The Court of Appeal
Criminal Division

Review of the Legal Year
2010 / 2011

Review of the period October 2010 to September 2011

Introduction by the Lord Chief Justice

Once again the dedication of the Court of Appeal (Criminal Division) to the administration of criminal justice has been impressive. The office, lawyers and staff, continues to provide exceptional levels of service under constant pressures. Their workload has been considerable. Each case coming into the Court must be prepared for dispatch to judges who have to consider whether there are any points in the proposed appeals, whether against sentence or conviction, which have any merit worthy of consideration by the Court. Then, if they do have any meritorious points, the sometimes complex papers must be prepared for the hearing of the appeals. Both tasks are complex and burdensome. I am immensely grateful to all the staff.

The importance of the work done in this Court can be summarised very simply. It is there to ensure that so far as humanly possible convictions which are unsafe are set aside, and sentences which are either manifestly excessive or unduly lenient are corrected. Convictions which are safe and sentences which are appropriate must be upheld. That simple summary of the objective of this Court reveals its importance, and the high level of responsibility which all who work in the Court, whether in the office or in the Court itself, must carry.

During the last year something has been seen of the introduction of live text-based communications in the criminal courts. I shall shortly publish my conclusions to the responses to the wide consultation process about the continuing use of live text-based communications. However, modern technology does not come without risks. I remain concerned at the ease with which a member of the jury can, by disobeying the judge's instructions, discover material which purports to contain accurate information relevant to an individual case or an individual defendant. I am also concerned that the use of technology enables those who are not members of the jury to communicate, in both directions. In the context of current technology, we must be astute to preserve the integrity of jury trial and the jury system.

Despite their own individual workloads in managing the office, Susan Holdham and Alix Beldam have dedicated their own time to the production of a new book entitled *"The Court of Appeal Criminal Division: A Practitioner's Guide"* which provides detailed practical guidance on the appeal process. The work will be published in the near future. I have no doubt that it will be of great value to practitioners and indeed anyone seeking to use the Court.

My particular thanks this year must go to Master Roger Venne QC. For the last eight years, among many other responsibilities, Roger Venne has served the Court tirelessly in the demanding role of Registrar. This has involved him in ultimate responsibility for running the office and looking after those who have worked in it, but also discharging a significant judicial function, in particular by identifying the cases which need urgent consideration, or which raise issues of importance to the criminal justice system. He has done this at a time when the legislation relevant to the criminal justice system pours out of Parliament at unceasing speed and when the administration of justice is becoming increasing complex and difficult. Roger Venne's time as Registrar will be remembered as a time of remarkable achievement. He has been held in great respect and with warm affection by us all.

With the Vice-President of the Court, Lord Justice Hughes, I take the opportunity provided by this introduction to express our gratitude to everyone who has enabled the Court to fulfil its functions and to keep its objectives firmly in mind throughout this year.

Lord Judge
Lord Chief Justice of England and Wales

1. Summary for the period October 2010 to September 2011

1.1 The Court continues to play a critical role in protecting and promoting public confidence in the criminal justice system. It exists to determine appeals from the Crown Court and to provide guidance on the interpretation of criminal law and its procedures. In most cases, it is also the Court of final appeal and its role is therefore fundamental in protecting the rights of the individual defendant from miscarriages of justice and in preserving the convictions of the guilty.

1.2 This year the number of conviction and sentence applications received by the Court has marginally decreased in comparison with those received last year. In total, 6972 applications have been received, compared with 7133 last year (a decrease of 161 cases). The Court received 5481 sentence applications (a decrease of 172 in comparison with those received last year) and 1491 conviction applications (an increase of 11 compared with last year). The number of outstanding applications has decreased by 233 cases from last year (3113 compared to 3346) (see **Annex A**).

1.3 The average waiting time of cases disposed of by the Court over the previous 12 months was 9.3 months for conviction cases where leave to appeal was granted or the case referred to the full Court, and 4.6 months for sentence cases (see **Annex B**). In terms of conviction cases, this represents a decrease of 0.8 months in the average waiting time compared with that of the preceding year. In sentence only cases the average waiting time has decreased by 0.4 months. The Court is constantly appraising and adapting its systems of work to ensure an efficient through-put of cases against a background of business constraints. Over the reporting year it has adopted proactive temporary arrangements as part of its commitment to reducing waiting times in the face of a recruitment freeze and a temporary reduction in staff arising from an unusually high level of maternity leave.

1.4 In order to proceed to a full appeal hearing, an appellant must be granted leave to appeal, either by a single judge or by the full Court dealing with a referred or renewed application for leave. A total of 1251 conviction applications were dealt with in the reporting year (137 more than the proceeding year). Of those, 231 appellants were granted leave to appeal by a single judge and 149 had their application referred to the full Court by a single judge or by the Registrar. 871 applications for leave to appeal against conviction were refused by a single judge (see **Annex C**).

1.5 In terms of the number of sentence applications dealt with during the reporting year, 1123 appellants were granted leave to appeal by a single judge, 415 had their application referred to the full Court by a single judge or by the Registrar. 2501 applications for leave to appeal against sentence were refused by a single judge (see **Annex C**).

1.6 In total 18 fewer applications and appeals have been heard by the full Court over the reporting year compared with the previous year. However conviction appeals and applications usually take up considerably more court time than sentence applications and appeals and the number of conviction cases heard by the full Court has increased by 178 (1185 compared to 1007 last year). The number of sentence cases heard by the full Court has decreased by 196 (3103 compared to 3299 last year) (see **Annex E**).

1.7 Of the 535 appeals against conviction (i.e. where leave to appeal had been granted) which were heard by the Court this year, 213 (40%) were allowed and 322 (60%) dismissed. Of the 2004 appeals against sentence which were heard by the Court this year, 1390 (69%) were allowed and 614 (31%) were dismissed. It is difficult to quantify the success or otherwise of appeals in terms of the number of cases received by the Court, as those received in a given year far outnumber those dealt with by the full Court because not all cases will proceed that far through the process. Analysing the results of the Court compared to its intake of cases over a three year period gives a clearer idea of the success rate. On this basis an average of 12.8% of conviction applications received and 26% of sentence applications received are successful. Since only approximately 10% of all cases (conviction or sentence) dealt with at the Crown Court are the subject of application to the Court of Appeal Criminal Division ('CACD'), the percentage of Crown Court decisions that are overturned is very low. This demonstrates good reason for confidence in the criminal justice system, especially since a proportion of successful appeals are based on "fresh evidence" which was not available at trial (see **Annex D**).

1.8 The Attorney-General has this year referred for the Court's consideration 101 potentially unduly lenient sentences pursuant to section 36 of the Criminal Justice Act 1988. This is a decrease of seven cases compared with the previous year. Of those cases dealt with by the full Court, 82 have resulted in an increase in sentence. In ***Attorney General's References Nos. 73, 75 & 03 of 2010 [2011] EWCA Crim [633]*** the Court increased sentences imposed for offences of rape and serious sexual offences perpetrated in the course of domestic burglary from eight to 15 years imprisonment, commenting that the sentence for rape committed in the course of such a burglary would rarely be less than 12 years imprisonment. Aggravating features would raise the starting point to 15 years and in such cases the question of dangerousness must be carefully examined. The "pernicious new habit…by which criminals take photographs of their victims" should always be treated as an aggravating feature.

1.9 There was also a decrease overall in the number of applications which were made under some jurisdiction other than that conferred by the Criminal Appeal Act 1968 (289 compared to 345 in the previous year). The number of cases in which the prosecution exercised its right of appeal under section 58 of the Criminal Justice Act 2003 was similar to last year (28 cases compared to 26 last year). Two applications under part 10 of the Criminal Justice Act 2003 for retrial for serious offences ("double jeopardy") were received. The number of interlocutory applications decreased from 28 to 16 cases. These applications represent a comparatively small number of cases compared with the bulk of the Court's business, but often require listing at very short notice, which can mean that the Court's lists have to be completely re-organised to accommodate them. For example, an urgent application under section 82 of the Criminal Justice Act 2003 for restrictions on publication in relation to an acquitted person was listed before the full Court within six working days of its receipt during the summer vacation, at a time when only one constitution was sitting.

1.10 **Annex E** shows the proportion of all cases heard by the Court during this reporting year. There is a clear consistency in the Court's decision making in terms of the rates at which leave to appeal is granted and the final results. This is further highlighted in **Annex F** which shows the number of successful appeals against conviction and sentence as against the total number of such applications received.

1.11 The number and type of cases heard by the Court can vary considerably over a given year. Hearings can last anything from 15 minutes to days depending on their nature. The length of a hearing will depend on many factors such as the nature and complexity of the case, the need to receive evidence and representation. On a number of occasions during this reporting year as many as 11 sentence appeals have been listed before a Court in a day's list.

1.12 There has been a steady increase in the average number of cases disposed of per court per day over this and previous reporting years (5.4 in this reporting year as compared with 4.6 in 2009). This can be attributed to a combination of factors such as enhanced efficiency in listing cases and more accurate reading time allocation, as well as demonstrating the high level of commitment and dedication of the Lord Justices of Appeal and the High Court judges who sit in the CACD.

1.13 The following table shows the number of days sat in court together with the number of reading days, reflecting the different types of constitution:

Year	Lord Justice		High Court Judge		Circuit Judge	
	CT	RD	CT	RD	CT	RD
2004-2005	765	301	1317	496	194	94
2005-2006	758	287	1283	482	242	92
2006-2007	743	384	1292	495	247	95
2007-2008	725	360	1178	439	258	89
2008-2009	728	340	1221	498	310	128
2009-2010	787	450	1412	712	280	152
2010-2011	702	445	1083	738	279	152

(CT = Court sittings, RD = reading days, including judgment writing)

1.14 Lord Justices have a higher proportion of administrative days to court days in comparison with the other judges; the reason for this is that they have a high level of other duties such as membership of the Judicial Appointments Commission and Sentencing Council, chairing inquests and inquiries and other extra judicial commitments.

1.15 The Court has continued to utilise two-judge courts where two High Court judges can deal with certain renewed applications for leave to appeal against conviction and sentence, and many appeals against sentence.

1.16 The Court regularly sits in six constitutions, with the exception of the summer vacation. To ensure the average waiting time of cases was not adversely affected by the summer vacation and that backlogs of work were not accumulating within the Office, some 56 constitutions sat during the vacation period (compared with 52 the previous year) and 734 applications for leave to appeal were allocated to single judges for consideration (a significant increase compared to approximately 600 the previous year).

1.17 Sir Anthony May, the President of the Queen's Bench Division retired in July of this year. His contribution to the work of the Court has been invaluable and we wish him well in the future. We welcome Sir John Thomas as the new President of the Queen's Bench Division and also Mrs Justice Rafferty and Mr Justice Davis who have been elevated to the Court of Appeal and will sit in the Criminal Division.

1.18 The Court wishes to record its grateful thanks to Master Venne QC who retired as Registrar of the Criminal Appeal Office and Master of the Crown Office at the end of July. His calm leadership and cheerful efficiency will be greatly missed. We wish him a long and happy retirement.

1.19 There is little change in the number of directions hearings in comparison with the previous year (104 compared with 106). Criminal Appeal Office lawyers continue to focus on case management to ensure the proper progression of cases without the need to take up valuable Court time, arranging directions hearings only where necessary and appropriate. In those rare cases where solicitors or counsel fail to comply with proper requests from the Office, the Registrar will give directions either in writing or require that counsel attend for an oral hearing before him.

