In the Court of Appeal (Criminal Division) 2015-16

Contents

Introduction by the Lord Chief Justice

The publication of this Report marks another year in the life of the Court of Appeal (Criminal Division). It has been a busy one for us.

The importance of the work done in this Court can be summarized 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.

The Court is often burdened with having to deal with comprehending and applying legislation which could have been better drafted and better organised. The law on sentencing particularly has become highly complex and provisions are often contained within an array of separate but overlapping sources. I therefore welcome the on-going work of the Law Commission to codify sentencing law and to introduce a single sentencing Code that will act as the first and only port of call for sentencing.

Some of the problems both of substantive and procedural law addressed by the Court this year are discussed in the text of the Review. They provide a thumbnail sketch of the work of the Court, which has on a number of occasions been specially constituted to consider matters such as sentencing in terrorism and historic sexual cases, credit for assistance given to the authorities, inconsistent verdicts and fresh evidence in sentence appeals.

Finally, I should like to thank Sir Brian Leveson, the President of the Queen's Bench Division and Lady Justice Hallett, the Vice-President of the Court of Appeal, Criminal Division, for the strong leadership they have provided to the Court over the last year, and to extend my thanks to the judges sitting in the Court for their commitment and dedication. They often have to cope with its burdens by working late into the night and at the weekends, so that they are fully prepared for the hearings and are able to deliver reserved judgments as speedily as possible. I would also wish to extend my thanks to the staff working in the office. The efficient disposal of the work of the Court depends on them, presided over with his unchanging, cheerful efficiency by Michael Egan QC.

Lord Thomas

Lord Chief Justice of England and Wales

Looking to the Future

The delivery of a fair and just criminal justice system in a climate of reduced public spending presents many difficult challenges for all courts including the Court of Appeal. The increased use of technology is one of the ways that the courts and those who use them can try to meet the challenges.

During the past year the Court of Appeal (Criminal Division), for example, which works with 132 different prisons nationally, has seen a huge increase in the number of video link hearings. It is now our 'default' setting. By 31st March the number of video link hearings had increased to 94%, a level either maintained or exceeded during the remainder of 2016. The use of the video link enables appellants and witnesses to participate in hearings without the cost and inconvenience of physically attending court. There are also reduced security risks.

But, changes in technology bring with them their own challenges for the courts. In a case heard earlier this year, for example, *R (on the application of the BBC) v. F and D* [2016] EWCA Crim 12, the Court had to consider the relationship between the right to a fair trial and openly abusive and potentially highly prejudicial communications on social media. The Court observed: "anyone posting a comment on a publicly available website which creates a substantial risk of causing serious prejudice faces the potential prospect of proceedings for contempt of court and we anticipate that the authorities will be alert to inform the Attorney General should such circumstances arise. This does not just apply to the appellant or any other media organisations: it applies to individuals who run the risk of causing real difficulty to the smooth progress of a fair trial for these defendants".

The work of the Court remains relentless. Most applications received are considered initially by a single High Court judge on the papers. As the Court noted in *R v. Hyde and Others* [2016] EWCA Crim 1031 the role of the single judge in filtering applications to the full Court is of the utmost importance. Their work saves the full Court considerable time and my thanks go to them all.

However, the full Court is still too often burdened with over-lengthy grounds of appeal. As was stated in a Civil Division appeal but is apposite to the Criminal Division: "Practitioners … are well advised to note the risk of the Court's negative reaction to unnecessarily long written submissions". It is simply unacceptable and contrary to the Criminal Procedure Rules for advocates and applicants in person to lodge prolix grounds of appeal. It is hoped that parties take note of recent comments of this Court in *James* [2016] EWCA Crim 1639, a judgment handed down on 12th October 2016.

A large percentage of the Court's business relates to appeals against sentence. This includes references by the Attorney General for consideration of potentially unduly lenient sentences. The last year has seen a significant increase in the number of such applications and figures show that over a four year period the number has more than doubled. This has had an impact on the List Office. Sentence applications generally may be heard by two judges and this provides the Court with considerable flexibility. It frees Lord/Lady Justices of Appeal to deal with the ever increasing burdens upon them. References, on the other hand, take more time than most sentence applications and must be heard by three judges headed by a Lord/Lady Justice of Appeal.

The increasing number has a major impact on the running of the court. We are monitoring the situation.

Finally, this year saw the retirement of Lord Justice Laws and Lord Justice Aikens. I should like to pay tribute to their considerable contribution to the administration of Criminal Justice.

The Right Honourable Lady Justice Hallett DBE

Vice President of the Court of Appeal (Criminal Division)

Master Egan QC, Registrar of Criminal Appeals

The Court of Appeal (Criminal Division) continues to sit outside London. The Lord Chief Justice sat in Birmingham, Bristol, Norwich, and Manchester and in an addition to the regular sitting in Cardiff the Court has also sat in Swansea.

Applications for leave to appeal lodged by applicants acting in person have increased markedly this year and now stand at approximately 9.21%[1]. Those numbers are now very significant and it looks as if the percentage will be over 10% next year. There is a price to be paid for this because the case management of cases place a much greater demand on the resources of my Office, in terms both of advice to applicants and support to the judiciary[2].

I am always impressed by the number of counsel and solicitor advocates who appear pro bono on renewals. As a small recognition of the difficulties and cost of this we have experimented this year with having a 2.00pm renewals Court so that counsel from other parts than London can take advantage of lower priced fares to the capital.

The requirement for fresh legal representatives to check the facts before submitting grounds of appeal as set out in *R. v. McCook*[3] continues to see an improvement in cases where fresh legal representatives are instructed. The Bar council have now issued guidance which will assist all legal representatives at:-

http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/criminal-appeals-duties-to-the-court-to-make-enquiries/.

Our Office continues to have a strong relationship with the Criminal Cases Review Commission. In addition to their vital statutory function under Section 9 Criminal Appeal Act 1995 our Court relies entirely upon them in directed investigations under section 23A Criminal Appeal Act 1968 into allegations of jury impropriety.

I must, however, say a word about Michael Catterson who has commenced a well-earned retirement this year. Michael has been a vital member of our legal team for many years now and was a true institution. However organisations must be prepared for change and the Criminal Appeal Office has almost always replaced retiring staff with outstanding new recruits. That has occurred here and it means that my office has a very powerful team of lawyers and administrative staff who approach next year in very good shape.

1 Approximate percentages for previous years are; 2015: 6.6%, 2014: 5%, 2013: 3.4% and 2012 2.53%.

2 We have introduced a system whereby all grounds by applicants in person are reviewed by lawyers and a summary prepared before the permission stage. Frequently lay persons have understandable difficulty in identifying the difference between arguable grounds and matters that go no further than assertion, we find that such input helps to ensure that genuine grounds are identified at an early stage.

3 [2014] EWCA Crim 734

Cases of Note

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.

Sentencing on Terrorism Offences

In ***R v. Mohammed Abdul Kahar and Others*** **[2016] EWCA** Crim 568 the Court (LCJ. PQBD. Sweeney, Hickinbottom and Cheema-Grubb JJ.) gave guidance on sentencing offences under section 5 of the Terrorism Act 2006 until the Sentencing Council was in a position to address the issue in Guidelines.

The Court adopted the following approach: The levels into which it divided the criminality were differentiated by two principal factors: (i) the culpability of the offender principally by reference to proximity to carrying out the intended act(s) measured by reference to a wide range of circumstances including commitment to carry out the intended act(s); and (ii) the harm which might have been caused measured in terms of the impact of the intended act (or series of acts) or the intended number of acts, including not only the direct impact intended on the immediate victims, but also the wider intended impact on the public in general if the act had been successful.

The Court noted that the offence was a "specified violent offence" within Chapter 5 of the Criminal Justice Act 2003. Accordingly, the dangerousness provisions and guidance given in *R v Burinskas* [2014] EWCA 334 and *R v Saunders* [2013] EWCA Crim 1027 would need to be considered. In deciding whether an offender was dangerous the extent and depth of their radicalisation / extremism and the likelihood of its continuance would be very important factors and an offender who was in the grip of idealistic extremism was likely to pose a serious risk for an indefinite period. The Court set out six levels to which sentencing judges should have regard, and the Court gave examples from recent cases of the type of offending which might be caught in the particular levels.

Further Guidance in Sentencing Historical Sexual Offences

In ***Forbes*** **[2016] EWCA Crim 1388**, the Court (LCJ. VPCACD. Treacy LJ. McGowan J. DBE and HHJ Peter Rook) heard a number of appeals together involving historic sexual offences since they raised related issues that had arisen in sentencing in such cases. The Court outlined the applicable general principles. The guidance in *R v H* [2011] EWCA Crim 2753 had been codified by the Sentencing Council in Annex B of the Definitive Guideline on Sexual Offences published in 2013. The offender must be sentenced in accordance with the regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice. The fact that attitudes had changed was of no moment. The sentence that could be passed was limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be

applicable.

Inconsistent verdicts

In ***Fanning and Others*** **[2016] EWCA Crim 550**, the Court (LCJ.VPCACD and Treacy LJ) considered cases raising inconsistent verdicts as a potential ground of appeal. The Court said that the law as it had evolved had become too complex with each new judgment adding a further gloss to a relatively straightforward principle which was set out with clarity in the unreported case of *R v Stone* [1955] Crim LR 120 (*and formally adopted in the later case of R v Durante* [1972] *1 WLR, (1972) 56 Cr App R 708, [1972] Crim LR 656*) where Devlin J. (giving the judgment of the Court over which Lord Goddard CJ presided) said:

> "When an appellant seeks to persuade this court as his ground of appeal that the jury had returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is upon the defence to establish that".

The Court said: "It is essential for the sound development of the Criminal Law and to prevent over complication that it should rarely be necessary for a court to reformulate or add a gloss to well established law".

