Department of Justice
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The Law on Unduly Lenient Sentences

A Consultation Paper

Comments are invited and should be made to the following address by **8 May 2015**

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1. Introduction

1.1 In recent months there have been calls for the Department of Justice to review existing laws that allow certain sentences to be referred to the Court of Appeal if they are considered to be "unduly lenient". Cases involving animal cruelty have led to such calls; so too have offences around certain types of environmental crime; as have offences where elderly or vulnerable people have been defrauded of money.

1.2 Calls have come from a range of sources: from victims who might feel that the punishment does not fit the crime; from elected representatives in support of victims; and from legal experts who feel that it can be the structure of the law governing appeal mechanisms that can in itself frustrate the judicial process. There appear to be increasing and varied understandings of "unduly lenient".

1.3 Recently, the Department responded to particular calls for the ability to appeal sentences in the fraudulent evasion of duty by way of fuel and tobacco smuggling. Neither offence could be referred to the Court of Appeal for review in cases where the sentence seemed, to some, to be light. With public, Assembly, and legal support in 2013 the Department added these to the list of offences that could be referred for review.

1.4 With subsequent calls for other offences to be added, the Department has taken the view that the time is right for a review of the law in this area. Rather than simply respond to calls for specific offences to be added to the list, the view was that a more overarching assessment would be preferable. Such a review would be to the benefit of all concerned: to victims; to the public; and to those within the criminal justice system.

1.5 It is against this background that on 29 September 2014 the Justice Minister announced[1] to the Northern Ireland Assembly his plans to review Unduly Lenient Sentence law to ascertain what, if any, improvements might need to be made.

[1] Oral Question 6681/11-15 from Mr Stephen Agnew MLA.

2. The purpose of the review

2.1 The purpose of the review is to consider the current legislation that provides for unduly lenient sentences to be reconsidered and to assess what improvements if any should be made. The legislation under review is Sections 35 and 36 of the Criminal Justice Act 1988 and the supporting Reviews of Sentences Orders (detailed later in this paper).

Review Aims

2.2 The aim of the review is to provide a future regime that will:

a) Ensure that review powers and mechanisms are focused on the most appropriate cases;

b) Enhance confidence in the justice system;

c) Maintain separate independence in both the prosecution and sentencing processes; and

d) Provide a system that is deliverable and manageable within the justice process.

2.3 The Department is keen to deliver a future regime that meets each of these four aims.

Issues for consideration

2.4 The Department has identified six issues for consideration:

a) Is there a continuing need for reviews of sentencing law?
b) If so, what form should such a scheme take?
c) Is restructuring required?
d) Should there be a case filtering system?
e) What scope should a scheme have?
f) What case timetables should there be?

2.5 Each of these issues is considered in turn and specific questions posed. Are the principles behind the current regime right? Does the scheme enhance confidence in the separate prosecution and sentencing processes? Does it adequately recognise judicial independence? Does the current structure assist or perhaps unintentionally obstruct the process? At a more practical level, is an offence-based model (as currently exists) the correct approach? Might a broader scheme be devised and are existing processes the most effective?

The consultation

2.6 The remainder of this consultation paper is comprised of seven core sections.

a) The context of the review.
b) The current law.
c) How the current law operates.
d) The reasons for the current construction of the law.
e) The law in other jurisdictions.
f) Statistics on the use of review powers across jurisdictions.
g) Consultation issues and questions.

2.7 It then describes the Department's approach to Equality Screening and advises on how to respond to the consultation.

2.8 Annex A provides the list of hybrid offences that can currently be referred for review. Along with all indictable offences, these provide the full list of referable offences.

2.9 Annex B provides a summary of the key questions asked throughout the consultation paper.

3. The Context

Introduction

3.1 In conducting this review of unduly lenient sentencing law the Department is keen to place it in context: a context that is not a review of sentencing policy and practice or of the criminal justice system more generally. The context is therefore one in which the Department recognises the existing effectiveness of the justice system; the importance the system places on public confidence; and the work that is already underway in terms of responding to public interest.

3.2 The Department recognises the vital importance of independence in the both the prosecution and sentencing processes. The consultation is not a commentary on sentences that are imposed by courts or whether they should or should not be appealed by prosecutors. Such decisions are matters solely for the independent prosecuting and judicial authorities.

3.3 There is a view however that the current statutory provisions for undue leniency applications can in themselves obstruct the challenge process. And this is where the current review and consultation will, we trust, assist. The review is therefore about the procedures around making application for undue leniency should prosecutors take that view.

3.4 The Department therefore wishes the review to be seen in the context of what is currently done; prosecutorial independence; judicial independence; the importance of public confidence; and the issues that have been emerging.

Court business

3.5 At the outset, it is worth setting the review in the context of sentencing and court business on the wider scale. A considerable amount of criminal court business goes through our courts every year without difficulty or challenge.

3.6 Across Northern Ireland's courts, each year some 50,000 convictions are secured in Magistrates'/Youth and Crown Courts – 50,761in total.[2] The vast majority are Magistrates'/Youth Court cases – 48,170 in 2013 - compared to 2591 defendants in the Crown Court.

3.7 A very low number of those cases are subsequently appealed: 117 Crown Court cases in 2013 (around 5% of the 2013 disposals); and 4025 from Magistrates'/Youth Court cases (around 8% of 2013 figures). In overall terms a total percentage of 92% of sentences are accepted and uncontested. As a base measure, that high level of "non-appeal" should not be lost sight of and would in itself suggest a highly effective process. In practice it means that all involved in a case can be fairly sure of the outcome at the point the Court hands down the sentence.