1.20 This year once again saw a reduction in claims for public funding. 5827 bills of costs were received compared with 6186 in the previous year and 6458 the year before that; £11.46m was claimed compared with £11.59m. In total, £6.99m was paid out. A slightly larger percentage of the total bills received (8.6% compared to 8.2% last year) were in excess of £4,000. There was a marginal reduction in the number of bills received which were in excess of £50,000, 30 (0.51% of the total number received) this year compared with 34 (0.55%) last year. The total number of bills received this year represents a 5.8% decrease on last year.

1.21 The Court has continued to make good use of video link facilities. Appellants and witnesses have attended hearings through some 99 links to various locations including 35 prisons and six courts during the year. Bandwidth limitations have restricted the number of cases which can be heard by video link on any single day, but on some occasions it has been possible for up to three different hearings in succession to be dealt with by this means. This saves costs and presents a more convenient method for appellants, witnesses and counsel to attend hearings. In particular, two vulnerable child witnesses were able to give evidence from their local Magistrates' Court rather than having to travel to London and, in another instance, an appeal involving a high security prisoner proceeded by video link over four consecutive days. The Court would encourage the expansion of such facilities to provide even greater benefits.

2. Criminal Appeal Office Organisation

2.1 The Court is supported by the Registrar and the staff of the Criminal Appeal Office, comprising 29 lawyers and 80 administrative staff, some of whom work part-time. Following the retirement of Master Venne QC at the end of July, interim measures are in place until the arrival of his successor.

2.2 The Office is responsible for processing applications for leave to appeal, obtaining the necessary papers, preparing the case to enable a single judge to determine it, writing a case summary for the Court and taking all steps to ensure that cases are heard at the earliest opportunity once fully prepared.

2.3 The structure of the Office is intended to provide maximum support to the judiciary in all aspects of the appeal process and to provide value for money as a publicly funded service. Budgetary constraints and the re-structuring of HMCS to include the Tribunals Service led to a restructure of the Office which took effect in April 2011. It is vital to the Court's ability to function effectively and efficiently that staffing levels in the Criminal Appeal Office are maintained. Conviction applications and appeals are managed by teams comprising administrative staff, casework lawyers and complex casework lawyers who are assigned cases according to complexity and who ensure that they are guided through the appeal process efficiently and justly. Casework lawyers and complex casework lawyers provide case summaries to the Court; the volume of cases is such that the Courts work simply could not be done without the input of these dedicated and experienced lawyers. The lawyers also provide advice on procedural matters to practitioners and to applicants in person. Complex casework lawyers deal with the more difficult cases, prosecution appeals against terminating rulings, interlocutory applications and other more unusual applications.

2.4 Sentence appeals and applications are managed by administrative staff with access to legal advice as required. Administrative staff are responsible for the preparation and progression of the majority of sentence only cases and write the case summaries on all but the most complex sentence cases. This work is similarly essential to the volume of cases dealt with.

2.5 The administrative staff is headed by the Senior Operational Manager, Criminal Appeal Office and Support Services and her Deputy who are responsible for office finance, systems and compliance with departmental objectives. In both the sentence and conviction casework groups administrative staff provide essential support dealing with day-to-day correspondence and preparing bundles for the court. Small teams of administrative staff within the Criminal Appeal Office also deal with specialist matters such as the assessment of costs, listing of cases, and the maintenance and development of electronic case managements systems and IT. Court clerks sit as the Registrar in Court.

2.6 The legal team at the Criminal Appeal Office is headed by the Senior Legal Managers. Their responsibilities include line management of the legal and secretarial staff, the development and maintenance of best practice and procedure in the Criminal Appeal Office and the maintenance of specialist legal skills for Criminal Appeal Office lawyers. Office procedures are reviewed to ensure compliance with any new relevant legislation, rules or authority and updated as necessary to support the work of the Court. This year, for example, has seen the introduction of a comprehensive guide to reporting restrictions in the CACD, which provides guidance

on the relevant statutory exceptions to the open justice principle and new procedures in Court to identify which of the provisions, if any, apply. Over the year, the new practices have become successfully embedded in the procedure of the Court so that the issue is always raised in advance, addressed in open court and recorded in the court order. The holders of this post also provide guidance to external users when invited to speak at external seminars and conferences. Lectures are supported by written notes on the practice and procedure of the CACD which have focused on the importance of case management, the use of respondent's notices and the invaluable guidance provided by the Criminal Procedure Rules. Through the dissemination of materials in this way the Criminal Appeal Office seeks to enhance the quality of the presentation of appeals before the Court.

2.7 The Registrar and Judiciary are also assisted by the Legal Information and Dissemination Lawyer and the Registrar's Staff Lawyer. The Legal Information and Dissemination Lawyer conducts a weekly review of the conviction appeals listed before the Court and distributes a list to the senior judiciary and within the Criminal Appeal Office, summarising the issues which are likely to arise, alerting different constitutions of the Court to similarities in cases before them, and ensuring that relevant recent unreported judgments of the Court are drawn to the attention of the Court and the parties. He also produces and distributes regular bulletins on the Registrar's behalf which digest statutory changes and important decisions of the Court and of other courts which may impact upon the decision-making of the Court. He assists the Registrar in keeping relevant primary and secondary legislation under review and in dealing with other interested parties when proposals for change are made. He has oversight of all legal advice given by the Registrar's legal staff to administrators in sentence cases and draws the Registrar's attention to recurring issues with a view to the Court being enabled to give general guidance in what has become an area of extraordinary complexity. The Registrar's Staff Lawyer works directly to the Registrar assisting him and the Judiciary with any matters which require legal input, such as advice, research, co-ordination of special courts and liaison with external stakeholders. She also acts as permanent editor of this review.

2.8 The Court is very grateful for the invaluable contribution made by the staff of the Criminal Appeal Office who continue to play a proactive role in preparing cases for the single judge and the full Court. Sentences are frequently drawn to the attention of the Court by the lawyers in the Criminal Appeal Office which are, in fact, unlawful and which the sentencing court had no power to pass. The statutory provisions which govern these sentencing decisions are extraordinarily complex. Mistakes are inevitable. Other legal issues are similarly identified to the Court. In ***R v McKenzie [2011] EWCA Crim 1550*** an appeal against findings made pursuant to s.4A of the Criminal Procedure (Insanity) Act 1964 that the appellant had done the acts charged against him, Lord Justice Hooper commented: *"Once again the Criminal Appeal Office has demonstrated its commitment to ensuring that justice is done notwithstanding the failure of all concerned at the hearing to realise that the indictment was flawed. We ask the Registrar to pass on the thanks of the Court to those responsible for detecting the errors".*

2.9 An important aspect of the work of the Criminal Appeal Office is to correctly identify and deal appropriately with those cases where expedition is merited. Delivering judgment in the sentence appeal of ***R v Ashley [2010] EWCA Crim 2913*** (discussed in part 3 of this Review) where a custodial sentence was replaced by a community sentence, the Court observed: *"We should record that the papers arrived in the office of the Registrar of Criminal Appeals on Thursday of last week and we are grateful to those working for the Registrar for ensuring that this case was given the expedition that it required."*

2.10 It a mark of the high regard in which the Office is held that when the State of Victoria sought to streamline the hearing of criminal appeals and substantially reduce waiting times in the Victorian Court of Appeal, it looked to our Criminal Appeal Office as a model. Following advice from Master Venne QC, a specialist Registrar of Criminal Appeals and a number of lawyers were appointed in Victoria to ensure active case-management of the applications and to prepare them for hearing. Preparation of case summaries by Court of Appeal lawyers to assist the court was also introduced mirroring the English system.

3. Cases of Note

3.1 Following guidance from the senior judges of the Court, the Registrar and his staff look out for cases raising novel or important points of law or procedure for inclusion in special or guidance courts. Such cases may be listed individually or conjoined; where appropriate before a constitution of five judges. It is not possible to report here on every case heard, but there follows a selection of cases of note.

3.2 During the reporting year the Court considered a number of issues relating to fitness to plead. In ***R v Walls [2011] EWCA Crim 443*** the appeal was founded upon expert reports obtained post-trial by both parties in which the experts agreed that the appellant had been unfit to plead at the time of his trial. The Court declined to determine the issue in reliance on the reports and required both experts to give live evidence. On evaluating all of the evidence, the Court determined that the appellant had been fit to plead, observing that the issue of fitness to plead had not been raised at the time of the trial, despite clear duties on all to do so if this was in doubt; nor had any consideration been given to the appointment by the trial court of an intermediary under the powers identified in *R(C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)*. As the court had emphasized in *R v Erskine [2009] EWCA Crim 1425*, contemporary assessment was a matter of real importance and it would be rare for later reconstruction to persuade the Court that unfitness existed. Save in cases where the unfitness was clear, a Court must conduct a rigorous examination of the psychiatric evidence adduced before it and subject that evidence to careful analysis against the criteria laid down in *R v Pritchard (1836)7 C. & P.303*.

3.3 In ***R v McKenzie [2011] EWCA Crim 1550*** the Court confirmed that where it quashed a finding that an unfit person "did the act charged" it had no power to order a retrial of the facts. The power contained in section 3 of the Criminal Appeal Act, 1968 (power on quashing a conviction, to substitute a conviction for an alternative offence), had no application to appeals by unfit persons under section 15 of the Act. The Court agreed with the observations in *R v Norman [2009] 1 Cr. App. R. 13* that this was a lacuna in the statutory provisions.

3.4 In ***R v Creed [2011] EWCA Crim 144*** the Court confirmed that evidence of bad character is admissible in a trial of the facts of a person found unfit to plead in the same way as it is admissible in any ordinary criminal trial. Such proceedings fell within "criminal proceedings" as defined in section 112 of the Criminal Justice Act 2003, notwithstanding that *H [2003] UKHL 1* had determined that proceedings under section 4A of the Criminal Procedure (Insanity) Act, 1964, did not result in the determination of a criminal charge so as to engage the protections of Article 6, ECHR.

3.5 Jury irregularities have been the focus of a number of cases. In ***Attorney-General v Fraill & Sewart; R v Knox [2011] EWCA Crim 1570*** the Court sat as a Divisional Court to consider an application by the Attorney-General for committal of a juror (Fraill) and an acquitted defendant (Sewart) for contempt and then as CACD to consider a renewed application for leave to appeal conviction by a convicted co-accused (Knox) founded upon part of the misconduct which formed the basis of the Attorney-General's committal application.

3.6 Following Sewart's acquittal, Fraill contacted her via "Facebook" whilst the jury was still in retirement considering the cases against the remaining co-accused. When this was brought to the Court's attention the jury was discharged from returning further verdicts. Investigations revealed that Fraill had also conducted internet research in relation to Knox. Fraill admitted that she was in contempt of court, both in disclosing information regarding the jury's deliberations to Sewart and in her internet research. Sewart was found to be in contempt in soliciting information about the jury's deliberations from Fraill. Both were committed to prison for contempt. Fraill's conduct was in flagrant breach of her oath as a juror and of orders made by the judge for the proper conduct of the trial and her committal for 18 months was immediate. Sewart had not instigated contact and her personal mitigation permitted suspension of the custodial sentence.

3.7 The Court emphasised that each juror promised by oath or affirmation to return a true verdict according to the evidence. That promise underpinned the jury system. Enquiries made by jurors on the internet had the potential to undermine the jury system and public confidence in it. The jury's deliberations and its verdicts had to be based exclusively on the evidence.