Offenders providing assistance to the authorities ("Texts")

In ***R v. AXN and ZAR*** **[2016] EWCA Crim 590** the Court (LCJ.VPCACD and Treacy LJ) said that it had always been the position at common law that an offender convicted of a crime would receive credit against his sentence for any assistance which had been rendered to the police or other law enforcement authorities. Although Parliament had enacted a statutory scheme under ss.73-75 of the Serious Organised Crime and Police Act 2005 to govern assistance rendered in certain circumstances, the long established common law position had remained available (see *R v P; R v Blackburn* [2008] 2 Cr.App.(S) 5). Over the years a procedure had developed where information, if provided by the police, was provided by way of confidential letter known as a "text" signed by a senior police officer. In the present appeal the Court was asked to consider three issues that had arisen when the police had been asked by an offender to provide confirmation of assistance provided by him to the authorities at his sentencing hearing. The issues were: (i) The extent of the obligation of the police to provide confirmation; (ii) The course a court should take in the event of a dispute between the police and the offender about the refusal by the police to provide any confirmation or about the information supplied by the police; and (iii) The circumstances in which a court should grant an adjournment if the request for assistance from the police was raised at a late stage. Whilst a court would always expect the police to inform it of

the fact that the police had made a decision not to provide a text as a matter of case management, it was sufficient if the police merely stated that they would not provide any information to the court in relation to the offender's assertions of assistance. The police were not required to give any explanation of their reasons for the decision, or the stage at which they decided not to provide any information. They need do no more than say that they would not provide any information to the court. Such a statement could generally be provided by letter and not by text. Where there was a dispute there should normally be no question of evidence being given or an issue tried. It was not the function of the court when engaged in a sentencing process to question the police as to the accuracy of the text supplied. A court should not readily contemplate granting an adjournment, unless the request to the police had been made in a timely manner and the delay had arisen because the police have been unable to provide the information despite every effort on their behalf. A court should not ordinarily grant an adjournment because a request had been made late, as it was the duty of the offender to make a request immediately; his failure to do so would result in the court generally proceeding without any adjournment.

A large percentage of the Court's business relates to appeals against sentence including confiscation and references by the Attorney General (unduly lenient sentences). Whilst the majority of cases stand alone in terms of their circumstances and facts, some provide useful guidance in terms of procedure and jurisdiction.

Fresh evidence in sentence cases - Section 23 Criminal Appeal Act 1968

A significant number of appeals against conviction seek to rely upon fresh evidence in accordance with section 23 of the Criminal Appeal Act 1968. In ***Rogers and Others*** **[2016] EWCA Crim 801** the Court (LCJ.VPCACD and Andrews J. DBE) was concerned with the circumstances in which section 23 applied to fresh evidence or other information which an appellant might seek to adduce before the Court on an appeal against sentence. There were circumstances where the court would consider updates to information placed before the sentencing judge without the conditions in section 23 being applied, but otherwise section 23 was, by its express terms, of general application to all sentencing appeals. In approaching section 23 a court must always have in mind the observations of Lord Judge CJ in *Erskine* [2010] 1WLR 183; [2009] EWCA Crim 1425:

> "Virtually by definition, the decision whether to admit fresh evidence is case and fact-specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in subsection (2)(a) to (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied."

Prevalence of an offence

The Court in ***Bondzie*** **[2016] EWCA Crim 552** the Court (Treacy LJ. Wyn Williams and Garnham JJ.) considered paragraph 1.39 of the Sentencing Guidelines Council's guideline on "Overarching Principles: Seriousness"; namely where the prevalence of an offence should influence sentencing levels. It said to increase a sentence for prevalence there must be evidence provided to the court by a responsible body or by a senior police officer. Such evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material could be made. However, even if such material was provided, a judge would only be entitled to treat prevalence as an aggravating factor if (a) he was satisfied that the level of harm caused in a particular locality was significantly higher than that caused elsewhere (and thus already inherent in the guideline levels); (b) that the circumstances could properly be described as exceptional; and (c) that it was just and proportionate to increase sentence for such a factor in the particular case before him. A court should be hesitant before aggravating a sentence by reason of prevalence. Only if the evidence placed before the court demonstrated a level of harm which clearly exceeded the well understood consequences of drug dealing (relevant to the present case but generally applicable) by a significant margin should courts be prepared to reflect this in sentence. If judges did, they must clearly state when sentencing that they were doing so. If the Crown intended to invite the court to consider that matter, it must expressly say so at the hearing, identifying the materials upon which it relied as evidence and referring the judge to the relevant guideline. If a judge of his or her own motion was contemplating prevalence as a factor, he or she should clearly identify that as a matter to be addressed in submissions to the court. Any sentence imposed should then identify if prevalence had been a factor and provide reasoning so that the parties, and possibly this Court, might understand how it had influenced the sentencing decision.

Conspiracy to defraud: LIBOR

The Court (LCJ. PQBD and Gloster LJ.) in ***Hayes*** **[2015] EWCA Crim 1944**, where the appellant had been convicted of eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen London Interbank Offered Rate ("Yen LIBOR"), made clear that conduct of which the appellant was convicted involving fraudulent manipulation of the markets, would result in severe sentences of considerable length.

Attorney General's Reference

Section 36 of the Criminal Justice Act 1988 enables the Attorney General to refer to the Court for consideration sentences which are potentially unduly lenient. In one such case, **AG Reference No. 32 of 2016 [2016] EWCA Crim 572**, the Court (VPCACD, Saunders and Soole JJ.) was faced with the vexed question of the appropriate level of sentence for sexual offences on children committed many years before by an offender who was himself a child at the time. In the particular circumstances the Court did not interfere with the sentence and relied upon the guidance given in *H and Others* [2012] 1 WLR 1416.

Confiscation

Once more the Court has had to deal with difficult issues concerning confiscation. One such case, ***Davenport*** **[2015] EWCA Crim 1731**, considered the interrelationship between confiscation and compensation. The appellant was made the subject of confiscation and compensation orders. It was common ground that the figure representing the compensation order had also been included in the amount of the benefit contained in the confiscation order. The appellant argued that such an outcome involved unfair double counting and that the combination of the two orders was such as to give, and had given, rise to a disproportionate result. The appeal was allowed with the amount of the confiscation order being reduced by the amount of the compensation order. The Court (Davis LJ. Lang and Patterson JJ.) concluded by saying:

> "As for future cases in the Crown Court, where the Crown seeks both a compensation order and a confiscation order in circumstances where s. 13(5) and (6) are not applicable, we think that judges may wish, irrespective of whether or not they are proceeding under s. 6(6), to bear in mind the following points:
>
> (1) The Court is empowered to make both a confiscation order and a compensation order.
>
> (2) However, the court should be alert to any risk of double counting inherent in such a combination of orders and should be alert to the risk of making a confiscation order which is disproportionate.
>
> (3) The court ordinarily should not make both a compensation order and a confiscation order representing the full amount of the benefit where there has been actual restitution to the victims prior to the date of the confiscation hearing: *Waya* [2013] UKSC 51 and *Jawad* [2013] EWCA Crim 644.
>
> (4) Where it is asserted by a defendant that there will be restitution made *after* the date of the hearing then the court should scrutinise very carefully and critically the evidence and arguments raised in support of such assertion.
>
> (5) If the court remains uncertain whether the victims will be repaid under the compensation order then a confiscation order which includes that amount will not ordinarily be disproportionate: *Jawad*.
>
> (6) However, mathematical certainty of restitution is not required. The court should approach matters in a practical and realistic way in deciding whether restitution is assured.
>
> (7) Restitution to the victims in the future is capable of being properly assessed as assured, depending on the particular circumstances, notwithstanding that such restitution will not be immediate, or almost immediate, at the time of the confiscation hearing. Obviously the longer the time frame the greater force there will be to an argument that restitution is not assured: but a prospective period of delay in realisation is not of itself necessarily a conclusive reason for proceeding to make a combination of such orders without adjusting the amount of the confiscation order.

(8) Whilst a defendant who is truly intent on making restitution in full to his victims ordinarily should be expected to have arranged such restitution prior to the date of the confiscation hearing there may sometimes be cases where that is not possible. If, in such a case, the court has firm and evidence-based grounds for believing that restitution may nevertheless be forthcoming, albeit that cannot be taken as "assured" at the time of the hearing, the court has power in its discretion to order an adjournment to enable matters to be ascertained.

(9) Finally, to state the obvious, each case must be decided on its own facts and circumstances".

We do not offer these pointers as either prescriptive or exhaustive. But Crown Courts may hereafter wish to have regard to them, as well of course to what is said in *Jawad*, when this kind of situation arises in the course of confiscation proceedings.

The Court also provides guidance on new legislation. During the year the Court considered two specific pieces of new legislation which have had an impact on sentencing.

Driving disqualification – extension to periods

The Court (Treacy LJ. Jeremy Baker J. and the Recorder of Cardiff) in ***Needham and Others* [2016] EWCA Crim 455** was concerned with the effect of the introduction into the Road Traffic Offenders Act 1988 ("RTOA 1988") of sections 35A and 35B (driving disqualifications). The purpose of the legislation is to ensure that offenders who have been disqualified from driving and are serving custodial sentences serve periods of disqualification whilst at liberty in the community. The provisions came into force on 13th April 2015 and, in broad terms, do not apply to offences committed wholly or partly before that date. At paragraph 28 of the judgment the Court provided useful guidance:

1. Where the court is dealing with a section 35A(1) offence or offences alone, section 35A alone applies and the court will make an order of disqualification representing both the discretionary period and the extension period.

2. Where an order of disqualification is made under section 34 or 35 RTOA but no custodial sentence is imposed for that offence, but at the same time a custodial sentence is imposed for another offence then section 35B alone, not section 34A, applies.

3. Section 35B also applies where the court proposes to impose disqualification and a custodial sentence for one offence and to impose a custodial sentence for another offence. In this situation both sections 35A and 35B are engaged.

4. There will be some cases where at the time of sentencing for an offence attracting disqualification the offender will already be serving a previously imposed custodial sentence. In such a scenario section 35B applies.