Sentencing

3.8 It is also worth setting the review in the context of the independence in the sentencing process and the factors that courts need to consider. It can be all too easy to comment on a particular sentence in the absence of the full facts of a case. When dealing with a case, the sentencing judge will consider a range of factors in terms of the victim of the crime, the situation in which the crime was committed, and the circumstances of the offender him/herself.

a) In terms of the victim, their age, circumstances, vulnerability and the impact the crime has had on them and their lives will have a major bearing.

b) In terms of the offender, their culpability and attitude; their previous record; alongside factors such as their age and character can all be relevant.

c) In terms of the offence, the level of seriousness, violence or abuse of trust involved; the amount of pre-meditation and planning; and the motivation involved – was it motivated, for example, by hatred of any particular group of people – can all have a bearing.

[2] Northern Ireland Courts and Tribunal Service: Judicial Statistics 2013: Tables C6, E4 and E7.

3.9 The facts and circumstances of each and every case therefore have a crucial bearing on the sentence that is imposed.

3.10 The Department recognises these key features of sentencing and the independence of the judicial process. The current review is not about sentencing outcomes or the factors to be considered. It is a review of the process whereby certain cases can be further reviewed by way of unduly lenient sentences law if required.

Criminal justice system initiatives

3.11 Alongside these aspects are two important confidence-building initiatives which seek to reflect increasing public interest in the criminal justice process. Through the work of the Lord Chief Justice's Sentencing Guidelines Group and the work of the Director of Public Prosecutions to publish key policy documents, the intention has been to increase public awareness and confidence in the court process.

3.12 In 2011, as part of his Programme of Action to enhance transparency and consistency in sentencing, the Lord Chief Justice established a Sentencing Group to oversee the development of sentencing guidelines. The Group is comprised of representatives from each tier of the criminal courts judiciary and chaired by a Lord Justice of Appeal and includes two lay members. A leading academic has already been appointed with the appointment of a representative of the views of victims anticipated in the near future.

3.13 The Public Prosecution Service has published a series of Prosecution Policy documents on topics such as serious sexual offences, domestic violence, hate crime as well as its Code for Prosecutors[3]. It has also established a Victim and Witness Care Unit as a single point of contact to keep victims and witnesses fully informed of their case as it progresses through the justice process. Most pertinently it has also published its guidance on its role in unduly lenient sentence matters.

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3 http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Code%20for%20Prosecutors/Code%20for%20Prosecutors%20Revised%202008%20FINAL.pdf

3.14 The purpose of initiatives such as these is to enhance public confidence in the court process both in terms of consistency in sentencing and openness in the prosecution process.

Public opinion

3.15 Alongside this work, the Department has been keen to measure and monitor public confidence in the justice system and for a number of years the Department has commissioned Crime Surveys to gauge public confidence in the justice system.

3.16 Research undertaken by the Department[4] shows that just under 60% of adults in Northern Ireland see the criminal justice system as fair and 40% see it as effective in overall terms. Slightly lower levels were found when the person questioned had been a victim, witness or spectator in court (52% and 35% respectively). When looking specifically at sentencing and court disposals however, less than 30% of adults see the courts as being effective in giving punishments which fit the crime. When asked how the criminal justice system could increase its confidence rating, the most frequently cited answer was "tougher sentences" (34%).

3.17 Conducting these surveys over time is intended to smooth out the effects of any particular event or case that could unduly influence the underlying trend. There has however been a slight downward trend in confidence levels in more recent research. This may be a feature of a number of factors: with the devolution of justice powers, an increased public commentary on the work of the courts; higher levels of public expectation and explanation in an increasingly media and social-media friendly world; and perhaps more recently perhaps, a pattern of certain types of case that attract particular public interest and concern.

3.18 Sentencing in recent animal welfare cases, for example, has touched a particular cord – to the extent that a separate review of the implementation of the Welfare of Animals Act (NI) 2012 is underway[5] and due to report in January 2015.

[4] Perceptions of Policing, Justice and Organised Crime: 2011/12 and 2012/13 Northern Ireland Crime Surveys: Department of Justice Research and Information Bulletin 7/2014.
[5] http://www.dardni.gov.uk/review-implementation-welfare-animals-act-2011.doc

Penalties being imposed for environmental damage alongside the profits available to those being penalised are another example. Cases where vulnerable people may have been defrauded out of savings that far exceed any fine available have also occurred is a third. These have served to bring concerns about unduly lenient sentencing powers into the public eye.

3.19 Whilst the sentences available to the court itself are also a factor, the absence of an ability to refer an undue leniency matter to a higher court can be obstructive. And it can be obstructive both to prosecutors and to the Court of Appeal itself which might welcome the opportunity to establish case authority.

Powers of referral

3.20 One other, rather different contextual aspect, relates to a specific feature of the unduly lenient sentences scheme: that of who has the power to refer cases to the Court of Appeal. It will be important at the outset of this consultation paper for consultees to be aware of one aspect of the law that will not be within the scope of the review.

3.21 The power to refer a sentence to the Court of Appeal in Northern Ireland currently sits with the Director of Public Prosecutions. It was previously vested in the Attorney General and on the devolution of justice powers to the Northern Ireland Assembly in April 2010 the power of referral was transferred from the Attorney to the Director. For the purposes of the unduly lenient sentence review, that position is not being proposed for change.

3.22 Responsibility for referral to the Court of Appeal of sentences which may be unduly lenient is part of a wider review of the governance and accountability of the PPS[6]. As such, this review on unduly lenient sentencing powers is not considering those wider issues. The ULS review is therefore focused solely on the scope and content of the current scheme.