3.8 In ***R v Hewgill & Others [2011] EWCA Crim 1778*** the jury had reached verdicts on all counts apart from one count against the appellant, which they were still considering. A co-accused, who had been granted bail following conviction, spoke to two jurors in a public house adjacent to the court and reference was made to the case against the appellant. The contact was discussed with other jurors but was not reported to the trial judge. The jury returned a guilty verdict against the appellant on the outstanding count. The Court held that it was impossible to view the conviction as safe. The fact that the matter had not been reported to the judge made it impossible to conclude objectively that the jury had reached their verdict in an impartial manner.

3.9 In ***R v B [2011] EWCA Crim 1183*** a juror left the retirement room during deliberations in a state of distress and complained to the usher of bullying by the foreman. She refused to return to the retirement room. The Court held that the judge had been wrong to send the jury home and not to inform counsel of the full nature of the events that had occurred. The correct approach would have been to conduct enquiries of the usher and court clerk in open court, with all parties present so that counsel could then make informed submissions as to the appropriate course of action.

3.10 In ***R v Al-Tamimi [2011] EWCA Crim 1123***, on being arraigned the appellant had pleaded not guilty to a count of racially aggravated criminal damage but guilty to a count of criminal damage. The plea was not accepted by the Crown. The principal prosecution witness failed to attend the trial and the Crown offered no evidence. At the judge's direction a verdict was entered in accordance with the appellant's earlier plea. The Court determined that once the plea was rejected by the Crown it was no longer effective. Where the Crown was given time to consider its position a plea was to be regarded as subsisting; but once it had been rejected, it was not capable of later acceptance.

3.11 In ***R v Thompson [2011] EWCA Crim 102*** the Court held that the power to amend an indictment contained in section 5 of the Indictments Act 1915 was very wide. It extended to the inclusion of additional counts reflecting offences which had not been committed as at the date of committal or sending for trial. The real issue for the judge was whether there was prejudice or the likelihood of injustice either to the defendant or to the trial process.

3.12 In ***R v Killick [2011] EWCA Crim 1608*** the Court considered whether the trial judge had erred in dismissing an application for a stay of proceedings for abuse of process. Allegations of sexual assault had been made against the appellant in March 2006 and he was interviewed shortly thereafter. In June 2007 the Crown Prosecution Service decided not to prosecute and the appellant was notified of this via his solicitors. A request for a review of the decision not to prosecute was lodged and in December 2009 the decision was reversed. The appellant was convicted of buggery and sexual assault in December 2010. The Court ruled that that there had been no abuse of process. There was good reason why the prosecution had to review the matter and the delay, which was lamentable, caused no prejudice. A fair trial was possible. The evidence had been properly tested and the judge had given a full direction on the effect of delay.

3.13 In ***R v Booker [2011] EWCA Crim 7*** the Court held that an indictment preferred by direction of the CACD following the quashing of a conviction and the ordering of a retrial could be amended so as to add a defendant who had not been a defendant at the original trial. There was no general principle that previously absent co-conspirators could not be tried with a conspirator subject to retrial. *R v Hemmings and Others [2000] 1 Cr. App. R. 360* did not support a general proposition that any amendment was only permissible if it did not put the defendant in a worse position than he had been at the first trial. A defendant may often be in a worse position at a retrial, amendment or not, because for example further evidence had emerged, or was better presented.

3.14 In ***R v Shepherd [2011] EWCA Crim 1228*** the Court rejected an argument that it had no jurisdiction to consider an application for leave to appeal against conviction by a defendant who had pleaded guilty in the Crown Court but remained un-sentenced. It was open to the defendant to apply to the Crown Court to change his plea or to lodge an application for leave to appeal. Neither *R v Cole (1965) 49 Cr. App. R. 199* nor *S v Recorder of Manchester [1971] AC 481* supported the distinction which counsel sought to draw between a verdict of the jury and an accepted plea of guilty. "Conviction" in section 18 (2) of the Criminal Appeal Act 1968 included conviction following a guilty plea.

3.15 Following the decision of the Administrative Court in *R (TB) v The Combined Court at Stafford [2006] EWHC 1645 (Admin)* Part 28 of the Criminal Procedure Rules was redrafted to prescribe the procedure for third party disclosure in the Crown and Magistrates Courts. On a directions hearing in ***R v Doski [2011] EWCA Crim 987*** the Court observed that although the procedures prescribed in Part 28 did not apply to the CACD where, exceptionally, an application for third party disclosure had to be made to the CACD, procedures equivalent to Part 28 should be followed.

3.16 In ***R v Barkshire & Others [2011] EWCA Crim 1885*** 20 defendants had been convicted of conspiracy to commit aggravated trespass as a result of their involvement in a plan to enter and occupy the Ratcliffe Power Station. The Court examined the safety of their convictions in the light of post trial disclosure that an undercover officer had infiltrated the group. His involvement went some way beyond his authorisation and it was argued that he had acted as an agent provocateur. Recordings made by the officer supported defence contentions at trial that the defendants' intended activities were directed to the saving of life and avoidance of injury and that they proposed to conduct the occupation in a careful and proportionate manner. The Court concluded that the Crown's failure to disclose this material in accordance with section 3 of the Criminal Procedure and Investigations Act 1996 rendered the trial unfair and

the convictions unsafe. The material had the potential to provide support for the defence case or undermine the prosecution case, which had been that the defendants' main objective had been to publicise their cause, and was pertinent to a submission of abuse of process by way of entrapment.

3.17 The Court made a number of important observations in relation to expert fingerprint evidence in its judgment in ***R v Smith [2011] EWCA Crim 1296***. An issue at trial was whether a fingerprint was sufficiently clear to be identified as that of the appellant. The defence had not relied upon scientific evidence after the Crown challenged the qualifications and experience of the defence "expert." The Court observed that whilst other forensic science services were provided by organisations wholly independent of the police, fingerprint experts were organised in Fingerprint Bureaux which fell within the organisational structure of police forces. This raised questions as to independence and quality standards. There was a real need for ACPO, the Forensic Science Regulator, and the Fingerprint Quality Standards Specialist Group to examine the issues as expeditiously as possible.

3.18 In ***R v Twist and Others [2011] EWCA Crim 1143*** the Court analysed the application of the hearsay provisions contained in Chapter 2, Part 11 of the Criminal Justice Act, 2003 to text messages. It concluded that in most cases there were two questions to address: (a) what was the matter sought to be proved (s114); and (b) whether the maker of the communication intended the recipient to believe or act upon that matter (s115). It was important to distinguish between where a communication was evidence of a fact and where that fact was the matter stated in the communication. Some communications might contain no statement at all. It was also important to distinguish between the "speaker" wishing the "hearer" to act upon his message and the "speaker" wishing the "hearer" to act on the basis that a matter stated in the message was true. Only the second engaged the hearsay rules. Generally, having identified the relevant fact sought to be proved, it would be appropriate to ask whether there was a statement of that matter in the communication. If there was not, no question of hearsay arose; if there was, it was only hearsay where it had been one of the purposes of the maker that anyone should believe or act upon it as true. Where a text message was not hearsay the ordinary rules as to admissibility applied.

3.19 In ***R v Smith & Others [2011] EWCA Crim 66*** the Court confirmed that a person could commit theft of property the possession of which was unlawful (in this case, controlled drugs). Nothing in the Theft Act, 1968, suggested that what would otherwise constitute or be regarded as "property" ceased to be so because its possession or control was, for whatever reason, unlawful, illegal or prohibited. Such a construction had been recognised soon after the Theft Act came into force in T*urner (No 2) (1971)55 Cr. App. R. 336*.

3.20 In what was understood to be the first prosecution for conspiracy to supply a controlled drug of Class A (cocaine) where the substance found was a cutting agent rather than a controlled substance, the Court found that the trial judge had not erred in ruling that there was a case to answer (***R v Fra Marron [2011] EWCA Crim 792***). Customs officers had discovered 44kg of Phenacetin in the applicant's luggage on her arrival at Luton Airport. Phenacetin was used as a painkiller in some countries, but was commonly used as a cutting agent for cocaine in the United Kingdom. The applicant's account in interview was demonstrably false and the Crown had contended that an inference could safely be drawn that she knew the true nature of what she was importing and of its intended use as a cutting agent.

3.21 In ***R v D, P and U [2011] EWCA Crim 1474*** the Court held that evidence that a defendant had viewed and/or collected child pornography was capable of being admissible as being "relevant to an important matter in issue" pursuant to section 101 (1) (d) of the Criminal Justice Act 2003 where an accused was on trial for sexual offences against children. It was evidence of a character trait which made it more likely that the accused had behaved as charged.

3.22 In two cases the Court considered presumptions based on age in historical sexual abuse cases. Until 1993 there was an irrebuttable presumption at common law that a boy under the age of 14 at the date of the act alleged was incapable of penetrative sexual intercourse and it followed that he could not be guilty as a principal of rape (or buggery). Similarly, until 1998, there was a rebuttable presumption that a child aged 10 but under 14 at the date of the act alleged was doli incapax and it was necessary for the prosecution to prove to the criminal standard that the defendant knew the act to be seriously wrong.

3.23 In ***R v Fethney [2010] EWCA Crim 3096*** the Court observed that neither presumption had been abolished retrospectively. As to the first presumption, if the act of penetration alleged had been committed before 1993 but could not be shown to have been committed after the defendant's fourteenth birthday, he could not be convicted of the offence. As to the second, a failure to direct as to the doctrine of doli incapax rendered convictions relating to conduct committed before 1998 whilst aged between 10 and 14, unsafe.

3.24 A similar situation arose in ***R v Bevan [2011] EWCA Crim 654*** where the Court quashed a conviction for rape alleged to have been committed by the appellant when he may have been aged under 14, thereby engaging the irrebuttable presumption of penetrative incapacity. Other convictions were safe. Although the jury should have been directed that the rebuttable presumption of doli incapax applied, a number of features of the evidence led the Court to conclude that there was no prospect that the jury would not have been convinced that the appellant had known his actions to be seriously wrong.

3.25 In ***R v Hackett [2011] EWCA Crim 380*** the appellant faced a count of attempted arson. Having initially denied in interview that he had driven his co-accused to a petrol station, he later admitted that he had done so albeit, he said, for an innocent reason. In evidence at trial his explanation for the initial lie was that he had sought to avoid prosecution for driving with excess alcohol. The Court held that the judge had erred in directing the jury that it was open to them to draw an inference from his failure to mention in interview something later relied upon in his defence and in delivering a "Lucas direction." Giving both directions was liable to complicate matters. It was preferable to give whichever direction was most appropriate in the circumstances of the case.

3.26 The Court examined the sufficiency of an unusually brief summing up by the trial judge in the case of ***R v Noble [2011] EWCA Crim 1920***. The applicant had been stopped by customs officials who searched his motor vehicle and discovered a large amount of heroin. His account in interview, which he repeated in evidence, was that he had believed that he was couriering money and he called witnesses in support. The Court highlighted that the question was whether the summing up was so brief as to render the conviction unsafe. Given the simplicity of the case and the stark nature of the issues, the summing-up adequately achieved its intended purpose which was to provide the jury with a sufficient understanding of the factual issues which they were required to resolve.

Sentence

A large percentage of the Court's business relates to appeals against sentence. Whilst the majority of cases stand alone in terms of their circumstances and facts, some provide useful guidance in terms of procedure and jurisdiction.

