (Sentencing) Act 2000 allows a magistrates' court to commit an offender to the Crown Court for sentence if it sends the offender to the Crown Court for trial for one or more related offences. Subsection (3) provides that if it has not yet determined whether to send the offender to the Crown Court for trial for the related offence or offences—

> "(a) it shall adjourn the proceedings relating to the offence until after it has made those determinations; and
>
> (b) if it sends the offender to the Crown Court for trial for one or more related offences, it may then exercise [the power in subsection (2)]".

51 Subsection (3)(b) is unnecessary because the circumstances it describes are precisely the circumstances in which the power in subsection (2) is exercisable. Accordingly it is not restated in *clause 18(3).*

52 The same point applies to section 4A(3)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 and *clause 19(2).*

Committal of person aged under 18 at first appearance

53 *Clause 19* applies, by virtue of *subsection (1),* where a magistrates court has convicted a person aged under 18 of an offence following a guilty plea; *subsection (5)* of that clause defines that expression, rewriting section 4A(1) of the Powers of Criminal Courts (Sentencing) Act 2000.

54 Under that provision, section 4A applies where—

> "(a) a person aged under 18 appears or [is] brought before a magistrates' court ("the court") on an information charging him with an offence mentioned in subsection (1) of section 91 below ("the offence");

(b) he or his representative indicates under section 24A or (as the case may be) section 24B of the Magistrates' Courts Act 1980 (child or young person to indicate intention as to plea in certain cases) that he would plead guilty if the offence were to proceed to trial; and

(c) proceeding as if section 9(1) of that Act were complied with and he pleaded guilty under it, the court convicts him of the offence."

55 An indication of guilty plea can be given under section 24A or 24B only if the person appeared or was brought before a magistrates' court when under 18. Normally the court would proceed under one of those sections immediately, but it is possible for proceedings under section 24A or 24B to be adjourned. It is a question of interpretation whether the court could proceed under either of those sections when the person has reached 18 and whether section 4A of the Powers of Criminal Courts (Sentencing) Act 2000 would apply in those circumstances, though it appears from R v Ford (Lewis) (2018) (CACD, unreported) that it could not. The position is preserved by *subsection (5)*.

Clause 25: power and duty to remit offenders aged under 18 to youth courts for sentence

56 *Clause 25* restates section 8 of the Powers of Criminal Courts (Sentencing) Act 2000. Subsection (6) requires an adult magistrates court which convicts a person aged under 18 to remit the case to a youth court, unless subsection (7) or (8) applies. Subsection (7) applies where the court would be required to make a referral order. Subsection (8) applies where the case "does not fall within subsection (7) above" but the court is of the opinion that it could be appropriately dealt with by a discharge, a fine or a requiring a parent to enter into a recognizance. Since the court cannot deal with the offender in any of those ways if it makes a referral order, the quoted words are unnecessary and have not been reproduced in *clause 25(5)(b)*.

Chapter 2 of Part 3: derogatory assertion orders

Partial restatement for England and Wales and Scotland of provisions extending to Northern Ireland

57 Sections 58 to 61 of the CPIA 1996 are about derogatory assertion orders, which are orders that prohibit the reporting of assertions made during sentencing proceedings.

58 The power to make such an order is in section 58. Section 59 prohibits publication in Great Britain of an assertion covered by a derogatory assertion order, and section 60 makes it an offence for certain people to publish in breach of that prohibition. All those sections extend to England and Wales and Northern Ireland; sections 59 and 60 both extend to Scotland as well. However, sections 58 and 59 are modified by Schedule 4 to that Act as they apply to Northern Ireland; in particular, section 59 is to be read as though the reference to "Great Britain" were a reference to "Northern Ireland".

59 Those modifications have the effect of creating two parallel regimes. A derogatory assertion order made by a court in England and Wales prohibits the publication in Great Britain of an assertion covered by the order, and it is an offence in England and Wales and Scotland for certain people to publish in breach of that prohibition.

60 As regards Northern Ireland, a derogatory assertion order made by a court in Northern Ireland prohibits publication in Northern Ireland of assertions covered by the order;

publication in breach of that prohibition is an offence in Northern Ireland.

61 At *clauses 38 to 41,* the Bill restates sections 58 to 60 (and section 61(3), which is just clarificatory) so far as they apply in relation to derogatory assertion orders of courts in England and Wales (including the provisions making contravention of those orders an offence in Scotland).

62 *Schedule 24* repeals those provisions except as they extend to Northern Ireland, by limiting their extent to Northern Ireland, and amends them so that they deal directly with derogatory assertion orders made by courts in Northern Ireland (and accordingly removes the modifications). See *paragraphs 134 to 138.*

Clause 69 and Schedule 1: aggravating factors: offences with a terrorist connection

Partial restatement of provisions extending outside England and Wales

63 Section 30 of the Counter-Terrorism Act 2008 makes provision requiring any terrorist connection of an offence listed in Schedule 2 to that Act to be treated as an aggravating factor. Section 30 extends to England and Wales, Scotland and Northern Ireland. *Clause 69 and Schedule 1* restate that section and Schedule for England and Wales.

64 *Schedule 1* does not list substantive offences listed in Schedule 2 to the Counter-Terrorism Act 2008 that are not offences under the law of England and Wales, namely culpable homicide, abduction and the offences under the law of Scotland or Northern Ireland that were added to Schedule 2 by section 8(5) and (6) of the Counter-Terrorism and Border Security Act 2019.

65 *Schedule 1* also does not cover all the ancillary offences covered by Schedule 2 to the Counter-Terrorism Act 2008, but only those that are offences under the law of England and Wales (namely offences that are "inchoate offences" within the meaning of the Code). Secondary offences of aiding, abetting, counselling or procuring are covered by the references to the substantive offences.

66 The nature of inchoate offences is that they are offences under the law of England and Wales which consist of secondary conduct of various kinds (e.g. encouraging, assisting, attempting) in relation to other substantive offences under the law of England and Wales. Although Part 2 of the Serious Crime Act 2007, section 1A of the Criminal Attempts Act 1981 and section 1A of the Criminal Law Act 1977 all make provision under which an inchoate offence can be committed in certain circumstances where the main conduct or the secondary conduct (assisting, encouraging, attempting etc) was committed outside England and Wales, the inchoate offence in question would still be such an offence under the law of England and Wales committed in respect of another offence under the law of England and Wales; therefore *paragraph 14 of Schedule 1* does not (and should not) cover inchoate offences relating to substantive offences under the law of Scotland or Northern Ireland that are listed in Schedule 2 to the Counter-Terrorism Act 2008.

Power to amend Schedule 2 to the Counter-Terrorism Act 2008

67 Section 33 of the Counter-Terrorism Act 2008 confers power on the Secretary of State to amend Schedule 2 to that Act; that power is restated for England and Wales in *paragraph 1 of Schedule 23* as a power to amend *Schedule 1.* Dividing the power in section 33 in this way

means that it would be possible for the Secretary of State to amend *Schedule 1* separately from Schedule 2 to the Counter-Terrorism Act 2008. At present, Schedule 2 extends in the same form throughout the United Kingdom (though it does list some offences that are not offences throughout the United Kingdom). Section 96 of the Counter-Terrorism Act 2008 provides that the power to amend Schedule 2 can be exercised to make different provision for different cases or circumstances. Although that would not necessarily cover exercising the power differently for England and Wales and for other parts of the United Kingdom, the power as it stands need not necessarily be exercised by the same Secretary of State in relation to each part of the United Kingdom and on that basis might be exercised separately for different parts of the United Kingdom.

68 The alternative to dividing Schedule 2 to the Counter-Terrorism Act 2008 in this way would have been to restate in the Code section 30 of the Counter-Terrorism Act 2008 as it extends to England and Wales, but so that it required a court to treat, as an aggravating factor, any terrorist connection of an offence that was listed not in the Code but in Schedule 2 to the Counter-Terrorism Act 2008. That would have been less helpful for a sentencing court and would therefore have amounted to a less satisfactory consolidation.

Subsections (2) and (3) of section 30 of the Counter-Terrorism Act 2008 not restated

69 *Clause 69* of the Bill does not restate subsection (2) or (3) of section 30 of the Counter-Terrorism Act 2008. Subsection (2) requires the court, in relation to an offence listed in Schedule 2 to that Act, to make a determination if "having regard to the material before it for the purposes of sentencing it appears to the court that the offence has or may have a terrorist connection", whether that is the case, and subsection (3) allows the court to hear evidence and requires it to "take account of any representations made by the prosecution and the defence, *as in the case of any other matter relevant for the purposes of sentence*".

70 *Clause 69* applies where the court is dealing with the offender for an offence listed in the restated Schedule; *subsection (2),* which rewrites subsection (4) of section 30, provides that, if the offence has a terrorist connection, the court must state that fact and treat it as an aggravating factor.

71 In order to be able to do that, the court is plainly required to determine whether the offence has a terrorist connection, where it is dealing with an offender for a listed offence; there is no need for a separate requirement. In making that determination, it is clear from the italicised words quoted above that it must do that in the way that it would deal with any other matter relevant for the purposes of sentence, so subsection (3) would not seem to add anything.

72 Accordingly there is no need to restate subsection (2) or (3) of section 30 of the Counter-Terrorism Act 2008. Further, to restate them would create a contrast with the approach in other provisions that relate to aggravating factors and suggest that they imposed different obligations on the court.

73 The words in subsection (1) "in England and Wales" in the reference to a court in England and Wales, and "for the purposes of sentencing" are not needed in the context of the Bill and are not restated.

Clause 70: aggravating factors: using minor to mind weapon

Partial restatement of provisions extending to Scotland

74 Section 28 of the Violent Crime Reduction Act 2006 creates an offence of using another person to mind a weapon. If that other person is a minor, that is an aggravating factor under section 29(11) and (12). Both section 28 and section 29 extend to England and Wales and Scotland. The Bill rewrites subsections (11) and (12) of section 29 of that Act (and interpretative provisions of subsections (13) and (14)) for England and Wales. *Schedule 29* repeals subsections (11) and (12) for England and Wales, and *paragraph 253 of Schedule 24* amends subsection (11) to make it clear that it, and therefore subsection (12), will apply only in Scotland.

Clauses 71 and 72: aggravating factors: controlled drugs and psychoactive substances

Partial restatement of provisions extending throughout United Kingdom

75 Section 4A of the Misuse of Drugs Act 1971 and section 6 of the Psychoactive Substances Act 2016 require a court to treat certain matters as aggravating factors in relation to certain offences under those Acts.

76 Both those provisions extend to England and Wales, Scotland and Northern Ireland. The Bill will restate them as they extend to England and Wales (see *clauses 71 and 72*, and will amend each of those sections to make it clear that they will apply in future only in Scotland and Northern Ireland (see *paragraphs 27 and 287 of Schedule 24*).

77 The Bill will also repeal those sections as they extend to England and Wales (see the entries in *Schedule 29*), apart from the subsections that define "school". One of the aggravating factors under each section is that the offence in question was committed on or in the vicinity of school premises at a relevant time. School premises are defined by reference to a "school" which in each case covers schools in England and Wales, Scotland or Northern Ireland. The definitions in section 4A of the Misuse of Drugs Act 1971 and section 6 of the Psychoactive Substances Act 2016 will continue to apply because it is not possible to rule out the possibility - albeit unlikely - that an offence could be committed in England and Wales in the vicinity of school premises of a school in Scotland, say.

78 Another aggravating factor under section 6 of the Psychoactive Substances Act 2016 is where an offence is committed in a custodial institution as defined in subsection (10). The definition in *clause 72(9)* need only cover institutions in England and Wales, and therefore does not restate the references to—

a. young offenders institutions, which are established under section 19(1)(b) of the Prisons (Scotland) Act 1989,

b. young offenders centres, which are provided under section 2 of the Treatment of Offenders Act (Northern Ireland) 1968,

c. juvenile justice centres, which are established under Article 51 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I. 9)), or

d. remand centres, which are provided in Scotland under section 19(1)(b) of the Prisons (Scotland) Act 1989 and in Northern Ireland under section 2 of the Treatment of Offenders Act (Northern Ireland) 1968.

Clauses 74 and 75: reduction in sentence for assisting prosecution

79 Chapter 2 of Part 2 of the Serious Organised Crime and Police Act 2005 (offenders assisting investigations and prosecutions) extends to England and Wales and Northern Ireland. At *clauses 74 and 75 and clauses 387 to 392,* the Bill restates that Chapter, but only so far as it relates to sentences and extends to England and Wales. The Bill will repeal sections 73 to 75 so far as they extend to England and Wales, and will repeal entirely section 75A and provisions of those sections that apply only to England and Wales.

Clause 76: effect of Chapter on other powers of court to consider seriousness

80 Subsection (5) of section 143 of the Criminal Justice Act 2003 provides that the requirements in subsections (2) and (4) of that section to take previous convictions (including convictions in another member State) are not to be taken to prevent the court from taking convictions by courts in other countries, or which are not relevant convictions, into account. But the court is not restricted to taking those matters into account for this purpose.

81 Section 143(5) is rewritten (along with the saving in section 73 of the Serious Organised Crime and Police Act 2005 for powers to take matters into account) as a general proposition that the express powers and duties of the court to take certain matters into account do not affect any other power that the court has to take matters into account.

Clause 82: effect of discharge

82 Section 14(4)(c) of the Powers of Criminal Courts (Sentencing) Act 2000 is not restated. It is a saving for the effect of enactments or instruments in force on 1 July 1974 that applied to persons dealt with under the Probation of Offenders Act 1907, which is not relevant to anyone who will be dealt with under the Bill.

Clause 120: general power of Crown Court to fine offender convicted on indictment

83 *Clause 120* re-enacts section 163 of the Criminal Justice Act 2003 to allow the Crown Court to impose an unlimited fine on conviction on indictment.

84 Section 163 came into force on 4 April 2005 and could have been superseded by subsequent provision that set a maximum for a fine on indictment for a particular offence but the Law Commission are satisfied that no such maximum has been introduced since that date, so *clause 120* will accurately restate the position for offences committed after the Bill comes into force.

85 However, *clause 120* must not alter the maximum fine that applies to offences committed before the Bill comes into force but of which the offender is convicted after that time.

86 Section 163 of the Criminal Justice Act 2003 itself restated section 127 of the Powers of Criminal Courts (Sentencing) Act 2000. That section re-enacted section 30 of the Powers of Criminal Courts Act 1973 (itself a consolidation), which was originally qualified by the words "subject however to any enactment limiting the fine that may be imposed".

87 Those words were repealed by Schedule 13 to the Criminal Law Act 1977, section 32(1) of which provided that—

> "(1) Where a person convicted on indictment of any offence (whether triable only on indictment or either way) would, apart from this subsection, be liable to a fine not exceeding a specified amount, he shall by virtue of this subsection be liable to a fine of any amount".

88 So section 32(1) removed any limit that existed in legislation at the time on maximum fines on indictment. It was brought into force on 17 July 1978, without any express commencement provision but, on general principles, must be read as not affecting the maximum fine for any offence already committed. The position for offences before 17 July 1978 would have been preserved by Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000 (Transitional provisions and savings) and the commencement of section 163 of the Criminal Justice Act 2003 would be construed as not affecting that position.

89 As a result, it is necessary to preserve any maximum fine that applied to an offence committed before 17 July 1978.

90 Section 32(1) set the very clear principle that fines on indictment should be unlimited, though it could not prevent an express limit on fines on indictment being imposed subsequently. If any such maximum had been introduced it would also need to be preserved for the offences to which it applied.

91 Neither section 127 of the Powers of Criminal Courts (Sentencing) Act 2000 nor section 163 of the Criminal Justice Act 2003 is in a form that suggests they were designed to remove any maximum on a fine on indictment that might have been introduced after section 32(1) of the CLA 1977 came into force, but each would have had that effect if any such maximum had been introduced.

92 However, as a consolidation, the Powers of Criminal Courts (Sentencing) Act 2000 would have had to preserve any such maximum fine on indictment that might have been introduced. The fact that it did not is a clear indication that no such maximum was introduced before the Powers of Criminal Courts (Sentencing) Act 2000.

93 Although the Criminal Justice Act 2003 was not a consolidation, the form of section 163 and the fact that the Explanatory Notes state that "This section re-enacts section 127 of the Powers of Criminal Courts (Sentencing) Act" are both clear indications no such maximum was introduced before the Criminal Justice Act 2003.

94 Therefore it appears that no maximum fines on indictment have been introduced since section 32(1) of the Criminal Law Act 1977 came into force. Nevertheless, *subsection (3) of clause 120* is included to avoid any doubt on this and give effect to section 1(4)(b) of the Sentencing (Pre-consolidation Amendments) Act 2020.

Clause 123: limit on fines imposed by magistrates' courts in respect of young offenders

Limit only on magistrates' courts

95 Subsection (1) of section 135 of the Powers of Criminal Courts (Sentencing) Act 2000 applies where a person aged under 18 is found guilty by a magistrates' court, and imposes a limit on "the amount of any fine imposed by *the court*"; accordingly it is restated as limit on

the fine that can be imposed by that court.

96 Subsection (2) of that section applies "In relation to a person aged under 14"; in the context that is considered to refer to a person aged under 14 at the time of conviction, and is restated in that way.

Clause 135: making a compensation order

97 The Bill will not restate section 130(2A) of the Powers of Criminal Courts (Sentencing) Act 2000, which provides—

> "A court must consider making a compensation order in any case where this section empowers it to do so."

98 That provision is plainly unnecessary because the court must give reasons for not making a compensation order if it has power to do so, so it is bound to consider whether to make such an order.

Clause 139: limit on compensation payable under compensation order of magistrates' court in case of young offender

99 Section 131 of the Powers of Criminal Courts (Sentencing) Act 2000, as originally enacted, imposed a limit of £5000 on the amount of a compensation order for any one offence. It was amended by the Crime and Courts Act 2013 to limit it to offenders aged under 18; subsection (1A), which was inserted by that Act, provided that "This section applies if (but only if) a magistrates' court has convicted a person aged under 18.....". Although appropriate in the context of a change which disapplied the £5000 limit for all cases other than children, the words "(but only if)" are not required in *clause 139,* which restates section 131 and is expressed to apply where a magistrates' court deals with an offender aged under 18 and makes a compensation order.

Clause 181: making youth rehabilitation order where offender subject to other order

100 Paragraph 30(4) of Schedule 1 to the Criminal Justice and Immigration Act 2008 provides that a court cannot impose a youth rehabilitation order where the offender is already subject to such an order or a reparation order unless the court revokes the earlier order. It does not expressly confer power to revoke the earlier order.

101 Paragraph 30(5) of that Schedule provides that where the court revokes the earlier order the notification provisions in Schedule 2 to the CJIA 2008 apply to the revocation as they apply to the revocation of a youth rehabilitation order. Since paragraph 30(4) is not thought to contain a new power to revoke a reparation order, paragraph 30(5) beats the air in relation to reparation orders and does not add anything to the existing provisions about revocation of youth rehabilitation orders and is therefore not reproduced.

Clause 213: the responsible officer

102 Section 197(1) of the Criminal Justice Act 2003 provides that the responsible officer is the person "responsible for discharging the functions conferred by this Part [i.e. Part 12 of the

Criminal Justice Act 2003] on the responsible officer". All the functions of a responsible officer conferred by that Part are transferred to the Code, and there are no functions of a responsible officer under the Code that do not derive from that Part of that Act so, in *clause 213(1),* those functions are described as "functions conferred by this Code".

Clause 222: definition of "custodial sentence"

103 Section 76(1) of the Powers of Criminal Courts (Sentencing) Act 2000 defines "custodial sentence".

104 Most instances of the term "custodial sentence" apply where a court in England and Wales is dealing with an offender and refer to a sentence of a kind listed in section 76(1) of the Powers of Criminal Courts (Sentencing) Act 2000 that the court could then impose. *Clause 222(1)* restates that definition of "custodial sentence" (but see below).

105 In the following contexts, "custodial sentence" is used to refer to sentences within section 76(1) of the Powers of Criminal Courts (Sentencing) Act 2000 that are already being served—

a. section 104B(5) and (6) of the Powers of Criminal Courts (Sentencing) Act 2000 (interaction of detention and training orders with other custodial sentences), rewritten in *paragraph 6 of Schedule 12,*

b. section 147B of the Powers of Criminal Courts (Sentencing) Act 2000 (duty of court to have regard to effect of custodial sentence when imposing driving disqualification), rewritten at *clause 167(2),*

c. paragraph 9 of Schedule 12 to the Criminal Justice Act 2003 ("Criminal Justice Act 2003") (activation of suspended sentence order where offender subject to another custodial sentence), rewritten at *paragraph 15 of Schedule 16.*

106 In those contexts, "custodial sentence" also includes sentences that could no longer be imposed; those other sentences are covered by the term "pre-Code custodial sentence", which is defined in *clause 222(4).*

References to "custodial sentence" that include sentences imposed by service courts

107 "Custodial sentence" in section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 includes some sentences that could be imposed by a service court, although it is clear from the context that most references to "custodial sentence" do not cover them; the rewrite in the definitions of "custodial sentence" and "pre-Code custodial sentence" in *clause 222(1) and (4)* does not change this.

108 In particular, the reference in section 76(1) of the Powers of Criminal Courts (Sentencing) Act 2000 to a sentence of custody for life under section 93 or 94 of that Act includes sentences imposed by a service court under those sections by virtue of paragraphs 6 and 7 of Schedule 2 to the Armed Forces Act 2006 (Transitory Provisions etc) Order 2009 (S.I. 2009/1059).

109 The power of a service court to impose a sentence of custody for life under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000 by virtue of paragraph 7 of Schedule 2 to the 2009 Order, is restated by *paragraph 30 of Schedule 25*, which inserts new section 210A of the Armed Forces Act 2006 (the "Armed Forces Act 2006"), which in turn applies *clause 272.*

110 Paragraph 6 of Schedule 2 to the 2009 Order is restated by *paragraph 37 of Schedule 25,* which amends section 217 of the Armed Forces Act 2006 (mandatory life sentence for murder) to apply *clause 275* where a service court is dealing with an offender for an offence under that Act corresponding to murder.

111 Accordingly the references in *clause 222(1)* to custody for life under *clauses 272 and* 275, and the references *clause 222(4)* to custody for life under sections 93 and 94 of the Powers of Criminal Courts (Sentencing) Act 2000, between them cover such sentences imposed by a service court in any context where "custodial sentence" is used to cover such a sentence already imposed.