Offenders of Particular Concern and s.236A Criminal Justice Act 2003

In ***R v. Fruen and Others*** **[2016] EWCA Crim 561** the Court (Treacy LJ. Dove J. and the Recorder of London) considered the new form of custodial sentence under s.236A Criminal Justice Act 2003 ("CJA 2003"), described in the legislation as a "Special custodial sentence for certain offenders of particular concern". The section, which came into force on 13th April 2015, applies to anyone sentenced on or after that date, irrespective of whether the offence was committed before or after that date. It applies to anyone convicted of an offence listed in Schedule 18A of the CJA 2003 (as amended), who was (a) aged 18 or over when the offence was committed and (b) is not sentenced to life imprisonment or an Extended Determinate Sentence under section 226A. Schedule 18A contains four types of offence: (i) certain terrorist offences; (ii) sexual offences, namely offences under section 5 (rape of a child under 13) or section 6 (assault of a child under 13 by penetration) of the Sexual Offences Act 2003; (iii) inchoate offences; and (iv) abolished offences. Assuming that the pre-conditions contained in section 236A(1) apply, then sub-section (2) requires the court to impose a sentence of imprisonment equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence. The further 1-year period of licence required by section 236A(2)(b) is a period of licence over and above the period of licence which would have applied had the offender been sentenced to a determinate sentence of imprisonment.

In a further case the Court was required to consider an offence within the Sexual Offences Act 2003 where there had been an absence of previous case law on the point.

Section 63 Sexual Offences Act 2003

In ***Pacurar*** **[2016] EWCA Crim 569** the principal issue was whether the prosecution was obliged to specify the sexual offence intended in section 63 of the Sexual Offences Act 2003: "A person commits an offence if – (a) he is trespasser of any premises, (b) he intends to commit a relevant sexual offence on the premises, and (c) he knows that, or is reckless as to whether, he is a trespasser." The Court (VPCACD. Jeremy Baker J. and HHJ Bourne-Arton) said that there would be many cases where the evidence pointed to a specific offence intended and the prosecution would be in a position to make clear what was alleged by identifying the offence alleged in the Particulars of the Offence. However, there would be other cases where the prosecution alleged it was obvious from all the circumstances that the defendant intended to commit a sexual offence but it was impossible to specify precisely which one and upon whom the appellant intended a sexual offence. The Court had no doubt that Parliament intended section 63 to cover both situations provided any prosecution and trial could be fair.

The Court is keen to set out guidance to the lower courts on procedure. There have been a number of such cases during the reporting year.

Section 66, Courts Act 2003

Judges are often asked to exercise their powers under section 66 of the Courts Act 2003, which provides for a judicial office holder, usually a Crown Court judge, to exercise powers of a District Judge (Magistrates' Courts) in criminal causes and matters. The Court (Fulford LJ. Flaux and Thirlwall JJ.) in ***Frimpong*** v. **CPS [2015] EWCA Crim 1933** made clear that in such circumstances a Crown Court does not become a Magistrates' Court and made specific reference to the explanatory notes to the section:

> "Under this section a Crown Court judge will be able to make orders and to sentence in relation to cases normally reserved to magistrates' courts when disposing of related cases in the Crown Court. As part of implementing the policy of greater flexibility in judicial deployment, this section provides that High Court judges, Circuit judges and Recorders should be able to sit as magistrates when exercising their criminal and family jurisdiction. The same is to apply to deputy High Court judges and deputy Circuit judges. It is not expected that extensive use would be made of the provision, but it would be possible for a Circuit judge in the Crown Court to deal with a summary offence without the case having to go back to a magistrates' court. At present, certain summary offences can be included in an indictment. If the person is convicted on the indictment, the Crown Court may sentence him if he pleads guilty to the summary offence, but if he pleads not guilty the powers of the Crown Court cease. It is intended in such cases that the judge of the Crown Court should be able to deal with the summary offences then and there as a magistrate. He would follow magistrates' courts' procedure."

Criticism of opposing counsel

In ***Ekaireb*** **[2015] EWCA Crim 1936** the Court (LCJ. Openshaw J. and Sir Richard Henriques) was critical of a practice of personal criticism being made of opposing advocates in addresses to the jury and made clear that such practice would not be tolerated:

> "Finally, there is one feature of the conduct of this case which judges must ensure ceases immediately and not be repeated in any case. That conduct is making in an address to the jury personal criticism of opposing advocates in contradistinction to criticism of the prosecution case. If any advocate has a criticism of the personal conduct of an opposing advocate that is a matter that should be raised before the judge who will deal with it then and there, though, in what we hope would be the rarest of circumstances, it could be referred to the professional disciplinary body. The conduct of a trial before a jury requires proper and professional conduct by all advocates in speeches to the jury. As any personal criticism of the conduct of an opposing advocate is a matter for the judge, it can form no proper part of an address to a jury. The regrettable departure from proper standards of advocacy by making personal criticisms of advocates of an opposing party in an address to the jury must therefore cease".

Section 240A, Criminal Justice Act 2003

In ***Marshall and Others*** **[2015] EWCA Crim 1999** the Court (VPCACD. Blake J. and HHJ May) felt the need to once again re-affirm and re-emphasise the relevant principles when dealing with qualifying days spent on electronic curfew pursuant to 240A of the Criminal Justice Act 2003. Guidance, it said, had been given in *R v. Hoggard* [2013] EWCA Crim 1024 and *R v Thorsby and Others* [2015] EWCA Crim 1. The relevant points were set out in *Thorsby* and practitioners needed to be aware of them:

> "Henceforward, the applicant will be expected to present to the Court of Appeal office with his notice and grounds, either agreement with the prosecution, or the necessary documentary and other evidence to support his assertions (i) that he is entitled to be credited with section 240A days and (ii) as to the number of those days. The Court of Appeal office will not routinely become the investigator for the applicant. It is the responsibility of his legal representatives to make the necessary enquiries. These enquiries will always involve contacting the prosecution. Having done this, the applicant should be able either to say that his calculation is agreed or identify the nature and extent of any dispute. In all well founded cases the Crown will also have failed in its duty to the court and the court will therefore expect the CPS to investigate the complaint promptly and to supply to the applicant and the Court of Appeal a brief written response setting out its approach to the application. These cases should be dealt with as urgent cases at a suitably senior level within the CPS as they directly involve the liberty of the subject. Applicants will be expected to demonstrate with some particularity in a witness statement when and in what circumstances they became aware of the entitlement for the first time, and that, upon discovery, no further delay occurred. In a case of delay by the applicant himself the single judge or the full court is likely to refuse the extension of time".

Extensions of time

There have been a number of cases in which the Court has considered applications for an extension of time in which to seek leave to appeal. This is an important issue and one the senior judiciary has been keen to impress upon counsel and applicants.

In the context of applications for leave to appeal against sentences of Imprisonment for Public Protection ("IPP") the Court (LCJ. Openshaw and William Davis JJ.) in ***R v. Roberts and Others*** **[2016] EWCA Crim 71** considered a number of otherwise unrelated applications for long extensions of time (between 5 and 9 years) in which to apply for leave to appeal against sentences of imprisonment/detention for public protection ("IPP") imposed between 2005 and 2008 under the Criminal Justice Act 2003 ("CJA 2003"). Each of the applicants had either been detained in custody long after the expiry of the minimum term or been recalled for breach of licence. Their central submission was that the imposition of the IPP was not justified by the statutory criteria as explained by case law, particularly *Lang* [2005] EWCA Crim 2864. The Court refused the applications and said: "where the judge has followed the provisions of the CJA 2003 as interpreted by the decisions of this court and passed a sentence of IPP in circumstances where it was properly open to the judge

to pass such a sentence, this court will not now revisit sentences of IPP on the bases argued in these applications. Unless clear new points are raised, the court will in all such cases in the future simply refuse an extension of time without more. The remedy, if any, is one that the Executive and Parliament must address". The Court emphasised that the time limits had to be strictly observed and reasons provided for requiring an extension (Rule 36.4(b) CPR and *Thorsby* [2015] 1 Cr.App.R (S) 63). The Court also said that the duty of fresh representatives to make appropriate inquiries with previous trial representatives (*R v McCook* [2014] EWCA Crim 734) applied equally to applications for leave to appeal against sentence as to applications for leave to appeal against conviction.

The Court (LCJ. Hickinbottom and Cheema-Grubb JJ.) in ***Wilson*** **[2016] EWCA Crim 65** was unimpressed with the reasons provided where an extension of time in excess of 10 years was sought. The reasons put forward for the delay simply read: "An extension of time is respectfully requested for the appeal, pursuant to section 18(3) of the Criminal Appeal Act 1968. The merits of an appeal may justify extension where there is no good reason at all for an inordinate or unexplained delay". The Court said that simply relying on the merits of the grounds of appeal in support of an extension was insufficient. Full details of the delay and an explanation for it were required before the Court could decide whether to grant an extension of time

The Court (VPCACD. Jay and Picken JJ.) in ***Kirk*** **[2015] EWCA Crim 1764** refused the applicant a time extension in which to seek leave to appeal against conviction. The Court would but for the fact the applicant was no longer in custody have made a loss of time order. In the circumstances attention was focused on making an order for the applicant to pay the costs of the transcripts. The power of the Court to make such an order as to costs to be paid by an accused is contained in section 18(2) of the Prosecution of Offences Act 1985: "Where the Court of Appeal dismisses - (a) an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968 … it may make such order as to the costs …" The issue for the Court was whether a refusal of an extension of time with the consequence that leave to appeal was not granted amounted to a dismissal of an "application for leave to appeal". The Court, adopting a common sense approach to the task of statutory construction, concluded it did.

Jury tampering

In ***McManaman*** **[2016] EWCA Crim 3**, a case involving alleged jury tampering, the Court made clear that the police were required to provide all assistance to the trial judge in the exercise of his powers under section 46 of the Criminal Justice Act 2003 ("CJA 2003"). In its concluding remarks the Court (LCJ. PQBD and Openshaw J.) said:

> "As jury nobbling/tampering undermines trial by jury, Parliament gave to a trial judge under the provisions of the CJA 2003 the express powers to which we have referred. It is, in our view, implicit in those powers that it is the legal duty of the police to provide all the assistance a judge reasonably requires for the exercise of those powers. When therefore a judge hearing a trial requires the police to investigate an allegation of jury tampering in that trial, the investigation must be conducted under the close supervision of a senior officer of police who must personally provide regular reports to the judge as the investigation progresses. Moreover, it is essential that the investigation be conducted

> with the highest priority and urgency as the judge has to make a decision on whether to continue the trial with or without the jury as soon as is reasonably practicable, that is to say within a few days. The judge needs regular reports so that he can assess by balancing the relevant considerations when he is in the best position to make that decision".