3.23 It is against this background that the Department is reviewing the law on "unduly lenient sentencing" powers.

[6] Governance and Accountability of the Public Prosecution Service: a Consultation Paper: Department of Justice February 2012.

4. The current law

4.1 Consultees may find a brief overview of the current law helpful. The Department would wish to stress that this is only a summary and that readers will wish to study for themselves the detail of the specific statutory provisions identified.

The Director of Public Prosecutions

4.2 Currently, in certain specified circumstances, if the Director of Public Prosecutions thinks that a sentence imposed by the Crown Court is unduly lenient, the law allows him to refer the case to the Court of Appeal for review. Sections 35 and 36 of the Criminal Justice Act 1988 provide for certain cases to be so referable if it appears to the Director that a sentence has been unduly lenient.

4.3 The Director's power of referral has particular limitations. Cases must have been heard in the Crown Court – sentences in Magistrates' Court cases cannot be appealed in this way - and leave of the Court of Appeal must have been sought before it can be referred. Referral is therefore not automatic.

Types of case

4.4 Cases that are heard in the Crown Court are defined in two ways.

a) Firstly, all offences that are triable on indictment – that is, serious crimes that only the Crown Court can deal with. Examples might be murder, rape and other serious sexual and violent crimes.

b) And secondly, cases that are "tri-able either way" or "hybrid" but which are also heard in the Crown Court (see 4.6 and 4.7 below).

4.5 The key is that in both scenarios, to come within the scope of the regime, cases must have been sufficiently serious to have been heard in the Crown Court.

Tri-able either way[7] offences that are referable

4.6 An offence "tri-able either way" is one that can be heard in either a Magistrates (with a lesser penalty available) or a Crown Court (with higher penalties available) – as defined in the Criminal Justice Act 1988 "an offence punishable on conviction on indictment or on summary conviction (s. 35(9))". It will have been for the prosecution to consider whether or not such cases should be presented to the Crown Court or not, based on the seriousness of the offence.

4.7 Even then, not all hybrid offences are referable. Across the full NI statute book there are 1,763 such "hybrid" offences in total specified in law, of which 1,067 have been in active use. Rather than bring them all within the scope of the referral provisions, separate statutory orders – known as Criminal Justice Act 1988 (Reviews of Sentencing) Orders (Northern Ireland) – provide specific lists of referable hybrid offences.

The Reviews of Sentencing Orders

4.8 There are currently four extant Orders[8]: the 1996 Order which lists four offences; the 2006 Order which lists 29 offences; the 2011 Order which lists 17 offences – many of which parallel the 2006 Order in light of changes to sexual offences law; and the 2013 Order which lists two offences. In total 52 hybrid offences are listed across the four Orders. A consolidated list is provided at Annex A.

4.9 It is worth noting that there are also a handful of offences which are normally tried in a Magistrates Court but can be tried on indictment if two conditions are satisfied:

a) where the offence could attract a penalty of over six months imprisonment (by and large the Magistrates' Court is limited to six months); and

[7] "Tri-able either way" is a term used in E&W law and is not used in Northern Ireland where "hybrid offence" is sometimes used. For the purposes of this consultation the term "hybrid" will be adopted.

[8] The Criminal Justice Act (Reviews of Sentencing) Order (Northern Ireland) 1996 (S.R. 40);
The Criminal Justice Act (Reviews of Sentencing) Order (Northern Ireland) 2006 (S.R. 1116); The Criminal Justice Act (Reviews of Sentencing) Order (Northern Ireland) 2011 (S.R. 428); The Criminal Justice Act (Reviews of Sentencing) Order (Northern Ireland) 2013 (S.R. 249);

b) where the defendant has elected to be tried on indictment. (Article 29 of the Magistrates' Courts (NI) Order 1981 sets out the conditions.)

4.10 It is important to note however that election for trial by the defendant and trial in the Crown Court does not automatically make these cases referable for unduly lenient sentencing purposes. Any such offence would still have to have been specified in a Reviews of Sentencing Order.

What offences are not listed?

4.11 The fact that so many hybrid offences are not listed for unduly lenient purposes is often commented upon - not simply on the sheer numbers involved but more often on the types of offence that are not listed. It has been observed, for example, how few hybrid offences of violence are listed. Similarly there are also many sexual offences that are hybrid and not listed: sexual assault under Article 7 of the Sexual Offences (NI) Order 2008 would be one example.

The Court of Appeal

4.12 When a case has been given leave to appeal and is subsequently considered by the Court of Appeal, the Court can quash any sentence passed on the person in the original proceedings and in place of it pass such sentence as the Court thinks appropriate. In re-sentencing, the Court of Appeal can only impose a sentence within the powers that were available to the originating court.

4.13 Where the Court of Appeal has concluded its review, with its leave the Director of Public Prosecutions or the person to whom the sentence applies can further refer the case on a point of law to the Supreme Court for its opinion. The Supreme Court can remit the case to the Court of Appeal or deal with it itself by exercising the powers of the Court of Appeal.

5. How the law operates

The role of the Director of Public Prosecutions

5.1 Under the legislation, referral to the Court of Appeal in cases where a sentence might be considered unduly lenient is a matter specifically for the Director of Public Prosecutions. The Director personally considers any such cases for referral to the Court of Appeal. Under the law any application to review a sentence must be made within 28 days from the day when the sentence was imposed.

5.2 In assessing whether or not to initiate an unduly lenient referral, the DPP or his senior staff, or on the advice of the prosecuting counsel engaged in the case, will consider the case. The DPP can also consider referral where interested parties contact the PPS concerning the sentence. Interested parties include victims, their families or their representatives including MPs or MLAs. Media interest in a case could also draw a case to the DPP's attention for consideration. Public interest is not, of course, the determining factor for a referral.

