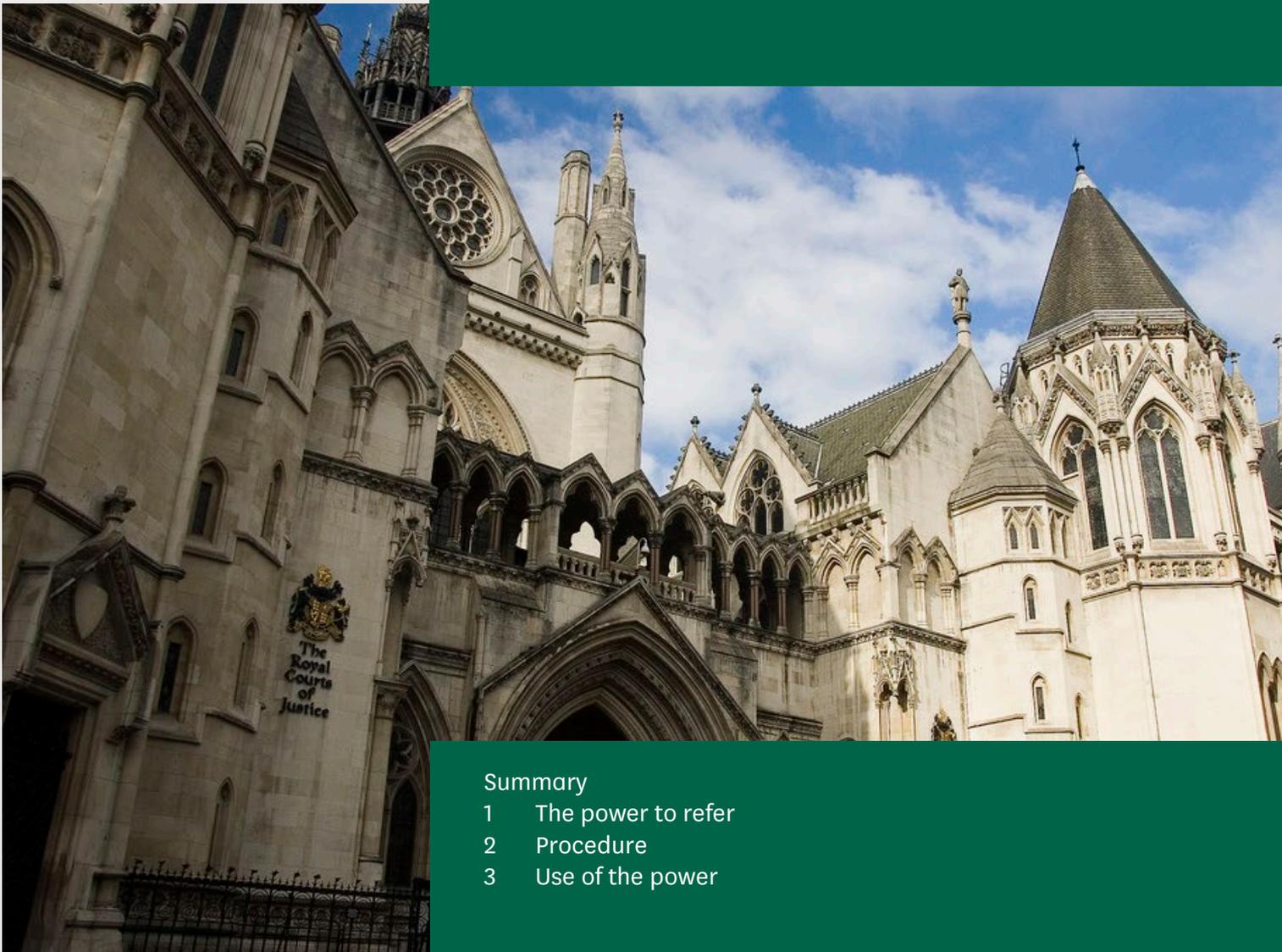


Research Briefing

8 November 2022

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Review of Unduly Lenient Sentences