112 "Custodial sentence" in section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 does not include any sentence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 corresponding to other sentences under section 76 of the Powers of Criminal Courts (Sentencing) Act 2000, nor does it include a detention and training order, or a sentence of detention for an offender aged under 18 imposed by a service court.

Clause 223: two year limit on imprisonment for statutory offence if no maximum specified

113 Section 77 of the Powers of Criminal Courts (Sentencing) Act 2000 refers to a person who is convicted of an offence "against" any enactment, which is considered to mean the same as an offence "under" any enactment; "against" is rarely if ever used in this context in legislation now and is therefore replaced with "under" in *clause 223.*

Clause 224: magistrates' courts' limit on imprisonment

General approach

114 Section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 limits the power of a magistrates' court to impose imprisonment or detention in a young offender institution to 6 months for any one offence.

115 It is to be replaced by section 154 of the Criminal Justice Act 2003 but that section, and the repeal of section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 by Schedule 37 to the Criminal Justice Act 2003, have not been brought into force.

116 The reference to detention in a young offender institution in section 78 will be repealed by paragraph 177 of Schedule 7 to the Criminal Justice and Court Services 2000, which is also not in force.

117 Section 154 of the Criminal Justice Act 2003 is in almost identical terms to section 78 of the Powers of Criminal Courts (Sentencing) Act 2000. The principal difference is that the limit will be 12 months, rather than 6 months.

118 The way that the kinds of imprisonment covered by section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 154 of the Criminal Justice Act 2003 are expressed (which, in relation to imprisonment for default etc, has diverged as those provisions have been amended over time) will be aligned by paragraph 62 of Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020.

119 Section 154 does not apply to detention in a young offender institution, but paragraph 140(d) of that Schedule will modify section 154 of the Criminal Justice Act 2003 so that the limit in that section applies on a transitory basis to detention in a young offender institution.

120 As amended and modified by paragraphs 62 and 140(d) of Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020, section 154 of the Criminal Justice Act 2003 will be in identical terms to section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 apart from the difference in the time limits.

121 So *clause 224* rewrites section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 154 of the Criminal Justice Act 2003 (apart from the time limit), with *paragraph 24 of Schedule 22* providing for the increase in the 6 month limit to 12 months.

122 In keeping with the general approach for the Bill not to include provisions about the maximum penalties for particular offences, it does not consolidate section 281 of the Criminal Justice Act 2003 which will increase the maximum penalty for certain summary offences from 6 months to 51 weeks (and is not in force).

Limit on detention in a young offender institution

123 *Paragraph 38 of Schedule 22* removes the references to detention in a young offender institution from *clause 224*. In doing that it removes the references from the restatement of both section 154 of the Criminal Justice Act 2003 and section 78 of the Powers of Criminal Courts (Sentencing) Act 2000, which will cease to have effect in different ways.

124 The reference in section 154 of the Criminal Justice Act 2003, which has effect by virtue of the transitory modification, will cease to have effect automatically when section 61 of the Criminal Justice and Court Services 2000 comes into force. Section 154 itself is not in force.

125 On the other hand, the reference in section 78 of the Powers of Criminal Courts (Sentencing) Act 2000, which is in force, will cease to have effect when paragraph 177 of Schedule 7 to the Criminal Justice and Court Services 2000 comes into force.

126 That paragraph, and section 61, of that Act can be brought into force by order under section 80 of that Act. In theory, it would be possible for them to be brought into force at different times but in reality they will come into force at the same time.

127 That is because paragraph 177 of Schedule 7 is consequential on the abolition of sentences of detention in a young offender institution by section 61 of that Act; commencement of that paragraph earlier than section 61 would amount to a substantive change that was not consequential on the abolition of such sentences; and if brought into force later the references to detention in a young offender institution that are repealed would simply beat the air (and would not be restated in a consolidation).

128 Under *clause 417(1), paragraph 38 of Schedule 22* will come into force in the same way as the amendment of section 78 of the Powers of Criminal Courts (Sentencing) Act 2000, namely in accordance with regulations made by the Secretary of State.

Clause 235: exercise of power to make a detention and training order

129 A court's power to impose a detention and training order under section 100(1) of the Powers of Criminal Courts (Sentencing) Act 2000 is expressed to be "Subject to sections 90 and 91 above, sections 226 and 226B of the Criminal Justice Act 2003 and subsection (2) below".

130 Section 90 is a mandatory life sentence and section 226 of the Criminal Justice Act 2003 requires a life sentence in some circumstances. A discretionary custodial sentence can be imposed under section 91 where the court "is of the opinion that neither a youth rehabilitation order nor a detention and training order is suitable". Section 226B of the Criminal Justice Act 2003 allows an extended sentence of detention to be imposed where the appropriate custodial term of detention would be at least 4 years (which is 2 years longer than the maximum detention and training order).

131 The effect of the opening words of section 100(1) must be that a detention and training order cannot be imposed where a sentence is imposed under one of the other sections mentioned (the effect of section 100(2) is not relevant for this purpose).

132 *Clause 234(1)(c)* prohibits a detention and training order where a life sentence is required or the court is required to impose a sentence under *clause* 250. *Clause 235(2)* makes explicit the other part of the proposition that follows from the opening words of section 100(1), that the court may not make a detention and training order if it imposes a sentence of detention under *clause 250,* in a case where it is not required to do so, or an extended sentence of detention under *clause 254.*

Clause 239: period on remand etc: effect on detention and training order

133 Certain periods for which an offender is in police detention are to be taken into account by a court in setting the term of a detention and training order for an offence, under section 101(8), (11) and (12) of the Powers of Criminal Courts (Sentencing) Act 2000.

134 Under subsection (12)(b), a period of police detention for this purpose includes time when the offender is detained under section 41 of the Terrorism Act 2000. The words "section 41 of the Terrorism Act 2000" were substituted by paragraph 20(2) of Schedule 15 to the Terrorism Act 2000.

135 Schedule 37 to the Criminal Justice Act 2003 repealed paragraph 20 of that Schedule and that repeal has been fully brought into force. However, the words themselves in section 101(12)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 have not been repealed (and there is no prospective repeal of them).

136 Paragraph 20(3) of Schedule 15 to the Terrorism Act 2000 amended a provision that was repealed by the Criminal Justice Act 2003 so the repeal of paragraph 20(3) was purely consequential. It seems clear that the repeal of paragraph 20(2) (and the introductory provision in paragraph 20(1)) along with it was simply a mistake.

137 On the basis that words inserted by an amendment have effect while the amendment is in force, it is at least in theory arguable that the repeal of paragraph 20(2) of Schedule 15 to the Terrorism Act 2000 means that section 101(12)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 should be read without the words "section 41 of the Terrorism Act 2000". But the provision must be read in context and that approach would leave section

101(12)(b) meaningless.

138 It is clear that section 101(12)(b) should continue to be read as referring to a period of detention under section 41 of the Terrorism Act 2000, and it has accordingly been rewritten as *clause 239(5)(b)*.

Clause 247: further supervision after end of term of detention and training order

139 In section 106B of the Powers of Criminal Courts (Sentencing) Act 2000, subsection (4)(b) provides that the supervisor, in relation to a period of supervision under that section may be a member of the youth offending team established by the relevant local authority; this is rewritten as a reference to *a* local offending team established by that authority, as local authorities can establish more than one youth offending team.

Schedule 12: detention and training orders: breach of supervision requirements and further offences

Imprisonable offence

140 Section 105(1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 applies where a person subject to a detention and training order where a person commits "an offence punishable with imprisonment in the case of a person aged 21 or over". Paragraph 186 of Schedule 7 to the Criminal Justice and Court Services Act 2000, which is not yet in force, replaces "21" with "18".

141 The words "in the case of a person aged 21 or over" in section 105(1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 are unnecessary because of section 164(2) of that Act, which provides—

> "Any reference in this Act to an offence punishable with imprisonment shall be construed without regard to any prohibition or restriction imposed by or under this or any Act on the imprisonment of young offenders".

142 Accordingly those words (and the amendment of them) are not reproduced in the Bill (see *paragraph 7 of Schedule 12*).

Clause 249: sentences of detention for under 18s

143 Where an offender is convicted when under the age of 18, the only custodial sentence for most offences is a detention and training order, with a maximum term of 24 months (or the maximum term of imprisonment for an adult for the offence, if less than 24 months).

144 For certain serious offences, however, section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 allows the court to impose a sentence of detention with the same maximum term as the maximum term of imprisonment for an adult. Those offences include—

a. "an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, not being an offence the sentence for which is fixed by law" (section 91(1)(a)), and

b. an offence listed in section 51A(1A)(b), (e) or (f) of the Firearms Act 1968 committed in relation to certain firearms or ammunition ("relevant firearms or ammunition") in certain circumstances, where the court is not obliged to impose a minimum sentence (section 91(1B)).

145 Section 51A of the Firearms Act 1968 requires minimum sentences to be imposed in certain circumstances for specified offences under that Act. In particular subsection (1)(a)(iii) specifies offences under provisions listed in section 51A(1A) that are committed in relation to relevant firearms or ammunition. The offences listed in section 51A(1A) are—

"(za) section 5(2A) (manufacture, sale or transfer of firearm, or possession etc for sale or transfer);

(a) section 16 (possession of firearm with intent to injure);

(b) section 16A (possession of firearm with intent to cause fear of violence);

(c) section 17 (use of firearm to resist arrest);

(d) section 18 (carrying firearm with criminal intent);

(e) section 19 (carrying a firearm in a public place);

(f) section 20(1) (trespassing in a building with firearm)."

146 Subsections (1)(a) and (1B) of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, between them, cover all the offences covered by section 51A(1)(a)(iii) of the Firearms Act 1968. Section 91(1B) lists only those that are not covered by section 91(1)(a). The offences listed in section 51A(1A)(za), (a), (c) or (d) of the Firearms Act 1968 all carry maximum sentences of life imprisonment and are therefore covered by section 91(1)(a).

147 *Subsection (1) of clause* 249 provides that a sentence of detention under clause 250 (the equivalent, under the Code, of a sentence of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000) is available for the offences listed in the table in that subsection.

148 *Paragraph (a)* of the table covers the same offences as section 91(1)(a).

149 *Paragraph (c)* of the table covers offences covered by subsections (1A) to (1C) of section 91. The offences covered by subsections (1A) and (1C) are those listed in *paragraphs 1, 2 and 5 of Schedule 20* to the Code.

150 *Paragraphs 3 and 4 of Schedule 20* restate section 51A(1)(a)(iii) of the Firearms Act 1968. In doing that, they cover all the offences listed in section 51A(1A), both those that carry a maximum sentence of life imprisonment and the offences specified in section 91(1B).

151 So, by covering offences listed in *paragraphs 3 and 4 of Schedule 20* to the Code but excluding those within *paragraph (a)* of the table in *clause 252(1)*, *paragraph (c)* of that table covers the same offences as are currently covered by section 91(1B) of the Powers of Criminal Courts (Sentencing) Act 2000.

152 Accordingly, in referring to "an offence (other than one within paragraph (a))... which is listed in Schedule 20", *clause 252(1)* reproduces section 91(1B) of the Powers of Criminal Courts (Sentencing) Act 2000 (as well as section 91(1A) and (1C)).

"Convicted on indictment"

153 *Clause 249(1)* provides that a sentence is available where an offender aged under 18 is convicted on indictment of an offence listed in the table, which lists the offences currently mentioned in subsections (1), (1A), (1B) and (1C) of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. The expression "on indictment" is justified because—

a. subsection (1), (1A) and (1B) each expressly covers only offences mentioned in the subsection where the conviction is on indictment, and

b. subsection (1C) does not include the same qualification, but the offence mentioned in that subsection (one under section 28 of the Violent Crime Reduction Act 2006) is triable only on indictment.

Clause 252: maximum sentence of detention for offender aged under 18

154 *Clause 252(2)* provides that the maximum sentence of detention under *clause 250* for an offence where the offender is aged under 18 is the maximum term of imprisonment for the offence in the case of a person aged 21 or over, or life, if the offence carries a maximum sentence for offenders aged 21 or over.

155 The explicit power to impose a sentence of detention for life is not necessary. *Clause 250* rewrites section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, which permits a sentence of detention for life to be imposed where the adult maximum sentence is life imprisonment, but does not provide this expressly. However, detention under section 91 contrasts with detention in a young offender institution which cannot be imposed for life: the sentence for 18 to 21 year olds is a different sentence of custody for life.

156 In order to make the position clearer, *clause 252(2)(b)* makes this contrast express by allowing a sentence of detention under *clause 250* to be imposed for life.

Clause 254: offender aged under 18: extended sentence for certain violent, sexual or terrorism offences

157 Section 226B of the Criminal Justice Act 2003 allows a court to impose an extended sentence where a person aged under 18 is convicted of a specified offence (that is, an offence listed in Schedule 15 to the Criminal Justice Act 2003) and certain other conditions are satisfied.

158 The length of an extended sentence is the appropriate custodial term plus an extension period of at least a year and up to 5 or 8 years depending on the offence.

159 One of the conditions for imposing an extended sentence under section 226B of the Criminal Justice Act 2003 is that "if the court were to impose an extended sentence of detention, the term that it would specify as the appropriate custodial term would be at least 4 years" (subsection (1)(d)).

160 Subsection (4) provides that the "appropriate custodial term is the term of detention that would (apart from this section) be imposed .....".

161 Apart from section 226B of the Criminal Justice Act 2003, the custodial sentences available to a court where a person aged under 18 is convicted are—

a detention and training order under section 100 of the Powers of Criminal Courts (Sentencing) Act 2000

a sentence of detention under section 91 of that Act

in the case of an offence that carries a sentence fixed by law as life imprisonment (i.e. murder), detention at Her Majesty's pleasure under section 90 of that Act.

162 A sentence of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 is available only for offences that carry a maximum term of imprisonment of 14 years or more and certain other offences specified in that section. Not all offences that are specified offences for the purposes of section 226B of the Criminal Justice Act 2003 are sentences for which a sentence of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 can be imposed.

163 A detention and training order is the normal custodial sentence for an offender aged under 18. By virtue of subsections (1) and (2) of section 101 of the Powers of Criminal Courts (Sentencing) Act 2000, the maximum length of a detention and training order is 24 months or the maximum term of imprisonment for the offence if less.

164 So, leaving aside section 226B of the Criminal Justice Act 2003, the maximum custodial term for an offender aged under 18 at conviction in cases other than murder etc, is a 24 month detention and training order unless the offender can be sentenced to detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

165 As a result, in such a case where a sentence under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 is not available, the term of detention "that would (apart from this section) be imposed" could not be more than 24 months. That means that the condition in section 226B(1)(d) for imposing an extended sentence, namely that the appropriate custodial term would be at least 4 years, could not be satisfied.

166 That means that an extended sentence under section 226B of the Criminal Justice Act 2003 is not available for all specified offences, but only for those specified offences for which a sentence of detention is available under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

167 The Code makes this explicit in *clause 254(1)(a)*.

Clauses 260 and 261: detention of offenders aged under 18 at conviction

Life sentence for under 18s: place of detention

168 Section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for a sentence of detention for offenders convicted when aged under 18. A sentence under section 91 can be a sentence for a term of detention or a sentence of detention for life.

169 Section 92 of that Act makes provision about the arrangements for detention of a person "sentenced to be detained under section 90 or 91 above".

170 Section 226(2) of the Criminal Justice Act 2003 provides that, in certain circumstances, where "the offence is one in respect of which the offender would apart from this section be liable to a sentence of detention for life under section 91 of [the 2000 Act]", the court "must impose a sentence of detention for life *under that section*" (emphasis added).

171 When enacted, section 226 of the 2003 Act also provided in subsection (3) that, in certain circumstances where it did not impose a sentence for life under section 91 of 2000 Act, the court "must impose a sentence of detention for public protection". Subsection (3) has been repealed.

172 Section 235 of the Criminal Justice Act 2003 makes provision about the arrangements for detention of "A person sentenced to be detained under section 226, 226B or 228", which are similar, but not identical, to those provided for by section 92 of the 2000 Act.

173 It is, arguably, possible to read section 235 of the 2003 Act as applying to a person sentenced to detention under section 91 of the 2000 Act by virtue of section 226(2) of the 2003 Act, in which case it would have to be read as impliedly repealing section 92 of the 2000 Act for those cases (though section 92 would still apply to life (and other) sentences of detention under section 91 of the 2000 Act that were not imposed by virtue of section 226(2) of the 2003 Act).

174 However, the better reading of the reference to a "person sentenced to be detained under section 226" in section 235 of the 2003 Act is that it covers only a person sentenced to detention for public protection under section 226(3), so that a person sentenced to detention for life under section 91 of the 2000 Act by virtue of section 226(2) of the 2003 Act is subject to the normal arrangements under section 92 of the 2000 Act for a sentence of detention under section 91.

175 *Clauses 260 and 261* are drafted on this basis.

Chapter 3 of Part 10: custodial sentences for adults aged under 21

176 Under section 89 of the Powers of Criminal Courts (Sentencing) Act 2000, imprisonment is not an available sentence for offenders convicted when they are aged under 21.

177 Instead, for adults aged 18 to 20 at conviction—

(a) section 96 of that Act provides for detention in a young offender institution for determinate terms, subject to the maximum term of imprisonment that would apply for an offender aged 21 or over;

(b) sections 93 and 94 of that Act provide for discretionary and mandatory sentences of custody for life for those offenders, in place of imprisonment for life.

178 Section 61 of the Criminal Justice and Court Services Act 2000 abolishes sentences of detention in a young offender institution and custody for life, and Schedule 7 to that Act makes a number of consequential amendments.

179 Section 61, and those consequential amendments, can be brought into force by order under section 80 of that Act, but have never been brought into force. Section 80(2) allows different provisions to be brought into force at different times or in stages.

180 Subsequent Acts have taken different approaches to dealing with the prospective repeal of detention in a young offender institution and custody for life.

181 Part 12 of the Criminal Justice Act 2003 was drafted as though section 61 of the Criminal Justice and Court Services Act 2000 had already been brought into force — in other words as though imprisonment were available for offenders aged 18 to 20 at conviction — but article 3

of the Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005 (S.I. 2005/643), made under section 333 of the Criminal Justice Act 2003, modifies that Act so that certain references to sentences of imprisonment also include references to detention in a young offender institution or custody for life.

182 Those modifications have effect "in relation to any time before the coming into force of section 61 of the Criminal Justice and Court Services Act 2000". So, when section 61 is brought into force, they all cease to have effect at the same time.

183 The Legal Aid, Sentencing and Punishment of Offenders 2012 and the Criminal Justice and Courts Act 2015 both made provision for imprisonment for offenders aged 18 or over at conviction and contained, in the Acts themselves, modifications for offenders aged 18 to 20.

184 Again, those modifications have effect only until section 61 of the Criminal Justice and Court Services Act 2000 comes into force.

185 The Code sets out sections 93, 94 and 96 of the Powers of Criminal Courts (Sentencing) Act 2000 as they currently have effect, and sets out other provisions about custodial sentences in the modified form in which they currently have effect for offenders aged 18 to 20 at conviction, relying on S.I. 2005/643 and transitory provisions in other Acts.

186 The Bill also contains, in *Schedule* 22, amendments of the Code that, when brought into force, will give effect to the abolition of sentences of detention in a young offender institution and custody for life; as a result certain age limits will be changed from 21 to 18. *Clause 417* provides for the commencement of the amendments in that Schedule.

187 As an example of this approach, see section 226A of the Criminal Justice Act 2003, which is expressed to allow the court to impose an extended sentence of imprisonment on an offender aged over 18 under, but is modified by paragraph 36(2) of Schedule 21 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the Act which inserted section 226A), until section 61 of the Criminal Justice and Court Services 2000 comes into force, so that it instead allows the court to impose an extended sentence of detention in a young offender institution where the offender is aged under 21.

188 At *clauses 266 to 268* the Code sets out the powers of the court to impose extended sentences of detention in a young offender institution, but *paragraph 41 of Schedule 22* provides for those powers to be repealed (along with the rest of *Chapter 3 of Part 10* which deals with custodial sentences for 18 to 20 year olds), and *paragraph 51* amends *clause 280* to apply the corresponding provisions about extended sentences for adults aged 21 and over to all adults. *Paragraphs 41 and 51 of Schedule 22* both come into force at the same time as section 61 of the Criminal Justice and Court Services 2000, by virtue of *clause 417(5)(a) and (c)*.

Clause 262: detention in a young offender institution for offender at least 18 but under 21

189 *Clause 262* restates section 96 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides for a court to pass a sentence of detention in a young offender institution where the offender is aged 18 to 20 at conviction and—

(b) "the court is of the opinion that either or both of paragraphs (a) and (b) of section 79(2) above apply or the case falls within section 79(3)".

190 Section 79 of the Powers of Criminal Courts (Sentencing) Act 2000 was repealed by the

Criminal Justice Act 2003 with no relevant saving and replaced by section 152 of that Act.

191 Section 79 provided—

"(2) Subject to subsection (3) below, the court shall not pass a custodial sentence on the offender unless it is of the opinion—

(a) that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence, or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.

(3) Nothing in subsection (2) above shall prevent the court from passing a custodial sentence on the offender if he fails to express his willingness to comply with—

(a) a requirement which is proposed by the court to be included in a probation order or supervision order and which requires an expression of such willingness, or

(b) a requirement which is proposed by the court to be included in a drug treatment and testing order or an order under section 52(4) above (order to provide samples)."

192 It appears therefore that section 96(b) merely sets out the threshold test that applied before the Criminal Justice Act 2003 for any custodial sentence.

193 The absence of any consequential amendment of section 96 when the Criminal Justice Act 2003 came into force is thought to be because section 96 had already been prospectively repealed by the Criminal Justice and Court Services 2000 (although the repeal has not yet been brought into force). Paragraph 28 of Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020 replaces the references to the provisions of section 79 with references to the corresponding provisions of section 152 of the Criminal Justice Act 2003.

194 The application by section 96(b) of the Powers of Criminal Court (Sentencing) Act 2000 of provisions of section 152 of the Criminal Justice Act 2003 is not considered to add anything to section 152 itself, which applies anyway to the court when deciding whether to impose a sentence of detention in a young offender institution. It applies also when deciding whether to impose a sentence of imprisonment, so this interpretation results in the threshold for custodial sentences applying consistently to 18 to 20 year olds as well as to under 18s and adults aged 21 and over.

