

cc NO

From: THE PRIVATE SECRETARY

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HOME OFFICE
QUEEN ANNE'S GATE LONDON SW1H 9AT

Prime Minister :

30 April 1984

The Home Secretary
agrees with you that
costs should be awarded as of right
Dear David, in "prosecution appeal" cases.

MT

Law

JT 30/7

Thank you for your letter of 24 April about the proposed right for the Crown to refer to the Court of Appeal sentences which appear excessively lenient, as outlined in the Home Secretary's letter of 18 April.

The principles underlying the awarding of costs in criminal cases are a matter for which the Lord Chancellor is primarily responsible, but subject to his views (which he will no doubt incorporate in his overall response) the Home Secretary is on reflection inclined to agree that the defendant in a case referred under the proposed new power should be entitled to costs as of right, rather than at the Court's discretion. Such an arrangement would follow that in the Criminal Justice Act 1972, which defines the power to refer a point of law arising from an acquittal. Section 36(5) of that Act states that the acquitted person "shall be entitled to his costs, that is to say to the payment out of central funds of such sums as are reasonably sufficient to compensate him for expenses properly incurred by him for the purpose of being represented on the reference".

I am copying this letter to the Private Secretaries of the recipients of the previous correspondence and the Attorney General.

I am ever

H H TAYLOR

Home Affairs July 1979

sentencing policy



10 DOWNING STREET

CO
 Lord Darbhon's Office
 WO CWO
 SO D/Trans.
 NIO CSO
 DES D/Emp.
 LCO CDLO
 LPO DHSS
 24 April, 1984 LPSO
 DFE
 1st Parl. Counsel.

From the Private Secretary

Dear Hugh,

The Prime Minister has seen a copy of the Home Secretary's letter of 18 April to the Lord President about the proposed right for the Crown to refer to the Court of Appeal sentences which appear excessively lenient.

The Prime Minister is generally content with what is proposed, subject to one point. She wonders, in relation to sub-paragraph (f) of the second paragraph of the Home Secretary's letter, whether it would not be right for the offender to be entitled to costs in any event, rather than at the Court's discretion. She would be grateful for the Home Secretary's views on this.

I am sending a copy of this letter to the recipients of your Secretary of State's letter.

Yours ever,
David

DAVID BARCLAY

Hugh Taylor, Esq.,
Home Office

Prime Minister ⁽¹⁾



Content, subject to colleagues, with these detailed proposals on the Crown's right of Appeal against lenient sentences?

QUEEN ANNE'S GATE LONDON SW1H 9AT

17 April 1984

Legislation is proposed in next Session's Crime Prosecutions Bill.

DMS
19/4

We are, as you know, committed to introducing in the Prosecutions Bill next session a Crown right to refer apparently excessively lenient sentences to the Court of Appeal. This would be quite closely based on the existing power (in section 36 of the Criminal Justice Act 1972) for the Attorney to refer to the Court of Appeal points of law arising from acquittals.

.....

I enclose a paper which my officials have prepared after consultation with officials of the main interested Departments. The principal features of the scheme as I envisage it are:

- (a) the Attorney's right of reference to the Court of Appeal would extend to all sentences passed on conviction on indictment or on committal to the Crown Court for sentence after conviction in a magistrates' court;
- (b) he would be able to refer such a case to the Court of Appeal for the Court's opinion on whether a more severe sentence ought to have been imposed and what would have been the appropriate sentence in the circumstances of the case;
- (c) the person whose case had been referred could not be directly affected adversely by the Court's opinion, i.e. he would not have to serve a more severe sentence;
- (d) by contrast with section 36, the person whose case had been referred would have no guarantee of anonymity; I think this impracticable since such cases are likely to have received publicity already, and indeed in some cases the notoriety may have been a factor leading to the reference. He would be able to be represented at the hearing by Counsel and, with the Court's leave, to present argument in person;
- (e) the Court would be able to take account of all relevant information, including information which was not available to the Crown Court;
- (f) if the offender chose to be represented, he would be entitled to legal aid and to costs, at the Court's discretion;
- (g) there would be (limited) scope for further reference by the Court to the House of Lords on a point of law.

Oughtn't he to get costs in any case? ←

The resource implications would fall mainly on the office of the Director of Public Prosecutions, partly in conducting the relatively small number of cases which the Attorney might be expected to refer each year, but also in establishing machinery for considering which cases to refer. The overall annual cost is put at around £150,000.

The introduction of a procedure of this kind was an important element of the package of measures which we agreed last autumn to improve public confidence. I believe it will have an important contribution to make, both in allowing the Attorney to pursue cases where the sentence has given rise to public unease and seems unduly lenient and in affording the Court of Appeal an opportunity to offer sentencing guidance in cases of this kind.

I should be grateful to know by Friday 4 May whether colleagues are, as I hope, content for me to instruct Parliamentary Counsel on this basis.