Summary

- 1 The power to refer
- 2 Procedure
- 3 Use of the power

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Contents

1	The power to refer	5
1.1	Offences to which the power applies	6
	Expansion of the scheme	6
2	Procedure	8
2.1	The Attorney General	8
	Time limit	8
2.2	The Court of Appeal	8
3	Use of the power	10
3.1	Number of sentences being considered	10
3.2	Types of offences most often referred	11
3.3	Proportion of offenders whose sentences are increased	11

Summary

The Attorney General has the power to refer to the Court of Appeal sentences for certain offences which they believe to be unduly lenient. This is sometimes called the unduly lenient sentence scheme.

The Attorney General's power to refer only applies to serious offences, being those that can only be dealt with by the Crown Court and some other offences specified in an order. In recent years the scheme has been extended to more offences.

Anyone can ask the Attorney General to consider whether a sentence should be referred to the Court of Appeal as being unduly lenient, including a victim, a relative of a victim or a member of the public.

The Attorney General will consider whether the sentence is unduly lenient. If the Attorney General considers that it might be, then they refer the sentence to the Court of Appeal for review.

There is a strict 28-day time limit within which the Attorney General is able to refer a sentence to the Court of Appeal.

If the Court of Appeal agrees that the sentence is unduly lenient then it may increase it. The Court of Appeal will only find a sentence to be unduly lenient where it falls outside the range of sentences which the judge, applying their mind to all the relevant factors, could reasonably consider appropriate.

The scheme was established in the Criminal Justice Act 1988 and came into force in 1989. The purpose of the scheme is to correct gross errors.

There have been calls for the scheme to be expanded further to include more offences. The Government has said it has no plans to do so.

This briefing applies to England and Wales.

1 The power to refer

In certain circumstances, where the Attorney General thinks a sentence imposed by a Crown Court appears to be unduly lenient, the Attorney General may refer the case to the Court of Appeal.¹ This is sometimes called the unduly lenient sentence scheme.

The scheme was established in the Criminal Justice Act 1988 and came into force in 1989.²

When first enacted, the scheme was justified on the basis of the correction of gross errors in sentencing and maintaining public confidence in the criminal justice system.³

The Government has recently described the scheme as “an important mechanism” to ensure that sentences for the most serious criminal offences are “commensurate with the seriousness of the offending and give the victims of crime confidence that justice will be served.”⁴

The Law Commission’s current review of the law on criminal appeals will include consideration of whether the Attorney General’s powers to refer to the Court of Appeal are adequate and appropriate.⁵ In a Criminal Law Review editorial David Ormerod and Hannah Quirk had suggested that the scheme be included in the review, noting that in recent years criticisms have been levelled “that the scheme has become too politicised, with too many cases referred, in some instances on most unusual grounds.”⁶

¹ [Sections 35 and 36 of the Criminal Justice Act 1988](#)

² Gov.uk, press release, [Over 30 years of the Unduly Lenient Sentence scheme](#), 1 February 2021

³ Lyndon Harris, Evaluating 30 Years of the Unduly Lenient Sentence Scheme: Attorney General’s References 1988-2017, [2019] Crim L R 5 370

⁴ [JIN 27579](#), 12 July 2022

⁵ Law Commission, [Criminal Appeals](#) and [Criminal appeals – Law Commission review, Terms of reference](#) (PDF)

⁶ David Ormerod and Hannah Quirk, Editorial, Reforming criminal appeals, [2022] Crim L R 10 791-795, p793

1.1

Offences to which the power applies

The Attorney General's power to refer cases to the Court of Appeal as appearing unduly lenient only applies in respect of sentences imposed by the Crown Court for certain serious offences as set out in legislation.

The power is only available for:

- offences that are triable on indictment (i.e. in the Crown Court) such as murder, rape and robbery; and
- some offences that are triable either way (i.e. in either the Crown Court or magistrates' court) that are specified in the [Criminal Justice Act 1988 \(Reviews of Sentencing\) Order 2006/1116](#), Schedule 1, made by the Secretary of State under section 35 of the Criminal Justice Act 1988.