3.27 In ***R v Smith; R v Clarke; R v Hall; R v Dodd [2011] EWCA Crim 1772*** the Court gave guidance in relation to the making of sexual offences prevention orders ('SOPO'). A SOPO would not usually be required alongside an indeterminate sentence, as release would be on licence, the terms of which would be carefully considered at the time of release. A SOPO might be necessary alongside a determinate or extended sentence as it could extend beyond the licence period. Where a sentence was suspended, a SOPO served a different purpose from the suspension and its duration would be longer. The duration of a SOPO and of the notification requirements need not be the same. The Court provided guidance as to the appropriate terms of SOPOs in respect of computer and internet use, personal contact with children and occupations or activities which were likely to bring the defendant into contact with children. A term in a SOPO which prohibited a defendant from activities which were likely to bring him into contact with children had to be justified as required beyond the restrictions placed upon him by the Independent Safeguarding Authority under the Safeguarding Vulnerable Groups Act 2006.

3.28 In ***R v Cooper [2011] EWCA Crim 1872*** the Court considered whether it was necessary for courts to continue to make "disqualification orders" pursuant to section 28 of the Criminal Justice and Court Services Act 2000 in addition to informing an offender that he was barred from working with children under the Safeguarding Vulnerable Groups Act 2006. It concluded that on a literal construction of the Safeguarding Vulnerable Groups Act 2006 (Commencement No. 6, Transitional Provisions and Savings) Order 2009 courts were required to continue to do so. A contrary conclusion had been reached in *Attorney General's Reference (No. 18 of 2011) [2011] EWCA Crim 1300* where the Court did not have the benefit of material and argument put forward by the Home Office. The case illustrated the Court's ability to reconsider issues of practical importance where concern arises that all material considerations have not been placed before the Court on an earlier occasion to ensure that the lower courts had clear guidance.

3.29 ***R v Kelly and Others [2011] EWCA Crim 1462*** raised questions as to the determination of the minimum term to be served following conviction for murder committed with a knife. The Court examined the meaning in paragraph 5A of Schedule 21 to the Criminal Justice Act 2003 of the words: "if the offender took a knife or other weapon to the scene." It was clear that paragraph 5A was not confined to murders committed with the use of a knife taken out and used on the streets. The Court acknowledged that there were problems in the context of what was meant by "the scene" particularly where the knife had been taken from one room in a house or other building and used in another.

3.30 In ***Attorney-General's Reference (No.6 of 2011) [2011] EWCA Crim 852*** the Court stated that offenders who carried knives and used them to wound and injure had to expect severe punishment. A sentence in the region of two to two and a half years' imprisonment after an early guilty plea would be appropriate for an offender of positive good character who had admitted use of a knife in a street argument.

3.31 In another such reference, ***Attorney-General's Reference (No. 23 of 2011) [2011] EWCA Crim 1496***, a sentence of life imprisonment with a minimum term of 15 years for the murder of the offender's former partner by means of prolonged beating in front of their three year old daughter was referred as being unduly lenient. The Court held that in the absence of any mitigation and with a late guilty plea, the sentence was unduly lenient and a minimum term of 20 years was substituted. In the context of this case, the fact that no further weapon was needed beyond shod feet and fists to inflict the fatal injuries did not afford any mitigation. The Court observed that where facts relevant to sentence arise it is meaningless for the Crown to indicate its position by use of the words "not" and "gainsay." The Court noted that the requirement under section 55(6)(c) of the Coroners and Justice Act 2009 to disregard a thing done or said that amounted to sexual infidelity in deciding whether a loss of control by a person accused of murder had a "qualifying trigger" for the purposes of a partial defence to murder did not prevent provocation being advanced in mitigation for an offence of murder. However, in the instant case there had been no provocation of any kind.

3.32 In ***R v Ashley [2010] EWCA Crim 2913*** the Court considered an appeal against an eight-month sentence of imprisonment for an offence of perverting the course of justice. The appellant had pleaded guilty to the offence on the basis that she had made a false retraction of allegations of rape against her husband. The Court observed that a complaint that an individual had been the victim of a crime was not and never had been a merely private matter between a complainant and the perpetrator. There was a distinct public interest in convicting those responsible for crime. However the withdrawal of a truthful complaint in a domestic environment usually stemmed from pressures arising from the nature of the relationship and characters of those involved. Where a woman had been raped more than once by her husband or partner who was the father of her children, his actions were often manifestations of his dominance and control over her and invariably a woman who had been ill-treated in this way became extremely vulnerable. A sentencing court should recognise and allow for the pressures to which she had been exposed and be guided by a broad measure of compassion for a woman who had already been victimised. The Court expressed a hope that it would be very exceptional for prosecutions to be brought in cases of this kind.

3.33 On 7th July 2011 following a period of consultation, the Crown Prosecution Service issued Guidance for prosecutors where a complainant of rape or domestic violence makes a false allegation, retracts an allegation or withdraws a retraction and could face a charge of perverting the course of justice.

3.34 In ***R v Tariq Majeed [2011] EWCA Crim 1409*** the Court held the fact that a victim of domestic violence had withdrawn her complaint was not compelling mitigation. Serious domestic violence called for substantial punishment even if the complainant could be prevailed upon to make pleas for clemency.

3.35 The application of Schedule 21 of the Criminal Justice Act 2003 to mercy killings was considered in ***R v. Inglis [2010] EWCA Crim. 2637***. The Court underlined that the law of murder did not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to partial defences, such as provocation or diminished responsibility, mercy killing was murder. The Court observed that Schedule 21 involved a prescriptive statutory sentencing regime which on occasion created difficulty and dilemma but it was satisfied that the factors specified in Schedule 21 paragraph 10(a), (b) and (d), which would normally aggravate

the offence of murder, should not be taken to aggravate a murder committed by an individual who genuinely believed that their actions in bringing about the death constituted an act of mercy. If this was not the case this express feature of mitigation would be deprived of any significant practical effect.

3.36 In ***R v Beesley & Coyle; R v Rehman [2011] EWCA Crim 1021*** the Court upheld sentences of imprisonment for public protection ('IPP') for offences of manslaughter, stressing that where it fell to the Court of Appeal to consider an assessment of dangerousness for the purposes of the Criminal Justice Act 2003, its task was to assess dangerousness at the time the trial judge had made his determination. Progress in custody was unlikely to be of assistance in that determination. The Court approved observations made by the Court in *R v Gisanrin [2010] EWCA Crim 504* to the effect that the whole purpose of a sentence for public protection was to effect improvements in the offender's behaviour. Progress in custody was likely to be relevant to the Parole Board's consideration but would not normally have any relevance as to whether or not an IPP had been correctly imposed. Whilst it was frequently the case in sentence appeals that the Court received what amounted to fresh information without formally requiring the conditions of s.23 Criminal Appeal Act 1968 to be satisfied, it would be very rare for the Court, when asked to review dangerousness, to receive new psychological assessments which had not been before the trial judge.

3.37 In ***Attorney-General's Reference (Nos. 48 and 49 of 2010) [2010] EWCA Crim. 2521*** the Court considered sentences of 25 and 30 months imprisonment imposed for offences of conspiracy to possess and distribute prohibited firearms and ammunition, and conspiracy to convert firearms. The Court noted that section 51A of the Firearms Act 1968 laid down a minimum sentence of five years imprisonment for possession of a prohibited weapon, but that the legislation made no provision for inchoate offences of conspiracy or attempt. There was no statutory duty to impose a sentence equivalent to the required minimum sentence for completed offences when dealing with conspiracy or attempt but the required minimum sentence should be treated as a relevant consideration.

3.38 In ***Attorney-General's Reference (Nos. 37, 38 and 65 of 2010) [2010] EWCA Crim. 2880*** sentences were increased for a statutory conspiracy to traffic persons for the purpose of exploitation contrary to section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The Court took the opportunity to identify the factors to be taken into account when assessing the seriousness of an offence under section 4. These included the nature and degree of deception or coercion, and subsequent exploitation exercised on an incoming worker; the level and methods of control exercised over the worker to ensure that he remained economically trapped; the level of vulnerability of the incoming worker and the degree of harm suffered by him; the level of organisation and planning behind the scheme, the gain sought or achieved, and the offender's status and role within the organisation; the number of those exploited; and previous convictions for similar offences.

3.39 In ***R v Auton & Others [2011] EWCA Crim. 76*** the Court laid down sentencing guidance for cannabis cultivation operations on a smaller scale than that considered by the Court in *Xu [2007] EWCA Crim 3129*. Where the cultivation involved no element of supply of any kind, the sentence following trial was likely to be in the range of nine to 18 months imprisonment. Where cultivation was for the defendant's own use and non-commercial supply without profit the sentence after trial was likely to be in the range of 18 months to three years. Where cultivation

was a commercial operation designed with a view to sale for profit, whether or not the defendant might use a limited quantity of the drug himself, the sentence after trial would usually be three to six years imprisonment.

3.40 Section 227 of the Criminal Justice Act 2003 as amended by the Criminal Justice and Immigration Act 2008 enables a sentencing court to pass extended sentences comprising a custodial term and an extended licence period where certain conditions apply; one such condition being that either the defendant has a previous conviction for a grave offence or the current offence justifies an appropriate custodial term of at least four years (section 227(2B)). Two unconnected appeals against sentence were listed together to enable the Court to consider the legality of aggregating sentences to meet this condition. Having considered a number of authorities the Court in ***R v. Joyce; R v. Pinnell [2010] EWCA Crim. 2848*** held that a sentencing court could aggregate non-specified offences as part of the totality of the offending and pass, on an appropriate count, an extended sentence with a custodial term longer than the facts of that count alone would justify. However, it would not be possible to pass shorter consecutive sentences to achieve a single custodial term of four years to qualify for an extended sentence under section 227(2B). The Court noted that there was no longer any objection to imposing consecutive extended sentences under section 227 of the Criminal Justice Act 2003, nor to imposing a determinate sentence consecutive to an extended sentence. This should only be done where there was a particular reason to do so.

3.41 In ***R v Clipston [2011] EWCA Crim 446*** the Court confirmed that confiscation proceedings are an extension of the sentencing hearing and are criminal in nature although they do not engage Article 6(2), ECHR, because they do not involve the determination of a criminal charge. The admissibility of hearsay evidence in confiscation proceedings was not governed (as it was in restraint proceedings) by the Civil Evidence Act 1995; nor by the regime contained in the Criminal Justice Act ('CJA') 2003, which applied only to criminal proceedings in which the strict rules of evidence applied (section 134(1)). This did not mean hearsay evidence was inadmissible in confiscation proceedings but where its admissibility was a live issue, the CJA 2003 regime, applied by analogy and would furnish the appropriate framework for adjudicating on such issues.

3.42 Section 32 of the UK Borders Act 2007 provides that if a person aged 18 or over who is not a British citizen is convicted of an offence and sentenced to at least 12 months imprisonment the Secretary of State is obliged to make a deportation order unless the order would breach the person's rights under the ECHR or various other conventions or treaties. In ***R v. Mintchev [2011] EWCA Crim. 499*** the Court dismissed an appeal against sentence, holding that as a matter of principle it could not be right to reduce an otherwise appropriate sentence so as to avoid the automatic deportation provisions.

3.43 In ***R v Mohammed Rakib [2011] EWCA Crim 870*** the Court held that even where an offender had served time in custody on remand which was at least equivalent to the maximum custodial term that could properly be imposed for an offence, the Criminal Justice Act 2003 gave the sentencing court a discretion to impose a community order where it considered this to be the appropriate sentence.