When is a sentence unduly lenient?

5.3 Section 36(2) of the 1988 Act provides the definition of unduly lenient. It states that without prejudice to the Director of Public Prosecutions' considerations of a case, undue leniency occurs if it appears to the Director that the judge in a case erred in law as to his powers of sentencing or failed to impose certain mandatory sentences as required by law.

5.4 Both the Public Prosecution Service and the Crown Prosecution Service for E&W (CPS) Guidance's on unduly lenient sentencing are helpful in further explaining the law.

5.5 The CPS Guidance states that there must have been some error in principle in the judge's sentence such that in the absence of the sentence being altered by the Court, public confidence would be damaged. The court should only grant leave in exceptional circumstances and not in borderline cases.

5.6 The PPS Guidance states that the Court of Appeal has held that an unduly lenient sentence is one that falls outside the range of sentence that a judge, taking into consideration all relevant factors, and having regard to sentencing guidance, could reasonably consider appropriate.

5.7 In other words, across both pieces, referral must be not be a matter of routine, and the sentence must not just be lenient but must be unduly lenient. These key concepts are returned to more fully later in the consultation paper.

Multiple sentences

5.8 Another point of detail as to how the current law operates provides that if one sentence from a multiple sentence case is referred for undue leniency, then all the sentences involved can be reconsidered – even if the others would not in themselves have been referable. The multiple sentences however must have been passed on the same day or, if passed on different days, the court must have stated that it was treating them as one sentence.

6. The reasons for the current law

6.1 The key features of the current unduly lenient sentence regime are therefore the restrictions on the types of case that can be reviewed; the filters in place; and the timetable within which cases must be referred. It may be helpful to review the reasoning behind the current provisions.

Case restrictions

6.2 As illustrated, the types of case that come within the current regime are limited to indictable only and specifically listed hybrid offences and where there has been an error of principle in the judge's sentence. Therefore only the more serious crimes are referable where there may have been an error in principle.

6.3 The reasoning behind this construction is four-fold.

a) Firstly, it was considered important to focus on serious cases of particular public concern rather than have every possible offence open for referral to the Court of Appeal.

b) Secondly, by focusing on cases that involve errors in principle, that would ensure that judicial discretion in sentencing in the full knowledge of the facts of a case, would be maintained. It should not be the case that a sentence would be referable simply on the grounds of a disagreement in judgment but that something more fundamental should be at stake.

c) Thirdly, there is the element of delivering a manageable regime that neither overburdens the DPP with cases to consider, nor which results in a heavy Court of Appeal caseload of unmeritorious cases.

d) Finally, under-pinning all of these factors is the issue of public confidence in the judicial system.

6.4 An overall regime that did not provide clarity for both the victim and offender could result in regular and routine challenge that would undermine public confidence.

Procedural Filters

6.5 Two procedural filters currently exist: the role played by the Director of Public Prosecutions (DPP); and the requirement for leave of the Court of Appeal to have a case re-considered.

The DPP

6.6 As previously illustrated, cases can only be referred to the Court of Appeal by the Director of Public Prosecutions. This is a function which the DPP personally performs and is one to which the DPP attaches considerable importance. Any case being considered for referral by his Office requires his personal consideration and approval.

6.7 Cases are examined very carefully by the DPP, taking into account the full facts and circumstances of the case and considering the proper concerns of the victim or family. The prosecutors who appeared in the case are consulted and independent legal advice can be taken from a barrister who has not been involved previously in the case.

6.8 The reason for this approach is to ensure that decisions to take a case to the Court of Appeal are not taken lightly; are objective; and that the full facts of a case are fully considered.

The Court of Appeal

6.9 Even after the DPP has considered a case for referral, if his view is that the case is to be pursued, it still requires the leave of the Court of Appeal for it to be considered by the Court itself. Appeals from the Crown Court require leave to appeal except for certain non-jury trial cases. The purpose is to ensure that only the most appropriate cases move to review by the most senior criminal court in the jurisdiction.

Timetables

6.10 Currently the law requires that a referral by the DPP to the Court of Appeal must be made within 28 days of sentence. The 28 day time limit is absolute and there are no powers to extend it or to apply for leave “out of time”.

6.11 The reasoning for the 28 day rule is three-fold:

a) Firstly, it mirrors the period within which a defendant must lodge his/her appeal – though an offender can still seek an extension of time to appeal;

b) secondly, it has the effect of ensuring that a case is reviewed promptly when the facts and issues are fresh; and

c) thirdly, it provides prompt clarity for both the victim and the offender.

6.12 Both the victim must know promptly if a sentence is final or can be challenged and the offender must have some certainty in the penalty he/she has had imposed.

6.13 Across each of these topics: the types of case that can be reviewed; the filters in place; and the timetable within which cases must be referred, issues arise which will form part of this consultation exercise.

7. Other jurisdictions

7.1 To assist the review of the law in Northern Ireland, consultees may find a short overview of similar provisions from other jurisdictions to be helpful. Again it is worth stressing that what follows are brief synopses of legislation and should not be taken as fully comprehensive or legally authoritative.

England and Wales

7.2 The law on unduly lenient sentencing is essentially the same as that in Northern Ireland. The same parent Act, the Criminal Justice Act 1988, applies in both jurisdictions and, until recently, the same has been true for the list of hybrid offences. The devolution of justice powers has led to the Justice Minister adding two offences to the Northern Ireland list that have not been applied in England and Wales. Those offences relate to the fraudulent evasion of duty under section 170 of the Customs and Excise Management Act 1979 and products specified in the Tobacco Products Duty Act 1979.