195 In consequence, there is no need to set out in *clause 262* the threshold test that is restated in *clause 130*.

Clause 272: custody for life for offences other than murder

196 Section 94(2) of the Powers of Criminal Courts (Sentencing) Act 2000 provides that the power conferred by subsection (1) to impose custody for life "is subject (in particular) to sections 79 and 80 above, but this subsection does not apply in relation to a sentence which falls to be imposed under section 109(2) below".

197 Sections 79 and 80 of the Powers of Criminal Courts (Sentencing) Act 2000, which set out the threshold for custodial sentences and the rules for determining the term of such a sentence, have been replaced by sections 152 and 153 of the Criminal Justice Act 2003. It is

thought that the references in section 94 of the Powers of Criminal Courts (Sentencing) Act 2000 to sections 79 and 80 of that Act were not amended to refer to the provisions of the Criminal Justice Act 2003 because section 94 itself was already prospectively repealed by the Criminal Justice and Court Services 2000, though that repeal has not yet come into force.

198 It is therefore considered that the references to sections 79 and 80 should be read as references to sections 152 and 153 of the Criminal Justice Act 2003, by virtue of section 17(2) of the Interpretation Act 1978, and that is reflected in *clause 272(2)*. Even if section 17(2) of the Interpretation Act 1978 were not to have that effect, sections 152 and 153 would apply anyway.

199 The second limb of section 94 is spent. Mandatory life sentences under section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 were abolished by the Criminal Justice Act 2003 for offences committed on or after 4 April 2005, so could not be relevant to an offender who is eligible for a sentence of custody for life under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000, and would therefore have to be still aged under 21.

Clause 264: suspended sentence order for offender under 21: availability

Minimum term of suspended sentence of detention in a young offender institution

200 *Clause 264(2)* restates for offenders aged under 21 the part of section 189(1) of the Criminal Justice Act 2003 setting out the maximum and minimum terms of a suspended sentence of imprisonment. In doing so it does not restate the minimum term of 14 days because, under section 97(2) of the Powers of Criminal Courts (Sentencing) Act 2000, the minimum term of a sentence of detention in a young offender institution is 21 days (which is restated in *clause 263(2)*).

Clauses 265 and 278: required special sentence for certain offenders of particular concern

201 Section 236A of the Criminal Justice Act 2003 requires a special custodial sentence for certain offenders, and subsection (4) provides that the term of such a sentence "must not exceed the term that, *at the time the offence was committed*, was the maximum term permitted for the offence".

202 The italicised words are omitted in *clauses 265(2) and 278(2),* which provide that the term must not exceed "the maximum term of imprisonment with which the offence is punishable". The italicised words merely state what the position is anyway and to include them for these sentences but not for other sentences might cast doubt on the basic principle.

Clauses 273 and 283: mandatory life sentence for second listed offence

Definition of "extended sentence"

203 The definition of "extended sentence" in section 224A of the Criminal Justice Act 2003 includes a sentence passed under section 58 of the Crime and Disorder Act 1998. That section was repealed by the Powers of Criminal Courts (Sentencing) Act 2000, so no offender aged under 21 could have had a sentence imposed under that section. There is therefore no need to include a reference to such a sentence in *clause 273,* which restates section 224A of the

Criminal Justice Act 2003 for offenders aged under 21 at conviction.

Definition of "life sentence" in section 224A of the Criminal Justice Act 2003

204 The definition of "life sentence" in subsection (10) of section 224A of the Criminal Justice Act 2003 (life sentence for second listed offence) applies the definition from section 34 of the Crime (Sentences) Act 1997 for the purposes of the "previous offence condition" in section 224A.

205 Section 34(2) of the Crime (Sentences) Act 1997 includes—

"....."

(b) a sentence of detention during Her Majesty's pleasure or for life under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000;

(c) a sentence of custody for life under section 93 or 94 of that Act;

(d) a sentence of imprisonment or detention in a young offender institution for public protection under section 225 of the Criminal Justice Act 2003 (including one passed as a result of section 219 of the Armed Forces Act 2006);

".....".

Detention for life or during Her Majesty's pleasure

206 As a result of paragraph 1(3) of Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000 (transitional provisions), the references to sections 90 and 91 of that Act in section 34(2)(b) of the Crime (Sentences) Act 1997 are to be construed as including, in relation to sentences passed before the commencement of the Powers of Criminal Courts (Sentencing) Act 2000, references to the corresponding provisions repealed by that Act, namely section 53(1) and (3) of the Children and Young Persons Act 1933.

207 Paragraph 40 of Schedule 1 to the Armed Forces Act 2006 (Transitory Provisions etc) Order 2009 (S.I. 2009/1059) (the "2009 Order") provides that the reference in section 34(2) of the Crime (Sentences) Act 1997 to section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000 includes section 71A(3) and (4) of the Army Act 1955 or Air Force Act 1955 or section 43A(3) and (4) of the Naval Discipline Act 1957.

208 The effect of the glosses in paragraph 1(3) of Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000 and paragraph 40 of Schedule 1 to the 2009 Order is set out expressly in *paragraph (b)(ii), (iii) and (v) and (c)(ii), (iii) and (v)* of the definition of "life sentence" in *clause 283.*

209 There is no need for a corresponding gloss in *clause* 273 (which applies to offenders aged under 21) because no-one on whom a sentence of detention was imposed by virtue of either of those glosses would still be under 21.

Custody for life imposed by service courts

210 Paragraphs 6 and 7 of Schedule 2 to the 2009 Order allow service courts to impose sentences of custody for life under sections 93 and 94 of the Powers of Criminal Courts (Sentencing) Act 2000. So section 34(2)(c) of the Crime (Sentences) Act 1997 includes such sentences imposed by a service court by virtue of those provisions of the 2009 Order. *Paragraph (c)(ii)* of the definition in *clause 273* and *paragraph (d)(ii)* of the definition in *clause 283*

make this explicit.

211 Those provisions are rewritten by *paragraphs 30 and 37 of Schedule 25* so that they will be sentences under *clauses 272 and 275* as applied by sections 210A and 217 of the Armed Forces Act 2006. The words "(including one passed as a result of [a provision] of the Armed Forces Act 2006)" in *paragraph (c)(i)* of the definition of "life sentence" in *clause 273* and *paragraph (d)(i)* of the definition in *clause 283* acknowledge this.

212 Sections 224A(2) and 225(2) of the Criminal Justice Act 2003 are currently applied by sections 218A(2) and 219(2) of the Armed Forces Act 2006 where a service court is dealing with an offender in certain circumstances. It is considered that the sections are applied as modified by the transitory provisions in the 2009 Order and in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, so that where they require a service court to impose a life sentence, the required sentence is one of custody for life under section 94 of the Powers of Criminal Courts (Sentencing) Act 2000 (by virtue of paragraph 7 of Schedule 2 to the 2009 Order).

213 *Paragraphs 38(3) and 39(3) of Schedule 25* will make the effect of sections 218A(2) and 219(2) for offenders aged under 21 explicit by inserting new sections 218A(1B) and 219(1A) to apply *clauses 273* and *274* where a service court is dealing with an offender in certain circumstances.

214 The words "(including one passed as a result of [a provision] of the Armed Forces Act 2006)" in *paragraph (c)(i)* of the definition of "life sentence" in *clause 273* and *paragraph (d)(i)* of the definition in *clause* 283" also acknowledge that a sentence of custody for life could be imposed under section 210A of the Armed Forces Act 2006 as a result of section 218A(1B) or 219(1A) of the Armed Forces Act 2006.

Other sentences of custody for life under old legislation

215 Section 34(2)(c) of the Crime (Sentences) Act 1997 refers to "a sentence of custody for life under section 93 or 94 of [the Powers of Criminal Courts (Sentencing) Act 2000]".

216 It also covers—

a. sentences of custody for life under the predecessor provision, namely section 8 of the Criminal Justice Act 1982, by virtue of paragraph 1(3) of Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000;

b. sentences under section 71A(1A) or (1B) of the Army Act 1955 or Air Force Act 1955 or section 43(1A) or (1B) of the Naval Discipline Act 1957, by virtue of paragraph 40 of Schedule 1 to the 2009 Order.

217 The effects of both of these are set out in *paragraph (d)(ii), (iii) and (v)* of the definition of "life sentence" in *subsection (10) of clause 283*.

Clause 284: required life sentence where second offence committed before 4 April 2005

218 Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 required the court to impose a life sentence for a second offence in certain circumstances. It was repealed (and not replaced) by section 303 of the Criminal Justice Act 2003. The repeal was brought into force by the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 (S.I. 2005/950), with savings for offences already committed.

219 That saving for those provisions is preserved by *clause 413(5),* and *clause 284* is a signpost for a sentencing court to those provisions.

Clause 288: operational period and supervision period for suspended sentence orders

220 Section 200(4) of the Criminal Justice Act 2003 refers to the supervision period and operational period of suspended sentence orders "as defined by" sections 189(1A) and (1)(a) of that Act. Those definitions apply for the purposes of Chapter 3 of Part 12 of the Criminal Justice Act 2003 and therefore need to be expressly applied for the purposes of section 200, which is in Chapter 4 of that Part.

221 But in the consolidation the corresponding definitions, which are in *clause 305,* apply directly to the restatement of section 200(4) of the Criminal Justice Act 2003 in *clause 288(5).*

Minimum sentences

Commencement

222 The minimum sentence requirements (and amendments to them) that are restated in the Bill apply only to offences committed after the commencement of provisions imposing (or amending) those requirements. There are exceptions from section 1 of the Sentencing (Pre-consolidation Amendments) Act 2020, in paragraphs 32 to 43 of Schedule 1 to that Act, for the commencement of those provisions, and the Code gives effect to those exceptions.

223 The note on *clause 311 and Schedule 20* gives an example of how this has been done in relation to offences relating to firearms. The same approach has been taken in relation to other minimum sentences.

224 Sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000 require minimum sentences to be imposed in certain circumstances where certain events occurred after a specified date (e.g. "after 30th September 1997"); they are restated instead, in the form used elsewhere in the Bill, as applying where those events occurred "on or after" the following date (e.g. "on or after 1 October 1997").

Mandatory sentences for repeat offence where previous offences include service offences etc

225 In *Chapter 7 of Part 10*, the following provisions provide for minimum sentences for repeat offences—

a. *clause 313:* third class A drug trafficking offence, which restates section 110 of the Powers of Criminal Courts (Sentencing) Act 2000;

b. *clause 314:* third domestic burglary offence, which restates section 111 of that Act;

c. *clause 315:* second offence of certain kinds involving a weapon, which restates the minimum sentence provisions from section 1 of the Prevention of Crime Act 1953 and sections 139 and 139A of the Criminal Justice Act 1988 and will be amended by *Schedule 22* to cover minimum sentences under section 6 of the Offensive Weapons Act 2019.

226 The requirement to impose a minimum sentence applies only for an offence of which a person is convicted in England and Wales, but in determining whether it is a second or third

offence, certain previous offences committed elsewhere in the United Kingdom or under service law, or (until the repeals in *Schedule 22* come into force) in other member States or under the service law of other member States, also count.

227 Under the existing legislation, section 114 of the Powers of Criminal Courts (Sentencing) Act 2000 treats previous offences under service law or which are member State service offences as being offences of the relevant kinds for the purposes of minimum sentence provisions in sections 110 and 111 of that Act. The Bill instead adopts the approach already taken in section 1ZA of the Prevention of Crime Act 1953 and section 139A of the Criminal Justice Act 1988 and sets out for the purposes of each of the minimum sentences the kinds of previous offences that count, including service offences. See *clause 313(3), clause 314(3) and clause 315*.

228 Section 42 of the Armed Forces Act 2006 provides that conduct by a person subject to service law is an offence if it is punishable under the law of England and Wales or would be punishable under the law of England and Wales if done in England and Wales. So a domestic burglary committed outside the United Kingdom by a person subject to service law is an offence under section 42 of the Armed Forces Act 2006 if it would be an offence if committed in England and Wales. For each clause, an offence under section 42 that corresponds to a class A drug trafficking offence, or domestic burglary offence, or a weapons offence of the relevant category counts as a previous offence of that kind.

Member State service offences

229 Section 114(1A) and (1B) of the Powers of Criminal Courts (Sentencing) Act 2000 operates in a slightly anomalous way. Subsection (1A) provides—

"(1A) Where—

(a) a person has at any time been found guilty of a member State service offence committed after the relevant date, and

(b) the corresponding UK offence was a class A drug trafficking offence or a domestic burglary,

the relevant section of this Chapter and subsection (1) above shall have effect as if the person had at that time been convicted in England and Wales of that corresponding UK offence."

230 For that purpose, subsection (1B) provides—

" "member State service offence" means an offence which—

(i) was the subject of proceedings under the service law of a member State other than the United Kingdom, and

(ii) at the time it was done would have constituted an offence under the law of any part of the United Kingdom, or an offence under section 42 of the Armed Forces Act 2006, if it had been done in any part of the United Kingdom by a member of Her Majesty's forces ("the corresponding UK offence")."

231 The words "or an offence under section 42 of the Armed Forces Act 2006" in the definition of "member State service offence" are not reproduced in *clause 313(3)(e) or clause 314(3)(e)*. For an act to constitute an offence under section 42 of the Armed Forces Act 2006 if it had been done in any part of the United Kingdom, it must be one that would be punishable in England and Wales if done there, so it would be covered by the expression "would have

constituted an offence under the law of any part of the United Kingdom..... if it had been done in any part of the United Kingdom". Therefore, restating the alternative category of acts that would constitute an offence under section 42 of the Armed Forces Act 2006 would not add anything.

232 A member State service offence which would be a class A drug trafficking offence in Scotland if committed in Scotland at the time of conviction would also be a class A drug trafficking offence in England and Wales if committed in England and Wales at the time of conviction, because class A drug trafficking offences are the same throughout the United Kingdom. So the words "which would have constituted a class A drug trafficking offence if committed in England and Wales at the time of conviction" have the same effect as section 114(1A) and (1B) of the Powers of Criminal Courts (Sentencing) Act 2000 for section 110 of that Act.

233 As domestic burglary is an England and Wales offence, "the corresponding UK offence" for a member State service offence can be a domestic burglary only if the offence would have constituted a domestic burglary in England and Wales if done in England and Wales; if done elsewhere in the United Kingdom, it would not have constituted a domestic burglary (even if it would have constituted a corresponding offence). So the words in *clause 314(3)(e)* "which would have constituted an offence of domestic burglary if committed in England and Wales at the time of conviction" reproduce the effect of section 114(1A) and (1B) of the Powers of Criminal Courts (Sentencing) Act 2000 for section 111 of that Act.

234 The provisions about member State service offences will be repealed by *Schedule 22* on IP completion date as defined by the European Union (Withdrawal Agreement) Act 2020 (see Schedule 1 to the Interpretation Act 1978).

Previous convictions of service offences that are secondary or inchoate offences

235 The offences covered by section 111 of the Powers of Criminal Courts (Sentencing) Act 2000, section 153 of the Prevention of Crime Act 1953 and sections 139 and 139A of the Criminal Justice Act 1988 include secondary offences, that is, aiding, abetting, counselling or procuring the commission of a contemplated substantive offence, in relation domestic burglary and weapons offences, and section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 covers secondary and inchoate offences in relation to substantive class A drug trafficking offences.

236 By virtue of sections 43 to 47 of the Armed Forces Act 2006, section 42 of that Act also covers conduct of the sort that would constitute a secondary or inchoate offence in England and Wales if done in relation to a contemplated act that is an offence in England and Wales or would be an offence if done in England and Wales.

237 Even if conduct is an offence under section 42 of the Armed Forces Act 2006 by virtue of sections 43 to 47 of that Act, it will not necessarily correspond to an offence in England and Wales if the contemplated act (that is, the substantive burglary, drug trafficking offence etc) is or would be carried out outside England and Wales. For those offences under section 42, section 48 of that Act treats the contemplated substantive act as being in England and Wales, but only for certain purposes of that Act.

238 Offences of that kind under section 42 of the Armed Forces Act 2006, in other words, where the contemplated substantive act would be outside England and Wales, do count as previous offences for the purposes of *clause 313, clause 314 and clause 315*.

239 That is achieved under the current law—

a. for mandatory sentences under sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000, by section 114(3) of that Act, which extends section 48 of the Armed Forces Act 2006 so that it applies for the purposes of those sections too;

b. for mandatory sentences under sections 139 and 139A of the Criminal Justice Act 1988 and section 1 of the Prevention of Crime Act 1953, by section 139AZA(3) of the Criminal Justice Act 1988 and section 1ZA(3) of the Prevention of Crime Act 1953 which deal with the point expressly.

240 This approach is followed in *clause 318(2) and (3)* of the Bill for *clause 313, clause 314 and clause* 315.

241 *Subsection (2) of clause 318* differs from *subsection (3)* because the offences covered by *clause 313,* class A drug trafficking offences, cover inchoate offences (attempting etc) as well as the secondary offences of aiding, abetting, counselling and procuring.

242 Subsection (4) of section 114 of the Powers of Criminal Courts (Sentencing) Act 2000 makes provision for member State service offences which are committed as accessory, or are attempts etc to commit a member State service offence, where the main offence would be committed outside England and Wales, that corresponds to provision made by subsection (3) of that section for service offences, and is restated in the references to *clause 313(3)(e) and clause 314(3)(e)* in *clause 318(2) and (3)(a).*

243 However, although corresponding member State services offences count as relevant offences for the purposes of section 1 of the Prevention of Crime Act 1953 and sections 139 and 139A of the Criminal Justice Act 1988, there is no provision corresponding to section 114(4) of the Powers of Criminal Courts (Sentencing) Act 2000, to treat committing them as an accessory, or attempting etc to commit them, as a relevant offence for the purposes of those sections where the main offence is (or would be) committed outside England and Wales and therefore *clause 318(3)(b)* does not refer to *clause 315(4)(e).*

244 Corresponding offences under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 (the "service disciplinary Acts") which are the precursors of offences under section 42 of the Armed Forces Act 2006—

a. count as class A drug trafficking offences and domestic burglary offences, by virtue of paragraph 45(3) of Schedule 1 to the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 (S.I. 2009/1059), which extends the reference to section 42 of the Armed Forces Act 2006 in section 114(3) of the Powers of Criminal Courts (Sentencing) Act 2000;

b. count as relevant weapons offences under section 1ZA(1)(d) of the Prevention of Crime Act 1953 and section 139AZA(1)(d) of the Criminal Justice Act 1988.

245 As regards secondary and inchoate offences under the service disciplinary Acts—

a. section 114(3) of the Powers of Criminal Courts (Sentencing) Act 2000, which deals with the case where the contemplated substantive act is or would be carried out outside England and Wales, does not apply because it operates by extending section 48 of the Armed Forces Act 2006 which does not extend to offences under the service disciplinary Acts for this purpose;

b. section 1ZA(3) of the Prevention of Crime Act 1953 and section 139AZA(3) of the Criminal Justice Act 1988 deal with the point expressly for offences under the

service disciplinary Acts; that is restated by the reference to *clause 315(4)(d)* in *clause 318(3)(b)*.

Certificates of conviction etc

246 Certificates given under section 113 of the Powers of Criminal Courts (Sentencing) Act 2000 are evidence for the purposes of the mandatory sentence provisions for repeat offences under sections 110 and 111 of that Act of previous offences being committed and previous convictions. They need to continue to be evidence for the purposes of the corresponding provisions under the Code, and *paragraph 17 of Schedule 27* provides for this.

Clause 311 and Schedule 20: minimum sentences relating to firearms offences

247 *Clause 311 (and Schedule 20)* rewrite section 51A of the Firearms Act 1968 for England and Wales and section 29(4) to (6) of the Violent Crime Reduction Act 2006, both of which require the court to impose minimum sentences for certain offences involving firearms.

248 The circumstances in which a minimum sentence is required, and the minimum sentence, are the same for offences under both Acts. The Code therefore combines the minimum sentence requirements for those offences in England and Wales into a single provision, *clause 311*.

249 The offences to which they apply are listed in *Schedule 20*.

Minimum sentence under section 29 of the Violent Crime Reduction Act 2006: reference to section 5(1)(c) of the Firearms Act 1968 unnecessary

250 Section 28 of the Violent Crime Reduction Act 2006 creates the offence of using someone to mind a dangerous weapon. Section 29 of the 2006 Act provides for a minimum sentence for an offence under section 28 where the dangerous weapon was "a firearm mentioned in section 5(1)(a) to (af) or (c) or section 5(1A)(a) of the [Firearms Act 1968]".

251 The Code does not reproduce the reference to section 5(1)(c) of the Firearms Act 1968, on the ground that no firearm is mentioned in that provision.

252 Section 28 of the Violent Crime Reduction Act 2006 defines a "dangerous weapon" for this purpose as—

"(a) a firearm other than an air weapon or a component part of, or accessory to, an air weapon; or

(b) a weapon to which section 141 or 141A of the Criminal Justice Act 1988 applies (specified offensive weapons, knives and bladed weapons)."

253 In sections 28 and 29 of the Violent Crime Reduction Act 2006, "firearm" has the same meaning as in the 1968 Act, by virtue of section 50(2) of the Violent Crime Reduction Act 2006.

254 Section 57(1) of the Firearms Act 1968 defines "firearm" as—

"(a) a lethal barrelled weapon (see subsection (1B));

(b) a prohibited weapon;

(c) a relevant component part in relation to a lethal barrelled weapon or a prohibited weapon (see subsection (1D));

(d) an accessory to a lethal barrelled weapon or a prohibited weapon where the accessory is designed or adapted to diminish the noise or flash caused by firing the weapon;"

subject to certain exceptions.

255 "Prohibited weapon" and "prohibited ammunition" are defined by section 5(2) of the Firearms Act 1968 respectively as "The weapons and ammunition specified in subsections (1) and (1A) of this section (including, in the case of ammunition, any missiles falling within subsection (1A)(g) of this section)".

256 Section 5(1)(c) of the Firearms Act 1968 covers—

"(c) any cartridge with a bullet designed to explode on or immediately before impact, any ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in paragraph (b) above and, if capable of being used with a firearm of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid."

257 Section 5(2) clearly defines prohibited weapons and prohibited ammunition separately and it is thought that the categories are mutually exclusive. On that basis, anything within section 5(1)(c) must be either a prohibited weapon (in which case it will be a firearm) or prohibited ammunition (in which case it will not). Section 5(1)(c) covers three categories of thing. The first two, cartridges and particular categories of ammunition, are clearly ammunition.

258 The third category, "any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid", is also considered to fall into the category of ammunition because of the requirement that it must be capable of being used with a firearm.