Expansion of the scheme

The Secretary of State has a power to specify that an either way offence is one that the power to refer applies to, that is to add an offence to the scheme. This power has been exercised a number of times since 1994.⁷

The Conservative party manifesto for the 2015 general election contained a commitment to widen the scope of the power to refer so that sentences for more offences could be referred to the Court of Appeal.⁸

The scheme was extended in August 2017 to 19 terror related offences including supporting extremist organisations, encouraging acts of terror and failing to disclose information about a terrorist attack.⁹ Further terror related offences were added in January 2018.¹⁰

14 offences were added in November 2019.¹¹

- From the Sexual Offences Act 2003: the abuse of position of trust offences set out in sections 16 to 19, the offence of inciting a child family member to engage in sexual activity under section 26 and the offences against persons with a mental disorder impeding choice set out in sections 30 to 33

⁷ Lyndon Harris, Evaluating 30 Years of the Unduly Lenient Sentence Scheme: Attorney General's References 1988-2017, [2019] Crim L R 5 370

⁸ The Conservative Party Manifesto 2015

⁹ Gov.uk, [Terror offences extension to Unduly Lenient Sentence scheme comes into effect](#), 8 August 2017

¹⁰ Gov.uk, [Further 9 terror-related offences added to Unduly Lenient Sentence scheme](#), 29 December 2017

¹¹ Gov.uk, [Public given power to question 'lenient' prison sentences](#), 29 October 2019

- Offences concerning indecent photographs of a child under section 160 of the Criminal Justice Act 1988 and section 1 of the Protection of Children Act 1978
- Offences of putting people in fear of violence and stalking involving fear of violence or serious alarm or distress under sections 4 and 4A of the Protection from Harassment Act 1997
- The offence of controlling or coercive behaviour in an intimate or family relationship under section 76 of the Serious Crime Act 2015.

There have been calls for further expansion of the scheme to cover other offences, for example causing death by careless driving, assault occasioning actual bodily harm and wounding or causing grievous bodily harm (without intent).¹²

The then Attorney General, Suella Braverman, [said in March 2022](#) that the Government had no immediate plans to further extend the coverage of the scheme.¹³

¹² See for example: [HC Deb 24 March 2022 c429](#), [HC Deb 25 May 2021 c85WH](#) and [HC Deb 5 October 2020 c715](#)

¹³ [HC Deb 24 March 2022 c429](#)

2 Procedure

2.1 The Attorney General

Anyone can ask the Attorney General to consider referring a sentence to the Court of Appeal. This would include the victim, a relative of a victim or a member of the public.

The relevant contact information for making a referral to the Attorney General can be found on the Gov.uk page: [Ask for a Crown Court sentence to be reviewed](#).

The Attorney General will consider whether the sentence is “unduly lenient”. If they consider that it might be, then they will refer the sentence to the Court of Appeal for review.

Time limit

There is a strict 28-day time limit within which the Attorney General is able to refer a sentence to the Court of Appeal.¹⁴ The time limit is absolute. There is no power to extend the time limit or to apply for leave to refer out-of-time. The period is calculated from the day following the sentence, so it will end on the same day of the week, four weeks later.¹⁵

There have been some calls for a change to allow the Court of Appeal discretion to extend this time limit in exceptional circumstances. However, the Government has said it does not plan to remove the certainty of an absolute time limit because of the importance of finality in sentencing.¹⁶

2.2 The Court of Appeal

Once the Attorney General has referred a sentence to the Court of Appeal, the court will review it and, if it agrees that the sentence is unduly lenient, it may then increase it. The Court of Appeal may alternatively decide that the sentence should stay the same.