3.44 The treatment of time spent on remand before sentence was considered in a number of cases. In ***R v. Bodman [2010] EWCA Crim. 3284*** the defendant had spent time in custody on remand before being sentenced to a community order. The judge indicated that the remand time had been a factor in his decision to impose the order and should not count against any custodial sentence should resentencing arise. The defendant went on to commit a further offence, the order was revoked and he received a custodial sentence. The judge directed that the time spent on remand would not count toward the sentence. The Court dismissed the appeal. Section 240 of the Criminal Justice Act 2003 required a sentencing judge to give credit unless it would be unjust to do so in all the circumstances. This involved an evaluation of the situation at the time of resentencing. Where the sentencing judge had made the position as to time spent in custody on remand clear at the time of the original sentencing and had expressly taken it into account in deciding not to impose a custodial sentence, it was not wrong to decline to give credit when re-sentencing. In ***R v. Greer [2011] EWCA Crim. 314*** the Court allowed an appeal and credited the days spent on remand where, on re-sentencing, a defendant who had breached a suspended sentence order, the judge declined to make an order on the understanding (which was in fact incorrect) that the original judge had stated that he had taken the period of remand into account when he imposed the suspended sentence order.

4 Other types of Appeal

4.1 In addition to appeals against conviction and sentence, there are some 20 other types of appeal within the jurisdiction of the CACD. They include amongst other things the prosecution's general right of appeal in respect of rulings under section 58 of the Criminal Justice Act 2003; interlocutory appeals against rulings in preparatory hearings; appeals in relation to restraint orders under section 43 of the Proceeds of Crime Act 2002; prosecution appeals against the making of a confiscation order or where the court declines to make one under section 1 of the Proceeds of Crime Act 2002; appeals against an order relating to a trial to be conducted without a jury where there is a danger of jury tampering or after jury tampering, respectively sections 45(5) and (9) of the Criminal Justice Act 2003 and section 47 of the Criminal Justice Act 2003; applications for a retrial for a serious offence; applications with respect to reporting restrictions and open justice under section 159 of the Criminal Justice Act 1988; and appeals against restraining orders made following acquittal under section 5A(5) of the Protection from Harassment Act 1997.

4.2 In ***R v Boggild & Others [2011] EWCA Crim 1928*** the Court had to determine whether it had jurisdiction to deal with a prosecution appeal under section 14A(5A) of the Football Spectators Act 1989, against the refusal of a Crown Court judge to make a football banning order. The Court determined that, uniquely in appeals from the Crown Court relating to matters on indictment, no statutory provision assigned such an appeal to the CACD, and the effect of section 53(3) of the Senior Courts Act 1981 was to bring it within the jurisdiction of the Court of Appeal Civil Division. The Court therefore sat as a Civil Division to deal with the prosecution appeal on the above issue, and then reconstituted as the CACD to correct an unlawful sentence imposed upon one of the defendants.

4.3 The right of appeal given to the prosecution under section 58 of the Criminal Justice Act 2003 is commonly referred to as a right of appeal against 'terminating rulings', although the Act does not use that term and section 58 creates a 'General right of appeal in respect of rulings'. The Court has received 28 such applications during the reporting year.

4.4 One such prosecution appeal was ***R v F [2011] EWCA Crim 1844***, a case concerning historic sexual abuse. At the conclusion of the prosecution case the defendant had submitted that the indictment should be stayed as an abuse of process arising from the delay in the complainant having reported the offences. A five judge Court reviewed the law and issued guidance observing that an application to stay proceedings for abuse of process on grounds of delay and a submission of no case to answer were distinct and should receive separate consideration. An application to stay proceedings on the basis of delay should be determined in accordance with the principles enunciated in *Attorney-General's Reference No.1 of 1990 [1992] 1QB 630* and would succeed only where, exceptionally, a fair trial was no longer possible owing to prejudice to the defendant caused by the delay which could not fairly be addressed in the normal trial process. An application to stop the case on the grounds there was no case to answer had to be determined in accordance with *R v Galbraith [1981] 1 WLR 1039* and there was no different *Galbraith* test for offences which were alleged to have been committed some years ago, whether or not they were sexual offences. An application for proceedings to be stayed on the grounds of delay should ordinarily be heard and determined at the outset of the case and before the evidence was heard unless there was specific reason to defer it. The Court

commented that it would no longer be appropriate to make reference to any authority beyond the instant case, *R v Galbraith, Attorney-General's Reference No.1 of 1990, and Stephen Paul S [2006] EWCA Crim 756*. Unless the CACD expressly indicated to the contrary, future judgments should be regarded as an application of the principles to a fact specific decision rather than as an elaboration or amendment of the governing principles.

4.5 The majority of prosecution appeals against terminating rulings were against a decision of the trial judge to accede to a defence submission of no case to answer at the conclusion of the prosecution case. The Court reversed a number of such rulings, finding that the trial judge had taken too narrow an approach to the evidence and that it was a matter for the jury to decide upon the evidence. In ***R v NY, GC, FM & AE [2011] EWCA Crim 1072***, the defendants were being tried for conspiracy to supply drugs. Reviewing the evidence and the judge's ruling the Court stated that the question was not whether the jury would ultimately convict, (this being a matter for the jury), but whether, under section 67(c) of the Criminal Justice Act 2003, the ruling made by the judge was not a reasonable ruling. That, in turn, raised the question of whether there was material before the Court upon which a reasonable jury properly directed could convict.

4.6 In ***R v MH [2011] EWCA Crim 1508*** the defendant had been charged with offences of causing death by driving whilst uninsured, and causing death by driving whilst unlicensed, contrary to section 3ZB of the Road Traffic Act 1988. The trial judge had ruled that on the agreed facts a jury could not properly be directed in law that the defendant had been a cause of the deceased's death and accordingly a properly directed jury could not find that the defendant had caused the death. The prosecution appealed the ruling. The issue was whether a person could be said to be 'a cause' of death where his driving was faultless and the death had nothing at all to do with the manner of his driving and where the deceased was wholly to blame for the accident and for his own death. The Court held that the case could not be distinguished from *R v Williams [2010] EWCA Crim 2552* in which it was held that regardless of fault it is sufficient that the driving was a cause of the death.

4.7 In two recent cases, following *R v C, I & I [2009] EWCA Crim 1793 and R v Z [2009] EWCA Crim 2476*, the Court deprecated the declaration of pre-trial rulings as, "preparatory hearings," so affording them rights of interlocutory appeal. In ***R v CJ [2010] EWCA Crim 2412*** the Court observed that interlocutory appeals disrupted the trial process and the work of the CACD. A preparatory hearing should not be directed unless, exceptionally, a ruling of pure law was required, arising without consideration of hypothetical facts, and an interlocutory appeal was likely to serve a real practical purpose. The case in point was emphatically not such a case. There was no reason why the normal procedure should not have been followed. If the defendant was convicted and if there were a disputed point of law, he could then appeal. In ***R v C [2010] EWCA Crim 2578*** a voir dire had been held to determine admissibility of low-copy DNA evidence. After ruling that the evidence was admissible the judge declared the hearing to have been a preparatory hearing. The Court quashed the order designating the hearing as a preparatory hearing and referred to the guidance laid down in *R v I, P, O, I & G* followed in *R v Z* as to the exceptional circumstances in which a preparatory hearing might be required under section 29 CPIA or section 7 of the Criminal Justice Act 1987. In the instant case there was no relevant material on which the judge could properly have concluded that the case fell within section 29(1). Furthermore there was no power to designate a hearing to be a preparatory hearing ex post facto.

4.8 In ***R v VJA [2010] EWCA Crim 2742*** the Court declined to permit an interlocutory appeal against a trial judge's ruling refusing to stay the indictment as an abuse of process where it was said that a fair trial was no longer possible as a result of the Crown's failure to retain documents relating to allegations of offences committed more than 25 years ago. The judge's decision did not constitute, "Any other question of law relating to the case," so as to give rise to the right of interlocutory appeal. The Court observed that even if it had constituted a question of law, the right of interlocutory appeal remained an exceptional one and it would have refused leave.

4.9 In ***R v Major [2010] EWCA Crim 3016*** the Court considered for the first time an appeal against a restraining order made against a defendant following her acquittal. The appeal was brought under section 5A(5) of the Protection from Harassment Act 1997, which provides the same right of appeal for a restraining order made on acquittal as in cases where one is made following conviction. The Court gave general guidance as to the circumstances in which an order may be made, commenting that reasons for imposing such an order should be announced in open court. In the instant case whilst there may have been good reasons for making the order following the defendant's acquittal, they were not apparent from the judge's remarks. The Court could therefore reach no conclusion as to whether the making of the order was justified and it quashed the order.

4.10 ***In R v Kapotra [2011] EWCA Crim 1843*** the Court stated that a restraining order should not be made under section 5A of the Protection from Harassment Act 1997 against a person who had been acquitted following a decision of the prosecution to offer no evidence, without consideration being given to the provisions of section 5A of the Act or to the provisions of the Criminal Procedure Rules 2010. The serious nature of such an order is underpinned by the provisions of Part 50 of the Criminal Procedure Rules 2010 which identify the steps which have to be taken in order to ensure that any person to whom any such order is directed is given a proper opportunity to understand what is proposed and why and to make representations at a hearing. In this case, no such steps were taken either before or after the Crown offered no evidence and such limited evidence as was before the Court could not provide a sound evidential basis upon which to make the restraining order; nor was it apparent that the judge addressed his mind to these issues.

4.11 During the reporting year the Court received two applications by the Director of Public Prosecutions to quash an acquittal and for a retrial under the provisions of Part 10 of the Criminal Justice Act 2003. Most notably, in ***R v Dobson [2011] EWCA Crim 1256*** an application was made in respect of one of the suspects in a much publicised murder in 1993 who had previously been acquitted at a private prosecution in 1996. The application to quash the acquittal depended on the reliability of new scientific evidence, which, it was alleged, closely linked the acquitted person with the fatal attack and for which there appeared to be no innocent explanation. On the acquitted person's behalf it was argued firstly, that the evidence was not reliable given the passage of time and the likelihood of contamination of the samples and secondly, that even if it were reliable, constant adverse publicity over many years meant that a fair trial would now be impossible. The Court concluded that the new evidence was sufficiently reliable and substantial to justify the quashing of the acquittal and to order a new trial. Given the exceptional public interest in the case, the Court gave a short judgment for publication, emphasising that the presumption of innocence continued to apply and that the decision meant no more than the issue of the acquitted person's involvement in the murder was to be reconsidered by a jury at a new trial.

4.12 The Court has considered various cases concerning reporting restrictions to delay publication of material, which, it is argued if published, might have a substantially adverse effect on the fairness of the proceedings. Such applications are often urgent, and are dealt with in a very short space of time between receipt and final disposal. One such case was ***MGN Limited & Others [2011] EWCA Crim 100***, an appeal by media organisations under section 159 of the Criminal Justice Act 1988. Faced with three separate trials involving 20 young defendants, accused of offences concerning the murder of a 15 year old boy the trial judge had imposed a blanket prohibition on any reporting of any aspect of any of the three trials until the conclusion of the third trial, pursuant to section 4(2) of the Contempt of Court Act 1981. The Court referred to the guidance in *R v Sherwood, ex parte the Telegraph Group Plc and Others [2001] 1 WLR 1983*, commenting that such an order should be made only as a last resort. "Open justice," requires that an order is only to be made when it is necessary for the purposes of ensuring that justice is fairly and properly done in the cases in which an order has been made. The use of section 4(2) to alleviate the difficulties for witnesses of giving evidence, even if evidence has to be given in more than one trial, is rarely appropriate.

