

SENTENCING ACADEMY

Sentencing Academy Research Summary

Evaluating 30 years of the unduly lenient sentence scheme: Attorney General's References 1988-2017

Lyndon Harris

Part IV of the Criminal Justice Act 1988 provides the Court of Appeal (Criminal Division) (CACD) with a rare power to increase a sentence imposed on an offender upon conviction in the Crown Court upon the application of the Attorney General to refer a sentence as “unduly lenient”. February 2019 saw the 30th anniversary of the coming into force of that scheme. This article examines the scheme from its origins through to its operation in the present day, asking: What were the principles it was founded upon? Has it departed from those principles? How "successful" are the Law Officers in their decisions as to which cases to refer? How often do the CACD increase sentences and by how much?

When debated in parliament and first enacted, the scheme was justified on the basis of the correction of gross errors in sentencing and concerns about under-sentencing. Examples such as the Ealing vicarage rape in 1987 which saw three men convicted of burglary and rape receive lesser sentences than otherwise would be imposed because the victim's trauma had not been “so great”. This case resulted in renewed calls for a power for the prosecution to appeal against low sentences. The scheme as enacted saw a number of cases referred under the scheme in its early years; the Court of Appeal stated in a number of judgments that the threshold for ‘undue leniency’ was high.

Over the following decades the scheme was expanded beyond its original limits; initially, just indictable only offences were capable of being referred but since then, there have been a number of expansions to bring within the scheme either way offences (most of which are sexual or terrorist offences).

The Attorney General's Office maintains and publishes statistics on the unduly lenient sentence scheme. From this data, it was possible to calculate a variety of figures including the number of cases in which leave was given, the average increase to a sentence and the percentage of cases in which the nature of the sentence change (as opposed to its length). Below are a number of tables displaying the results of this study.

The key findings of this study are as follows:

- Table 1 reveals that the percentage of cases referred by the Law Officers receiving leave of the court (save for two years) is between 90 and 100%;
- Table 1 also reveals that the percentage of cases referred by the Law Officers considered to be unduly lenient by the court (save for one year) is between 75 and 92%;
- Table 2 reveals that the percentage of cases increased by the court falls around 75%;
- Table 2 also reveals that the average increase in the length of a custodial sentence) is around 80%;
- in 15 to 20% of cases given leave and considered to be unduly lenient, the court changes the nature of the sentence, suggesting something more fundamental has gone wrong in the sentencing exercise;

- although the scheme has expanded (both in scope and scale) it has remained true to its roots so far as the correction of gross error is concerned;
- the lower courts do make mistakes in terms of under-sentencing offenders, but this represents a very small proportion of appeals to the Court of Appeal; and
- the Law Officers maintain a very high ‘success rate’ viz referrals; granting of leave; and increases in sentence.

Table 1: Referrals, leave, sentence considered unduly lenient (2002-2017)¹

Year	Cases referred to CACD	Cases granted leave	Cases granted leave (%)	Sentence considered unduly lenient by the CACD (and as a % of referrals)
2002	135	133	99%	115 (85%)
2003	96	91	95%	88 (92%)
2004	136	132	97%	110 (81%)
2005	108	100	93%	82 (76%)
2006	144	137	95%	113 (79%)
2007	106	96	91%	86 (81%)
2008	71	69	97%	57 (80%)
2009	108	102	94%	77 (71%)
2010	78	74	95%	65 (83%)
2011	117	108	92%	97 (83%)
2012	82	73	89%	65 (79%)
2013	69	65	94%	61 (88%)
2014	122	117	96%	109 (89%)
2015	136	127	93%	102 (75%)
2016	190	174	92%	147 (77%)
2017	173	156	90%	142 (77%)

¹ The full article contains data going back to 1989.

Table 2: Referrals leading to increase (2002-2017)

Year	Cases referred to CACD	Cases in which the sentence was increased (and % of total cases referred)	Average increase (months)	Average increase %
2002	135	92 (68%)	14.6	88%
2003	96	77 (80%)	25.2	75%
2004	136	85 (62%)	26.9	68%
2005	108	67 (62%)	36.1	103%
2006	144	104 (72%)	28.6	76%
2007	106	75 (70%)	28.8	84%
2008	71	51 (72%)	43.5	100%
2009	108	71 (66%)	48	95%
2010	78	60 (77%)	31.8	90%
2011	117	95 (81%)	32.9	101%
2012	82	62 (76%)	43.4	85%
2013	69	60 (87%)	36.9	94%
2014	122	106 (87%)	42.6	83%
2015	136	102 (75%)	35.2	64%
2016	190	141 (74%)	32.5	79%
2017	173	137 (79%)	42	83%

Citation:

Harris, L., (2019) Evaluating 30 years of the unduly lenient sentence scheme: Attorney General's References 1988-2017. In: *Criminal Law Review* Issue 5, 370-393

Further reading:

Shute, S., (1994) Prosecution Appeals against Sentence: The First Five Years. In: *Modern Law Review*, Volume 57(5), 745-772

Shute, S., (1999) Who passes unduly lenient sentences? How were they listed?: a survey of Attorney-General's reference cases 1989-97. In: *Criminal Law Review*, (Aug) 603-626

For a copy of the full article, contact: lyndon.harris@worc.ox.ac.uk