I am copying this letter to the other members of H Committee, to Sir Robert Armstrong and to First Parliamentary Counsel.

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ATTORNEY GENERAL'S RIGHT TO REFER CASES TO THE COURT OF APPEAL FOR AN OPINION AS TO SENTENCE

1. Ministers have agreed that the Prosecutions Bill should include a provision empowering the Attorney General to refer cases to the Court of Appeal where he considers that the Crown Court's sentence was unduly lenient. Such a right would not operate in such a way as to affect the particular offender adversely, even if the Court held that the sentence had indeed been unduly lenient. But it would enable public concern about apparently inadequate sentences to be recognised and met, and would provide the Court of Appeal with an opportunity to offer general guidelines on sentencing, as it now does in other kinds of cases.

2. The main questions which arise in framing such a power are:
 - (a) the range of cases to which it should apply;
 - (b) the basis on which such cases would be referred to the Court of Appeal, and the nature of the opinion which it would be invited to offer;
 - (c) the position of the offender, and the safeguards which he should be afforded;
 - (d) the procedure to be followed;
 - (e) the possibility of further reference to the House of Lords; and
 - (f) the resource implications.

Range of cases

3. Ministers have agreed that the right of reference should not extend to sentences imposed in the magistrates' court, if only because of the resource implications. If cases originally dealt with summarily are to be excluded, it would probably also be sensible to exclude sentences passed by the Crown Court on appeal against sentence by the magistrates' court. A more difficult question is whether to include sentences passed by the Crown Court on committal for sentence from the magistrates' court. Excluding all such sentences would considerably narrow the range of cases to which the new power applied, and would prevent the Attorney from referring some relatively serious cases, including some involving offences of violence. Including all such sentences would mean that the Attorney would be able to refer cases in which the offender himself had not had right of appeal to the Court of Appeal against sentence, since that right

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extends only to sentences of imprisonment of six months or more. This might add to pressure (which has so far been resisted) for an expansion of the defendant's right of appeal.

4. The Lord Chancellor's officials have suggested that this dilemma might be resolved by making the Attorney's right of reference co-extensive with the defendant's right of appeal. The difficulty with this course is that it would exclude the more lenient sentences, which are precisely those which are the target of the new power.

5. On balance, it seems right to opt for the widest coverage, on the basis that Ministers would be open to criticism if some serious offences were not covered, and that any criticism to the effect that the right of reference was more extensive than the defendant's right of appeal could be met by the argument that the processes were different, and that the Attorney's right of reference was bound, by its nature, to focus on shorter sentences. The proposal is therefore that the right should extend to all sentences and orders made by the Crown Court on conviction on indictment or on committal for sentence from the magistrates' court. (The inclusion of orders as well as sentences will allow the reference of, for example, hospital orders and probation orders, on which important sentencing issues can arise).

Basis of referral

6. The Attorney General already has a power of reference (in section 36 of the Criminal Justice Act 1972) in relation to points of law arising on acquittal. Ministers have agreed that the new power, which is not precisely analogous, should nevertheless be modelled broadly in section 36 which provides that:

"Where a person tried on indictment has been acquitted.... the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall consider the point and give their opinion on it".

In cases where the Attorney considers that the sentence was unduly lenient, the opinion which he desires of the Court might be expressed in terms of "whether a more severe sentence ought to have been imposed in the circumstances of the case". The Lord Chancellor's Department and the Registrar of Criminal Appeals have pointed out that the concept of "relative severity" could give rise to problems, since it may not be clear whether, for example,

a short suspended sentence is more or less severe than a £10,000 fine. They suggest that it would be better to focus on the "appropriateness" of the sentence, and define the procedure as flexibly as possible, by keeping the Attorney's discretion to refer at large and requiring the Court simply to consider the point referred by the Attorney and furnish him with an opinion on it, on the model of section 17(1)(b) of the Criminal Appeal Act 1968.

7. The point about the difficulty of judging the "relative severity" of two sentences has force, especially in relation to non-custodial orders. But it would be absurd to omit from the proposed provision any reference to the severity or otherwise of the sentence actually passed by the Crown Court when the undue leniency of this sentence is the premiss on which the exercise of the power of reference is based. In practice the Court will not be called on to compare two sentences in point of severity. The first question for it to consider will be whether the particular sentence imposed was sufficiently severe. Only if this question is answered in the affirmative does the further question arise of what other sentence would have been appropriate.

8. The proposal is therefore that the Attorney General would be able to refer a case to the Court of Appeal if he desired the Court's opinion on whether a more severe sentence ought to have been imposed and what would have been an appropriate sentence in the circumstances of the case.