Scotland

7.3 For Scotland, provisions allowing appeals against an unduly lenient sentence are contained in the Criminal Procedure (Scotland) Act 1995 as amended.

7.4 Section 108 provides for the Lord Advocate – in effect the Scottish equivalent of the Director of Public Prosecutions – to bring proceedings where a conviction on indictment is involved. In Scotland there is no requirement for leave of the Court to lodge an appeal.

7.5 Section 175 of the 1995 Act provides for appeals in summary proceedings which are then specified in a statutory order and which can be brought by the prosecutor in the proceedings (subject to the consideration of the Lord Advocate).

7.6 This is a different approach to both E&W and Northern Ireland (and also to the Republic of Ireland see below) in that cases in summary proceedings can be

appealed – though similar to the E&W/NI approach, a list of cases made by statutory Order restricts the scope.

7.7 The Scottish approach to case specification is by class of case rather than by way of individually specified offences. Case specification is by statutory Order with only one such Order having been made in 1996. The Prosecutor's Right of Appeal in Summary Proceedings (Scotland) Order 1996 adopts a broad approach to the class of case by specifying those cases where:

a) a sentence has been passed; or

b) an order deferring sentence is made; or

c) the person is admonished or discharged absolutely.

7.8 Across both court tiers the Scottish law then applies grounds to the model on which each particular sentence can be challenged. Some sentences can be challenged on grounds of undue leniency; others on the grounds that they were inappropriate.

7.9 Appeals on grounds of undue leniency apply to sentences on conviction; admonitions; absolute discharges; the making of drug treatment and testing orders; and sentence deferrals.

7.10 Appeals on grounds of inappropriateness apply to decisions *not to make*: supervised release orders; non-harassment orders; confiscation orders; publicity orders; remediation orders; and the decision to defer a sentence. A decision to remit a case to the Principal Reporter for a Children's Hearing can also be challenged as inappropriate.

Republic of Ireland

7.11 The law on unduly lenient sentencing in the Republic of Ireland is provided by the Criminal Justice Act 1993 as amended by the Criminal Justice Act 2006.

7.12 The 1993 Act provides a single power under Section 2 for the Director of Public Prosecutions to apply to the Court of Criminal Appeal if he/she considers a conviction on indictment to be unduly lenient. The 2006 Act amended the period for application to the Court from 28 days to the current 56 days.

7.13 Apart from the referral period difference, the principle differences with the law in Northern Ireland are two-fold.

7.14 There is no specific provision excluding certain hybrid offences that have been heard in the Circuit Court (the equivalent to our Crown Court). The simpler construction of “all cases tried on indictment” is adopted which means that more are potentially referable in the Republic Of Ireland compared to E&W/NI.

7.15 There is no requirement in law to seek leave of the Court of Appeal. The Director can make application for review straight to the Court itself.

8. Statistics[9] [10]

Northern Ireland

8.1 The following figures for Northern Ireland show the number of cases considered by the DPP for the two most recent years 2012 and 2013. It should be noted that these are cases not defendants.

Cases considered by the DPP (NI) for reference to the Court of Appeal for unduly lenient sentences

Northern Ireland	2012 *	2013 *
Cases considered by DPP	10	29
Cases referred for leave to appeal	4	27
Cases not granted leave	1	7
Cases granted leave	3	15
Sentence changed	3	11

* Cases considered/referred do not tally with those dealt with due cases carried over or still outstanding at the end of a calendar year. Figures for 2013 are provisional at this stage.

8.2 Of the total 18 cases granted leave across 2012-2013 (3 in 2012 and 15 in 2013) 14 had their sentences changed and 4 were untouched.

England and Wales

8.3 Figures for England and Wales are compiled from lists for 2011 and 2012 of individual cases published by the Attorney General's Office in the Attorney's Annual Reports.

[9] Statistical periods and details vary across jurisdictions due to differing recording systems and data availability.
[10] Figures for Scotland are not available.

England and Wales	2011	2012
Total Applications referred to the Court for leave	117	82
Cases not granted leave	20	5
Cases granted leave	97	77
Sentence changed	94	64

8.4 Of the total 174 cases granted leave across 2011-2012, 158 had their sentences changed and16 were untouched.

Republic of Ireland

8.5 Figures for the Republic of Ireland are published in a different form and include matters beyond unduly lenient applications. They include reviews of sentence in relation to confiscation and forfeiture of criminal assets and European Arrest Warrants.

Republic of Ireland	2012	2013
Total Applications considered	28	26
Application successful	15	16
Application refused	10	6
Application struck out or withdrawn	3	4

8.6 Of the total 54 cases considered in 2012-2013, 31 were successful and 23 were not for differing reasons.

9. Consultation Issues and Questions

Reviews of sentencing powers – should they even exist?

9.1 Perhaps the first and most basic question to be asked is, are consultees content that there should be legislative provision for unduly lenient sentences to be referred on appeal? Do reviews of sentencing powers - in whatever form – remain legitimate and useful in the justice process?

9.2 It could be claimed that any procedure that allows a sentence to be appealed in this way undermines the authority of the sentencer. The sentencer has heard and considered the full facts of the case and the judgment should be final. Likewise, that it is unfair on the defendant who has had his/her case fully aired, considered, and dealt with, to then be subject to further review. The defendant needs to know the sentence imposed.

9.3 On the other hand however, the case has been made and endorsed by the legislature that the system has to be equally fair to victims and their families for example, to ensure that their interests are also catered for. If a sentence is in their eyes overly lenient, should it not be challengeable? Can there be a regime that balances both interests?