259 On that reading, the things within section 5(1)(c) of the Firearms Act 1968 are not prohibited weapons, and, as they do not fall into any of the other categories of firearm in section 57(1) of the Firearms Act 1968, are not firearms for the purpose of that Act.

260 Accordingly the condition for a mandatory minimum sentence in section 29(3)(b) of the Violent Crime Reduction Act 2006 that the dangerous weapon in respect of which the offence was committed must have been "a firearm mentioned in section 5(1)(a) to (af) or (c)...." of the Firearms Act 1968 cannot be satisfied in the case of something within section 5(1)(c) because it would not be a firearm, so the words "or (c)" beat the air and have not been rewritten.

261 This reading is supported by the approach taken in paragraph 10 of Schedule 2 to the Offensive Weapons Act 2019. That Act creates two new categories of prohibited weapon in relation to which the mandatory minimum sentence in section 29 of the Violent Crime Reduction Act 2006 applies, which are specified in section 5(1)(ag) and (ba) of the Firearms Act 1968. Paragraph 10 of Schedule 2 to the Offensive Weapons Act 2019 adds those new categories of firearm to section 29(3) of the Violent Crime Reduction Act 2006 in consequence of the creation of those new categories of prohibited weapon. The amendment replaces the reference to section 5(1)(a) to (af) or (c) of the Firearms Act 1968 with a reference to section 5(1)(a) to (ag) or (ba) of that Act, which incidentally removes the reference to section 5(1)(c). In the context, that indicates that the reference to section 5(1)(c) in section 29(3) of the Violent Crime Reduction Act 2006 simply beats the air.

Reference to an individual

262 Section 51A(1) of the Firearms Act 1968 provides for section 51A to apply where "an individual" is convicted of an offence mentioned in paragraph (a) committed when "he was aged 16 or over"; by contrast, subsections (4) and (6) of section 29 of the Violent Crime Reduction Act 2006 apply "where a person... is guilty of an offence under section 28", and was aged 16 or over when the offence was committed (underlining added).

263 *Clause 311(1)(a)* rewrites the underlined words as "a person", in line with other provisions about mandatory sentences in *clauses 312 to* 315.

264 The mandatory sentence requirements could not apply to a person other than an individual, because of the age tests in section 51A(1) and section 29(4) and (6), which are reproduced at *clause 311(1)(b).* There is therefore no need to reproduce the word "individual" in section 51A(1) of the Firearms Act 1968.

Extent

265 *Clause 311 (and Schedule 20)* rewrite section 51A of the Firearms Act 1968 for England and Wales and section 29(4) to (6) of the Violent Crime Reduction Act 2006, both of which require the court to impose minimum sentences for certain offences involving firearms.

266 Section 51A of the Firearms Act 1968 extends to England and Wales and Scotland. *Schedule 28* repeals provisions in that section that apply only to England and Wales; *Schedule 29* will repeal the remainder of that section so far as extends to England and Wales. Finally, *paragraph 15 of Schedule 24* will amend that section (as it continues to have effect in Scotland) to make it clear that it applies only in Scotland and to insert a new subsection (6) drawing attention to *clause 311* of the Code.

267 Section 29 of the Violent Crime Reduction Act 2006 extends to England and Wales and Scotland, and sets maximum sentences and minimum sentences for offences under section 28 of that Act (using someone to mind a weapon).

268 Subsections (4) to (6) of section 29 impose minimum sentence requirements for England and Wales; those subsections alone are rewritten in *Clause 311 (and Schedule 20)* and are repealed for England and Wales and Scotland by *Schedule 28.*

Operation of the clean sweep

269 Paragraph 32 of Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020 creates an exception from section 1 of that Act (the clean sweep) for the words "after the commencement of this section and" in section 51A(1)(b) of the Firearms Act 1968. Section 51A of that Act, which was inserted by the Criminal Justice Act 2003 and came into on 22 January 2004, requires minimum sentences to be imposed for certain offences under that Act.

270 *Clause 311* and part of *Schedule 20* rewrite section 51A of the Firearms Act 1968. The Schedule lists the offences to which the minimum sentences apply and *paragraphs 1 and 2,* which list the offences that fell within section 51A when it was enacted, give effect to the exception in paragraph 32 of Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020 by limiting the offences covered by those paragraphs to offences committed on or after 22 January 2004.

271 Similarly, *paragraph 4 of Schedule 20* lists offences that were added to section 51A of the Firearms Act 1968 by section 30 of the Violent Crime Reduction Act 2006, but the mandatory offence requirements only applied to offences committed after the commencement of that section (by virtue of subsection (5)). There is an exception from section 1 of the Sentencing (Pre-consolidation Amendments) Act 2020 for section 30(5) of the Violent Crime Reduction Act 2006 in paragraph 34 of Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020. *Paragraph 4 of Schedule 20* gives effect to that exception by limiting the offences that it covers to those committed on or after 6 April 2007 (the date on which section 30 of the Violent Crime Reduction Act 2006 came into force).

272 Although the same principle applies to *paragraph 3 of Schedule 20*, there is no need for any corresponding provision, because the offences listed by that paragraph were added to the list in section 51A at the same time as they were created (by section 108 of the Anti-social Behaviour, Crime and Policing Act 2014) so the mandatory sentence provisions apply to all offences listed in that paragraph from the time they could first have been committed.

273 Section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 are to be amended by section 54(6) of and paragraph 10 of Schedule 2 to the Offensive Weapons Act 2019 to add to the list of types of weapons in relation to which the minimum sentences apply. There are corresponding commencement provisions in section 54(8) of and paragraph 12 of Schedule 12 to the Offensive Weapons Act 2019, for which there are exceptions in paragraphs 33 and 35 of Schedule 1 to the Sentencing (Pre-consolidation Amendments) Act 2020, which are given effect in the amendments of the Code in *paragraph 68 of Schedule 22* (which replace the amendments to be made to section 51A of the Firearms Act 1968 and section 29 of the Violent Crime Reduction Act 2006 by the Offensive Weapons Act 2019).

Amendment of section 1(4A) of the Firearms (Amendment) Act 1988

274 Section 1(4) of the Firearms (Amendment) Act 1988 allows an order to be made extending the categories of prohibited weapons and ammunition specified in section 5(1) of the Firearms Act 1968.

275 Section 1(4A) of the Firearms (Amendment) Act 1988 allows an order under section 1(4) to—

- apply a provision of the Firearms Act 1968 "with or without modification or exception" to the new categories of prohibited weapons and ammunition (see paragraph (a)), and
- amend the kinds of offences for which a custodial sentence can be passed on an offender aged under 18 under section 91(1A)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 (see paragraph (bb)).

276 Section 1(4A) was inserted by the Anti-social Behaviour Act 2003. At the same time, the

Criminal Justice Act 2003—

- inserted section 51A of the Firearms Act 1968 to require minimum sentences for offences under section 5(1) of that Act committed in relation to particular kinds of prohibited weapons and ammunition (referred to below as "relevant weapons"),
- inserted a new subsection (1A) into section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 to allow sentences under that section for under 18s for the same offences in relation to the same relevant weapons;
- amended section 1(4A) of the Firearms (Amendment) Act 1988 to allow orders under section 1(4) to amend section 91(1A) of the Powers of Criminal Courts (Sentencing) Act 2000.

277 It is clear from the context that section 51A is one of the provisions of the Firearms Act 1968 that can be applied by an order under section 1(4) of the Firearms (Amendment) Act 1988 (with or without modification or exception) to the new categories of prohibited weapons and ammunition specified by the order.

278 The Violent Crime Reduction Act 2006—

- amended section 51A of the Firearms Act 1968 to add new offences under the Firearms Act 1968 committed in relation to the same relevant weapons;
- created new offences of minding certain weapons (section 28 of the Violent Crime Reduction Act 2006);
- required minimum sentences for those new offences of minding weapons where they relate to relevant weapons (section 29 of the Violent Crime Reduction Act 2006);
- inserted subsections (1B) and (1C) of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 to extend that section to cover the new offences added to section 51A of the Firearms Act 1968 and the new offence under the Violent Crime Reduction Act 2006 to which the minimum sentence applies under section 29 of that Act.

279 The Violent Crime Reduction Act 2006 did not amend the power in section 1(4A) of the Firearms (Amendment) Act 1988.

280 It is a question of interpretation whether an order under section 1(4) of the Firearms (Amendment) Act 1988 can amend section 51A of the Firearms Act 1968 or section 91(1A) of the Powers of Criminal Courts (Sentencing) Act 2000 to extend the kinds of weapons that will lead to a minimum sentence for an offence added to those section by the Violent Crime Reduction Act 2006.

281 The better view is that it cannot. If it had been the intention that the Violent Crime Reduction Act 2006 should extend the power in section 1(4) in that way, it would have amended section 1(4A) of the Firearms (Amendment) Act 1988 to allow amendments of the Violent Crime Reduction Act 2006 and sections 91(1B) and (1C) of the Powers of Criminal Courts (Sentencing) Act 2000.

282 Given the express powers to amend section 51A of the Firearms Act 1968 and section 91(1A) of the Powers of Criminal Courts (Sentencing) Act 2000, the power in section 1(4A)(e) of the Firearms (Amendment) Act 1988 to make consequential provision, should be read narrowly; on that basis it would not allow corresponding amendments of section 29 of the Violent Crime Reduction Act 2006 or section 91(1B) and (1C) of the Powers of Criminal Courts

(Sentencing) Act 2000.

283 In conclusion, the only changes that can be made under section 1(4A) that are relevant for the purposes of *Schedule 20* are changes to offences that relate to weapons or ammunition listed in section 5 of the Firearms Act 1968 in respect of which minimum sentences apply under section 51A of the Firearms Act 1968 or a sentence of detention can be imposed under section 91(1A) of the Powers of Criminal Courts (Sentencing) Act 2000, as those provisions were originally enacted.

284 Those offences are the offences listed in *paragraph 1 of Schedule 20.*

285 So, by replacing the reference to section 91(1A)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 in section 1(4A)(bb) of the Firearms (Amendment) Act 1988 with a reference to *paragraph 1 of Schedule 20, paragraph 93 of Schedule 24* also replaces the power in section 1(4A)(a) of the Firearms (Amendment) Act 1988 for England and Wales.

286 New subsection 1(4B) replaces the power in section 1(4A)(a) so far as it allows an order under section 1(4) to apply section 51A of the Firearms Act 1968 with modifications. Although the powers in section 1(4A)(a) and (bb) can be exercised separately, the structure of section 91(1A) means that it is not possible to apply that provision to offences under section 5(1) of the Firearms Act 1968 involving the new categories of prohibited weapons without also applying section 51A of that Act to them. So section 1(4B) need not, and does not, permit an order under section 1(4) of the Firearms (Amendment) Act 1988 to apply section 91(1A) of the Powers of Criminal Courts (Sentencing) Act 2000 to the new offences but not section 51A of the Firearms Act 1968.

Clause 315: minimum sentences relating to offensive weapons

287 *Clause 315* rewrites requirements to impose minimum sentences, including those in sections 139 and 139A of the Criminal Justice Act 1988 (which extend to England and Wales and Northern Ireland). However, the provisions being rewritten (subsections (6A) to (6G) of section 139 and subsections (5A) to (5G) of section 139A) apply only where a person is convicted by a court in England and Wales. So those subsections are repealed fully by *Schedule 28.* The remainder of those sections, which define the offences and deal with maximum penalties, will remain in the Criminal Justice Act 1988 and continue to extend to England and Wales and Northern Ireland.

Clause 316: Appeals where previous convictions set aside

Time limit

288 *Clause 316* rewrites provisions in section 1(2E) of the Prevention of Crime Act 1953, section 139(6E) and section 139A(5E) of the Criminal Justice Act 1988, section 112(1) of the Powers of Criminal Courts (Sentencing) Act 2000 and section 8(5) of the Offensive Weapons Act 2019, all of which allow a late appeal against a mandatory sentence which depended on a previous conviction which itself was set aside. In each case the time limit for appeal is "28 days from the date on which the conviction was set aside".

289 The approach taken here in expressing the time limit is appropriate because it matches the way that other time limits for appeal are expressed in the Criminal Appeal Act 1968.

Because the better view is that the day on which the conviction was set aside does not count towards the 28 days for this purpose, it does not matter that it contrasts with other time limits in the Code, which are expressed by reference to periods "beginning with the day on which.....".

Clauses 322 and 323: minimum term for life sentences

290 Section 269(3)(b) of the Criminal Justice Act 2003 requires a court setting a minimum term tariff for a mandatory life sentence for murder to take into account—

> "the effect of section 240ZA (crediting periods of remand in custody) or of any direction which it would have given under section 240A (crediting periods of remand on certain types of bail) if it had sentenced him to a term of imprisonment".

291 Section 82A(3)(b)(i) and (iii) of the Powers of Criminal Courts (Sentencing) Act 2000 has the same effect for minimum terms for discretionary life sentences.

292 Under section 240A of the Criminal Justice Act 2003, where an offender has spent time on bail under qualifying restrictions (involving a curfew and electronic monitoring), the court must determine the number of days and direct that they are to count towards a determinate sentence. It is the direction which reduces the offender's time. In the Code *clause 325* will require the court to determine and specify the number of days, but not direct that it is to count as time served as part of the sentence; rather, that result will be achieved by section 240A of the Criminal Justice Act 2003, as explained below at paragraphs 299 to 302.

293 Therefore *clauses 322(2)(b) and 323(2)(c)* refer to both the declaration under *clause 325* and the effect of section 240A of the Criminal Justice Act 2003.

294 Section 240ZA of the Criminal Justice Act 2003 provides for time when the offender was remanded in custody to count towards time served under a term of imprisonment. Where a person convicted in England and Wales was held in custody pending extradition, section 243 of the Criminal Justice Act 2003 requires the sentencing court to specify how many days the person was in custody awaiting extradition, and then provides for section 240ZA to apply to the number of days so specified as if they were days when the offender was remanded in custody.

295 Section 240ZA therefore has the effect that both time on remand in custody and time determined by the court to be time in custody awaiting extradition will count towards time served under a determinate sentence.

296 The reference to "the effect of section 240ZA" in section 269(3)(b) of the Criminal Justice Act 2003 therefore is thought to cover its effect in relation to time specified under section 243.

297 This is made explicit in *clauses 322(2)(b) and 323(2)(c).*

298 Because of the way that the sentencing court's role in determining time off for remand on bail is being rewritten, those provisions will refer to both to a declaration that the court would have given under *clause 325* and section 240A of the Criminal Justice Act 2003 (which gives effect to such a declaration). In the light of that, not to include a reference to a declaration under section 243 in relation to time spent in custody in extradition might create an implication which does not exist at the moment that the effect of section 240ZA on such

time is not covered.

Clause 325: direction for time on bail under certain conditions to count as time served

299 Section 240A of the Criminal Justice Act 2003 provides for time spent on bail under certain curfew and electronic monitoring conditions to count towards time served under a custodial sentence; the amount of time must be determined by the sentencing court.

300 Subsection (2) requires the court to "direct that the credit period is to count as time served by the offender as part of the sentence" (but subject to subsections (3A) and (3B)) and subsection (3) sets out how the credit period is to be calculated.

301 The Bill rewrites, at *clause 325,* the part of that section that requires the court to calculate, and give a direction specifying, the credit period, but leaves section 240A to set out the effect of that direction.

302 *Paragraph 217 of Schedule 24* will amend section 240A of the Criminal Justice Act 2003 so that—

a. the section will apply where a court has given a direction under *clause 325* specifying a credit period, and
b. subsection (2) will provide simply for that credit period to count as time served (subject to subsections (3A) and (3B)).

Chapter 1 of Part 11: criminal behaviour orders

Clause 330: criminal behaviour order

303 Subsection (5) of section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 defines a criminal behaviour order as one which "for the purpose of preventing the offender from engaging in such behaviour" contains prohibitions or requirements. "Such behaviour" refers to the phrase "behaviour that caused or was likely to cause harassment, alarm or distress to any person". Clause 330 defines a criminal behaviour order as one which contains prohibitions or requirements "for the purpose of preventing an offender from engaging in behaviour that is likely to cause harassment, alarm or distress to any person". In this context "caused" is not appropriate. Even behaviour of the kind that has previously caused such harassment, alarm or distress can only be said to be "likely to cause" that response in future.

Clause 331: criminal behaviour orders: standard of proof

304 Section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 allows a court to make a criminal behaviour where a person is convicted of an offence, provided that, amongst other things, "the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person" (section 22(3)). Breach of a criminal behaviour order is an offence.

305 Provisions about criminal behaviour orders are reproduced in *Chapter 1 of Part 11* of the Bill. *Chapters 2, 3 and 4 of that Part* make provision about other kinds of behaviour order that can be imposed where a person is convicted, and breach of which is an offence.

306 Where breach of a behaviour order is an offence, it is clear from *R v McCann [2002]*

UKHL 39 that the criminal standard of proof applies in proceedings for making the order. That standard is made explicit in relation to criminal behaviour orders, in section 22(3) of the Anti-Social Behaviour, Crime and Policing Act 2014, but left implicit for the other behaviour orders to which *Part 11* applies.

307 Because the words "beyond reasonable doubt" do no more than restate the underlying position, they have been omitted in *clause 331(2)(a)* for consistency with the provisions about other behaviour orders in *Part 11*.

308 To restate the provisions in *Part 11* in their present form, including those words for criminal behaviour orders but not for other orders in that Part, would in fact change the current position by suggesting that different standards of proof applied in proceedings for making those orders. Not including those words for criminal behaviour orders therefore preserves the current position.

309 A particular reason for making the criminal standard of proof explicit in section 22(3) of the Anti-social Behaviour, Crime and Policing Act 2014 was the contrast with section 1(2) of the same Act, which expressly provided for the civil standard to apply to proceedings in which the court makes an injunction to prevent anti-social behaviour. Because the Code does not restate the provisions about anti-social behaviour injunctions, that reason does not apply to the restatement of section 22.

310 The particular circumstances of section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 were recognised by Lord Ahmad of Wimbledon, when the words were added by amendment to the Bill for that Act at Report stage in the House of Lords, as follows—

> "The government position was that, as the case law is clear on this point, there was no need to provide for the criminal standard in the legislation. This approach is in line with that taken in other legislation providing for other types of civil preventive orders. However, on reflection, we are satisfied that there are sufficient grounds here for taking a different approach. Part 1 expressly provided that an IPNA *[i.e. an order under clause 1 of that Bill]* was subject to the civil standard of proof so, unless express provision was made in Part 2, we accept that there could be some doubt that the criminal standard would apply in proceedings in respect of the criminal behaviour order. This amendment therefore removes any such doubt."
>
> (HL Hansard 8 Jan 2014: Column 1590)

Clause 331(3): "sentence"

311 Section 22(6) of the Anti-social Behaviour, Crime and Policing Act 2014 provides that a criminal behaviour order can only be made if it is in addition to—

"(a) a sentence imposed in respect of the offence, or

(b) an order discharging the offender conditionally."

312 "Sentence" is not defined in section 22(6) but the implication of paragraph (b) is that it is narrower than that term as defined in the Bill (see *clause 401*); the effect of paragraphs (a) and (b) seems to be to exclude a case where the offender is discharged absolutely. In restating those paragraphs, *clause 331(3)* does not use the term "sentence" but refers to dealing with the offender and expressly excludes an order for absolute discharge.

Chapter 2 of Part 11: sexual harm prevention orders

Extent

313 Sections 103A to 103K of the Sexual Offences Act 2003 make provision about sexual harm prevention orders ("SHPO"s), and interim orders, under the law of England and Wales. Sections 104 to 122 of that Act make provision about similar orders under the law of Scotland and Northern Ireland; those sections are to be replaced for Scotland by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (asp 22), which has not yet been brought into force.

314 Most orders under sections 103A to 103K can be made only on application, but section 103A(2)(a)(i) allows a court to make an SHPO on its own motion where it is dealing with an offender in respect of an offence listed in Schedule 3 or 5 to the Sexual Offences Act 2003. The provisions about SHPOs under section 103A(2)(a)(i) are therefore rewritten in the Bill.

315 As a result, the Bill will repeal section 103A(2)(a)(i), and sets out in *Chapter 2 of Part 11* all the provisions in sections 103A to 103K that apply to such an order. It does not repeal any other provisions of the Sexual Offences Act 2003, which will continue to apply in relation to other SHPOs, which will continue to be made under that Act.

316 Accordingly, *clause 354* restates the offence of doing anything in England and Wales that a person is prohibited from doing by an SHPO imposed under the Code. However, the extension of prohibitions in an SHPO under the Code to Scotland and Northern Ireland, and the offences of contravening them in Scotland and Northern Ireland, will remain in section 136ZA and section 113, respectively, of the Sexual Offences Act 2003 (see the amendments of the Sexual Offences Act 2003 in *paragraphs 210 and 206 of Schedule* 24). When the relevant provisions of the Abusive Behaviour and Sexual Harm (Scotland) 2016 come into force, section 37 of that Act will provide for enforcement of an SHPO made under the Code (by virtue of the amendment in *paragraph 301 of Schedule 24*).

317 Under section 136ZB of the Sexual Offences Act 2003, certain existing orders under that Act cease to have effect when a court makes an SHPO. That provision is reproduced at *clause 349,* which provides for not only earlier orders under *Chapter 2 of Part 11* of the Code, but also relevant orders under the Sexual Offences Act 2003, to cease to have effect when a new SHPO is made under that Chapter.

Section 103B of the Sexual Offences Act 2003

318 The Bill will restate only those parts of section 103B (which provides interpretation and other supplemental provision for section 103A) that are relevant to section 103A(2)(a)(i) as it will have effect for offenders to whom the Sentencing Code applies.

319 In particular, this means that the definition of "qualifying offender" in subsection (1) (and the related provisions in subsections (2) to (4) are not required).

320 Subsection (5) provides—

> "(5) For the purposes of section 103A, acts, behaviour, convictions and findings include those occurring before the commencement of this Part."

321 This is relevant for the purposes of section 103A(2)(a)(i) only to make clear that it applies where the court is dealing with the offender for an offence whenever the offence was committed (or, in fact, whenever the offender was convicted). Because the Code will apply to

anyone convicted after it comes into force, regardless of when the offence was committed, it would not add anything in *Chapter 2 of Part 11*.

Supplementary

322 *Subsection (4) of clause* 356 restates section 103K(1) of the Sexual Offences Act 2003 so far as relevant for SHPOs under the Code. Section 103K(1)(b) allows rules of court to make provision about transfers from a youth court of proceedings against section 103A or 103E of that Act against a person who reaches 18 after they have begun. There are two categories of proceedings under section 103A, namely those under subsection (1) where a court is dealing with an offender for an offence (or other findings), which is partly restated in the Code, and those on an application under subsection (4) (which is not restated in the Code).