The position of the offender

9. As has been remarked above, Ministers have agreed that the particular offender whose case is referred by the Attorney should not have to serve a more severe sentence, if it is the Court of Appeal's opinion that such a sentence should have been imposed. His case is, however, likely to have been the subject of Parliamentary or press comment, and his reputation could be affected by the outcome of the reference. It therefore seems essential that he should have the right to representation by counsel at the Court of Appeal hearing, or (with the leave of the Court) to represent himself. This would follow the model of section 36 of the Criminal Justice Act 1972. What could not be assured, however, would be anonymity for the defendant, which is a feature of the section 36 procedure. The case may well have already attracted press or public attention; and Ministers will want to be able to say in Parliament whether a particular case has been referred.

/Nor

Nor is the case for anonymity as strong as in section 36 cases, since such cases by their nature involve a defendant who has been acquitted. The Lord Chancellor's Department have suggested that the Court might be given power in the Rules to order that the defendant's name should not be disclosed, to deal with particular cases where this would be desirable or practicable.

10. Acknowledging the particular offender's interest in the reference raises the question of whether it should be possible for information which was not before the Crown Court to be considered by the Court of Appeal in forming its opinion. The Lord Chancellor's Department is strongly of the view that, if anonymity is not to be preserved, all relevant material, whether or not available to the Crown Court, should in principle be available to the Court of Appeal. Otherwise, they see a risk that the Court of Appeal might be placed in an intolerable position, where, for example, a defendant had good grounds for appealing against a sentence of imprisonment on the basis of new information which established that he should have been made the subject of a hospital order, but the Attorney had equally good grounds for concluding that the sentence which had actually been passed was, on the facts available to the Crown Court, unduly lenient. The Law Officers' Department, on the other hand, would regard the admission of "new" information and material as inconsistent with a scheme which was intended simply to review the correctness of the Crown Court's decision.

11. The question turns on whether the procedure is seen as a review of the sentence in the (full) circumstances of the case, or as a review of the trial Court's decision. The embarrassing combination of events which the Lord Chancellor's Department fears might be avoided by careful selection of the cases which the Attorney chose to refer, but there remains the difficulty that, if all relevant material were not be admissible, the offender might feel that his reputation was at risk of damage on the basis of only a partial account. Even if Ministers decided that the reference constitutes a review of the trial court's decision pure and simple, it might be difficult to explain the distinction satisfactorily. On the other hand, a process which allowed information to be taken into account which had not been available to the Crown Court would run the risk of amounting to a rehearing of the case (or at least those parts of it which were liable to bear on the sentencing decision) and it might then be more difficult to hold the position that the offender should not be adversely affected by the Court of Appeal's decision. On balance, for the reasons given in the

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earlier part of this paragraph, the Home Office's preference would be to allow information which had not been before the Crown Court to be taken into account.

12. The proposal is therefore:

- (a) that if the sentenced person desires to present any argument to the court, he may do so, by counsel on his behalf, or, with the leave of the Court, in person:
- (b) that the offender should not be guaranteed anonymity, but that it should be open to the Court of Appeal in appropriate cases, which would be rare, to order that his identity should not be disclosed during the proceedings;
- (c) that it should be open to the Court of Appeal to take into account information and material which had not been before the Crown Court.

Other procedural questions

13. There are several questions of procedure, which have not been covered in the preceding paragraphs.

- (a) The Attorney's role would be confined to making the reference. The conduct of the case for the Crown would be in the hands of the Director of Public Prosecutions, and the Court of Appeal would hear argument by counsel on his behalf.
- (b) Where the sentenced person was represented by counsel it would seem right for him to be entitled to legal aid (awardable, at any stage, by a single judge) and to costs, at the Court's discretion. This would follow the model of section 36 of the 1972 Act.
- (c) Where the sentenced person had lodged an appeal against conviction and/or sentence, it would be left to the Court of Appeal to make the necessary arrangements.

/Further

Further reference to the House of Lords

14. The Law Officers' Department would confine any further reference to the House of Lords to points of law such as the scope of the powers conferred upon the Courts by particular enactments. The Lord Chancellor's Department consider that there should not be the possibility of further reference to the House of Lords, which has never dealt with questions of sentencing.

15. In fact questions of law relevant to sentencing - e.g. how a court is to determine, after a plea of guilty to buggery, whether the higher penalty for a non-consensual offence can be imposed - have been before the House of Lords. It therefore seems justifiable that, where the questions on which the Court of Appeal has given an opinion involve a point of law of general public importance which ought to be considered by the House of Lords, the Court should have power (as under section 36(3) of the Criminal Justice Act 1972) to refer the point to the House of Lords.

Resource implications

16. It is understood that the Attorney expects to use the power sparingly. There will, however, be a need for some form of sifting of cases, within the new prosecution service (and probably in the office of the Director of Public Prosecutions), and consideration of representations by the public that the power should be exercised in particular cases. It is difficult to be precise, but a best estimate is that the scheme as described will cost about £150,000 a year, mainly in staff time.

Home Office

April 1984

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