The Court of Appeal will act in relation to a sentence only where it is unduly lenient (not simply lenient). A sentence will be unduly lenient where it falls

¹⁴ Criminal Justice Act 1988, Schedule 3

¹⁵ Crown Prosecution Service, [Legal Guidance: Unduly Lenient Sentences](#), updated 9 March 2021

¹⁶ [HL Deb 15 December 2021 c342](#). See also [HC Deb 25 May 2021 c85WH](#)

outside the range of sentences which the judge, applying their mind to all the relevant factors, could reasonably consider appropriate.¹⁷

The Court of Appeal will decide whether the sentence was unduly lenient on the basis of the evidence that was before the sentencing judge. It will not change the sentence on the grounds of new material that was not before the sentencing judge. However, if the Court decides that the sentence was unduly lenient, it may look at fresh material when deciding on the new sentence.¹⁸

The former practice of the Court of Appeal where a sentence was increased, was to allow some discount from what it considered to have been the correct sentence on account of what it commonly referred to as the “double jeopardy” of an offender having to wait before knowing if their sentence was to be increased. However, as the practitioner textbook Archbold Criminal Pleading Evidence and Practice 2023 explains, the Court of Appeal has more recently said that the cases in which the principle of double jeopardy is likely to arise have become, and are likely to remain, rare.¹⁹

¹⁷ Attorney General's Reference No 4 of 1989 11 Cr. App. R. (S) 517 - Lord Lane CJ

¹⁸ Blackstone's Criminal Practice 2023, D28.4

¹⁹ Archbold Criminal Pleading Evidence and Practice 2023, 7-449

3 Use of the power

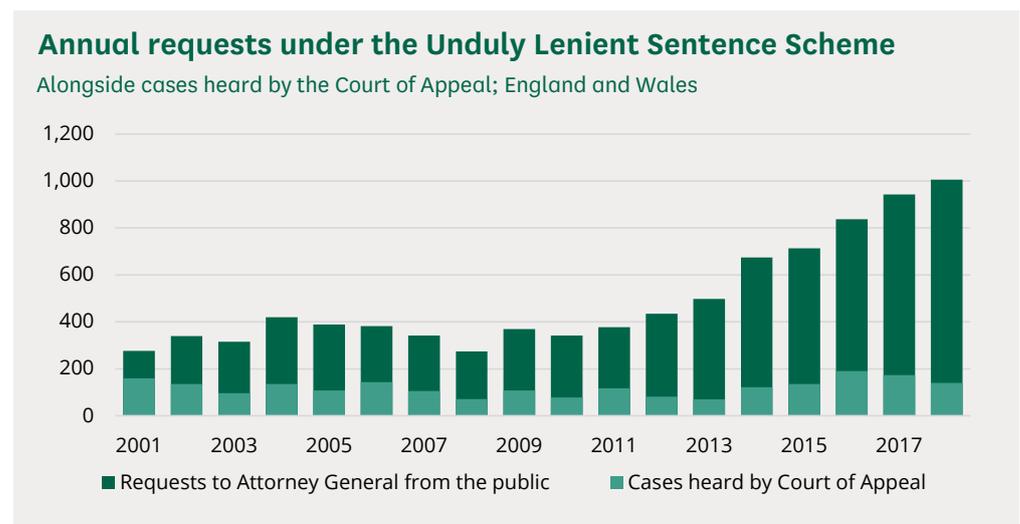
There is no comprehensive, published account of how often the power to refer under the unduly lenient sentence scheme (ULSS) has been used.

The Attorney General's Office publishes [a weekly-updated list of applications made to the ULSS](#), along with the outcome of the case, where known. At present it contains details of applications made in 2021 and 2022. When all applications from a given year have been decided, the annual statistics for that year are released. These are [published on Gov.uk](#) going back to 2011. Earlier published figures going back to 2001 are archived.

3.1 Number of sentences being considered

The available data indicates that overall, the number of requests to the Attorney General under the ULSS has risen since 2001. In 2021, 990 sentences were submitted for review, which was the second highest annual number since 1,006 in 2018.

As the chart below shows, only a small fraction of cases that are sent to the Attorney General are reviewed by the Court of Appeal. Comparable figures are not yet available for the years 2019-2021. In 2018, 140 sentences were considered by the Court of Appeal, which was fewer than the peak of 173 in 2016 but roughly the same as the numbers considered in 2001 and 2002.