323 Where the youth court makes an order under section 103A(1) where it is dealing with an offender for a relevant offence, it must derive its power to do so from that provision and the fact of being the court which deals with the offender. The power to make rules of court about a youth court's jurisdiction in proceedings against a person under section 103A(1) is not restated in *clause 356(4)*.

Chapter 4 of Part 11: parenting orders

324 A number of statutory provisions allow a court to make a parenting order, including—

a. section 8 of the Crime and Disorder Act 1998, and

b. Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (where a parent or guardian is referred back to a court in connection with a referral order).

325 *Chapter 4 of Part 11* of the Code will restate—

a. the provisions about parenting orders in Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000, and

b. the powers in section 8 of the Crime and Disorder Act 1998 that a court has to impose a parenting order of its own motion when dealing with an offender for an offence, together with the provisions of the Crime and Disorder Act 1998 that relate to those orders.

326 The kinds of parenting order covered by section 8 of the Crime and Disorder Act 1998 that will be moved into the Code are—

a. orders under subsection (2)(c) where a person aged under 18 is convicted of an offence, and

b. orders under subsection (2)(d) where a parent or guardian of a pupil is convicted of certain offences relating to the pupil's school attendance.

327 *Clauses 342 and 355* contain signposts to the powers in section 8(2)(b) of the Crime and Disorder Act 1998 to make a parenting order where an SHPO or criminal behaviour is made in respect of a person aged under 18.

Repeal of section 9(2A), (2B) and (7A) of the Crime and Disorder Act 1998

328 The consolidation repeals subsections (2A) and (2B) of section 9 of the Crime and Disorder Act 1998. They apply "In a case where a court proposes to make both a referral order

in respect of a child or young person convicted of an offence and a parenting order".

329 A parenting order can be made under two separate provisions where a person aged under 18 has been convicted of an offence. One is under section 8(1)(c) of the Crime and Disorder Act 1998 and the other is under section 8(1)(b) of that Act where a criminal behaviour order has been made in respect of the child or young person.

330 The power in section 8(1)(c) is being rewritten in the Code, with the associated provisions in section 9(2A) and (2B). The question arises whether those provisions could also apply to parenting orders under section 8(1)(c) where a criminal behaviour order has been made, and therefore need to remain in the Crime and Disorder Act 1998 for the purposes of such orders.

331 Section 9(2A) requires the court to obtain a report from an appropriate officer about the proposed requirements of the parenting order. The nature of the report means that the provision applies only where a parenting order is made under section 8(1)(c).

332 That is because, under section 9(2A)(b), the report must indicate "the reasons why [the appropriate officer] considers [the proposed] requirements would be desirable in the interests of preventing the commission of any further offence by the child or young person". That reflects the test in section 8(6)(c) for including requirements in a parenting order under section 8(1)(c).

333 The test for including requirements in a parenting order under section 8(1)(b) where a criminal behaviour order is made is different. The requirements must be desirable in the interests of preventing any repetition of the kind of behaviour that led to the criminal behaviour order being made. A report under section 9(2A) would not address whether the proposed requirements meet that test.

Appeals: section 10(5) of the Crime and Disorder Act 1998 not rewritten

334 Section 10(5) of the Crime and Disorder Act 1998 provides—

> "(5) A person in respect of whom a parenting order is made by virtue of section 8(1)(d) above shall have the same right of appeal against the making of the order as if the order were a sentence passed on him for the offence that led to the making of the order."

335 That subsection has not been reproduced on the ground that it is unnecessary; in fact this is reinforced by a pre-consolidation amendment (see paragraph 119(3) of Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020. A parenting order under section 8(1)(d) is made in respect of a person who has been convicted of an offence under section 443 or 444 of the Education Act 1996 (which relate to school attendance), and in the same proceedings (see the reference to "in any court proceedings" in the opening words of section 8(1) and "in the proceedings" in section 8(2)). Under section 50(1) of the Criminal Appeal Act 1968, a sentence (against which a person can appeal under section 9 of that Act), in relation to an offence, includes "any order made by a court when dealing with an offender".

336 It is considered that a parenting order made under section 8(1)(d) of the Crime and Disorder Act 1998 would fall within that definition of "sentence" in relation to an offence under section 443 or 444 of the Education Act 1996, so that no separate right of appeal against such an order is needed in section 10(5) of the Crime and Disorder Act 1998 and that

provision is not reproduced in the Code.

337 By contrast, express provision is needed to confer a right of appeal against a parenting order made where a child or young person is convicted of an offence or where the parent fails to attend panel meetings under a referral order, because, in the first case, it will be a child or young person, not the parent, who committed the offence in question and, in the second, it will not have been made in respect of an offence. Therefore the express rights to appeal in section 10(4) of the Crime and Disorder Act 1998 and paragraph 9E of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 are reproduced at *clauses 366(9) and 368(7).*

Clause 382: power to determine financial circumstances of offenders' parent or guardian

Enforcement where order made by Crown Court

338 Under section 137 of the Powers of Criminal Courts (Sentencing) Act 2000, where an offender aged under 18 is fined, an order can be made requiring a parent or guardian of the offender to pay the fine. The order does not impose the fine on the parent or guardian, but the amount of the fine can be based on the financial circumstances of the parent or guardian and after a financial circumstances order has been made under section 165 of the Criminal Justice Act 2003 against the parent or guardian.

339 Section 165(3) of the Criminal Justice Act 2003 requires a term of imprisonment in default of payment of a fine to be reduced where a term has been fixed under—

a. section 139 of the Powers of Criminal Courts (Sentencing) Act 2000, or

b. section 82(5) of the Magistrates' Courts Act 1980

and the amount of the fine is reduced as the result of a financial circumstances order.

340 Section 82(5) of the Magistrates' Courts Act 1980 allows a magistrates' court to fix a term in default of payment of certain sums (including fines).

341 Section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 deals with enforcement of fines imposed by the Crown Court and requires the Crown Court to fix a term that a person is to serve in default where it imposes a fine on that person. But an order requiring a parent or guardian to pay a young person's fine under section 137 of the Powers of Criminal Courts (Sentencing) Act 2000 does not impose the fine on the parent or guardian, so the requirement in section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 to fix a term in default does not apply here.

342 Instead, by virtue of section 41 of the Administration of Justice Act 1970, the order under section 137 is enforceable as if it were a sum adjudged to be paid on conviction by a magistrates' court, so any fixing of a term in default is under the magistrates' court's enforcement powers, namely section 82(5) of the Magistrates' Courts Act 1980.

343 The reference to section 139 of the Powers of Criminal Courts (Sentencing) Act 2000 is therefore not reproduced in *clause 382(4),* which reproduces section 165(3) of the Criminal Justice Act 2003, as applied by section 138(4) of the Powers of Criminal Courts (Sentencing) Act 2000 to a order under section 137 of that Act.

Clause 387: failure of offender to provide agreed assistance: review of sentence

344 Section 74 of the Serious Organised Crime and Police Act 2005 allows (amongst other things) a court to increase a sentence that has been discounted under section 73 of that Act. That aspect of section 74 is restated in *clause 387*. Subsection (14) (as amended by the Sentencing (Pre-consolidation Amendments) Act 2020)) provides for the normal provisions about explanation of sentence to apply where a higher sentence is substituted "unless the court thinks that it is not in the public interest to disclose that the person falls within subsection (2)(a) above". Subsection (2)(a) applies to a person if "he receives a discounted sentence in consequence of his having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence but he knowingly fails to any extent to give assistance in accordance with the agreement".

345 *Clause 387* restates the words "that the person falls within subsection (2)(a) above" in subsection (14) as "that the original sentence was a discounted sentence".

Clause 398: ancillary and inchoate offences

346 The following provisions that are rewritten in the Code are expressed to apply not only to substantive offences but also to secondary and inchoate offences relating to those offences—

- Section 2 of the Assaults on Emergency Workers (Offences) Act 2019 and Schedule 2 to (and section 30 of) the Counter-Terrorism Act 2008, which both require a court to treat certain matters as aggravating factors in relation to certain offences, and
- Schedules 15, 15B and 18A to the Criminal Justice Act 2003, all of which list offences for which particular sentences are available.

347 In each of those cases, the "ancillary offences" are—

a. aiding, abetting, counselling or procuring the commission of the main offence,
b. an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the main offence,
c. attempting or conspiring to commit the main offence, and
d. in some cases, incitement to commit the main offence (which was abolished by the Serious Crime Act 2007).

348 They are described in slightly different ways but the kinds of ancillary offences covered in each case are the same.

349 An offence can be committed by aiding, abetting, counselling or procuring the commission of the offence. Therefore, a reference to a particular offence also covers committing the main offence by aiding, abetting, counselling or procuring it (a "secondary offence").

350 To make express provision to cover secondary offences where inchoate offences are also covered would imply, wrongly, that other references to offences (e.g. in provisions about minimum sentences for domestic burglary and offences involving offensive weapons or firearms) do not cover secondary offences.

351 Instead, *subsections (1) and (2) of clause 398* make it clear that the general law on secondary offences applies without express provision in each case (and even though the existing references to ancillary offences expressly list secondary offences). This preserves the existing position for minimum sentences for domestic burglary, offensive weapons and firearms, where the mandatory sentence requirements apply to secondary offences but not related inchoate offences.

352 The offences under the Part 2 of the SCA 2007 that are covered are expressed as such an offence "in relation to" a listed offence or "in relation to which [a listed offence] is the offence (or one of the offences) which the person intended or believed would be committed". The latter formula is used in Schedule 15, 15B and 18A to the Criminal Justice Act 2003 and reflects the language of sections 44, 45 and 46 of the SCA 2007 which defines the main offences of encouraging or assisting another offence.

353 It is clear that both are intended to identify the same offences under Part 2 of the SCA 2007 in relation to a given offence and therefore *clause 398(5)* applies that interpretative provision to all references to offences under Part 2 of the SCA 2007 in relation to another offence.

Clause 402: powers to re-sentence

354 There are numerous powers in provisions about non-custodial orders that allow a court to revoke the order and impose a different sentence on the offender for the offence. The powers vary slightly in detail, and in particular whether the court should exercise the powers it would have if sentencing the offender now, or the powers that it would have had when originally sentencing the offender.

355 These powers to re-sentence the offender will be amended by Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020 to align them with one another. See paragraphs 18(3), (4), (5), (6), 52(2) and (8), 53(2) and (3), 83(2) and (3), 100(4), (5), (8), (9), (10), (12) and (14), 102(11) and 111(3), (5), (7), (8), (11), (13) and (15).

356 These give the court power to re-sentence the offender as if the offender had just been convicted by or before it. But if the re-sentencing court is the Crown Court and the powers under which the offender was originally sentenced were those of a magistrates' court, then the Crown Court can only exercise magistrates' court powers. And if the offender was aged under 18 when convicted, then in re-sentencing the court must assume that the offender is the age when actually convicted.

357 Rather than set out in each place what the court's powers are, *clause 402* sets out the powers to re-sentence. This should help avoid diverging powers arising if new orders are created in future.

Clause 405: age of the offender

358 *Clause 405* restates section 7(2) of the Criminal Justice and Immigration Act 2008, amongst other provisions. Section 7(2) deals with the determination of a person's age for the purposes of provisions about youth rehabilitation orders by the court, the Secretary of State or a local authority. None of those provisions requires a local authority to determine a person's age, so the references to a local authority are unnecessary and not restated in *clause 405*.

Clause 407: regulations and rules

Ancillary powers

359 *Clause 407* restates the general provisions that apply to all powers to make subordinate legislation that are restated in the Bill. Those powers take different forms but so far as possible have been rewritten in the same way in the Code.

"Which the Minister making the instrument considers necessary or expedient"

360 Section 330(3) of the Criminal Justice Act 2003 provides that any power conferred by that Act to make subordinate legislation includes power to make—

> "(a) any supplementary, incidental, or consequential provision, and
>
> (b) any transitory, transitional or saving provision,
>
> which the Minister making the instrument considers necessary or expedient".

361 Section 147(2)(c) of the Criminal Justice and Immigration Act 2008 provides that orders and regulations "may make incidental, supplementary, consequential, transitional, transitory or saving provision".

362 Section 30(4) of the Powers of Criminal Courts (Sentencing) Act 2000 is similar to section 330(3) of the Criminal Justice Act 2003, except that the test is that the Secretary of State "thinks fit".

363 It is considered that there is no difference between the two types of ancillary powers, and, in particular, that the phrase "which the Minister making the instrument considers necessary or expedient" does not change the position, because a Minister making subordinate legislation would not include provision unless the Minister considered it necessary or expedient.

364 Accordingly, that phrase (and similar phrases such as "as the Secretary of State thinks fit") have not been rewritten in the Bill, and *clause 407(4)* and *(5)* provides that powers to make regulations under the Bill include power to make "supplemental, incidental or consequential provision" and "transitory, transitional or saving provision".

"Transitional provision"

365 Section 160(6) of the Powers of Criminal Courts (Sentencing) Act 2000 confers power on the Secretary of State making an order under that Act to "make such transitional provision as appears to him necessary or expedient in connection with any provision made by the order".

366 This power is considered to permit the same kind of provision to be made as section 330(4)(b) of the Criminal Justice Act 2003, which permits "any transitory, transitional or saving provision... which the Minister making the instrument considers necessary or expedient".

367 "Transitional" provision can be read in a wide sense as encompassing any kind of provision concerned with moving from the situation before a change comes into force to the situation where it is in force, or in a narrow sense of treating something done before the change as counting for the purposes of the law as it operates after the change.

368 "Transitional" in section 330(4)(b) of the Criminal Justice Act 2003, where it is contrasted with "transitory" and "saving" should be read more narrowly than "transitory", without more, in section 160(6) of the Powers of Criminal (Courts) Sentencing Act 2000 where the wide meaning is natural. The expression "transitory, transitional or saving provision" in *clause 407(5)* is considered to cover the same ground as section 160(6) of the Powers of Criminal Courts (Sentencing) Act 2000.

"In connection with any provision made by the order"

369 Where a power to make provision by regulations includes power to make transitional or consequential provision, it is implicit that any provision made under that ancillary power must be transitional or consequential on the substantive provision made by the regulations; that is how a power to make transitional or consequential provision would be read.

370 So the words "in connection with any provision made by the order" in section 160(6) of the Powers of Criminal Courts (Sentencing) Act 2000, which are not matched in section 330(4) of the Criminal Justice Act 2003 are unnecessary and not restated in the Bill.

Different or partial exercise of a power

371 General provision about secondary legislation that is restated in the Bill expresses the ability to exercise a power in different ways as, variously, differently for different purposes, cases, circumstances or areas, or only partially. In recent legislation, express provision allowing a power to be exercised differently for different purposes would normally be considered to allow it to be exercised differently for different cases or circumstances, or to be exercised only partially, but the ability to exercise differently for different areas would normally be made express. However, the absence of an express power to exercise differently for different purposes does not necessarily mean that the power cannot be exercised in that way (particularly for older legislation); it is a matter of construction of the power and it would often be inherent in the power that it should be exercised differently for different purposes.

Power to exercise differently for different purposes etc

372 Powers conferred by the following provisions are not expressed to be exercisable differently for different purposes, but are expressed to be exercisable differently for different cases (or, except in relation to section 107(1)(3) of the Powers of Criminal Courts (Sentencing) Act 2000, circumstances). It is not considered that providing instead, in *clause 407(6)(a),* for them to be exercisable differently for different purposes will change the position for—

a. sections 17(3) and 21(4) of and paragraph 13(8) of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (referral orders);
b. section 107(1)(e) of the Powers of Criminal Courts (Sentencing) Act 2000 (youth detention accommodation);
c. the Criminal Justice and Immigration Act 2008 (except as noted below);
d. section 33 of the Counter-Terrorism Act 2008 (power to amend Schedule 1).

373 *Clause 407(6)(b)* is disapplied for powers that are not expressed to be exercisable differently for different areas, with the exception of the power conferred by section 107(1)(e) of the Powers of Criminal Courts (Sentencing) Act 2000 to designate youth detention accommodation. At present, the power can be exercised differently for different cases or descriptions of case (section 160(5) of that Act). The reason why express provision is normally made where a power should be exercisable differently for different areas is that a power

would normally be expected to be exercisable in the same way for cases of the same kind; merely being in different areas is unlikely to be a relevant difference for this purpose. But the contrast between "cases" and "classes of case" indicates that that consideration does not matter for the purpose of this power, so it is not considered necessary to disapply *clause 407(6)(b)* for the purposes of that power.

374 The following powers are not expressed to be exercisable differently for different purposes, cases or areas and it is not thought that they are intended to be so exercisable. Accordingly *clause 407(6)* is disapplied in relation to the corresponding powers in the Bill—

a. powers under Part 2A of the Prosecution of Offences Act 1985 (criminal courts charge);

b. section 15 of the Powers of Criminal Courts (Sentencing) Act 2000 (power to amend the maximum period of conditional discharge);

c. section 103(2) of the Powers of Criminal Courts (Sentencing) Act 2000 (power to amend the period of supervision of a detention and training order);

d. section 104B of the Powers of Criminal Courts (Sentencing) Act 2000 (power to extend the period of detention for breach of a detention and training order);

e. section 147A of the Powers of Criminal Courts (Sentencing) Act 2000 (power to amend circumstances in which court must extend driving disqualification to cover expected period of imprisonment);

f. paragraph 6A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 (power to amend the maximum fine for breach of a referral order);

g. powers under section 143 of the Magistrates' Courts Act 1980 and section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend the standard scale, maximum fines and periods.

375 In the case of powers conferred by the Powers of Criminal Courts (Sentencing) Act 2000, the conclusion rests on the contrast between the express power to make different provision for different cases or classes of case in relation to order specifying kinds of youth detention under section 107(1)(e) and other order-making powers in relation to which no such provision applies. The power in section 103(2) of the Powers of Criminal Courts (Sentencing) Act 2000 to alter the period of supervision was amended by the Offender Rehabilitation Act 2014 to provide that an order under that provision could not "include provision about cases in which.... the offender is aged 18 or over at the half-way point of the term of the detention and training order, and... the order was imposed in respect of an offence committed on or after [1 February 2015]". That amendment is considered just to limit the power and not imply that it is otherwise exercisable to make different provision for different cases.

Exercise otherwise than to full extent

376 Section 330(3) of the Criminal Justice Act 2003 provides—

"(3) The power—

(a) may be exercised so as to make different provision for different purposes or different areas, and

(b) may be exercised either for all the purposes to which the power extends, or for those purposes subject to specified exceptions, or only for specified purposes."

377 *Clause 407(6)* restates just paragraph (a) of that subsection. Paragraph (b) is not restated because it is thought to be covered by paragraph (a) in relation to powers in the Criminal

Justice Act 2003 that are restated in the Bill. The same applies to powers in the Criminal Justice and Immigration Act 2008 and Coroners and Justice Act 2009 that are restated in the Bill (which in the case of the Coroners and Justice Act 2009 are only powers to bring provisions of *Schedule 22* into force).

378 The powers in the Criminal Justice Act 2003 and Criminal Justice and Immigration Act 2008 that are restated include the provisions at *paragraph 42(2) of Schedule 6 and paragraph 31(2) of Schedule* 9, which require a person responsible for an electronic monitoring requirement imposed by a youth rehabilitation order, community order or suspended sentence order to be "of a description specified in regulations made by the Secretary of State". For the electronic monitoring provisions to work at all, the Secretary of State needs to specify to specify at least one description for all cases where electronic monitoring requirements can apply (and the powers have always been exercised to do that); the general provision in section 330(3)(b) of the Criminal Justice Act 2003 (and the corresponding provision in the Criminal Justice and Immigration Act 2008) is not considered to affect that so it is not necessary to restate it.

Extent and the armed forces

379 The Armed Forces Act 2006 creates a sentencing regime for the purposes of the armed forces and service courts that consists—

partly of free-standing provisions in that Act, and

partly of sentencing provisions in other Acts that apply to courts in England and Wales and are applied by the Armed Forces Act 2006.

380 In general, all provisions of sentencing legislation in, or that are applied by or amend the Armed Forces Act 2006—

a. extend to (i.e. form part of the law) of each part of the United Kingdom;

b. extend to the Isle of Man and the British overseas territories other than Gibraltar;

c. can be extended to the Channel Islands;

d. can be modified as they extend outside the United Kingdom.

381 So far as those provisions are to be consolidated in the Bill, *clause 414(5)(c) and (d) and (6)* gives effect to paragraph a above, and *clause 415(4) to (6)* gives effect to paragraphs b to d above.

382 For the present legislation, that is achieved—

for the Armed Forces Act 2006 as originally enacted and provisions originally applied by it: by sections 384 and 385 of the Armed Forces Act 2006, as amended by section 13 of the Armed Forces Act 2016

for subsequent amendments of those provisions, up to the Armed Forces Act 2016: by the extent provisions governing the amendments, and the provisions in the Schedule to the Armed Forces Act 2016: as described below

for amendments of the Armed Forces Act 2006, and provisions applied by it, by the Sentencing (Pre-consolidation Amendments) Act 2020: by section 5(9) to (11) of that Act.

383 This is explained in more detail in the following paragraphs.

Provisions originally applied by the Armed Forces Act 2006

384 In section 384 of the Armed Forces Act 2006, subsection (1) allows provisions of that Act to be extended, with modifications, to any of the Channel Islands by Order in Council. Under subsection (2), the provisions of that Act extend to the Isle of Man and the British overseas territories except Gibraltar, and can be modified, as so applied, by Order in Council. No Order in Council has been made under that section in relation to any of the provisions being consolidated.

385 In section 385 of that Act, subsection (1) provides that the extent of provisions of other Acts that are applied by or under the Armed Forces Act 2006 is, for those purposes, not governed by what those other Acts say about their extent for other purposes. Subsection (2) applies section 384 to those provisions. Thus, for example, provisions of the Powers of Criminal Courts (Sentencing) Act 20000 or the Criminal Justice Act 2003, which otherwise extend only to England and Wales, are not limited to England and Wales so far as they are applied for the purposes of the Armed Forces Act 2006.

386 The Bill will rewrite some provisions which were applied by the Armed Forces Act 2006 as originally enacted. For example, *clause 285* will replace section 225(2) of the Criminal Justice Act 2003 (required life sentence), which is applied by section 219(2) of the Armed Forces Act 2006; for those purposes it extends throughout the United Kingdom and, by virtue of section 385(1) of the Armed Forces Act 2006, it also extends or can be extended in accordance with section 384 of that Act.