4.13 The provisions of section 44 and 46 of the Criminal Justice Act 2003 permit Crown Court trials to take place without a jury in certain circumstances where there is a danger of jury tampering or where jury tampering has occurred. In ***R v Twomey & Others [2011] EWCA Crim 8*** the Court dismissed appeals against conviction arising from the first trial to take place without a jury. The main issue in the case was the asserted unfairness of the process by which the defendants were deprived of their right to trial by jury. In ***R v G & Others [2011] EWCA Crim 1338*** the Court refused appeals against a ruling pursuant to section 46(3) of the Criminal Justice Act 2003, that (following the discharge of the jury due to tampering) the trial continue without a jury.

4.14 In the case of ***R v Hull [2011] EWCA Crim 1261*** the Court considered its powers under the Repatriation of Prisoners Act 1984 s.3(4). Hull had been sentenced to life imprisonment for murder in the Republic of Ireland and transferred to serve the remainder of his sentence in the United Kingdom. He sought to appeal against a minimum term of 18 years which had been set by the High Court. The Court concluded that the Act gave it jurisdiction to quash and substitute a minimum term of imprisonment imposed after a decision on the referral of a prisoner from another jurisdiction under the Criminal Justice Act 2003 s.273. However, in the instant case the appeal was dismissed.

4.15 In ***R v Peter Coonan (formally Sutcliffe) [2011] EWCA Crim 5*** the appellant had been convicted in May 1981 of 13 counts of murder and seven counts of attempted murder and sentenced to life imprisonment. In accordance with the practice at the time, the trial judge had made a recommendation that the minimum custodial period which he should serve was 30 years. After the coming into force of the Criminal Justice Act 2003 the Home Secretary made a reference to the High Court for a minimum term to be set. In July 2010 an order was made in the High Court that he should be subject to a whole life minimum term. The Court considered an application for leave to appeal against that decision. It was submitted that the High Court had been wrong to refuse to admit the evidence of a psychiatrist in assessing the appropriate minimum term, and thereafter, in failing to take account of evidence of the appellant's mental disorder or mental disability as mitigation on the basis that his mental condition lowered his culpability (the appellant had run the defence of diminished responsibility at trial.) The

arguments focused on the appellant's state of mind when he committed the offences. The Court concluded that *"the passage of time does not make the appellant's account at trial of how he came to commit these offences any more likely to be credible now than it was then"*. Even accepting that an element of mental disturbance was intrinsic to the commission of these crimes, the interests of justice required nothing less than a whole life order which was the only available punishment proportionate to these crimes.

5. The Role of the Criminal Cases Review Commission

5.1 The Criminal Cases Review Commission ("the CCRC") was established on 1st January 1997. It is an independent body whose purpose is to investigate possible miscarriages of justice. Its statutory role and responsibilities are set out in Part II of the Criminal Appeal Act 1995 and it has jurisdiction over all criminal cases at any Magistrates' or Crown Court in England, Wales and Northern Ireland.

5.2 Over the reporting year, the CCRC referred 17 cases to the Court (the same number as referred the previous reporting year); 14 relating to appeals against conviction and three to appeals against sentence. Although a relatively small number of cases in comparison to the total number of applications received, these cases are often very complex and their referral is usually the culmination of a lengthy investigation where the CCRC concludes that there is a "real possibility" that the conviction or sentence would not be upheld. Over the life of the Commission the average rate of referral is less than 4% of the cases it considers; for 2010/2011 its referral rate was under 3% of closed cases.

5.3 This year the Court overturned convictions from 1975 for robbery and wounding with intent in the appeal of ***R v George Davis [2011] EWCA Crim 1258*** on a second referral by the Commission. The case had received a considerable amount of publicity over the years. Fresh evidence and new material cast doubt on identifications made by those at the scene of the robbery and the Court ruled that it was impossible to be satisfied that the convictions were safe.

5.4 Grounds of appeal referred by the CCRC do not require leave to be argued. However, in many cases, appellants seek leave to argue additional grounds of appeal which were not referred by the CCRC. Leave to appeal is required in respect of any additional grounds, which may mean that additional court time will be required to consider the issue of leave. There can also be delays if further investigation and additional transcripts and documents are required for the Court.

5.5 The relationship between the Court and the CCRC is an important one. Not only does the Court deal with cases referred by the CCRC but the Commission also has an essential role as an independent investigatory body for the Court. The Court can direct, pursuant to section 15 of the Criminal Appeal Act 1995, that the CCRC use its statutory powers to carry out investigations on its behalf. This section applies to all cases before the Court and is not limited to those referred to the Court by the CCRC.

5.6 The CCRC's powers of investigation have proved of particular assistance to the Court in cases where jury irregularity is alleged, for example in ***R v Hewgill & others [2011] EWCA Crim 1778***, where the investigation related to conversations which took place in a public house during trial between a defendant who was on bail and members of the jury. The presiding Lord Justice acknowledged the very real value of the investigatory work carried out by the CCRC in that case as follows, *"The court wishes to record its gratitude to the CCRC for its thorough and painstaking investigation and for its clear report. Its work has been essential to ensuring the interests of justice can properly be considered by the Court in the circumstances that have arisen."*

6 Contacts

6.1 Over the reporting year the Registrar welcomed a number of judicial and academic visitors from overseas as well as from this country. The visits help to build and strengthen global relations and international understanding of our legal system.

The Registrar met with and hosted visits from:

- Judge Okeksandr Paseniuk, President of the High Administrative Court of Ukraine; Judge Stock, Vice-President of the Court of Appeal, Hong Kong; Judge Satoshi Watahiki of the Kyoto District Court, Japan; Mr Justice Mathealira Ramodibedi, President of the Appeal Court, Lesotho.
- Registrar Bibi Ali of the Supreme Court of Appeal, Guyana; and Registrar Mositsi Mokeke of the Appeal Court, Lesotho
- A delegation of ten prosecutors from the Attorney-General's Office, Qatar lead by Chief Prosecutor, Mr Saad Saaed al-Gahtani.
- Visits by RIPA International consisting of magistrates, court managers and lawyers from Nigeria, Malawi, Uganda, Tanzania, Brunei and Barbados.
- The UK Commissioner for Victims and Witnesses, Ms Louise Casey CB.
- Law students from Portsmouth University

6.2 Mark Pedley was appointed as the Judicial Registrar of the Victorian Court of Appeal early in 2011 and visited Master Venne QC and the Criminal Appeal Office in July to see and learn more about its working practices. He has in turn invited a member of staff to visit Melbourne to comment on the Victorian Court of Appeal and Registrar's Office. Such links can only serve to enhance the reputation of the UK Criminal Appeal Office.

6.3 The CACD User Group aims to meet at least once a year and it has proved to be an important forum for discussing the practical effects of changes in law and procedure upon the work of the Court. The success of the meetings stems from the diversity and breadth of experience of the User Group members who include practitioners of appellate law, counsel and solicitors, representatives from the Criminal Cases Review Commission, Crown Prosecution Service, The Office of the Attorney-General, the Probation Service, law reporters and senior Criminal Appeal Office staff.

6.4 Lord Justice Hughes, the Vice-President of the CACD chaired this year's User group meeting. Amongst the topics discussed was the positive impact upon the work of the Court by the CPS Special Crime Division Appeals Unit, and the introduction of the 'Yellow Book', written by Alix Beldam Senior Legal Manager of the Criminal Appeal Office which provides a practical approach to reporting restrictions in the CACD. It was agreed that the guidance was most timely given the increasing impact of text messaging, 'Twitter' and 'Facebook' upon the operation of jury trials.

6.5 The Vice-President thanked the CCRC for the continuing assistance it provided to the CACD in those cases which involved the sensitive issue of jury investigations.

7. Looking to the future

7.1 The Criminal Appeal Office has been engaged in ongoing work to continue to develop and enhance what has proved to be a productive working relationship with the Crown Prosecution Service Appeals Unit. The existence of the dedicated appeals unit has improved lines of communication between the Crown Prosecution Service and the Court, giving rise to greater efficiency in terms of casework progression. The Court has also been able to respond to the needs of victims and their families highlighted to it by the unit. It is intended that in the near future accommodation will be made available to enable the Crown Prosecution Service to have a site office at the CACD. Amongst other anticipated benefits, this will assist and encourage prosecutors to take a proactive role in liaising with victims and their families and with witnesses.

7.2 The Criminal Appeal Office remains committed to providing an efficient service to the Court and its users. The Office is under the same financial pressures as the wider public sector and a recruitment freeze has resulted in reduced staffing. Changes have been made to internal systems and processes, including the replacement of manual processes with centralised systems to provide the best use of resources and to ensure continued efficiency and service to users. Standard operating procedures have been agreed with the Crown Court to streamline delivery of necessary information to the Court. The Office has also entered into a protocol with the Attorney-General's Office to achieve greater efficiency in the throughput of sentences referred to it as potentially unduly lenient where the defendant has received either a short (up to 12 month) custodial sentence or a non-custodial sentence.

7.3 Technological advances impact on the Court in different ways. Whilst they present opportunities for the Court to improve the service and efficiency it can offer to users, some advances require a response from the Court to issues which they raise. Examples are the implications for the reporting of court proceedings and the potential for jury misuse which arise from increased methods of mobile internet access.

7.4 As part of its commitment to enhancing the service which it offers to its users, the Court Service as a whole is looking to expand and maximise its use of electronic services. In taking this forward safeguarding security of information is of prime importance. Arrangements are now in place which enable the Attorney-General's Office to lodge referrals of potentially unduly lenient sentences and other documents with the Court electronically. It is envisaged that this facility will be extended to other court users in the future.

7.5 Following implementation of a "pilot" scheme in six Crown Court centres, the use of digital audio recording equipment, known as the "DARTS" system, will be rolled out to all branches of the Crown Court by the end of March 2012. The new system will replace the current analogue recording equipment and the logging of stages and events in court by staff provided by firms contracted to provide transcription services. It is expected to bring an enhanced quality of recording and a faster transcription service for all court users.

7.6 On the 20th December 2010 the Lord Chief Justice issued ***Interim practice guidance on the use of live text-based forms of communication (including Twitter) from court [2010] All ER (D) 228 (Dec)***. The effect of the Interim Guidance was to provide a framework for the issues which judges must consider when determining whether to allow the use of mobile

electronic devices to transmit text-based communications directly from the courtroom for the purpose of reporting the proceedings. The Interim Guidance confirmed that there was no statutory prohibition on the use of live text-based communications in court. The paramount question was whether the use of such forms of communication may interfere with the proper administration of justice in the individual case.

7.7 The Interim Guidance was followed by a consultation issued by the Judicial Office on behalf of the Lord Chief Justice which closed on the 4th May 2011. A response will consider what, if any, further guidance or rules may be required.

7.8 The Secretary of State for Justice has issued a statement expressing his intention to allow television broadcasting from the courts. He intends to commence with the Court of Appeal and the Criminal Appeal Office is engaged with other agencies in active consideration of the issues which will need to be addressed.

7.9 In recent months the Magistrates' Courts and the Crown Court faced the challenge of dealing with the sudden influx in cases arising from the riots which took place in London and other cities over the summer. At the end of the reporting year the Court considered applications for leave to appeal by 10 defendants against sentences imposed for their parts in the riots and subsequent looting. The Court's reserved judgment was subsequently delivered in October 2011 and provided guidance as to sentencing in such cases.