Gang affiliation evidence

In ***Awoyemi and Others*** **[2016] EWCA Crim 668** the Court (VPCACD. Blake and Andrews JJ.) was concerned with gang affiliation evidence and said the judgment of the Privy Council in *Myers, Brangman and Cox v. The Queen (Bermuda)* [2015] UKPC 40 provided helpful guidance on the approach to gang affiliation evidence generally. The Court also considered the judge's directions to the jury and was satisfied that they were sufficient and in accordance with the guidance given in *Campbell* [2007] EWCA Crim 1472 where Lord Phillips CJ said:

> "When evidence of bad character is introduced the jury should be given assistance as to its relevance that is tailored to the facts of the individual case. Relevance can normally be deduced by application of common sense. The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with it.
>
> If the jury is told in simple language and with reference, where appropriate, to the particular facts of the case, why the bad character evidence may be relevant, this will necessarily encompass the gateway by which the evidence was admitted. ….
>
> It is of course highly desirable that the jury should be warned against attaching too much weight to bad character evidence let alone concluding that the defendant is guilty simply because of his bad character."

"In camera" hearings in the Crown Court

In ***Re. Times Newspapers Ltd*** **[2016] EWCA Crim 887** the Court (Gross LJ. Wyn Williams J. and The Recorder of London) dealt with an application by the Times Newspaper Ltd for permission to appeal under section 159(1)(a) and (c) of the Criminal Justice Act 1988. In the Crown Court the prosecution applied for a private hearing in respect of "all those parts of the trial in which any evidence is given by or on behalf of the defendant, or any reference is made to the same in any manner, concerning any matter of a kind to be identified to the court". The prosecution had only become aware of the need (or perceived need) for the application on the same day. Subsequently the application, which began in open court before moving into private session, was heard and granted. On resumption of the public hearing the judge was asked by a reporter present in court on what grounds the order had been made. The judge gave a brief explanation in open court. The words he used gave rise to concerns and led to a successful application by the prosecution for an order under section 11 of the Contempt of Court Act 1981. The appeal was dismissed but the Court made two concluding remarks, of which the first was:

> "Before parting … we add these observations by way of lessons to be learnt for the future:

(i) First, as the events of this case so clearly demonstrate, when there is a hearing *in camera*, it is of the first importance to give proper attention to what is thereafter said in open court as to that hearing and any decisions there taken. As provided by *CPD 2015, 6B.4(i)*, the order must specify "…whether or not the making or terms of the order may be reported or whether this itself is prohibited". The CPD goes on to state that such a report could "cause the very mischief" which the order was intended to prevent".

The Work of the Criminal Appeal Office

Staff

Lawyers at the Criminal Appeal Office ("CAO") work closely with the Registrar to ensure that cases are guided through the appeal process efficiently and justly. They provide case summaries which are invaluable to the Court and practitioners. They also provide advice on procedural matters to practitioners and applicants in person. They are supported by dedicated teams of administrative staff support who are responsible for the preparation and progression of the majority of sentence only cases, obtaining advice from CAO lawyers as necessary. They write the case summaries on all but the most complex sentence cases and also provide essential back office support. They also deal with specialist matters such as the assessment of costs and the listing of cases. Court clerks sit as the Registrar in Court.

The Registrar's staff play a proactive role in preparing cases for the Single Judge and indeed the Full Court. One clear example of this is in respect of unlawful sentences. In some instances, the failure by the Crown to provide the sentencing judge with proper information as to sentencing and indeed defence counsel's apparent misunderstandings of sentencing provisions has led to a number of unlawful sentences not being identified until grounds of appeal (sometimes against conviction only) have been lodged with the Court. In many instances the staff of the CAO are the first to identify that a sentence is in fact unlawful and draw that to the attention of the parties and the Court.

The legal team is headed by three Senior Legal Managers, who are responsible for the throughput of all work in the CACD. Their work however is not confined to the management of staff and work, but also encompasses specialist training both internally and externally, maintaining best practice and assisting the Registrar in carrying out his statutory functions.

This year has seen the retirement of one of the Registrar's most experienced lawyers, Michael Catterson, whose encyclopaedic knowledge of the law of criminal appeals and phenomenal memory for cases made him an invaluable resource for the CAO and the judiciary alike. We all wish him a long and happy retirement. Such was the depth and breadth of his experience and knowledge no one person could fill his shoes as the Legal Information and Dissemination Officer for Criminal Appeal and the work he did is now covered by a team of CAO lawyers, who in addition to their "day job" of preparing cases for consideration by the court now also provide this specialist support. The Registrar and judiciary have particularly welcomed the regular Newsletter prepared by members of the team and circulated to the CAO and the judiciary. Other members of the team have taken on other duties such as preparation of the weekly database, giving specialist advice about sentencing and representing the Registrar at meetings of the Criminal Procedure Rules Committee.

HMCTS Reform

In line with the HMCTS Reform program, the CAO is embracing new technology, learning to work with the Crown Court Digital Case System and continuing with the updating of our in-house case management system, which will form part of the digital infrastructure for criminal courts. Initial feedback from staff has been very positive and the ability to obtain case papers directly from DCS will certainly increase efficiency. Work is ongoing to enable appeal documents to be served digitally and uploaded to DCS. In the fullness of time not only will the judges sitting in CACD have digital bundles, but work on the Common Platform will also mean that decisions and results are transmitted and recorded digitally.

Improving access to and delivery of justice for Litigants in Person

Litigants in Person present a challenge for the CAO of the Court of Appeal. How do we manage them in a just, accessible and proportionate way? The Litigant in Person is usually of limited means and is most often in prison custody. They do not have access to digital resources (including the new Digital Case System) and cannot be expected to have any understanding of the process of the Court of Appeal. However, the importance of their case to them cannot be understated and for most applicants the Court of Appeal is the Court of last resort.

Using more proactive case management, our strategy for the future is to provide more effective support to Litigants in Person during the entire appeal process and to assist them in presenting their case in the best possible way. That includes preventing grounds of appeal from becoming too voluminous, which overburdens CAO resources and judicial time. Voluminous grounds of appeal also do not ultimately benefit Litigants in Person, as their best points can become lost in pages of duplicitous and repetitive material. To achieve this, staff in the CAO will give Litigants in Person more guidance on what the Court expects grounds of appeal to look like and more information as to our processes at a much earlier stage. We will also proactively inform them when their case has reached the next stage of progression to ensure they feel properly engaged in the process.

We must also be more robust if our case management is not working and the Registrar (and his lawyers) will more routinely give directions that applicants consolidate their grounds of appeal and/or documents to assist the Court. In such cases the Litigants in Person will be given adequate time and direction to be able to do this. In cases where the Litigant in Person has repeatedly ignored our directions or is being deliberately vexatious, the Court has indicated that it will support our robust case management, using sanctions which include loss of time orders, costs and other hard hitting measures including potentially dismissing applications without merit.

Applications from unrepresented applicants continue to increase and are now having an impact on all work of the Criminal Division. This often involves an increase in work for the staff of the Criminal Appeals Office, which compounds pre-existing pressures. To assist, the Registrar has directed, particularly in cases where voluminous documentation has been filed, that papers are sent to him at an early stage to enable him to exercise his case management powers.

Summary and Statistics

1st October 2015 to 30th September 2016

The Annexes attached to this Review provide details of the number of applications considered by the Court, the average waiting times and the general success rates.

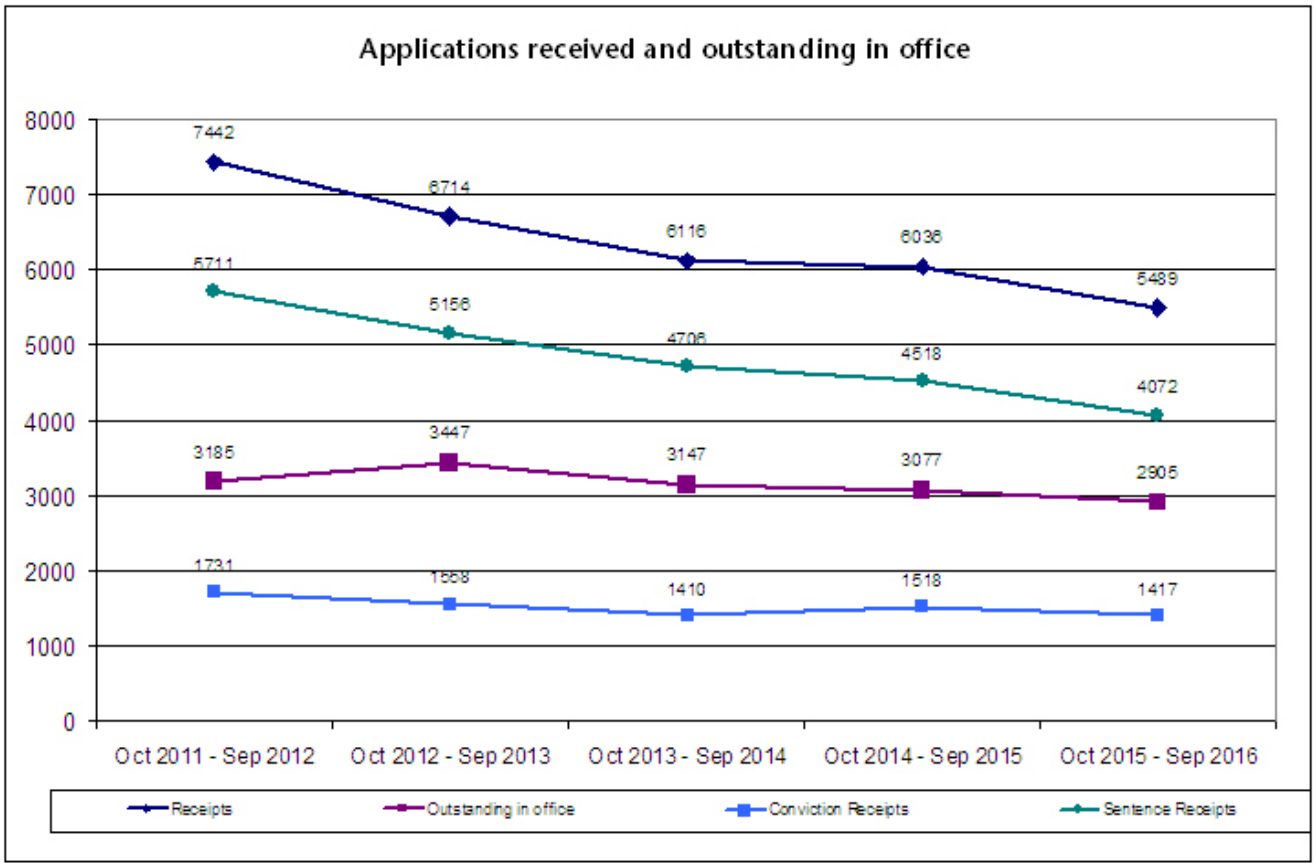
Over the year there has been a decrease in the number of applications, the largest of which has been in sentence. However, there has been an increase in the number of Attorney General References (unduly lenient sentences).