387 *Paragraph 39(4) of Schedule 25* will amend section 219(2) of the Armed Forces Act 2006 so that it will instead refer to *clause 285.* Those provisions of the Bill are "armed forces provisions" within *paragraphs (a) and (b)* respectively of *subsection (6) of clause 415* and will therefore have the same extent under *subsections (4) and (5) of that clause* as section 225(2) of the Criminal Justice Act 2003, as it is applied by section 219(2) of the Armed Forces Act 2006, has by virtue of sections 384 and 385 of the Armed Forces Act 2006.

Provisions subsequently applied, or subsequently amended as applied, by the Armed Forces Act 2006

388 Later Acts that amended the Armed Forces Act 2006 or provisions applied by it dealt with the extent of the amendments in different ways.

389 Sections 151(2) and 152(9) of the Criminal Justice and Immigration Act 2008 and sections 180(2) and 181(8) of the Coroners and Justice Act 2009 had the effect, so far as relevant for the consolidation, of applying section 384 of the Armed Forces Act 2006 to—

a. the Armed Forces Act 2006 as amended by or under any provision of the Act in question, and

b. amendments by those Acts of provisions applied for the purposes of the Armed Forces Act 2006, other than amendments made by Part 1 of the Criminal Justice and Immigration Act 2008.

As a result of the modifications made by the Schedule to the Armed Forces Act 2016, those provisions no longer extend to Gibraltar.

390 The provisions that were not applied for the purposes of the Armed Forces Act 2006 by the exception for Part 1 of the Criminal Justice and Immigration Act 2008 were mainly provisions about youth justice, which is not relevant in the service context. However, they did also include paragraph 109 of Schedule 4 to that Act (which inserted a new paragraph 25A

into Schedule 8 to the Criminal Justice Act 2003 to bring the provisions about adjournment on breach of a community order into line with similar provisions for youth orders). The Criminal Justice and Immigration Act 2008 consequentially amended Schedule 5 to the Armed Forces Act 2006, which applies Schedule 8 to the Criminal Justice Act 2003, to achieve the result that the new paragraph 25A is not applicable in relation to the armed forces. This is followed in the consolidation: *paragraph 11(a) of the Schedule 6A inserted into the Armed Forces Act 2006 by paragraph 12 of Schedule 25* provides that, in the application of the corresponding Schedule for the purposes of the Armed Forces Act 2006, the paragraph corresponding to paragraph 25A is to be omitted.

391 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 provided, again so far as relevant to the consolidation—

a. at section 152(6) for amendments made by it to have the same extent as the provisions they amended (namely, the extent provided for by the Armed Forces Act 2006, in the case of provisions applied by it), ignoring extent by virtue of an Order in Council;

b. at section 152(4) and (11) for section 77 (which makes free-standing provision about piloting alcohol abstinence and monitoring requirements) to have the same extent as the Armed Forces Act 2006, so far as relating to a provision of, or made under or applied by, the Armed Forces Act 2006, ignoring extent by virtue of an Order in Council;

c. at section 153(4) for section 384 of the Armed Forces Act 2006 to apply to that Act as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

392 Section 152 itself only has UK-wide extent (see subsection (10)), except insofar as it relates to section 77 (see subsection (11)). So the question of the extent, outside the UK, of the amendments to the Armed Forces Act 2006 and of provisions applied by it (other than those in section 77), falls to be dealt with under section 153(4).

393 Although on its face section 153(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 appears to deal only with amendments to the Armed Forces Act 2006 itself, it needs to be read as also covering amendments made by Legal Aid, Sentencing and Punishment of Offenders Act 2012 of enactments applied by the Armed Forces Act 2006. It would simply not make sense for the extent of the amendments to the Armed Forces Act 2006 itself to be governed by section 384 of the Armed Forces Act 2006 but not also the amendments to provisions applied by the Armed Forces Act 2006.

394 To give a concrete example: section 66(2) of Legal Aid, Sentencing and Punishment of Offenders Act 2012 inserts new subsections (5A) and (5B) into section 177 of the Criminal Justice Act 2003. Section 78(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 then consequentially amends section 182(4) of the Armed Forces Act 2006, which applies the Criminal Justice Act 2003 provisions on community orders to overseas community orders (a type of order only available under the Armed Forces Act 2006), so as to include a reference to the new subsections (5A) and (5B). It simply would not work for the amendment to the Armed Forces Act 2006 made by section 78, inserting a reference to subsections (5A) and (5B), to have a different extent from subsections (5A) and (5B) themselves (as they apply for the purposes of service law). The narrow reading of section 153(4) would mean that the power to extend the amendments to the Armed Forces Act 2006 to the Channel Islands had no substance. Prior to the enactment of the Schedule to the Armed Forces Act 2016 (explained at paragraphs 395 and 399 below), such a narrow reading would also have caused confusion about the application of those provisions to the British overseas territories, as the reference to

subsections (5A) and (5B) would have extended to those places, but the substantive provisions would not.

395 The Schedule to the Armed Forces Act 2016 sorts out some inconsistencies in how the extent of provisions applied by the Armed Forces Act 2006 had been dealt with in the previous few years. Paragraph 2 of that Schedule provides that amendments of the Armed Forces Act 2006 and of provisions applied by the Armed Forces Act 2006, are to be treated as if they were the Armed Forces Act 2006 itself for the purposes of section 384(2) of that Act. The practical effect of that for the purposes of Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that the amendments made by Legal Aid, Sentencing and Punishment of Offenders Act 2012 to the Armed Forces Act 2006 *and* to provisions applied by it clearly and expressly extend to the Isle of Man and the British overseas territories other than Gibraltar. However, the Schedule does not deal with the power to extend such provisions to the Channel Islands, so this still needs to be dealt with as a matter of interpretation of section 153 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 itself, as discussed at paragraphs 393 and 394 above.

396 A different approach was taken in the Crime and Courts Act 2013, the Offender Rehabilitation Act 2014 and the Criminal Justice and Courts Act 2015, following the Armed Forces Act 2011, in that amendments of the Armed Forces Act 2006 or provisions amended by it were not extended to the Isle of Man or the British overseas territories; instead those Acts include power to amend them by Order in Council.

397 The only amendments by the Crime and Courts Act 2013 of legislation that is consolidated by the Bill were in Schedule 16 (dealing with offenders non-custodially). Section 61(21) provided for amendments of the Armed Forces Act 2006 to be capable of being extended (with or without modifications) to the Channel Islands, the Isle of Man, and the British overseas territories. Where provisions applied by the Armed Forces Act 2006 were amended by Schedule 16 to the Crime and Courts Act 2013, it was clear from related amendments of the Armed Forces Act 2006 that the amendments were meant to operate on those provisions as applied by the Armed Forces Act 2006 (in the same way as discussed in relation to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at paragraphs 393 and 394 above).

398 The Offender Rehabilitation Act 2014 and the Criminal Justice and Courts Act 2015 provided for amendments and repeals by those Acts of provisions of, or as applied by (or, in the case of the Offender Rehabilitation Act 2014, under), the Armed Forces Act 2006 to—

i. extend throughout the United Kingdom, and

ii. be capable of being extended to the Channel Islands, Isle of Man or the British overseas territories by Order in Council, with or without modification.

399 The approach taken in the Armed Forces Act 2011 and subsequent criminal justice legislation was changed in the Armed Forces Act 2016. The Schedule to the Armed Forces Act 2016 has replaced the powers in the Crime and Courts Act 2013, the Offender Rehabilitation Act 2014 and the Criminal Justice and Courts Act 2015 to extend provisions to the Isle of Man and British overseas territories; instead, any amendments of the Armed Forces Act 2006, or of provision applied by it now extend directly to the Isle of Man and British overseas territories other than Gibraltar, and there is a power to make modifications in their application in those places. The powers to extend provisions to the Channel Islands are not affected.

400 Finally, section 5(9) to (11) of the Sentencing (Pre-consolidation Amendments) Act

2020—

a. extends provisions of that Act that amend repeal or modify provisions of, or that are applied by or under, the Armed Forces Act 2006 to the Isle of Man and the British overseas territories other than Gibraltar, and

b. apply to those provisions the powers in section 384 of the Armed Forces Act 2006 (power to extend to the Channel Islands, and to modify those provisions in their application outside the United Kingdom).

Extent of section 134 of the Powers of Criminal Courts (Sentencing) Act 2000 as it applies for the purposes of the armed forces provisions

401 Section 134 of the Powers of Criminal Courts (Sentencing) Act 2000 makes provision about the award and recovery of damages in civil proceedings where a compensation order under that Act, or a service compensation order under the Armed Forces Act 2006, has already been made in favour of the claimant.

402 Insofar as it relates to "civilian" compensation orders under the Powers of Criminal Courts (Sentencing) Act 2000, section 134 is rewritten at *clause 144* of the Sentencing Code. But insofar as it relates to service compensation orders, section 134 is being moved into the Armed Forces Act 2006, as a new section 177A.

403 Section 134 of the Powers of Criminal Courts (Sentencing) Act 2000 currently extends only to England and Wales (see section 167 of that Act). The drafting approach taken means that, when the part of section 134 that applies to service compensation orders is moved into the Armed Forces Act 2006, its extent will change so that it has the same extent as the other "armed forces provisions" in the Code. The extent of the armed forces provisions is governed within the United Kingdom by *clause 414(5)(c) and (d) and (6)*, and beyond the United Kingdom by *clause 415(4) to (6)*. The result is that, once moved, section 134 as it applies to service compensation orders will extend to the whole of the United Kingdom, and to the Isle of Man and the British overseas territories (except Gibraltar), and there will be a power to extend it to the Channel Islands.

404 In order to preserve the current position, it would be possible to make changes to *clauses 414 and* 415 as drafted. However, this has not been done because this change in the extent of section 134 will in fact have no legal or practical effect, and therefore making such changes to the extent clauses would significantly complicate them for no good reason.

405 The reason that changing the extent of section 134 (as it applies to service compensation orders) has no practical or legal effect is because section 134 only governs courts conducting civil proceedings in England and Wales, and nothing in the re-draft changes this position. The new section 177A of the Armed Forces Act 2006 preserves the current position by adding an express reference to a court in England and Wales. So subsection (1) of the new section 177A will read as follows (the underlined words do not appear in section 134 of the PCCSA or *clause 144* but are implicit from the fact that the provision only extends to England and Wales)—

"(1) This section has effect where—

(a) a service compensation order has been made in favour of any person in respect of any injury, loss or damage, and

(b) a claim by the person in civil proceedings for damages in respect of the injury, loss or damage subsequently falls to be decided <u>by a court in England and Wales</u>."

Clause 413 and Schedule 28: attendance centre orders

406 Sections 60 and 61 of, and Schedule 5 to, the Powers of Criminal Courts (Sentencing) Act 2000 make provision about attendance centre orders, which were available on conviction (section 60(1)(a)) and are available in certain circumstances where under 21s are in default (section 60(1)(b)) or under 25s are in default of payment (section 60(1)(c)).

407 Those sections are repealed by section 6(1) of the Criminal Justice and Immigration Act 2008, but that repeal has not been brought into force so far as it relates to attendance centre orders under section 60(1)(b) and (c).

408 Accordingly, *Schedule 28* excludes from the repeal of the Powers of Criminal Courts (Sentencing) Act 2000 sections 60 and 61 of and Schedule 5 to that Act, along with sections 33 and 163 to 168 of that Act (parts of which are needed to support those provisions) (but see *paragraph 166 of Schedule* 24, which repeals definitions in section 163 that are not needed for those or other provisions of the Powers of Criminal Courts (Sentencing) Act 2000 that remain).

409 The position is the same for section 36B of the Powers of Criminal Courts (Sentencing) Act 2000 (electronic monitoring requirements), except that it will be repealed by Part 1 of Schedule 28 to the Criminal Justice and Immigration Act 2008.

410 Section 159 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for execution of process in Scotland where warrants are issued under certain provisions of that Act, including under paragraph 1 of Schedule 5.

411 The reference in section 159 to paragraph 1 of Schedule 5 is to be repealed by paragraph 59(c) of Schedule 4 to the Criminal Justice and Immigration Act 2008, which has not been brought into force. Section 159 itself will be repealed as part of the repeal of the Powers of Criminal Courts (Sentencing) Act 2000 by *Schedule* 28, but *clause 416(5)* provides for the repeal of section 159, so far as it relates to paragraph 1 of Schedule 5, not to come into force until the repeal of Schedule 5 to the Powers of Criminal Courts (Sentencing) Act 2000 comes into force.

412 The combined effect of the repeal in *Schedule 28* of the Powers of Criminal Courts (Sentencing) Act 2000 and the saving in *clause 416(5)* for section 159 is that section 159 will continue to have effect so far as it relates to paragraph 1 of Schedule 5 to the Powers of Criminal Courts (Sentencing) Act 2000. Repealing the reference to that paragraph would leave the rest of section 159 beating the air. There is no need for the separate repeal in paragraph 59(c) of Schedule 4 to the Criminal Justice and Immigration Act 2008 of the reference to paragraph 1 of Schedule 5 to the Powers of Criminal Courts (Sentencing) Act 2000, and accordingly *Schedule 24* repeals the whole of paragraph 59 of Schedule 4 to the Criminal Justice and Immigration Act 2008.

413 The following other provisions of Schedule 4 to the Criminal Justice and Immigration Act 2008 have not been brought into force because they would consequentially repeal provisions that relate to attendance centre orders:

paragraph 3(3), which repeals section 49(4A)(d) of the Children and Young Persons Act 1949 (reporting restrictions: proceedings involving children);

paragraph 24, so far as it repeals the reference to Schedule 5 to the Powers of Criminal Courts (Sentencing) Act 2000 in Schedule 6A to the Magistrates' Courts Act 1980 (power to alter fines);

paragraph 25, which repeals the section 14(2A) of the Contempt of Court Act 1981 inserted by the Criminal Justice Act 1982 that prohibits an attendance centre order being made for contempt or any kindred offence where the offender is aged under 17;

paragraph 54, which repeals words in section 74(3)(a) of the Powers of Criminal Courts (Sentencing) Act 2000; that provision is replaced by paragraph 25(2) of Schedule 2 to the Sentencing (Pre-consolidation Amendments) Act 2020 so paragraph 54 is therefore spent and is repealed by *Schedule* 28;

paragraph 57, which preserves section 137 of the Powers of Criminal Courts (Sentencing) Act 2000 (fines to be paid by parent or guardian) for fines under Schedule 5 to the Powers of Criminal Courts (Sentencing) Act 2000 on breach of an attendance centre order; that effect is reproduced by a consequential amendment in Schedule 5 made by *paragraph 168(3) of Schedule 24* and therefore paragraph 57 of Schedule 4 to the Criminal Justice and Immigration Act 2008 is repealed by *Schedule 28*;

paragraph 59(c) - which amends section 159 of the Powers of Criminal Courts (Sentencing) Act 2000; see above.

paragraph 61(a), so far as it omits the definitions of attendance centre, attendance centre order and youth community order;

paragraph 92(a) and (c), which amends section 221 of the Criminal Justice Act 2003 (duties to provide attendance centres) which will remain in the Criminal Justice Act 2003 and is not restated in the consolidation.

414 Paragraph 60(2) and (4) of Schedule 4 to the Criminal Justice and Immigration Act 2008 amended section 160(2) and (5) of the Powers of Criminal Courts (Sentencing) Act 2000 and was brought only partly into force on 30 November 2009; however those provisions of section 160 were replaced by the Coroners and Justice Act 2009 which also repealed paragraph 60(2) and (4) of Schedule 4 to the Criminal Justice and Immigration Act 2008.

Clause 417: commencement of Schedule 22

Commencement in relation to abolition of detention in a young offender institution

415 The provisions that can be brought into force by the Secretary of State by regulations under *subsection (1) of clause 417* include the successors of certain provisions of the Criminal Justice and Court Services Act 2000 that are not yet in force. Section 80(1) of that Act provides for them to come into force on the day appointed by an order made by the Lord Chancellor or the Secretary of State.

416 However the power of the Lord Chancellor is considered to be exhausted (and never applied to the provisions rewritten in Schedule 22).

417 Apart from the power to make commencement orders, the Lord Chancellor's only functions under the Criminal Justice and Court Services 2000 were powers under Chapter 2 of Part 1, which establishes the Children and Family Court Advisory and Support Service. It seems therefore that the commencement power conferred on the Lord Chancellor was designed to enable the Lord Chancellor to bring that Chapter into force, leaving other provisions of that Act (including those rewritten in the Code) to be brought into force by the Secretary of State.

418 Chapter 2 of Part 1 of that Act has been brought into force (in fact by an order made by the Secretary of State (the Criminal Justice and Court Services Act 2000 (Commencement No. 4) Order 2001 (S.I. 2001/919)), and the scheme of the Criminal Justice and Court Services 2000 suggests that there is no remaining power in section 80 that was ever intended to be exercised by the Lord Chancellor. Indeed the supplementary provision in section 76 of that Act about secondary legislation has been repealed so far as it relates to orders made by the Lord Chancellor.

419 On that basis, the only power to bring into force the provisions of the Criminal Justice and Court Services 2000 rewritten in *Schedule 22* is a power of the Secretary of State; that is reflected in *clause 417(1).* Relying on section 105 of the Deregulation Act 2015, it is rewritten as a power to make regulations.

Schedule 2: order for conditional discharge: commission of further offence

420 Section 13 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for what should happen where an offender who has been conditionally discharged is convicted of a further offence committed during the period of conditional discharge. Section 15(3) of the Powers of Criminal Courts (Sentencing) Act 2000 applies "In proceedings before the Crown Court under section 13 above", and makes the question whether the offender has been convicted of a further offence a question for the court not the jury. Questions for the Crown Court under section 13 arise—

a. under subsection (1), which gives the Crown Court power to issue a summons or warrant in certain circumstances where "it appears to the Crown Court that...." the offender has been convicted of a further relevant offence, and

b. under subsections (6) and (7), which in certain circumstances give the Crown Court power to deal with a conditionally discharged offender who commits a further offence during the period of conditional discharge.

421 There is no question of the Crown Court's function to issue a summons or warrant under section 13(1) being exercised on the basis of a jury verdict. So section 15(3) is restated in *paragraph 7(3) of Schedule 2* only so far as it applies to the court's powers to deal with the offender under section 13(6) and (7) (which are restated in *paragraph 7).*

Schedule 4: referral orders: further court proceedings

422 Paragraph 5 of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 allows the court to revoke a referral order and re-sentence the offender. Sub-paragraph (5)(a) provides that where the court deals with the offender for the offence for which a revoked referral order was made, it should assume "section 16 of this Act had not applied".

423 Section 16 contains both—

a. the duty to make a referral order where the compulsory referral conditions are met, and

b. the power to make one where other conditions are met.

424 The effect is that the court cannot make a referral order when it is re-sentencing the offender under paragraph 5 of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000. Those words are rewritten at *paragraph 7(4) of Schedule 4* as "(but assuming that a referral

order is not available)".

425 The same point arises on *paragraph 17(2)(b) of that Schedule,* which rewrites paragraph 14(3) of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.

Schedule 6: youth rehabilitation order: requirements

Attendance centre requirement

426 In paragraph 12 of Schedule 1 to the Criminal Justice and Immigration Act 2008, sub-paragraph (4) provides that, where an attendance centre requirement is imposed by a youth rehabilitation order, "The first time at which the offender is required to attend at the attendance centre is a time notified to the offender by the responsible officer", and sub-paragraph (5) provides that "The subsequent hours are to be fixed by the officer in charge of the centre....". Sub-paragraph (7) provides—

> "(7) A requirement to attend at an attendance centre of any period on any occasion operates as a requirement—
>
> (a) to attend at the centre at the beginning of the period, and
>
> (b) during that period, to engage in occupation, or receive instruction,.....".

427 Paragraph (a) goes without saying and in fact does not appear in the otherwise identically-worded attendance centre requirement for community orders. For consistency it has not been included in *paragraph 14(7) of Schedule 6,* which restates paragraph 12(7) of Schedule 1 to the Criminal Justice and Immigration Act 2008.

Schedule 8: transfer of youth rehabilitation orders to Northern Ireland

Express requirement for offender to be supervised in accordance with requirements unnecessary

428 Paragraphs 1(3) and 3(3) of Schedule 9, and paragraphs 1(3) and 6(3) of Schedule 13, to the Criminal Justice Act 2003 provide that, where an offender who is subject to a community order or suspended sentence order resides or will reside in Scotland or Northern Ireland, and it appears to the court that suitable arrangements for supervision of the offender in Scotland or Northern Ireland can be made, the court can amend the community order "by requiring it to be complied with in Northern Ireland *and the offender to be supervised in accordance with [those arrangements]*" (italics added).

429 Paragraph 2(2) of Schedule 3 to the Criminal Justice and Immigration Act 2008 makes provision about amending a youth rehabilitation order to transfer it to Northern Ireland that is similar to paragraph 3(3) of Schedule 9 to the Criminal Justice Act 2003, except that it omits the italicised words.

430 But that the offender must be supervised in Northern Ireland is implicit in the requirement for the youth rehabilitation order to be complied with in Northern Ireland. Furthermore, the corresponding provisions about *making* a community order, suspended sentence order or youth rehabilitation order where the offender resides in Scotland or Northern Ireland from the outset, leave it implicit that the order, if made, must be complied with, and the offender must be supervised there (see paragraphs 1(1) and 3(1) of Schedule 9, and paragraph 1(1) and 6(1) of Schedule 13, to the Criminal Justice Act 2003 and paragraph 1

of Schedule 3 to the Criminal Justice and Immigration Act 2008).

431 So it is considered that paragraph 2(2) of Schedule 3 to the Criminal Justice and Immigration Act 2008 and paragraphs 3(3) of Schedule 9, and 6(3) of Schedule 13, to the Criminal Justice Act 2003 all have the effect that, where an order is amended so as to require it to be complied with in Northern Ireland, the offender must be supervised there, even though one includes those words and the other does not.

432 As the Schedules are being brought together in a single Bill, it is appropriate to align them. Accordingly that expression has been added into *paragraph 2(2)(b) of Schedule 8* to bring the provisions about youth rehabilitation orders into line with those for community orders (and suspended sentence orders).

