

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE ACT 2003 (REVIEWS OF SENTENCING)
(CONSEQUENTIAL AND SUPPLEMENTARY PROVISIONS) ORDER 2007

2007 No. 1762

1. This explanatory memorandum has been prepared by the Office for Criminal Justice Reform and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This instrument modifies section 36 of the Criminal Justice Act 1988 ("the 1988 Act") to ensure that the Attorney General has power to refer all mandatory life sentence cases to the Court of Appeal as unduly lenient for judicial reconsideration of the minimum term to be served. Because of an unintended gap in the law, the Attorney General did not have power to refer certain cases, namely, those in which prisoners already sentenced for murder are awaiting the determination of a minimum term by the High Court. This instrument closes that gap.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 Section 36 of the 1988 Act provides for the Attorney General to refer a case concerning certain offences to the Court of Appeal for review if he is of the opinion that the sentence imposed is unduly lenient.

4.2 Section 36 was amended by section 272(1) of the 2003 Act with effect from 18 December 2003, to take account of orders made by the Crown Court under section 269 of the 2003 Act, which requires a court passing a mandatory life sentence to determine the minimum term to be served by the offender.

4.3 Schedule 22 to the 2003 Act sets out arrangements to deal with minimum terms in transitional cases. It specifically deals with two situations: prisoners serving minimum terms determined by the Secretary of State before section 269 came into force and prisoners already sentenced for murder but awaiting the determination of a minimum term at the time section 269 was commenced.

4.4 In the case of prisoners who have had their minimum term determined by the Secretary of State, paragraph 3 of Schedule 22 provides that they may apply to have their minimum term re-set by the High Court. In the case of prisoners awaiting determination of their minimum term, paragraph 6 of the Schedule 22 requires the Secretary of State to refer these cases to the High

Court for the determination of a minimum term under section 269 (hereinafter referred to as “paragraph 6 cases”)

4.5 Paragraph 15 of Schedule 22 provides that the power of the Attorney General to refer a sentence under section 36 of the 1988 Act applies in relation to an order made under paragraph 3(1)(a) as it applies in relation to an order made by the Crown Court under section 269(2) of the Act. No such analogous provision is made in relation to orders made under paragraph 6. There is no difference in principle between the two sets of cases and this was an unintended oversight.

4.6 Section 333(1) of the 2003 Act enables the Secretary of State to make any “supplementary, incidental or consequential provision ... which he considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to” any provision of the 2003 Act.

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Under section 36 of the 1988 Act, if it appears to the Attorney General that the sentencing of a person in the Crown Court, in a relevant case, has been unduly lenient, he may refer the case to the Court of Appeal for them to review the sentencing of that person. On such a reference the Court of Appeal may quash any sentence passed in the proceeding; and in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass.

7.2 As explained above, when section 36 was amended by section 272(1) of the 2003 Act (to take account of orders determining the minimum term in mandatory life sentencing cases under section 269 of the 2003 Act) express provision was made in paragraph 15 of Schedule 22 to bring paragraph 3 cases within the Attorney General’s unduly lenient jurisdiction in section 36 of the 1988 Act. Paragraph 15 makes no such analogous provision in relation to paragraph 6 cases. The issue was identified as requiring urgent attention when the Attorney General attempted to refer a paragraph 6 case to the Court of Appeal in April, and the Court queried his power to do so.

7.3 It was the policy intention at the time section 36 was amended by the 2003 Act to bring paragraph 6 cases within the ambit of section 36. Inquiries have disclosed no policy intention to treat paragraph 3 and 6 cases differently. It appears therefore that this was an unintended omission. This is supported by the Explanatory Notes to the 2003 Act, which suggest that the policy intention was to include both paragraph 3 and paragraph 6 cases in paragraph

15, explaining that paragraph 15 “extends section 36 of the Criminal Justice Act 1988 to these transitional arrangements”, referring to the transitional arrangements under both paragraphs.

7.4 There are approximately 180 cases referred to the High Court by the Secretary of State which are still awaiting determination of their minimum term, which, because of the gap in the 2003 Act, the Attorney General has no power under section 36 of the 1988 Act to refer and in which the Court of Appeal is deprived of jurisdiction to consider whether the orders made are “unduly lenient”.

7.5 It is clearly in the public interest that the Attorney General has power to refer, and the Court of Appeal has jurisdiction to review, paragraph 6 cases, in order to maintain consistency and public confidence in sentencing.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The Order will primarily affect the Attorney General’s Office and the Crown Prosecution Service. Any impact is being treated as de minimis in resource terms.

9. Contact

9.1 Stephen Jones at the Office for Criminal Justice Reform Tel: 020 7035 8456 or e-mail: stephen.jones@cjs.gsi.gov.uk can answer any queries regarding the instrument.