The overall conviction waiting times have remained fairly constant. However, in respect of conviction grants/single judge referrals there has been an increase. This too is mirrored by an increase in sentence applications.

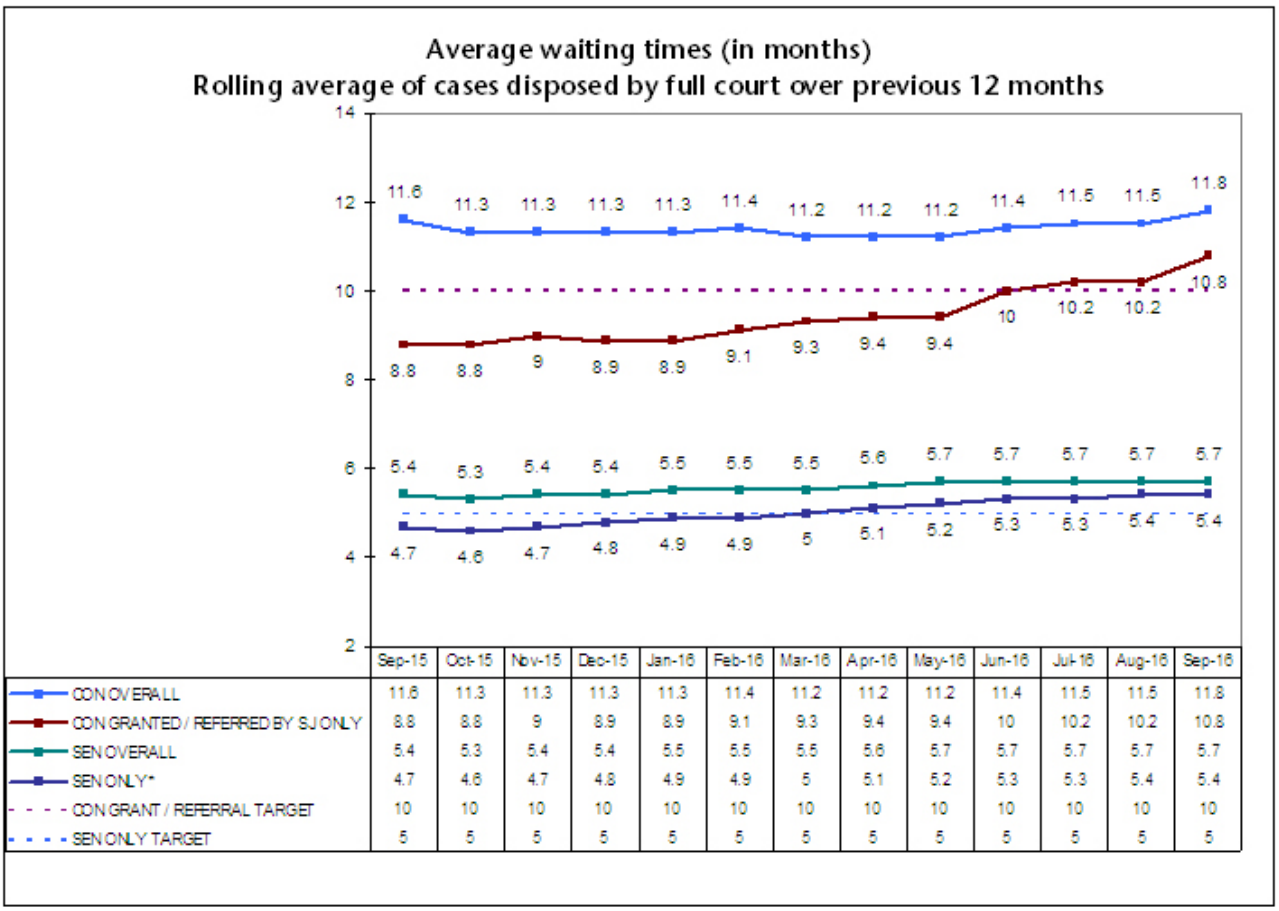
There are several reasons for the increase. The main reason is that the CAO has suffered significant staff shortages. Those shortages have been due to the general financial constraints across HMCTS (the effects of which have, amongst other things, delayed recruitment) and the specialist nature of the work in CAO (which limits the sharing of staff across business areas and means it takes longer for new staff to become effective in post).

However, other more minor contributory factors have been: a significant increase in Special Court sittings (which has meant some cases being held back for inclusion in a specific court or whilst awaiting the outcome of a Special Court); an increase in applications from litigants in person (as these cases require more case officer resource to ensure they are properly prepared for hearing); and HMCTS is going through Reform and during this time of change, CAO staff have taken on more work temporarily in some areas.

Annex A

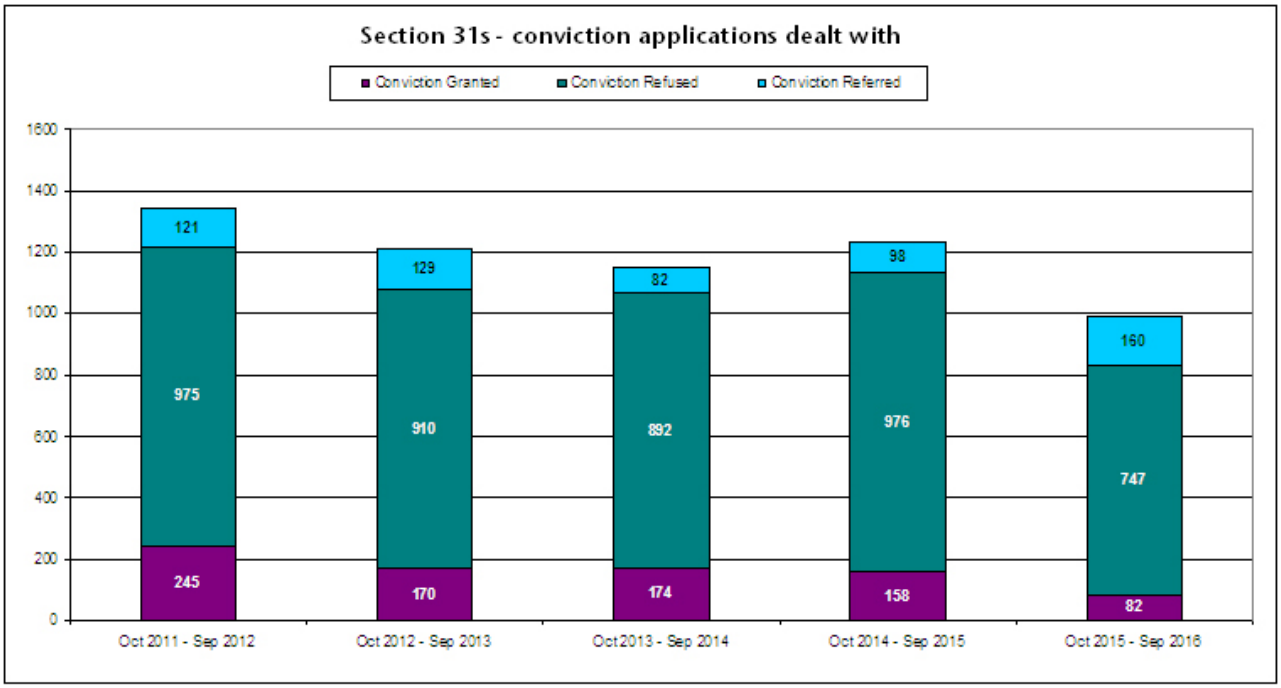

Applications received and outstanding in office
8000
7000
6000
5000
4000
3000
2000
1000
0
7442
6714
6116
6036
5489
5711
6156
4706
4518
4072
3185
3447
3147
3077
2905
1731
1558
1410
1518
1417
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Receipts
Outstanding in office
Conviction Receipts
Sentence Receipts