Application of provisions where transferred order is amended

433 Paragraph 16(2) of Schedule 3 to the Criminal Justice and Immigration Act 2008 provides that "the preceding paragraphs of this Schedule have effect" in certain circumstances where a court in England and Wales amends a youth rehabilitation order that has been transferred to Northern Ireland; paragraph 16(2) overlaps with paragraph 16(1), the effect of which is to apply paragraph 2(2) in those circumstances. Paragraph 16(2) of Schedule 3 to the Criminal Justice and Immigration Act 2008 is restated in *paragraph 20(6) of Schedule 8*, which provides for the preceding provisions of that Schedule to apply other than *paragraphs 4 to 6,* which correspond to paragraph 2(2) of Schedule 3 to the Criminal Justice and Immigration Act 2008 and the effect of which is already set out in *paragraph 20(3) to (5) of Schedule 8,* and *paragraphs 18 and 19*, which apply anyway in the circumstances.

Curfew orders

434 On *paragraph 16(6) of Schedule 8,* and amendments of periods relating to curfew orders under youth rehabilitation orders transferred to Northern Ireland, see the note below at paragraphs 456 to 460 about the corresponding point in relation to community orders.

Schedule 9: community orders and suspended sentence orders: requirements

435 Section 205 of the Criminal Justice Act 2003 defines an exclusion requirement as prohibiting the offender from entering a place specified in the order for a period so specified. Subsection (2) provides for the period not to be more than two years, but subsection (3) allows an exclusion requirement to—

"(a) .... provide for the prohibition to operate only during the periods specified in the order, and

(b) .... specify different places for different periods or days."

436 This makes it clear that there can be more than one exclusion period. It is considered that any period for which a person is excluded from a place must fall within the overall two year period, and *paragraph 11(4) of Schedule 9* makes this explicit.

Schedule 10: breach etc of community order

Imprisonment for breach of community order

437 Paragraphs 9(1)(c) and 10(1)(c) of Schedule 8 to the Criminal Justice Act 2003 confer power to impose a sentence of imprisonment (of, currently, not more than 6 months) where an offender has wilfully and persistently breached a community order, where the offence for which the order was imposed was not punishable with imprisonment.

438 Under section 150A of the Criminal Justice Act 2003, until section 151 of that Act comes into force, a community order is available only for an offence punishable with imprisonment. So until then the situation in which a court could impose imprisonment for breach of a community order under paragraph 9(1)(c) or 10(1)(c) of Schedule 8 to that Act cannot arise.

439 Therefore they are restated at *paragraph 21(2)(a) and (c) and (3)(a) and (c) of Schedule* 22 as amendments of *Schedule 10* to the Code. *Clause 417* provides for them to come into force at the same time as *paragraph 13 of Schedule* 22, which restates section 151(2) of the Criminal Justice Act 2003.

440 Paragraphs 9(1)(b) and 10(1)(b) of Schedule 8 to the Criminal Justice Act 2003 allow a court to re-sentence an offender on breach of a community order. Paragraph 9(4) or 10(4) allows it to impose a custodial sentence even if the normal threshold for custody is not met, "(where the order was made in respect of an offence punishable with such a sentence)". The quoted words are unnecessary while a community order can only be made in respect of an offence punishable with imprisonment, but will carry weight when section 151(2) of the Criminal Justice Act 2003 comes into force. Accordingly they are restated at *paragraph 21(2)(b) and (3)(b) of Schedule* 22, to come into force at the same time as *paragraph 13 of that Schedule,* which restates section 151(2) of the Criminal Justice Act 2003.

441 The same point applies to the disapplication of the custodial threshold sentence where the offender fails to express willingness to comply with a mental health treatment requirement. See section 211(4)(b) of, and paragraph 17(4)(b) of Schedule 8 to, the Criminal Justice Act 2003, which are rewritten at *paragraph 22 of Schedule 22,* also to come into force at the same time as *paragraph 13 of that Schedule.*

Reference to petty sessions area

442 The Courts Act 2003 changed the name of petty sessions areas to "local justice areas". The Courts Act 2003 (Consequential Provisions) Order 2005 (S.I. 2005/886) consequentially amended statutory references. Paragraph 106(f) of the Schedule to that order amended the reference in paragraph 27(1)(b) of Schedule 8 to the Criminal Justice Act 2003, which requires a notice to be given to a provider of probation services in the new local justice area when the community order is amended to specify a new local justice area, and also amended paragraphs 27(2) and (3). It also amended paragraph 7(5) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004, which inserted paragraph 27(1)(d) which (without the amendments) provides—

> "(d) where the court acts for a petty sessions area other than the one specified in the order prior to the revocation or amendment, provide a copy of the revoking or amending order to a magistrates' court acting for the area so specified."

443 In fact paragraph 7(5) of Schedule 5 to the Domestic Violence, Crime and Victims Act

2004 came into force before the Courts Act 2003 (Consequential Provisions) Order 2005, so the order should instead have amended paragraph 27(1)(d) of Schedule 8 to the Criminal Justice Act 2003. However it is clear what the amendment was intended to achieve, and how the reference should be read as; magistrates' courts now act in local justice areas. Accordingly, in *paragraph 27(5) of Schedule 10* the reference is restated as a reference to a local justice area.

444 The same point applies to paragraph 8(5) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004, which amends Schedule 12 to the Criminal Justice Act 2003 and is amended by paragraph 113(f) of the Schedule to the Courts Act 2003 (Consequential Provisions) Order 2005, and is rewritten as *paragraph 28(5) of Schedule 16.*

Amendment "by order"

445 Paragraph 17(1) of Schedule 8 to the Criminal Justice Act 2003 allows a court "by order" to amend the requirements of a community order. The words "by order" are unnecessary and not restated in *paragraph 18(1) of Schedule* 10. There is no other way that the court could amend the requirements, and paragraph 17 contrasts with other powers of the court to amend community orders, which are not expressed to be "by order".

Schedule 11: transfer of community orders to Scotland or Northern Ireland

Modifications of requirements: references to "responsible officer"

446 Paragraph 2 of Schedule 9 to the Criminal Justice Act 2003 treats any reference to the responsible officer in Chapter 4 of Part 12 of that Act, where a court is considering making or amending a community order in order to transfer it to Scotland, as a reference to the relevant local council officer in Scotland. In fact, the only references to a responsible officer that are relevant in that context are those in provisions restated in *Schedule 9,* so the reference to Chapter 4 of Part 12 appears in *paragraph 6 of Schedule 11* as a reference to *Schedule 9.*

447 The corresponding point applies for paragraph 4 of Schedule 9 to the Criminal Justice Act 2003 in relation to a community order that a court is considering transferring to Northern Ireland (see *paragraph 13 of Schedule 11).*

Copy of order as made or amended to be given to offender on transfer to Scotland or Northern Ireland

448 Where a community order is made or an existing order is amended so as to transfer it to Scotland or Northern Ireland, paragraph 6 of Schedule 9 to the Criminal Justice Act 2003 requires the court to give a copy of the order "as made or amended" to the court in Scotland or Northern Ireland, with other documents likely to be of assistance to it, and provides that section 219(1)(b) to (d) do not apply, the implication being that section 219(1)(a) does apply in any case where a court transfers a community order to Scotland or Northern Ireland, whether on making it or by amending it.

449 However section 219 of that Act applies only where an order is made. Subsection (1)(a) requires a copy of the community order to be given to the offender and the responsible officer.

450 Where a community order is amended, section 219 does not apply; instead paragraph 27 of Schedule 8 (reproduced at *paragraph 27 of Schedule 10*) requires copies of the amending order (as opposed to the community order as amended) to be given to the offender and

responsible officer, and contains other requirements in certain cases to provide copies to courts or providers of probation services in England and Wales that are not apt where the order is transferred to Scotland or Northern Ireland.

451 So *paragraph 17 of Schedule 11* –

a. restates section 219(1)(a) as it applies where the court *makes* an order that is immediately transferred to Scotland or Northern Ireland (and disapplies *clause 213* that would otherwise apply);

b. instead of restating the requirement in paragraph 27(1)(a) of Schedule 8 to provide a copy of the *amending order* to the offender, requires the court to give a copy of the community order as amended to the offender (which is what it must provide to the court in Northern Ireland under paragraph 6 of Schedule 9), given the implication that section 219(1)(a) applies;

c. restates, at *paragraph 17(1)(b),* paragraph 6 of Schedule 9 (documents to be provided to the court in Scotland or Northern Ireland);

d. restates so much of the remainder of section 219 and paragraph 27 of Schedule 8 as is applicable.

Home court "is of the opinion"

452 Where a community order has been transferred to Scotland or Northern Ireland under Schedule 9 to the Criminal Justice Act 2003, paragraph 11 of that Schedule confers power on the home court (the court in Scotland or Northern Ireland), to require the offender to appear before a court in England and Wales where "it appears to the home court..... that the offender has failed to comply with any of the requirements of the order".

453 Where it does so, it must also send a certificate to the court in England and Wales certifying that the offender has failed to comply with the requirements in question, which is admissible in the court in England and Wales as evidence of the failure.

454 The expression "it appears to the home court" in this context is rewritten in *paragraph 22(1) of Schedule 11* as "the home court is of the opinion that" (which facilitates the drafting by allowing a reference to forming the opinion). In the context this is considered appropriate because the "it appears to the court" test requires the court to form an opinion as to whether the offender has failed to comply with a requirement of the order, in order to give the required certificate of that fact.

Application of provisions where transferred order is amended

455 Paragraph 14 of Schedule 9 to the Criminal Justice Act 2003 provides that "the preceding paragraphs of this Schedule have effect" in certain circumstances where a court in England and Wales amends a community order that has been transferred to Scotland or Northern Ireland. Paragraphs 12 and 13 of that Schedule apply directly in those circumstances and do not need to be applied by paragraph 14. So *paragraphs 25(5) and 26(6) of Schedule 11,* which rewrite paragraph 14 of Schedule 9 to the Criminal Justice Act 2003, apply those paragraphs of *Schedule 11* that rewrite paragraphs 5 to 11 of Schedule 9 to the Criminal Justice Act 2003, and, for Scotland and Northern Ireland, the provisions of *Schedule 11* that rewrite paragraphs 2 and 4 respectively of Schedule 9 to the Criminal Justice Act 2003; the provisions of paragraphs 1 and 3, so far as relevant in the circumstances to which paragraph 14 applies, are also applied by paragraph 13 of Schedule 9 to the Criminal Justice Act 2003 and set out in the Bill in *paragraph 25(2) to (4) and paragraph 26(2) to (5) of Schedule 11.*

Curfew periods

456 Where a community order has been transferred to Scotland or Northern Ireland, paragraph 10(d) of Schedule 9 to the Criminal Justice Act 2003 provides that where the home court (the court in Scotland or Northern Ireland) varies a curfew requirement imposed by the order, it may not substitute "for the period specified in it any longer period than the court which made the order could have specified". It is not clear what period is referred to in the expression "the period specified in it".

457 Under section 204 of the Criminal Justice Act 2003 a curfew requirement requires that "the offender must remain, for periods specified in the relevant order, at a place so specified". Subsection (2) provides that the periods specified must not amount to less than 2 nor more that 16 hours a day, and subsection (3) provides that the specified periods may not "fall outside the period of twelve months" beginning with the day on which the order is made.

458 So subsection (2) requires particular curfew periods to be specified but subsection (3) does not require an overall period to be specified in the order, though in practice that is how a curfew requirement is likely to be expressed.

459 It is considered that the better reading of paragraph 10(d) of Schedule 9 to the Criminal Justice Act 2003 is that the home court may not specify any periods that the court in England and Wales cannot specify. That means that not only can the home court not specify periods that mean that, overall, the curfew requirement lasts more than 12 months, but also that it cannot specify individual periods of less than 2 hours or more than 16 hours. This is reflected in *paragraph 21(7) of Schedule 11*.

460 The corresponding position applies for youth rehabilitation orders (see paragraph 14 of Schedule 1, and paragraph 12(c) of Schedule 3, to the Criminal Justice and Immigration Act 2008 and *paragraph 16(6) of Schedule 8*).

Schedule 12: detention and training orders: breach of supervision requirements and further offences

461 *Paragraph 2(3) of Schedule 12* restates section 104(2) of the Powers of Criminal Courts (Sentencing) Act 2000, which originally provided—

> "(2) For the purposes of this section a petty sessions area is a relevant petty sessions area in relation to a detention and training order if—
>
> (a) the order was made by a youth court acting for it; or
>
> (b) the offender resides in it for the time being."

462 That subsection was replaced by paragraph 2(3) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004, which came into force on 31 March 2005.

463 The Courts Act 2003 (Consequential Provisions) Order 2005 (S.I. 2005/885) amended both—

a. section 104 of the Powers of Criminal Courts (Sentencing) Act 2000 containing the original version of subsection (2) (paragraph 77(b) of the Schedule to that order), and

b. paragraph 2(3) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004, containing the replacement version (paragraph 113(a) of that Schedule),

in each case to substitute references to local justice areas for references to petty sessions areas. That order came into force on 1 April 2005.

464 It is clear from the fact that the order amended both versions that when paragraph 2(3) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004 came into force on 31 March 2005, the version of section 104(2) that it substituted was the version as prospectively amended by paragraph 113(a) of the Schedule to the Courts Act 2003 (Consequential Provisions) Order 2005 (and that it replaced the existing version of section 104(2) as it had been prospectively amended by paragraph 77(b) of that Schedule (so that paragraph 77(b) should not be read as operating on the replacement version)).

465 The same point applies on *paragraph 8(3) of Schedule 16,* which restates paragraph 6(3)(b) of Schedule 12 to the Criminal Justice Act 2003, which was amended by paragraph 8(3) of Schedule 5 to the Domestic Violence, Crime and Victims Act 2004; again, both were amended by the Schedule to the Courts Act 2003 (Consequential Provisions) Order 2005.

Schedules 14 and 15: listed offence

466 Schedule 15B to the Criminal Justice Act 2003 contains a list of offences for the purposes of—

a. extended sentences under section 226A of that Act;

b. life sentences for a second listed offence under section 224A of that Act.

467 The Schedule applies differently for those purposes and has therefore been restated as two separate Schedules, *Schedule 14,* for the purposes of extended sentences, and *Schedule 15* for the purposes of life sentences.

468 Schedule 15B applies for the purposes of what is referred to as "the earlier offence condition" in the Bill. That is one of the alternative conditions for an extended sentence under section 226A, and is that "at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B". What matters for this purpose is whether the offence is listed in Schedule 15B at the time that the offender is sentenced, regardless of when the offence was committed.

469 So *Schedule 14,* which applies for the purposes of *clauses 266 and 279* lists all the offences listed in Schedule 15B. It is grouped into offences under the law of England and Wales, service law and the law of Scotland or Northern Ireland (or, until 31 December 2020, another member State) only for convenience. *Part 1 of Schedule 14* includes both Parts 1 and 2 of Schedule 15B to the Criminal Justice Act 2003; there is no reason to keep them separate.

470 Schedule 15B applies differently, and in two separate ways, for the purposes of section 224A of the Criminal Justice Act 2003.

471 First, that section applies where a person is convicted of an offence (the "index offence") listed in Part 1 of that Schedule. Because of section 224A(1)(b) (which requires the offence to have been committed after section 224A came into force, which occurred at the same time as Schedule 15B came into force) and section 3(9) of the Criminal Justice and Courts Act 2015 (which provided that offences added to the Schedule had effect only if the person committed the offence after the amendments came into force), the effect is that section 224A only applies if a person is convicted of an offence which was listed in Part 1 of Schedule 15B at the time that it was committed.

472 Therefore, *Part 1 of Schedule 15* sets out, for each offence listed, the date on which it was first listed and *clauses 273(1)(b) and 283(1)(b)* require the offence for which the offender is being sentenced to have been committed on or after that date.

473 Second, section 224A requires a sentence of life imprisonment if either of two conditions is met, one of which is that, at the time the offence (the "index offence") was committed the offender had been convicted of an offence listed in Schedule 15B.

474 For that purpose, the effect of the commencement provisions described above is that Schedule 15B must be read as it stood when the index offence was committed. For *Part 1 of Schedule 15,* see *clauses 273(5) and 283(5),* which also affects offences listed in *Parts 3 and 4* by reference to offences listed in *Part 1.*

475 Offences committed in other member States were added to Part 4 of Schedule 15B to the Criminal Justice Act 2003 by section 3 of the Criminal Justice and Courts Act 2015, which came into force on 13 April 2015, but, for the purposes of section 224A, only where the index offence was committed on or after that date. This is given effect by modifications in *paragraph 23 of Schedule 15.*

Schedule 17: transfer of suspended sentence orders to Scotland or Northern Ireland

Notices

476 Paragraph 22 of Schedule 12 to the Criminal Justice Act 2003 requires copies of orders to be provided or notified to the offender, responsible officer and others where a suspended sentence order is amended.

477 *Paragraph 13 of Schedule 17* rewrites that paragraph 22 as it is applied when existing suspended sentence orders are amended under paragraph 1(3) or 6(3) of Schedule 13 to that Act so as to transfer them to Scotland or Northern Ireland.

478 There is an argument that paragraph 22 is disapplied in those circumstances by paragraph 12(7) of Schedule 13 to that Act.

479 Paragraph 12(7) of Schedule 13 to the Criminal Justice Act 2003, read with paragraphs 10 and 12(1), provides that paragraph 22 of Schedule 12 to that Act does not apply "at any time while a suspended sentence order made or amended in accordance with paragraph 1 or 6 is in force in respect of an offender". That state of affairs begins when the order is amended under paragraph 1(3) or 6(3). So, the argument runs, paragraph 12(7) disapplies paragraph 22 of Schedule 12 as soon as the suspended sentence order is amended to transfer it to Scotland or Northern Ireland (in other words, precisely when it should apply).

480 It seems clear that that argument is not correct. There is a clear contrast between the language of paragraph 10 of Schedule 13 (which provides that Part 3 of that Schedule (including paragraph 12) has effect "at any time while a suspended sentence made or amended in accordance with paragraph 1 or 6 is in force") and that of paragraphs 4(1) and 9(1) of that Schedule (which modify Chapter 4 of Part 12 to the Criminal Justice Act 2003 "[in] relation to the making or amendment of a suspended sentence order in accordance with paragraph [1 or 6]").

481 That contrast indicates that paragraphs 4 and 9 are concerned with the process of

amending a suspended sentence order so as to transfer it to Scotland or Northern Ireland (which must include providing copies of the order etc), whereas Part 3 of Schedule 13 to the Criminal Justice Act 2003 is clearly looking forward to what happens under a transferred suspended sentence order, not backwards to the mechanics of transferring it. Although headings are of limited interpretative value, the heading of Part 3 of Schedule 13 ("General provisions: breach or amendment") reinforces that view.

482 Paragraph 12(7) of Schedule 13 to the Criminal Justice Act 2003 is therefore considered not to displace paragraph 22 of Schedule 12 to that Act where a suspended sentence order is amended in accordance with paragraph 1 or 6 of Schedule 13 to transfer it to Scotland or Northern Ireland, and paragraph 22 of Schedule 12, as it applies for the purposes of Schedule 13 to that Act, is rewritten in *paragraph 13 of Schedule 17.*

Schedules 18 and 19: Schedule 15 to the Criminal Justice Act 2003

General approach

483 Schedule 15 to the Criminal Justice Act 2003 contains a list of offences and applies for the purposes of—

a. two sets of provisions that are rewritten in the Code, namely—
   i. required life sentences under sections 225 and 226 of that Act, and
   ii. extended sentences under sections 226A and 226B of that Act, and
b. other provisions that will not be restated in the Code, which include—
   i. Schedule 4 to the Licensing Act 2003 and Schedule 7 to the Gambling Act 2005 (relevant offences for the purposes of licences under those Acts);
   ii. section 49 of the Children and Young Persons Act 1933 (restrictions on reports of proceedings in which children or young persons are concerned);
   iii. section 113A of the Police Act 1997 (criminal record certificates)
   iv. banning orders under the Housing and Planning Act 2016.

484 *Schedules 18 and 19* rewrite Schedule 15 separately for the purposes of extended sentences and required life sentences, respectively; *Schedule 18* will be applied for the purposes of some of those other provisions but, where appropriate, Schedule 15 will remain unaltered in the Criminal Justice Act 2003 for those other purposes.

Extended sentences

485 *Schedule 18* rewrites Schedule 15 to the Criminal Justice Act 2003 for the purposes of extended sentences, which apply where an offender has committed a "specified offence", defined in section 224 of that Act by reference to Schedule 15. In the same way, extended sentences under *clauses 255, 267 and 280* are available where an offender has committed a specified offence, which as a result of *clause 306* is an offence specified in *Part 1, 2, or 3 of Schedule 18* to the Code.

486 For the purposes of whether an extended sentence is available for an offence, what matters is whether the offence is listed in Schedule 15 when the offender is convicted, regardless of when the offence was committed.

487 In the case of offences that could have been committed before they were added to Schedule 15, this result is achieved—

a. for any offence in Schedule 15 when it was originally enacted, by the expression "(whether the offence was committed before or after this section comes into force)" in section 226A(1)(a) and 226B(1)(a) of the Criminal Justice Act 2003;

b. for any offence added by section 2 of the Criminal Justice and Courts Act 2015, by subsection (8) of that section;

c. for any offence added by section 9 of the Counter-Terrorism and Border Security Act 2019, by section 25(3) of that Act.

488 Other offences added to Schedule 15 were added at the same time as the offence was created, so the offence could not have been committed before being added to Schedule 15. They are—

a. the offence under section 4A of the Protection from Harassment Act 1997 added by paragraph 147 of Schedule 9 to the Protection of Freedoms Act 2012;

b. the offence under section 3ZC of the Road Traffic Act 1988 added by Schedule 6 to the Criminal Justice and Courts Act 2015;

c. the offence under section 5 of the DVCVA 2004 and as subsequently amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012;

d. the offences under sections 1 and 2 of the Modern Slavery Act 2015;

e. the offence under section 59A of the Sexual Offences Act 2003 (now repealed) which was created by section 109 of the Protection of Freedoms Act 2012, which came into force at the same time as paragraph 139 of Schedule 9 to that Act which added it to the Schedule;

f. the offence under section 15A of the Sexual Offences Act 2003, which was created by the Serious Crime Act 2015 and added to Schedule 15 at the same time.

489 Which Part of Schedule 15 the offence is listed in is material for the purposes of extended sentences because it affects the length of any extension period.

490 *Schedule 18* therefore rewrites Schedule 15 as it has effect for anyone convicted now, divided into the same Parts 1 to 3 as at present.

Required life sentences

491 *Schedule 19* rewrites Schedule 15 to the Criminal Justice Act 2003 for the purposes of required life sentences under sections 225 and 226 of that Act.