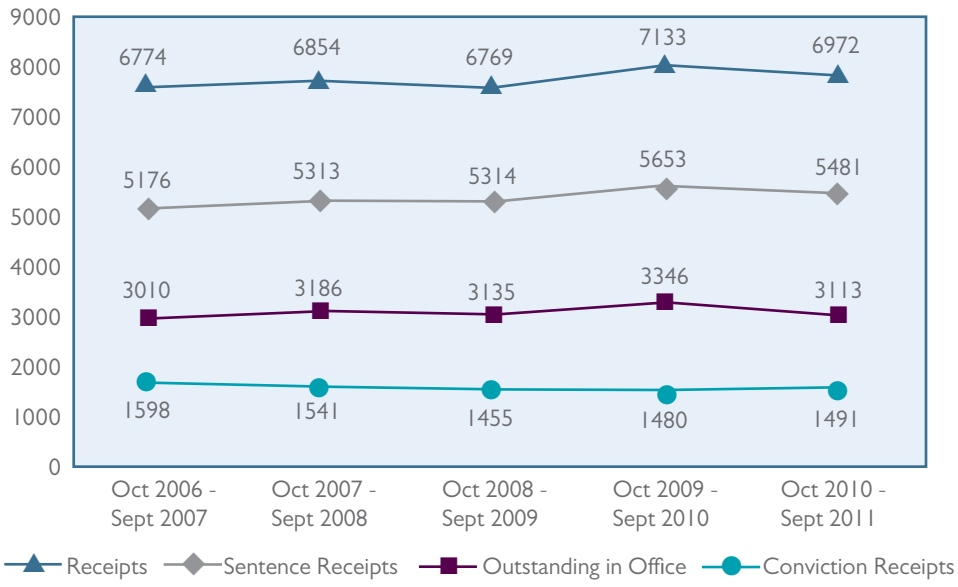
7.10 The Court looks forward to welcoming the new Registrar to the Criminal Appeal Office with every confidence that the staff of the Criminal Appeal Office will show to him the same unqualified support and loyalty as they did his predecessor as the challenges of the next year unfold.

Lord Judge
Lord Chief Justice of England and Wales

Lord Justice Hughes
Vice President of the Court of Appeal Criminal Division

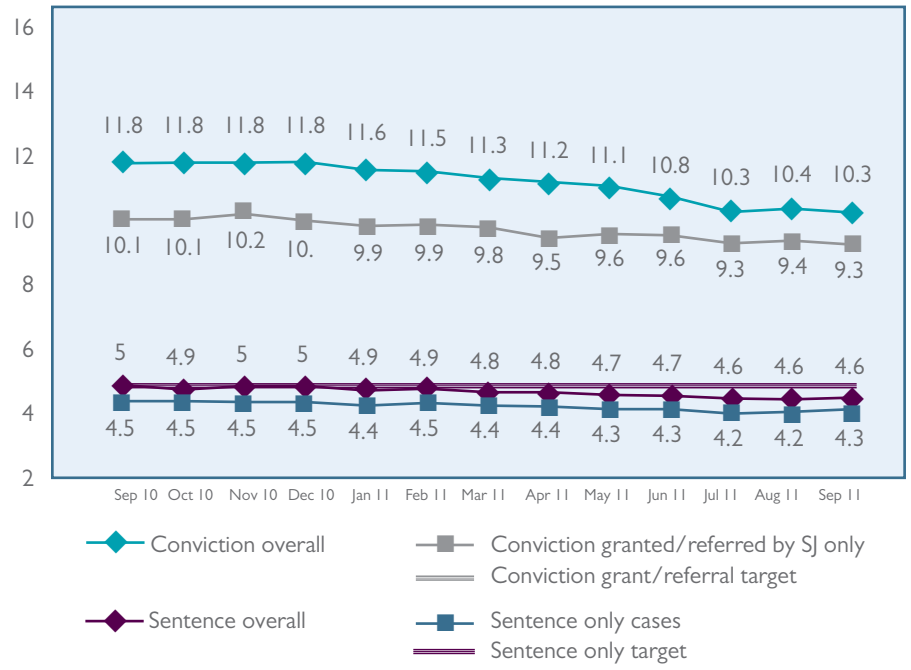
Annex A

Applications Received and Outstanding in Office



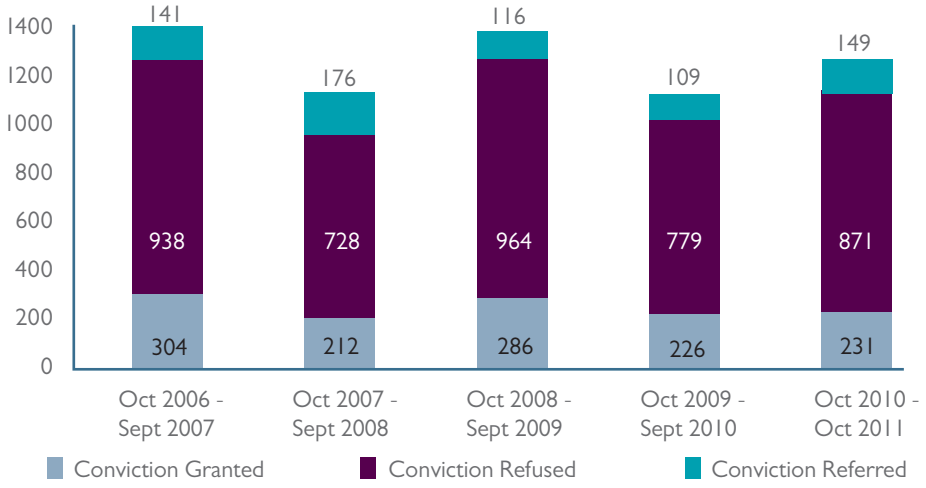
Annex B

Average Waiting Times (in months)
Rolling average of cases disposed by full court over previous 12 months

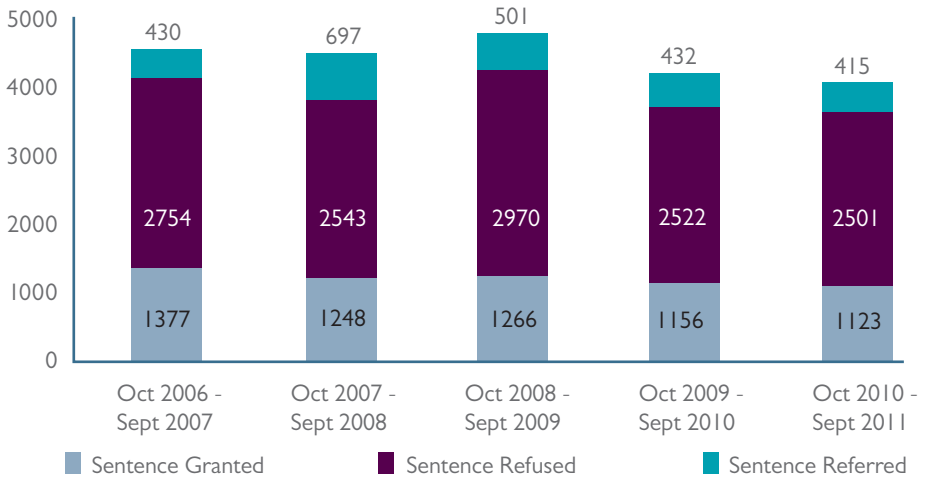


Annex C

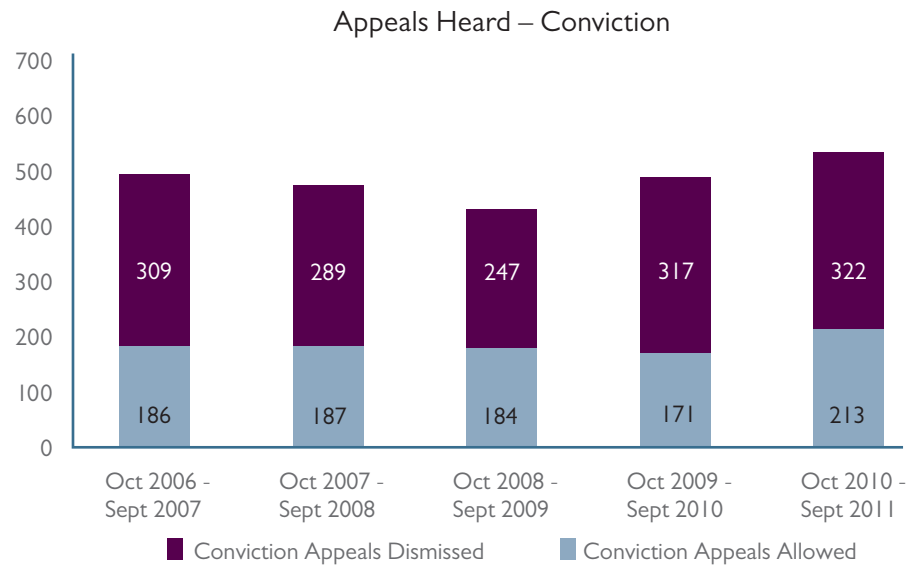
Section 31s – Conviction Applications dealt with

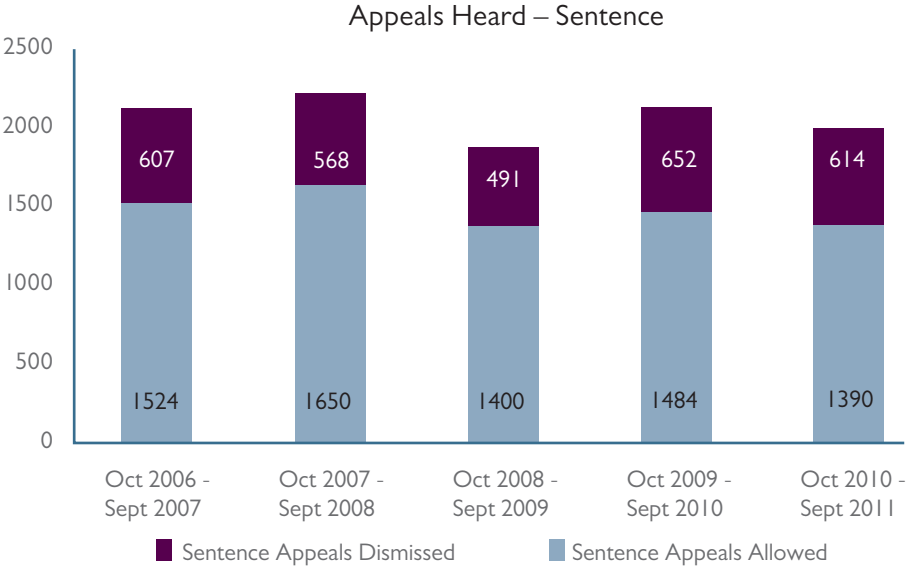


Section 31s – Sentence Applications dealt with



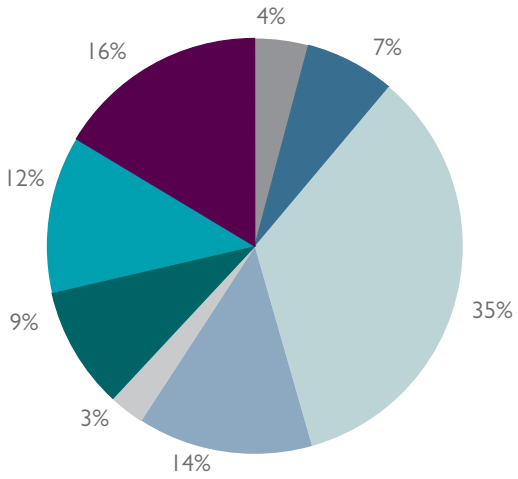
Annex D


Appeals Heard – Conviction
700
600
500
400
300
200
100
0
309
289
247
317
322
186
187
184
171
213
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Conviction Appeals Dismissed
Conviction Appeals Allowed