9.4 The Department would welcome views on the ongoing need for a review of sentencing powers.

If review powers are to exist, what form might they take?

9.5 Currently the Northern Ireland (and E&W) legislation hinges on the two key concepts previously noted:

a) that referrals for review must be where there has been an error of principle in the judge's sentence; and

b) that sentences must be not simply lenient but *unduly* lenient.

9.6 Both of these concepts have been interpreted by the Courts on foot of Attorney General's references and provide the established base for case referral.

9.7 In the case of Attorney General's Reference No. 5 of 1989 Cr. App. R. (S) 289 Lord Lane CJ said there must be some error of principle in the judge's sentence, such that, in the absence of the sentence being altered by the Court, public confidence would be damaged. The Court should only grant leave in exceptional cases, and not in borderline cases.

9.8 And in terms of undue leniency, in the case of Attorney General's Reference No. 4 of 1989 Cr. App. R. (S) 517 Lord Lane CJ, a sentence is defined as unduly lenient

> "...where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases and in particular to guidance given by this Court from time to time in the so-called guideline cases".

9.9 For Scotland, Scottish courts have determined that "unduly" means that "The sentence must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant facts, could reasonably have considered appropriate" Bell v HMA 1995 SCCR 244.

9.10 The Department takes the view that these definitions, established by court authority, provide the keystones on which sentence review powers should be built. They stress the importance of public confidence and that cases must be exceptional. Sentences must not be simply lenient to be attracted into the scheme, they must be unduly lenient.

9.11 The Department takes the view that if one were to move away from such concepts there would be the danger of a system that simply allows any disagreement or sense of disappointment in a sentence to be passed to the higher courts. However the Department would welcome views on the core concepts on which the scheme is built.

What should be the scope of the scheme?

9.12 The current scope of the scheme is fixed in law around more serious offences – in essence certain types of case that are dealt with in the Crown Court. As has been described earlier in the paper, the law is based on all indictable offences that are tried in the Crown Court along with a list of specified hybrid offences that *may be* and then *are* also heard in the Crown Court. Cases that are dealt with in the Magistrates' Courts are not within the scope of the unduly lenient provisions.

9.13 Currently, from the full list of 1763 (and 1067 active) "hybrid" offences, 52 have been so listed. The list (Annex A) is largely sexual offences along with some violent and drug-related offences and, more recently, some offences connected to fuel fraud.

9.14 Such then is the scope of the current regime – however might alternative approaches be considered? Should there be an expansion of the list of hybrid offences to allow further examples to be within the scheme? Should the outcome of this review be to simply expand the statutory list? Should specific offences be selected from the full list of hybrids and added in an ad hoc fashion? Might the Department add in certain animal welfare and environmental damage cases? This would certainly make an early impact on the law but would it be beneficial in the more strategic context of the review?

9.15 In the alternative, might the Department consider a model that is not based on a list of specific offences but rather on the basis of offence categories or class of case (as in the Scottish legislation for example)? A model could be devised that allowed, for example, all offences of violence or all sexual offences to be referable irrespective of court tier. Referral would still be based on the core concepts of the scheme around a sentence being considered unduly lenient and against the principles of sentencing.

9.16 Alongside that however would be the potential for an unworkable scheme if it then also drew in cases from the Magistrates' Court. Given the fact that Judicial Review proceedings are already available in such circumstances and the potential

and major impact that would otherwise result, the Department is not minded to bring Magistrates' Court sentencing within the scope of a revised unduly lenient sentencing scheme - but would nevertheless welcome views.

Is restructuring required?

9.16 As an alternative to adjusting the scope of the scheme and how offences are or are not listed, the Department would welcome views on whether or not there should be a fundamental re-configuration of the powers of referral. Should there be a broader approach that is less limiting in its construction and more open in the way it would operate?

9.17 For example, might there be a model that left any sentence amenable to review irrespective of offence, court tier, or indeed outcome? Under such a scheme, any sentence in, for example, a Magistrates' Court – and that would include fines, discharges, driving disqualifications etc. – could be referred to the relevant court if considered unduly lenient. If that were to be the case, would that then engage the County Court as the appeal venue for Magistrates' Court cases? Or would they too go to the Court of Appeal?

9.18 In truth, the Department does not see this as a practical or operable approach. Any and every sentence could be challengeable; the County Court and Court of Appeal could – in theory at least - be swamped; and costs and legal aid costs would escalate. The Court of Appeal, which can require up to three Lords Justice of Appeal to consider such cases, would be impacted upon.

9.19 So too would the Crown Court in terms of its reliance on those same judges along with the increased delays that would arise. The potential would be that not only could the justice system grind to a halt but it could be undermined in terms of public confidence. Nevertheless the Department offers this suggestion for views.

9.20 Alternatively, might there be a model that focused on any case that was dealt with in the Crown Court? Such a model would focus referrals on the more serious offences and would not restrict hybrid offences in the Crown Court to those that have been listed in statute. The legislation in the Republic of Ireland is such a model.

Therefore instead of selecting further offences from the hybrid offences list to bring them into the scheme, might one remove that construct altogether and simply rely on all Crown Court cases?

9.21 A beneficial effect of this would be to establish a much simpler approach to the identification of reviewable sentences. Irrespective of whether a particular offence was "hybrid" or not; and whether or not it has been listed on a separate piece of subordinate legislation; greater clarity as to reviewable sentences would be achieved. Seeking to extend a list in subordinate legislation may only cause further complications and have the effect of reducing clarity for victims, defendants, legal representatives, prosecutors and the courts. The Department sees certain merits in this "all Crown Court cases approach" and would welcome views.