492 Those sentences apply only to serious offences if they carry a maximum sentence of life imprisonment (see section 225(2)(a) and section 226(1)(b)). Section 224(2) provides that a "serious offence" is an offence listed in Schedule 15 that carries a maximum penalty of 10 years' or more imprisonment (or life imprisonment).

493 In combination, this means that sections 225 and 226 of the Criminal Justice Act 2003 only to an offence that is listed in Schedule 15 and carries a maximum sentence of life imprisonment. It is immaterial in which Part of Schedule 15 the offence is listed.

494 *Clause 285(1)(b)* provides that the requirement to impose a life sentence under that section applies only to offences committed on or after 4 April 2005 (when Schedule 15 came

into force).

495 There is no need for such a provision in the corresponding clauses for children and young adults (*clauses 258 and 265*) because no-one to whom those clauses could apply could have committed an offence before 4 April 2005.

496 For offences added to Schedule 15, or for which the maximum sentence was increased to life imprisonment, after it came into force (i.e. after 4 April 2005), transitional provisions ensured that sections 225 and 226 did not apply to those offences if committed before the offence was added to Schedule 15 or before the maximum sentence was increased to life imprisonment. Those provisions are—

i. subsection (10) of section 2 of the Criminal Justice and Courts Act 2015, in relation to offences added to Schedule 15 by that section;

ii. paragraph 37 of Schedule 22 to the Coroners and Justice Act 2009 in relation to offences added to Schedule 15 by section 138 of that Act;

iii. subsection (4) of section 1 of the Criminal Justice and Courts Act 2015, in relation to offences listed in Schedule 15 whose maximum sentences were increased by that section.

497 There was no need for express provision in order to achieve that result in relation to the offences that were created at the same time as they were first listed in Schedule 15 (see the list above).

498 Section 9 of the Counter-Terrorism and Border Security Act 2019 removed certain terrorism-related offences from Part 1 of Schedule 15 and replaced them, along with some other offences, in a new Part 3 of that Schedule.

499 The only offences now listed in Part 3 that carry a maximum penalty of life imprisonment are those under—

a. sections 54, 56 and 59 of the Terrorism Act 2000,

b. sections 47 and 50 of the Anti-terrorism, Crime and Security Act 2001, and

c. sections 5, 6, 9, 10 and 11 of the Terrorism Act 2006.

500 All of those offences were added to Schedule 15 by section 138 of the Coroners and Justice Act 2009, but only in the case of offences committed on or after 12 January 2010 (by virtue of section paragraph 37(1) of Schedule 22 to that Act). The maximum sentences for offences under section 54 of the Terrorism Act 2000 or section 6 of the Terrorism Act 2006 was increased to life imprisonment by section 1 of the Criminal Justice and Courts Act 2015 but only for offences committed on or after 13 April 2015 (by virtue of section 1(4) of that Act).

501 Schedule 4 to the Counter-Terrorism and Border Security Act 2019 moved those offences from Part 1 to Part 3 of Schedule 15 (by repealing section 138 of the Coroners and Justice Act 2009 and all the paragraphs of Schedule 15 to the Criminal Justice Act 2003 inserted by it, and adding the new Part 3 to Schedule 15 to the Criminal Justice Act 2003, for offences committed on or after 12 April 2019), but those changes by the Counter-Terrorism and Border Security Act 2019 did not affect whether any given offence is relevant for the purposes of sections 225 and 226.

502 *Schedule 19* lists the offences that are listed in Schedule 15 to the Criminal Justice Act 2003 for the purposes of sections 225 and 226 of that Act and carry a sentence of life imprisonment; it does not need to be divided into separate Parts.

503 Take, for example, section 54 of the Terrorism Act 2000: offences under that section—

a. were listed in Part 1 of Schedule 15 for offences committed on or after 12 January 2010 but before 12 April 2019,

b. were listed in Part 3 for offences committed on or after 12 April 2019, and

c. carried a maximum sentence of life imprisonment from 13 April 2015.

504 It is only offences under section 54 of the Terrorism Act 2000 that are committed after the maximum sentence was increased that satisfy the conditions in section 225(1)(a) and section 226(1)(b) of the Criminal Justice Act 2003; all that is relevant for that purposes is whether the offence in question was committed on or after 13 April 2015; it does not matter for those purposes whether it was listed in Part 1 or Part 3 of Schedule 15. That is reflected in *paragraph 18(a) of Schedule 19.*

505 The Bill could instead have restated the position as at present, specifying in Schedule 15 all offences under section 54, and providing that *clauses 285, 265 or 258* apply only to those offences that carry maximum sentences of life imprisonment, but it is considered to be more helpful to set out which the offences are that satisfy those conditions.

506 Section 1 of the Sentencing (Pre-consolidation Amendments) Act 2020 is not in point. It will not apply to section 1(2) of the Criminal Justice and Courts Act 2015, which increased the maximum penalty for the offence under section 54 of the Terrorism Act 2000, because that provision did not amend the relevant sentencing legislation (sections 225 and 226 of the Criminal Justice Act 2003), and the Bill does not deal with penalties for particular offences.

Incitement to commit murder

507 Paragraph 65 of Schedule 15 to the Criminal Justice Act 2003 originally provided—

"65 An attempt to commit murder or a conspiracy to commit murder."

508 It was replaced by section 2(4) of the Criminal Justice and Courts Act 2015 to provide—

"65(1)An attempt to commit murder.

(2) Conspiracy to commit murder.

(3) Incitement to commit murder.

(4) An offence under Part 2 of the Serious Crime Act 2007 in relation to which murder is the offence (or one of the offences) which the person intended or believed would be committed."

509 In effect, this added incitement to commit murder and offences under Part 2 of the Serious Crime Act 2007 in relation to murder.

510 For the purposes of sections 225 and 226 of the Criminal Justice Act 2003, the replacement of paragraph 65 operates only in relation to offences committed on or after 13 April 2015. For other purposes it operates whenever the offence in question was committed (by virtue of section 2(8) and (10) of the Criminal Justice and Courts Act 2015).

511 The offences currently listed in paragraph 65 will be inchoate offences in relation to murder, within the meaning of that expression for the purposes of the Bill (see *clause 398).*

512 Accordingly *paragraph 28 of Schedule 18,* which refers to an inchoate offence in relation to murder, rewrites paragraph 65 Schedule 15 as it applies for the purposes of sections 226A and

226B of the Criminal Justice Act 2003 (extended sentences).

513 For the purposes of sections 225 and 226 of the Criminal Justice Act 2003 (required life sentences)—

a. attempt and conspiracy to commit murder were listed in Schedule 15 both before and after the change made by the Criminal Justice and Courts Act 2015;

b. an offence under Part 2 of the Serious Crime Act 2007 in relation to murder is only covered if committed on or after 13 April 2015;

c. incitement to commit murder is also only covered if committed on or after 13 April 2015, but by then could no longer be committed as it had been abolished as an offence by section 59 of the Serious Crime Act 2007.

514 Therefore *paragraph 24 of Schedule 19,* which rewrites Schedule 15 of the Criminal Justice Act 2003 for the purposes of sections 225 and 226 of that Act, specifies attempt and conspiracy to commit murder without any restriction on when they were committed, and an offence under Part 2 of the Serious Crime Act 2007 in relation to murder that was committed on or after 13 April 2015, but does not list incitement to commit murder.

Schedule 22: amendments of the Code

Youth rehabilitation orders and pre-sentence drug testing

515 Paragraph 5(2) of Schedule 1 to the Criminal Justice and Immigration Act 2008 provides that the threshold tests for imposing a community sentence or particular kinds of youth rehabilitation order prevents a court from imposing one of those orders if the offender fails to comply with an order under section 161(2) of the Criminal Justice Act 2003 (pre-sentencing drug testing).

516 Although that paragraph is in force, it will not have any effect until section 161 of the Criminal Justice Act 2003 comes into force. Both provisions are rewritten as amendments of the Code, at *paragraphs 1 and 11 of Schedule 22; clause 417(7)* provides for *paragraph 11* (the rewrite of paragraph 5(2) of Schedule 1 to the Criminal Justice and Immigration Act 2008) to come into force at the same time as *paragraph 1,* which will be brought into force by regulations.

Youth rehabilitation orders and persistent offenders previously fined

517 Section 151 of the Criminal Justice Act 2003, as enacted, allowed a community order to be made in the case of a persistent offender where the normal threshold for such an order was not met. Section 151 has never been brought into force.

518 Community orders, as enacted, were to have been available for offenders aged 16 and over, but the provisions were never brought into force for 16 and 17 year olds; the Criminal Justice and Immigration Act 2008 replaced community sentences for all under 18s with youth rehabilitation orders and amended provisions about community orders so as to limit them to adults.

519 Section 151 of the Criminal Justice Act 2003 was amended by the Criminal Justice and Immigration Act 2008, as follows—

a. by section 11, which will insert subsections (A1) and (1A) and amend subsection (1), so that a community order can be imposed for a persistent offender even if the offence is not punishable with imprisonment;

b. by paragraph 76 of Schedule 4, in connection with the introduction of youth rehabilitation orders, where—

   i. sub-paragraph (3) replaces the age limit of 16 in subsections (1)(a) and (1A)(a) (the community order provisions) with 18, and

   ii. sub-paragraph (4) inserts subsections (2A) and (2B), which allow a court to impose a youth rehabilitation order on a persistent offender even if the normal threshold is not met.

520 Paragraph 76 of Schedule 4 to the Criminal Justice and Immigration Act 2008 has been brought into force, but section 11 has not. Two points arise from this.

521 First, it is unclear what effect bringing paragraph 76(3) has had on the age limit in subsection (1)(a); that paragraph will be replaced by section 11. Both paragraph (a) of section 151(1) as originally enacted and the paragraph (a) to be substituted by section 11 have a 16 year age limit.

522 On a literal reading, section 151(1)(a) of the Criminal Justice Act 2003 at present (i.e. as amended by paragraph 76 of Schedule 4 to the Criminal Justice and Immigration Act 2008) says "a person aged 18 or over is convicted of an offence....." and, when section 11 of the Criminal Justice and Immigration Act 2008 comes into force, will be replaced by a paragraph (a) that says "the offender was aged 16 or over when convicted".

523 However, it is clearly not the intention of either section 11 or paragraph 76 to re-instate the age 16 limit in subsection (1) of section 151 of the Criminal Justice Act 2003, not least because that would appear to allow a community order to be made for a persistent offender for whom the appropriate order is not a community order but a youth rehabilitation order. Rather, it is clear that the intention was that whichever form paragraph (a) of that subsection (1) takes when section 151 is brought into force, it should apply subsection (1) only to offenders aged 18 and over.

524 That is considered to be the better interpretation of the effect on section 151(1) of bringing paragraph 76 of Schedule 4 to the Criminal Justice and Immigration Act 2008 into force.

525 That interpretation is reinforced by the fact that paragraph 76 of Schedule 4 inserts subsections (2A) and (2B) into section 151 which make provision for 16 and 17 year olds that corresponds to subsection (1), so clearly that subsection only needs to make provision for 18 year olds and over. It is also clear from the fact that paragraph 76(3) amends subsection (1A) of section 151, which was itself inserted by section 11 of the Criminal Justice and Immigration Act 2008, that paragraph 76(3) was intended to operate on section 151 of the Criminal Justice Act 2003 as amended by section 11 of the Criminal Justice and Immigration Act 2008.

526 Section 151(1) is restated as an amendment of the Code at *paragraph 14 of Schedule 22. Subsections (3) and (4)* of the inserted *section 204A* restate subsections (1) and (2) of section 151. *Paragraph (a) of subsection (3)* provides for the power to impose a community order to apply where a community order is available. As a community order is available only where the offender is aged 18 or over when convicted (see *clause 202*), there is no need to repeat the 18 year age limit in inserted *section 202A(3).*

527 Paragraph 76(4) of Schedule 4 to the Criminal Justice and Immigration Act 2008, which inserts subsections (2A) and (2B) (which relate to youth rehabilitation orders for persistent offenders) into section 151 of the Criminal Justice Act 2003, is in force. It is a question of interpretation whether—

a. those two subsections are in force already, or

b. paragraph 76(4) has amended section 151 of the Criminal Justice Act 2003 which is still not in force, so that it will include those subsections when it comes into force.

528 The latter is clearly the better interpretation. Subsections (2A) and (2B) are not completely free-standing but depend on subsection (3), which is not in force: under subsection (2B) a youth rehabilitation order can be made if the court considers that "having regard to all the circumstances including the matters mentioned in subsection (3), it would be in the interests of justice to make such an order". Subsection (3) is not in force. That interpretation is consistent with the fact that section 151 is not in force for adults.

529 *Paragraph 12 of Schedule 22* restates section 151 of the Criminal Justice Act 2003 as it applies for youth rehabilitation orders (including subsections (2A) and (2B)) as an amendment to the Code, to be brought into force by regulations under *clause 417(1),* which in substance is the same way as section 151 of the Criminal Justice Act 2003 can be brought into force at the moment.

530 Paragraphs 76(5) and (6) of Schedule 4 to the Criminal Justice and Immigration Act 2008 make consequential amendments of section 151 of the Criminal Justice Act 2003 which are incorporated in *paragraphs 12 and 14 of Schedule 22*. Paragraph 76(7) of Schedule 4 to the Criminal Justice and Immigration Act 2008 has amended section 166 of the Criminal Justice Act 2003 to add a reference to section 151(2B) of that Act. Although the amendment is in force, because it refers to a provision that is not considered to be in force, in the Bill that amendment is reproduced in *paragraph 20 of Schedule 22* as an amendment of *clause 77(5)(c)* of the Code.

Schedule 23: paragraphs 5 and 6 and Schedule 28

Powers to amend the standard scale

531 Clause 122 rewrites the standard scale of fines for England and Wales. *Schedule 28* repeals section 37 of the Criminal Justice Act 1982 but for England and Wales only, and *clause 413(5)* makes it clear that the repeals do not affect the standard scale, or powers in the Magistrates' Courts Act 1980 to amend it, as it extends or could be extended outside England and Wales.

532 There are powers to amend the standard scale in section 143(2)(o) of the Magistrates' Courts Act 1980 and section 87(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The power in the Magistrates' Courts Act 1980 is available where there has been a change in the value of money since the levels were last set (which is explained in section 143(3)(b) of the Magistrates' Courts Act 1980 to mean set by primary legislation or under section 143(2) of the Magistrates' Courts Act 1980 or section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012), and is subject to negative Parliamentary procedure. The power in section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is not so limited (but does not allow the relative difference between levels 1 to 4 to change), and is subject to affirmative Parliamentary procedure.

533 The Bill rewrites the power in section 143(2)(o) in *paragraph 5 of Schedule 23,* and the

power in section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in *paragraph 6 of that Schedule.* The reference to section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in section 143(3)(b) of the Magistrates' Courts Act 1980 only qualifies the power in section 143(2)(o) because there is no other power in section 143(2) to amend a figure that can be amended by section 87 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Accordingly the reference to section 87 in section 143(3)(b) of the Magistrates' Courts Act 1980, which is restated for this purpose at *paragraph 5 of Schedule 23*, is repealed.

534 Section 37(3) of the Criminal Justice Act 1982 provides for references to the standard scale to be construed as references to the standard scale provided in that section as it has effect "from time to time by virtue either of this section or of an order under section 143 of the [Magistrates Courts Act 1980] or section 87 of the [Legal Aid, Sentencing and Punishment of Offenders Act 2012]". The table in *clause 122(1)* sets out the standard scale at all the times that it has or has had effect, and the powers in *paragraphs 5 and 6 of Schedule 23,* read with *clause 419,* confers power to add columns to that table (and adjust the heading of the second column to add a final date**)**. *Clause 122(2)* restates the effect of the quoted words from section 37(3) of the Criminal Justice Act 1982 by referring to the column of the table in *subsection (1)* that applies to offences committed on the date on which the offence was committed.

Schedule 25: amendments to the Armed Forces Act 2006

535 Section 271(2) of the Armed Forces Act 2006 provides as follows—

"The Secretary of State may by regulations modify—

(a) any provision of Chapter 1 of Part 12 of the 2003 Act [i.e. the Criminal Justice Act 2003] (sentencing principles for civilian courts),

(b) any other enactment that confers functions on sentencing courts,

in its application to a civilian court dealing with an offender for a service offence."

536 The new provisions in the Code corresponding to Chapter 1 of Part 12 of the 2003 Act are scattered throughout the Code. If paragraph (a) of section 271(2) were amended to reproduce the exact provisions that derive from Chapter 1 of Part 12, it would look extremely complicated and rather incoherent.

537 Section 271(2) is therefore amended so as to remove paragraph (a) altogether, and the word "other" in paragraph (b), so that the regulations may modify "any enactment that confers functions on sentencing courts..."

538 This does not affect the scope of the power, given that Chapter 1 of Part 12 of the Criminal Justice Act 2003 is itself an enactment that confers functions on sentencing courts (as is clear from the word "other" currently in paragraph (b)), and results in a far more intelligible provision than would be the case if the alternative approach, of listing in paragraph (a) all the provisions deriving from Chapter 1 of Part 12 of the 2003 Act, were taken.

Schedule 27: transitional provisions and savings: continuity of the law

539 The material in *Part 1 of Schedule* 24 is some respects similar to what generally appears in a Schedule of transitional provisions for a consolidation Act—for example, paragraph 1 of Schedule 11 to the Powers of Criminal Courts (Sentencing) Act 2000. But the Bill takes a

different approach to commencement from the approach taken by that Act, in that it does not repeal the existing law for cases where the offender was convicted before the commencement date. Accordingly, some of the "standard" provisions are not needed and some of them have needed to be adapted.

540 *Paragraph 2* provides for the validity and effect of instruments etc made under provisions re-written in the Code to survive the repeal of those provisions.

541 *Paragraph 3* provides for references to provisions of the Code to be read, in relation to pre-commencement cases, as including references to the corresponding provisions replaced by the Code. In particular, *paragraph 3* deals with consequential amendments of other legislation made by *Schedule* 24. Although approach to commencement that applies to the Code itself is apt for many of these (see *Part 7* of that Schedule for a list of the relevant paragraphs), with a number of them it is not, and accordingly these amendments simply come into force on the commencement date. Some of them operate by inserting references to the relevant provisions of the Code alongside the references to the existing law. Others, however, simply substitute references to the provisions of the Code (for example because a reference to the existing law would soon become spent). In these cases a transitional provision is needed to enable the reference to the Code provision to be read including a reference to the existing law, and that is the purpose of *sub-paragraphs (1)(b) and (2) of paragraph 3*.

542 Conversely, there will be cases where an instrument contains a reference to a provision of the existing law and the Bill has not updated it (for example, because the instrument is a document, which cannot be amended by the Bill). In such cases a transitional provision is needed to enable the reference to read as including a reference to the corresponding provision of the Code, and that is the purpose of *paragraph 4*.

Schedule 28: repeals and revocations

Section 60 of the Criminal Justice and Court Services Act 2000

543 Section 60(1) of the Criminal Justice and Court Services 2000 inserted section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (life sentences: determination of tariffs). Subsection (4) of section 60 of the Criminal Justice and Court Services 2000 provided that—

> "(4) In relation to any time before the coming into force of section 87 of the Powers of Criminal Courts (Sentencing) Act 2000, section 82A of that Act shall have effect as if, in paragraph (b) of subsection (3), for "of any direction which it would have given under section 87 below (crediting periods of remand in custody)" there were substituted "which section 67 of the Criminal Justice Act 1967 would have had".

544 Section 87 of the Powers of Criminal Courts (Sentencing) Act 2000 was never brought into force. It was repealed by the Criminal Justice Act 2003 which also repealed the reference to it in section 82A(3)(b). However the Criminal Justice Act 2003 did not repeal section 60(4) of the Criminal Justice and Court Services 2000, but once section 87 of the Powers of Criminal Courts (Sentencing) Act 2000 had been repealed there was no longer a reference to section 87 in section 82A(3)(b) that could be modified by section 60(4), which therefore became spent.

Paragraphs 1, 3 and 9 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000

545 Paragraphs 1 and 3 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 modified sections 8(4) and (10) and 13(5) of that Act to unwind the effect of certain provisions of Schedule 13 to the Access to Justice Act 1999 which had not come into force when the Powers of Criminal Courts (Sentencing) Act 2000 came into force, until a day appointed under Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000.

546 Paragraph 9 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 modified sections 122(6) and 124(4) in a similar way to paragraphs 1 and 3.

547 The provisions of the Powers of Criminal Courts (Sentencing) Act 2000 that were affected by those transitory modifications have all now been replaced or repealed, so paragraphs 1, 3 and 9 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 are now spent.

Paragraphs 8 and 11 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000

548 Paragraph 8 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 modified section 83 of that Act to unwind the effect of paragraphs 2 and 25 of Schedule 4 to the Access to Justice Act 1999 and the repeals by Schedule 15 to that Act in section 21 of the Powers of Criminal Courts Act 1973 and section 3 of the Criminal Justice Act 1982, which had not come into force when the Powers of Criminal Courts (Sentencing) Act 2000 came into force.

549 Paragraph 11 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 modified section 155 of that Act to unwind the effect of paragraph 24 of Schedule 4 to the Access to Justice Act 1999, which also had not come into force when the Powers of Criminal Courts (Sentencing) Act 2000 came into force.

550 The provisions of the Powers of Criminal Courts (Sentencing) Act 2000 modified by paragraphs 8 and 11 of Schedule 10, sections 83 and 155(8), have subsequently been amended by the Criminal Defence Service Act 2006 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in ways that are not consistent with the modifications made by paragraphs 8 and 11, so it is considered that those modifications were no longer in force by the time of those amendments (and would in any case have been impliedly repealed by those amendments). Paragraphs 8 and 11 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 are therefore considered to be spent and can be repealed.

Paragraphs 2, 7, 10 and 11 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000

551 These paragraphs modified section 8(6) to (8), section 73(4), section 150(1) and section 155(8) of the Powers of Criminal Courts (Sentencing) Act 2000 if certain provisions of Schedule 4 to the Youth Justice and Criminal Evidence Act 1999 had not come into force before the Powers of Criminal Courts (Sentencing) Act 2000. Those provisions were brought into force on 26 June 2000, before the Powers of Criminal Courts (Sentencing) Act 2000 came into force, and accordingly paragraphs 2, 7, 10 and 11 of Schedule 10 to the Powers of Criminal Courts (Sentencing) Act 2000 have never had any application.