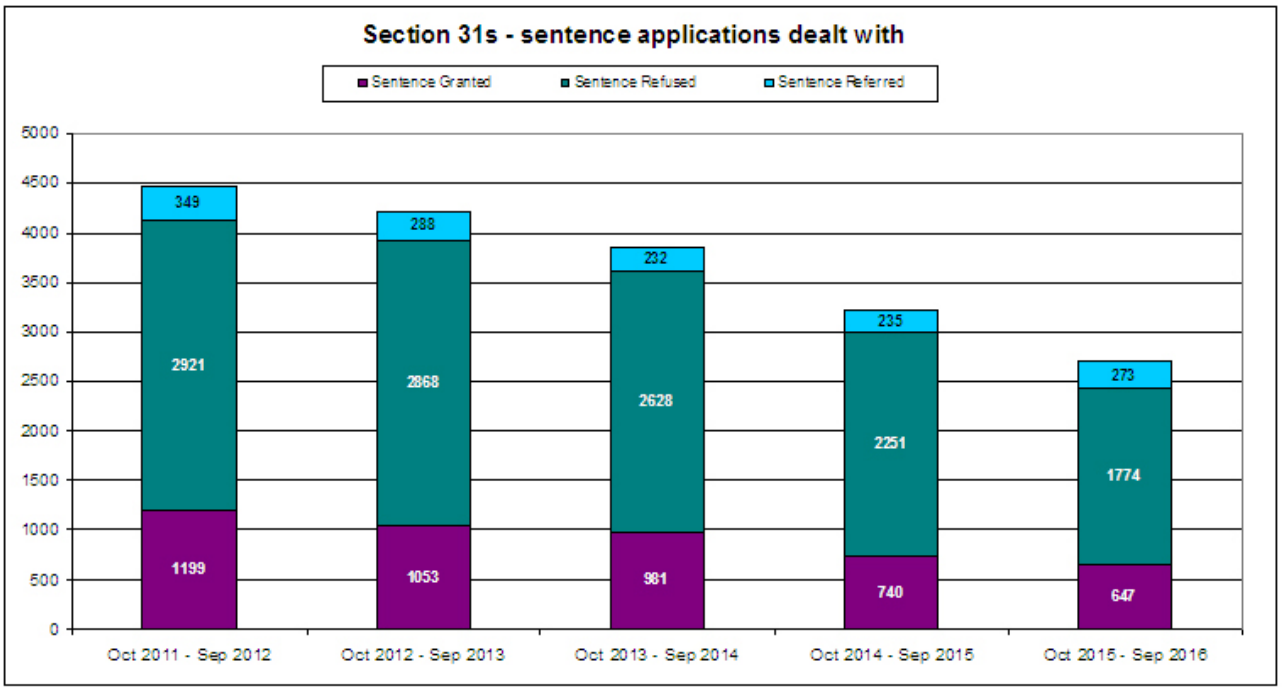
Annex B



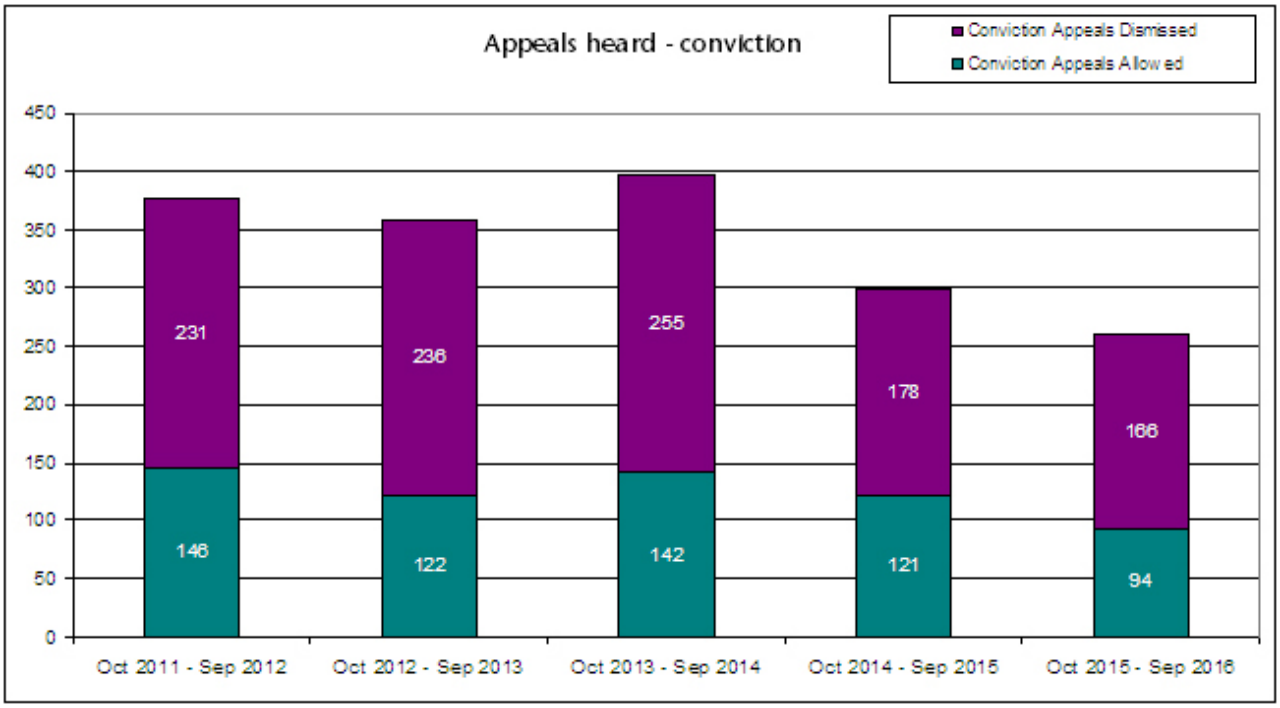
	Sep-15	Oct-15	Nov-15	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16	Aug-16	Sep-16
CON OVERALL	11.6	11.3	11.3	11.3	11.3	11.4	11.2	11.2	11.2	11.4	11.5	11.5	11.8
CON GRANTED / REFERRED BY SJ ONLY	8.8	8.8	9	8.9	8.9	9.1	9.3	9.4	9.4	10	10.2	10.2	10.8
SEN OVERALL	5.4	5.3	5.4	5.4	5.5	5.5	5.5	5.6	5.7	5.7	5.7	5.7	5.7
SEN ONLY*	4.7	4.6	4.7	4.8	4.9	4.9	5	5.1	5.2	5.3	5.3	5.4	5.4
CON GRANT / REFERRAL TARGET	10	10	10	10	10	10	10	10	10	10	10	10	10
SEN ONLY TARGET	5	5	5	5	5	5	5	5	5	5	5	5	5

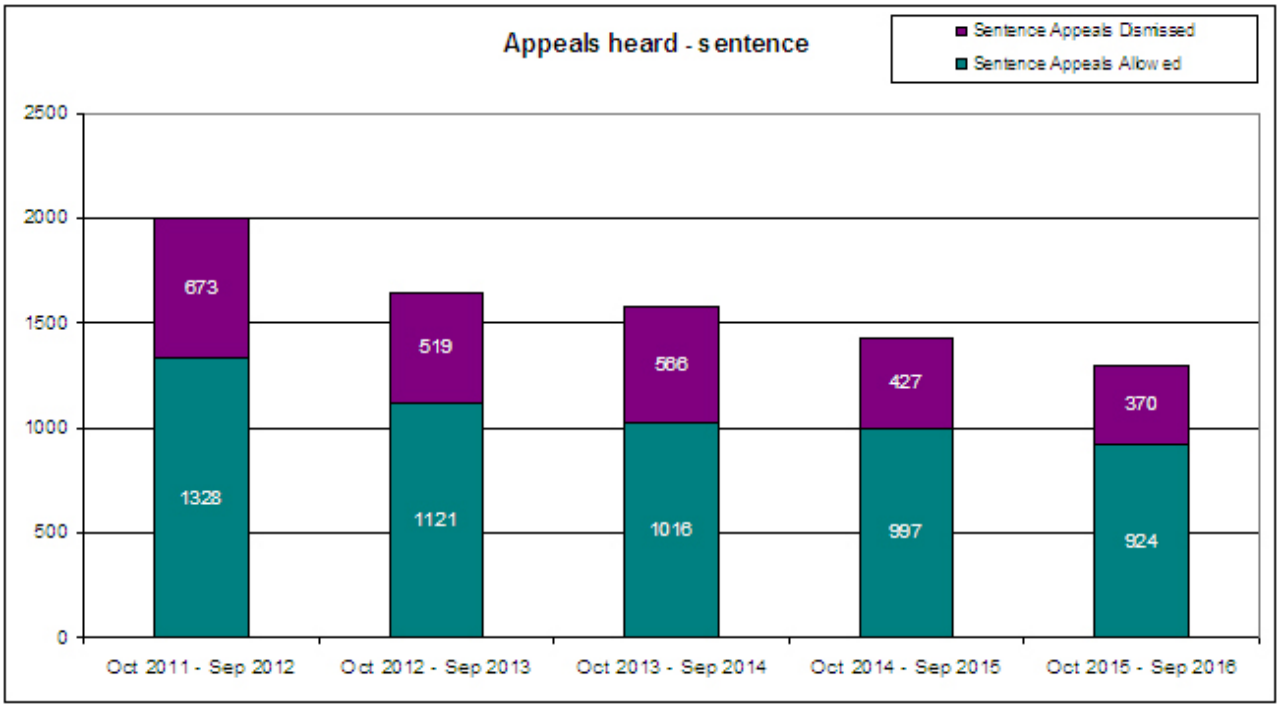
Annex C


Section 31s - conviction applications dealt with
Conviction Granted
Conviction Refused
Conviction Referred
1600
1400
1200
1000
800
600
400
200
0
121
975
245
129
910
170
82
892
174
98
976
158
160
747
82
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

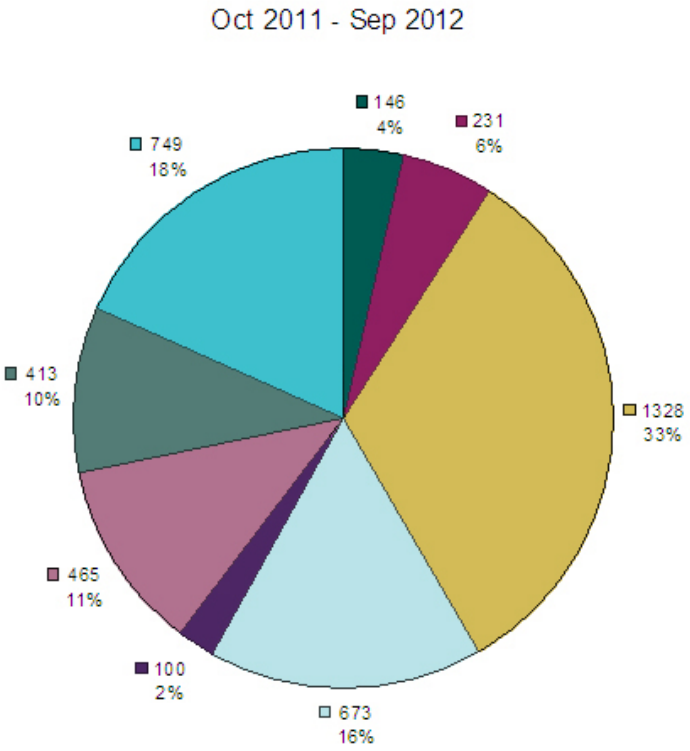

Section 31s - sentence applications dealt with
Sentence Granted
Sentence Refused
Sentence Referred
5000
4500
4000
3500
3000
2500
2000
1500
1000
500
0
349
2921
1199
288
2868
1053
232
2628
981
235
2251
740
273
1774
647
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