Source: Attorney General's Office, [Unduly lenient sentence annual case outcomes data](#); Unduly Lenient Sentence data for 2009 [archived]; HC163289, 8 July 2013; HC UIN 44888, 5 September 2016

The weekly-updated information on requests to the Attorney General contains details of cases which are not referred to the Court of Appeal and the reason (for example, that the offence is not within the scope of the scheme or that the application was after the time-limit for an application). However, this data is not held publicly for earlier years than the current one.

3.2 Types of offences most often referred

The way in which the data on ULSS requests is currently published does not allow for a straightforward breakdown by offence type. Looking at the most recent year for which we have annual statistics (2020), the most common single offence type among ULSS cases which were heard by the Court of Appeal was ‘wounding with intent’.

However, when aggregating different specific offences, around one in six appeals heard was for murder or manslaughter, around one in eight appeals heard was for rape, and the same proportion was for child sexual abuse.²⁰

In 2019, the BBC analysed data on applications to the ULSS between 2015 and 2018 which it obtained via Freedom of Information (FOI) Act 2000 request. It found that among rejected appeals, the most common offence category was ‘violence and injury’, followed by sexual offences and fraud.²¹

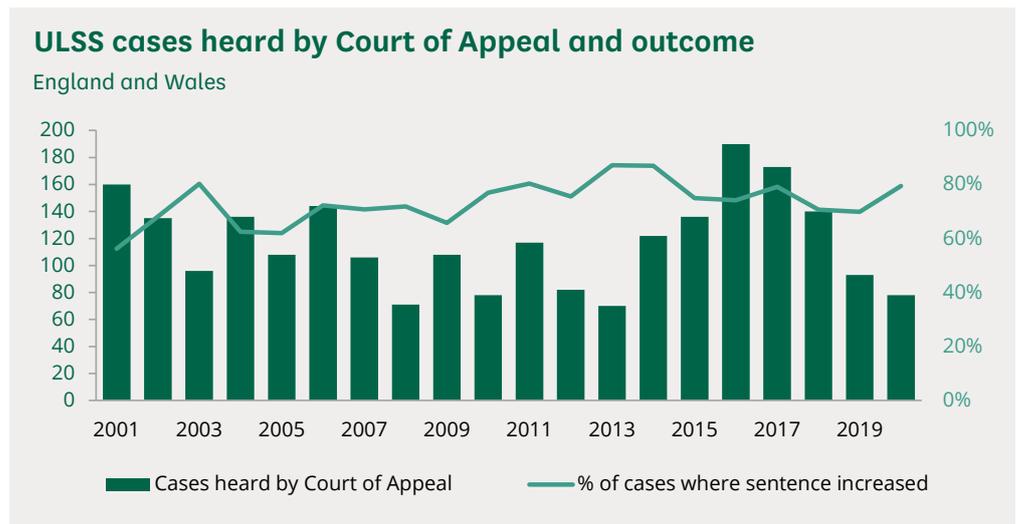
3.3 Proportion of offenders whose sentences are increased

The proportion of cases reviewed by the Court of Appeal resulting in an increased sentence can be estimated using the annual ULSS figures published by the Attorney General’s Office. Figures for earlier years can be found in the responses to Parliamentary questions and in the archived statistics.

The chart below shows the number of cases heard in each year between 2001 and 2020 along with the proportion which were successful, meaning that the sentence was increased by the Court of Appeal.

²⁰ Attorney General’s Office, [Unduly lenient sentence annual outcomes data](#), 2020

²¹ BBC, [Unduly lenient sentences review scheme ‘inadequate’](#), 9 July 2019



Source: [Statement UIN HCWS331](#), 20 October 2022

Although the number of cases heard by the Court of Appeal has fluctuated considerably in each year, the success rate has stayed broadly the same, at around 60-80% of appeals. The success rate was highest in 2013 and 2014, at 87%, and 2013 also saw the lowest number of cases heard, of any year in the series. Overall however there does not appear to be a relationship between the number of cases heard and the proportion resulting in an increased sentence.

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