Should there be a case filter system?

9.22 As described earlier in the paper, two key filters currently operate:

a) the Director of Public Prosecutions must personally consider and refer (or not refer) cases; and

b) the Court of Appeal must then grant leave to have the case considered.

9.23 In terms of the power of referral, it has on occasion been speculated that the power to refer should be more general in its scope and, for example, a victim, his/her family or representative should be able to instigate sentence review proceedings. They, after all, have been the victim of the crime and are the most closely involved. Others less directly involved are often known to call for increases in sentence.

9.24 The Department fully recognises the rights and concerns of victims in both the prosecution and sentencing processes. The Department and the DPP have provided a range of powers and services to ensure that victim voices are engaged. As indicated earlier the PPS has established its Victim and Witness Care Unit with published guidance and standards. The Department created arrangements for Victim Impact Statements to be brought to the Court ahead of sentence. The current

review of sentence procedures within the PPS also provides arrangements for victims to make representations in terms of possible undue leniency.

9.25 The Department takes the view that these pre-and post-sentence opportunities provide a strong victim voice in the sentence and review process. It takes the view however that it would be inappropriate to expand those opportunities into a direct ability to refer a case to the Court of Appeal – either on the part of victims or more widely.

9.26 The Department's view is that a professional filter such as that operated by the DPP is required and should be retained before cases are to be referred for review. Such a professional filter operates in each of the jurisdictions we have reviewed, however the Department would welcome views.

9.27 Once a case has been assessed as suitable for referral, it must then obtain leave of the Court of Appeal before the case can be considered by it. The purpose is that, as the highest criminal court in the jurisdiction involving two or possibly three of the most senior judicial figures, only cases that merit such consideration should be so considered. Again alternative models exist – there is no leave application process in Scotland or in the Republic of Ireland for example.

9.28 As indicated earlier, with the exception of certain non-jury trial cases in the Crown Court, leave to appeal is core requirement for any case to be considered by the Court of Appeal. The Department takes the view that this filter should remain in place but would welcome views.

What should the referral period be?

9.29 The final aspect of the current law that the Department would welcome views on is the statutory period within which cases must be referred by the DPP to the Court of Appeal. Currently the period is 28 days from date of sentence.

9.30 If the period were to be changed, different approaches could be taken. The Department has noted, for example, the 56 day period available in the Republic of Ireland. An alternative model, rather than doubling the period might allow the

referring authority to seek extension of time to refer if the 28 days proved to be insufficient.

9.31 There is no doubt that a balance must be struck between the normal period of 28 days allowed for a defence appeal; the need for cases to be considered promptly; and the need for finality for both the victim and the offender. The issue of clarity and finality in outcome and the time available for review is of particular importance. A victim will want to see justice done. And the offender will need to know his/her sentence was soon as possible and without any threat of “double jeopardy”.

9.32 On the one hand it is likely that an extended period would allow a better consideration of cases before a referral decision. On the other hand an eight week period or potentially even longer, has the effect of elongating the period of uncertainty for victim and offender alike. The Department is keen to ensure prompt and clear outcomes and in that context would welcome views on retaining the current or creating alternative review periods or approaches.

9.33 Annex B provides a summary of the key questions on which the Department would like views.

10. Equality Considerations

10.1 As a public authority under Section 75 of the Northern Ireland Act 1998, the Department is required to have due regard to the need to promote equality of opportunity. This legislation also requires public authorities to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such impact is justifiable. These obligations are designed to ensure that equality and good relations considerations are made central to government policy development.

10.2 At this stage the Department has not settled on any particular model for a future review of sentencing regime. It has nevertheless screened each of the options and has not identified whether any of the options will have a differential impact on any of the relevant groups. The Department does not therefore consider that an Equality Impact Assessment (EQIA) is required at this stage though that would not preclude one being completed when a way forward is being identified.

10.3 The Department's screening form is available on the DOJ website.

10.4 Comments on this screening assessment and equality conclusion are welcome.

11. Responding to the consultation

11.1 The Department would welcome views on the proposals and issues raised in this consultation paper. The consultation will run from 6 February 2015 and all responses should be submitted by 5pm on 8 May 2015. Comments are welcomed by post, e-mail or text phone and responses will be acknowledged on receipt.

For queries and responses to the consultation please contact:-

Department of Justice
Criminal Law Branch
Massey House
Stoney Road
Belfast
BT4 3SX
E-mail: access.public@dojni.x.gsi.gov.uk
☏Telephone: 028 9016 9604
☏Text phone: 028 9052 7668

11.2 If you have any queries or concerns about the way in which the consultation has been handled please contact the DOJ Consultation Co-ordinator at the following address:

Peter Grant
Department of Justice
Central Co-ordination Branch
Central Management Unit
Knockview Buildings
Stormont Estate
Belfast
E-mail: peter.grant@dojni.x.gsi.gov.uk

☏ Telephone 028 9076 5138
☏ Text phone: 028 9052 7668

Alternative Formats

11.3 An electronic version of this document is available in the current consultation section of the DOJ website. Hard copies will be posted on request. The text phone contact details are provided above.

11.4 Copies in other formats, including Braille or large print, etc. may be made available on request. Please let us know if you need copies in an alternative language or format.

Confidentiality of Responses

11.5 The DOJ will publish a summary of responses following the completion of the consultation process. Unless individual respondents specifically indicate that they wish their response to be treated in confidence, their name and the nature of their response may be included in any published summary of responses. Respondents should also be aware that the DOJ's obligations under the Freedom of Information Act may require that any responses, not subject to specific exemptions in the Act, may be disclosed to other parties on request.