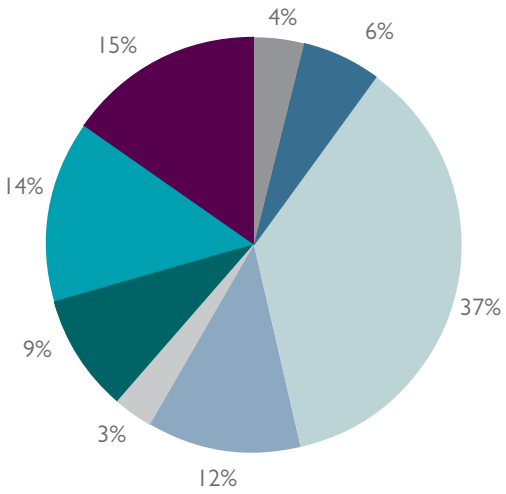

Appeals Heard – Sentence
2500
2000
1500
1000
500
0
607
568
491
652
614
1524
1650
1400
1484
1390
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Sentence Appeals Dismissed
Sentence Appeals Allowed

Annex E

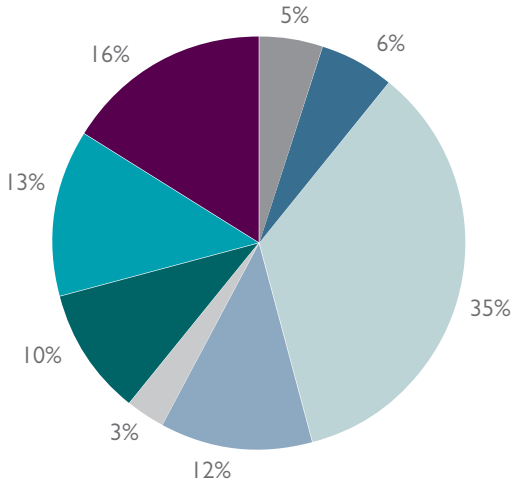
October 2006 - September 2007



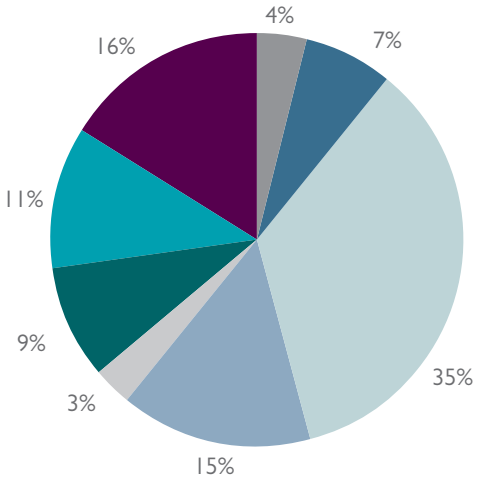
October 2007 - September 2008



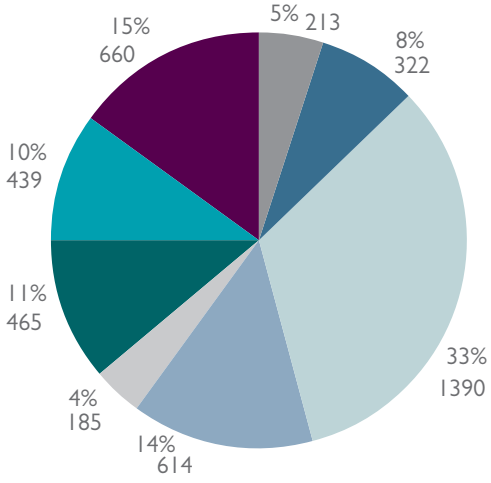
October 2008 - September 2009

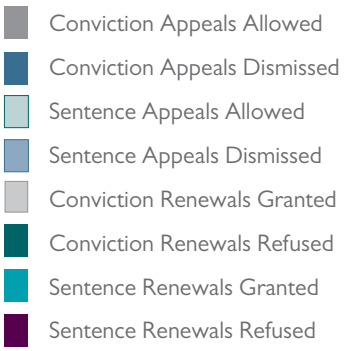


October 2009 - September 2010

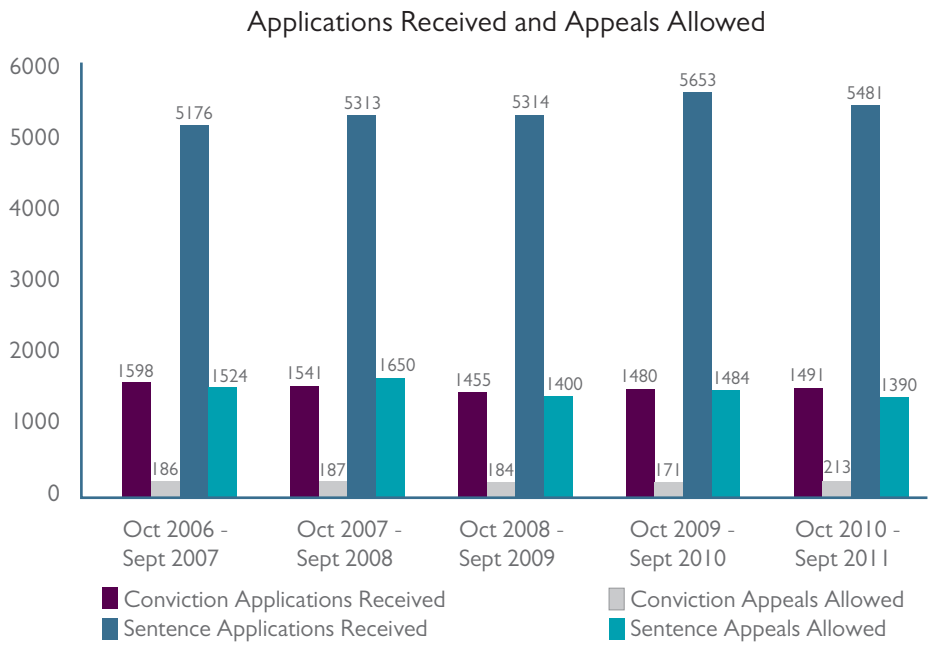


October 2010 - September 2011



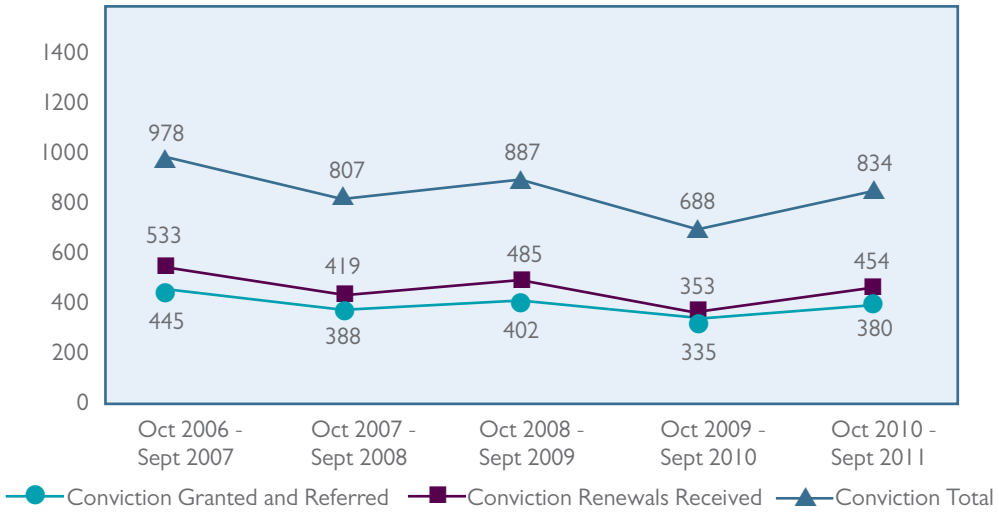


Annex F

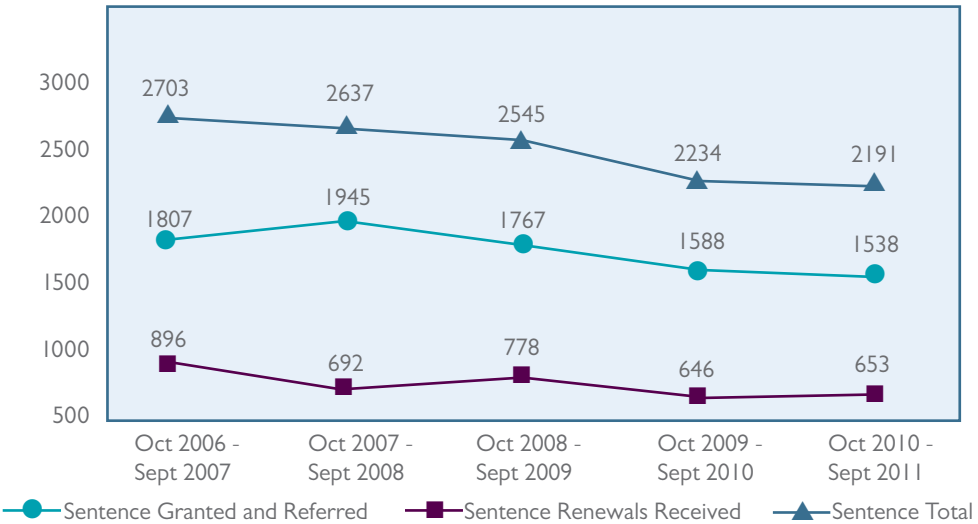

Applications Received and Appeals Allowed
6000
5000
4000
3000
2000
1000
0
1598
186
5176
1524
1541
187
5313
1650
1455
184
5314
1400
1480
171
5653
1484
1491
213
5481
1390
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Oct 2010 - Sept 2011
Conviction Applications Received
Conviction Appeals Allowed
Sentence Applications Received
Sentence Appeals Allowed

Annex G

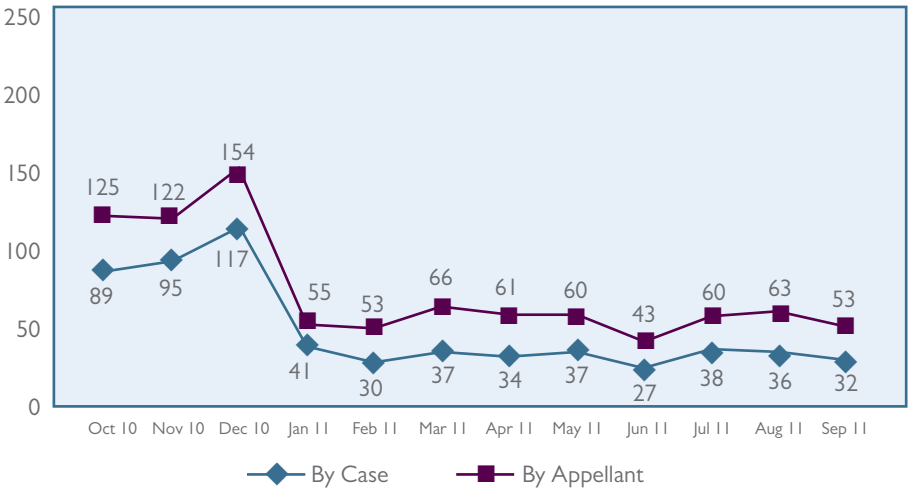
Applications Granted / Referred and Renewals Received (Conviction)



Applications Granted / Referred and Renewals Received (Sentence)



Conviction Old Cases – Outstanding over 10/13 months



Sentence Old Cases – Outstanding over 5 months