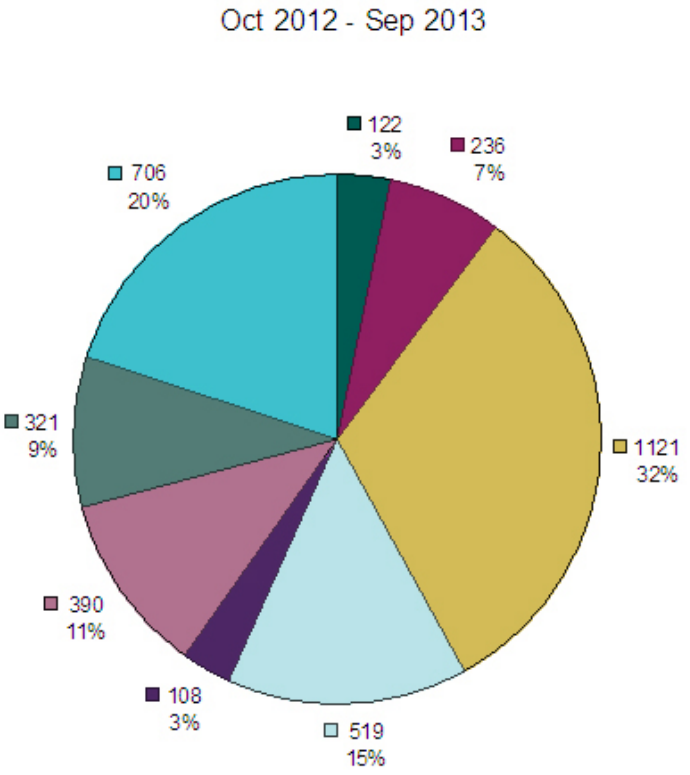
Annex D


Appeals heard - conviction
Conviction Appeals Dismissed
Conviction Appeals Allowed
450
400
350
300
250
200
150
100
50
0
231
146
236
122
255
142
178
121
166
94
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

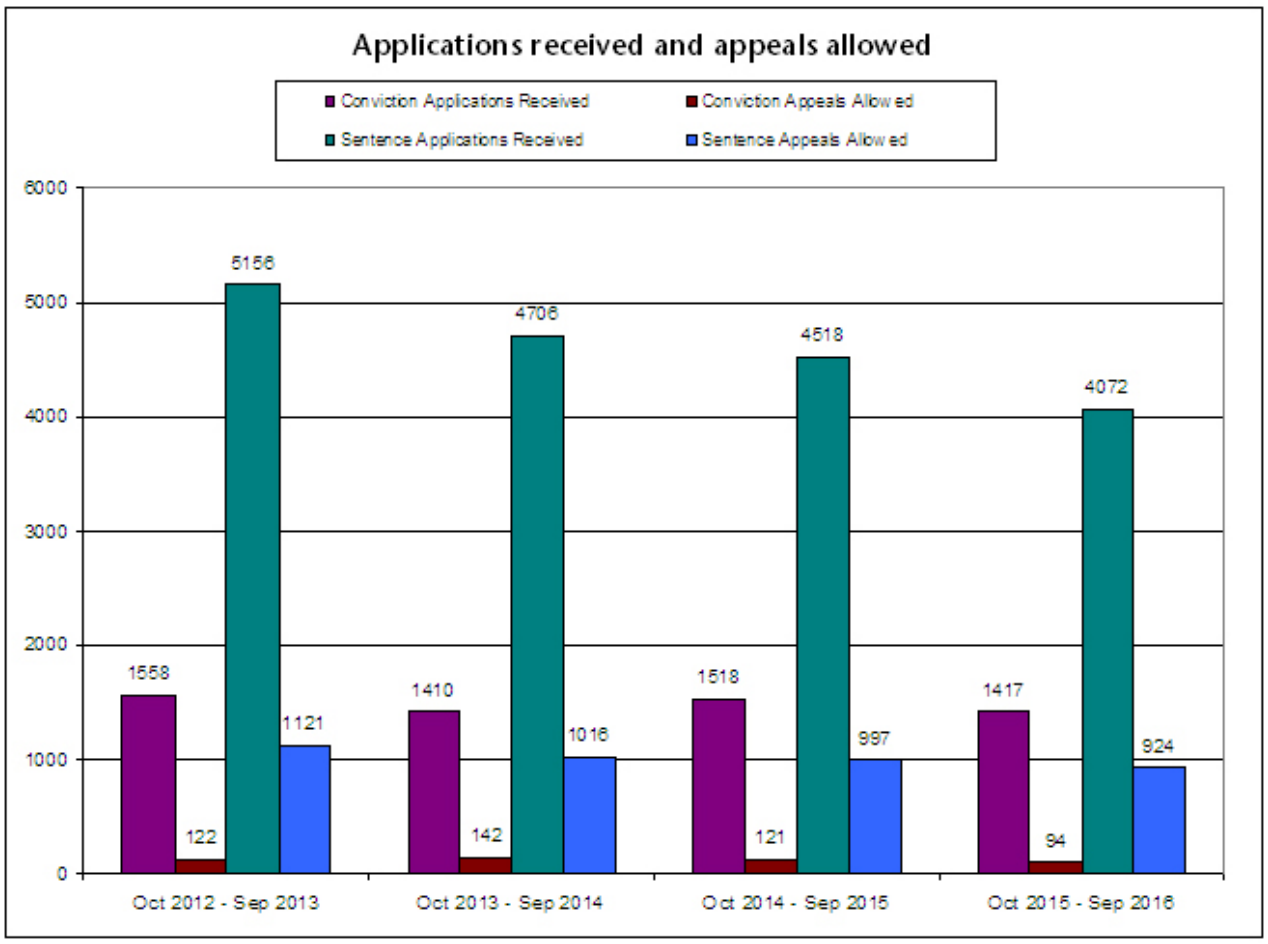

Appeals heard - sentence
Sentence Appeals Dismissed
Sentence Appeals Allowed
2500
2000
1500
1000
500
0
673
1328
519
1121
566
1016
427
997
370
924
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

Annex E

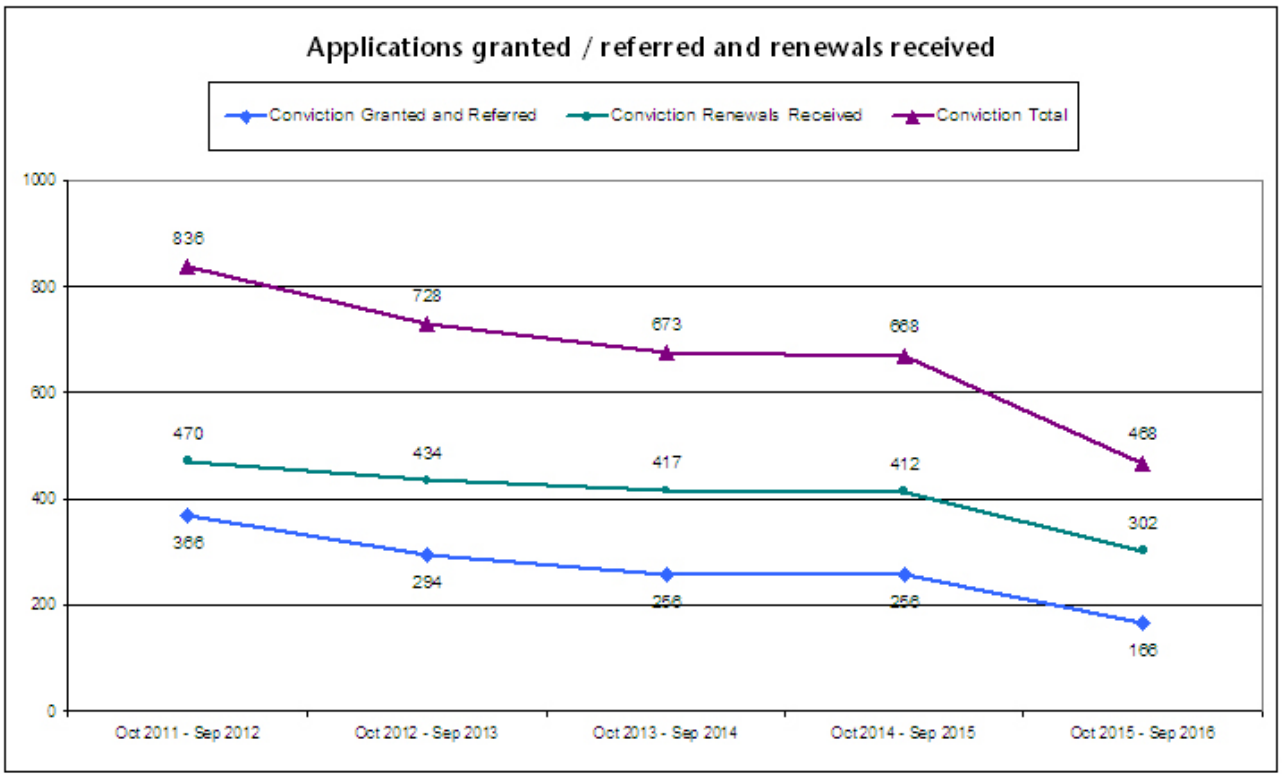

Oct 2011 - Sep 2012
146
4%
231
6%
749
18%
413
10%
1328
33%
465
11%
100
2%
673
16%