Annex A

Hybrid Offences Currently Listed for Unduly Lenient Sentencing Referrals[11]

Sexual Offences

1. The following Articles of the Sexual Offences (NI) Order 2008:

   (a) Article 7 (sexual assault);
   (b) Article 8 (causing a person to engage in sexual activity without consent);
   (c) Article 14 (sexual assault of a child under 13);
   (d) Article 15 (causing or inciting a child under 13 to engage in sexual activity);
   (e) Article 16 (sexual activity with a child);
   (f) Article 17 (causing or inciting a child to engage in sexual activity);
   (g) Article 18 (engaging in sexual activity in the presence of a child);
   (h) Article 19 (causing a child to watch a sexual act);
   (i) Article 21 (arranging or facilitating commission of a child sex offence);
   (j) Article 22 (meeting a child following sexual grooming etc.);
   (k) Article 32 (sexual activity with a child family member);
   (l) Article 37 (paying for sexual services of a child);
   (m) Article 38 (causing or inciting child prostitution or pornography);
   (n) Article 39 (controlling a child prostitute or a child involved in pornography);
   (o) Article 40 (arranging or facilitating child prostitution or pornography);
   (p) Article 62 (causing or inciting prostitution for gain);
   (q) Article 65 (administering a substance with intent).

2. The following sections of the Sexual Offences Act 2003:

   (a)section 57 (trafficking into the UK for sexual exploitation);
   (b) section 58 (trafficking within the UK for sexual exploitation);
   (c) section 59 (trafficking out of the UK for sexual exploitation);

3. Indecent assault on a male:
   (a) Article 21 of the Criminal Justice (Northern Ireland) Order 2003
   (b) section 15 of the Sexual Offences Act 1956
   (c) s72 Offences Against the Person Act 1861

4. Indecent assault on a female:
   (a) section 14 of the Sexual Offences Act 1956
   (b)section 52 of the Offences against the Person Act 1861

5. Indecent conduct with a child:
   (a)section 22 of the Children and Young Persons Act (Northern Ireland) 1968
   (b)section 1 of the Indecency with Children Act 1960

6. Unlawful sexual intercourse with a girl under 16: section 6 of the Sexual Offences Act 1956

7. Defilement of a girl between 14 and 17: section 5(1) of the Criminal Law Amendment Act 1885

[11] This list has been compiled for the purposes of the consultation only. It is a consolidation of offences across four separate Criminal Justice Act 1988 (Reviews of Sentencing) Orders that extend to Northern Ireland.

8. Inciting a girl under 16 to have incestuous sexual intercourse:
   (a) Section 54 of the Criminal Law Act 1977
   (b) Article 9 of the Criminal Justice (Northern Ireland) Order 1980

9. Prohibition/restriction on importation/exportation of an article prohibited by virtue of section 42 of the Customs Consolidation Act 1876 insofar as it relates to or depicts a person under the age of 16; section 50(2) or (3), section 68(2) or section 170(1) or (2) of the Customs and Excise Management Act 1979

Violent Offences

1. Threats to kill: section 16 of the Offences against the Person Act 1861
2. Cruelty to persons under 16:
   (a) section 1 of the Children and Young Persons Act 1933
   (b) section 20 of the Children and Young Persons Act (Northern Ireland) 1968

Drug Offences

1. Production of a controlled drug section 4(2) of the Misuse of Drugs Act 1971
2. Supply of a controlled drug section 4(3) of the Misuse of Drugs Act 1971
3. Possession of a controlled drug with intent to supply section 5(3) of the Misuse of Drugs Act 1971
4. Cultivation of cannabis plant: section 6(2) of the Misuse of Drugs Act 1971
5. Prohibition/restriction on importation/exportation of a controlled drug within the meaning of section 2 of the Misuse of Drugs Act 1971, such prohibition or restriction having effect by virtue of section 3 of that Act: section 50(2) or (3), section 68(2) or section 170(1) or (2) of the Customs and Excise Management Act 1979

Fraud

1. Complex fraud triable on indictment: Arts 3 & 5 Criminal Justice (Serious Fraud)(Northern Ireland) Order 1988
2. Evasion of duty payable on hydrocarbon oil or any other fuels specified in the Hydrocarbon Oil Duties Act 1979: section 170 of the Customs and Excise Management Act 1979
3. Evasion of duty on tobacco products as specified in Tobacco Products Duty Act 1979: section 170 of the Customs and Excise Management Act 1979

Inchoate offences

1. Attempting to commit or inciting the commission of any offence above.
2. Encouraging or assisting crime under Part 2 of the Serious Crime Act 2007 in relation to which an offence above is the offence (or one of the offences) which the person intended or believed would be committed.

Annex B

Summary of Consultation Questions

(a) Is there a continued need for reviews of sentencing powers?

(b) And if so,

i. What form might the powers and scheme take?

ii. Are the core concepts of errors of principle in sentencing and undue leniency correct?

iii. What should the scope of the scheme be?

iv. The current model of indictable offences plus an expanded list of specified hybrid offences?

v. A model based solely on a class of offence or court? All indictable offences? All cases dealt with in, for example, the Crown Court?

vi. A more generic model that left any sentence amenable to review irrespective of offence, court tier, or outcome?

vii. Should the current filter systems of DPP consideration and leave of the court of Appeal continue?

viii. Should there be a referral period (currently 28 days) or should it be increased?

ix. Should there be a power for an extension of time to appeal?

x. How important is clarity and finality for the victim and the offender?

xi. Should there be a power for an extension of time to refer?

(c) Are there any additional measures that could be considered?

(d) Are there any particular equality considerations arising from the review?