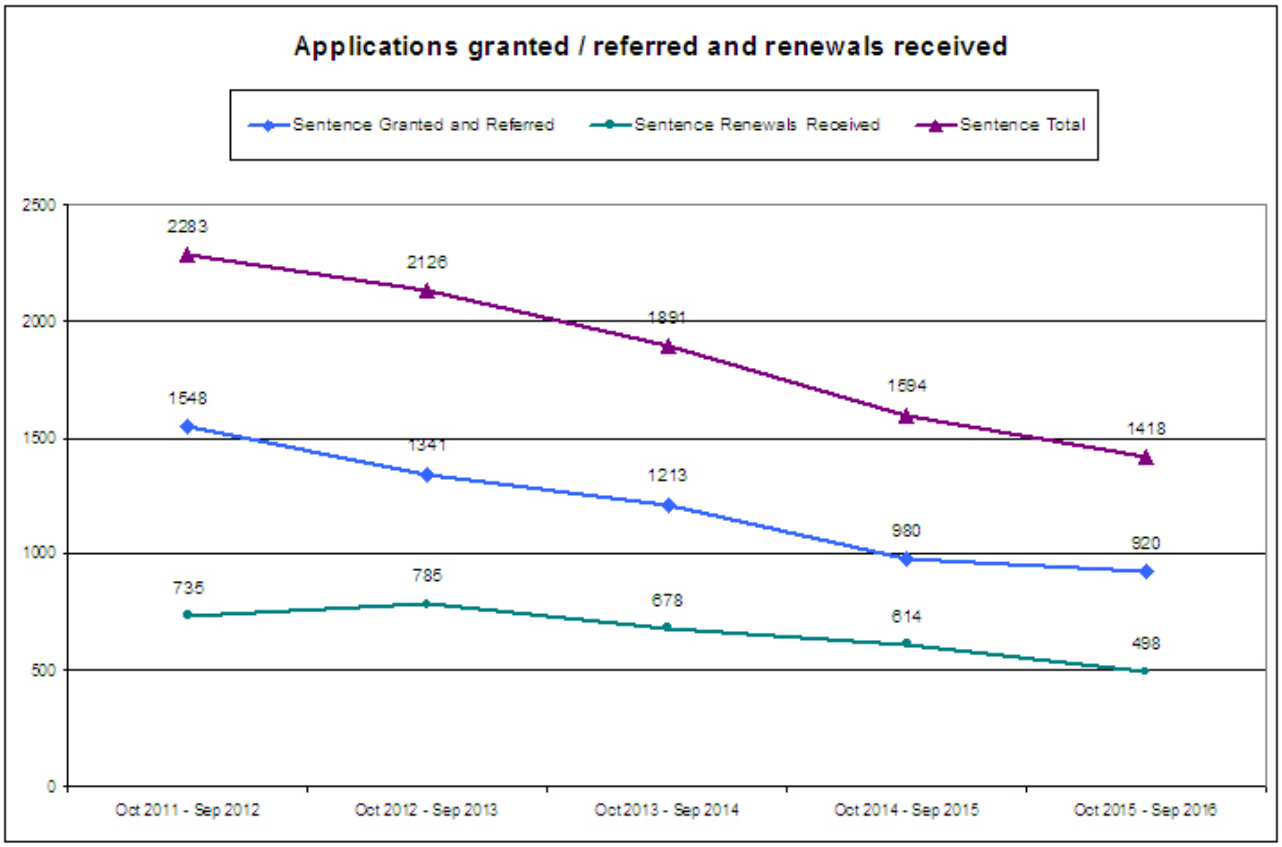

Oct 2012 - Sep 2013
122
3%
236
7%
706
20%
321
9%
1121
32%
390
11%
108
3%
519
15%

Annex F


Applications received and appeals allowed
Conviction Applications Received
Conviction Appeals Allowed
Sentence Applications Received
Sentence Appeals Allowed
6000
5000
4000
3000
2000
1000
0
1558
122
5156
1121
1410
142
4706
1016
1518
121
4518
997
1417
94
4072
924
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

Annex G


Applications granted / referred and renewals received
Conviction Granted and Referred
Conviction Renewals Received
Conviction Total
1000
800
600
400
200
0
836
728
673
668
468
470
434
417
412
302
366
294
256
256
166
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016


Applications granted / referred and renewals received
Sentence Granted and Referred
Sentence Renewals Received
Sentence Total
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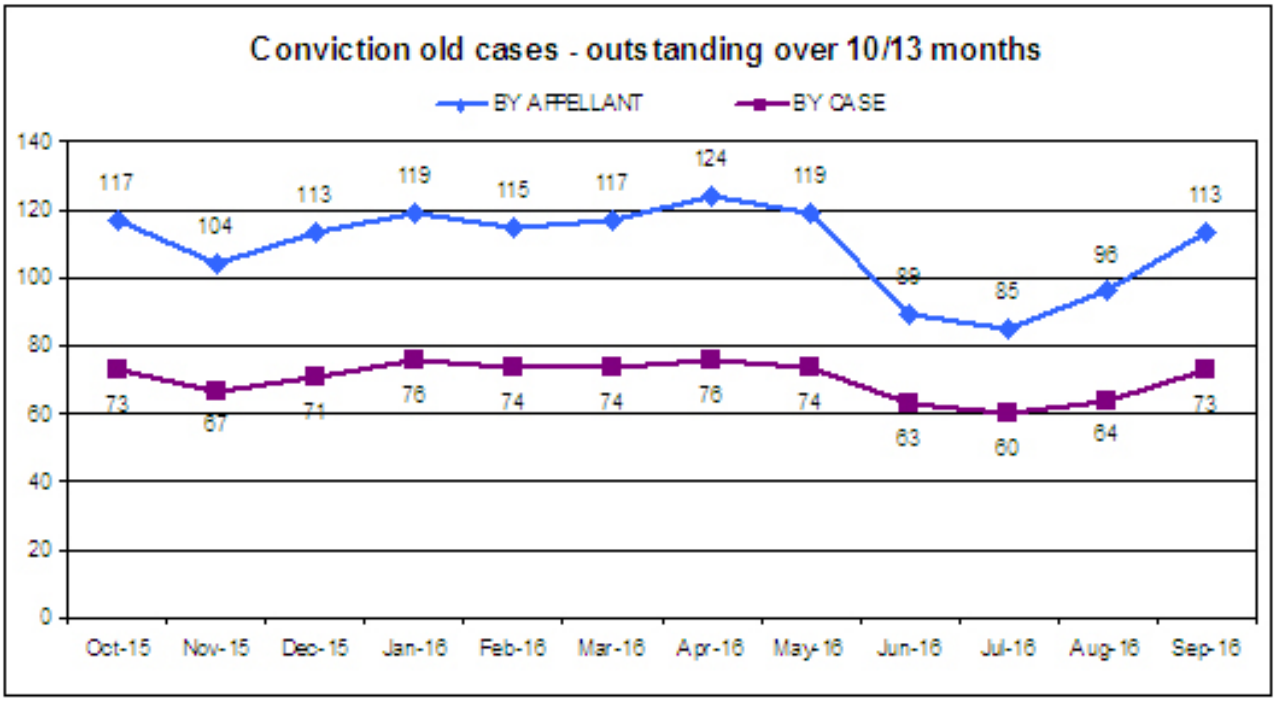
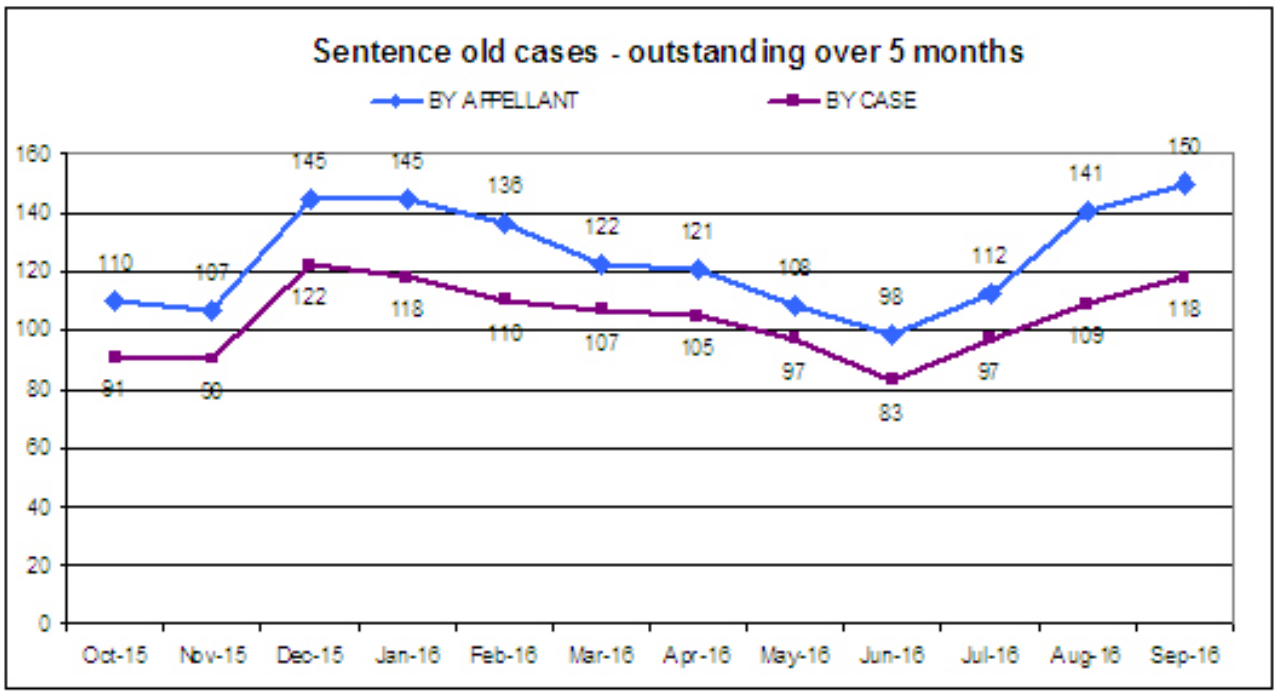
2000
1500
1000
500
0
2283
2126
1891
1694
1418
1548
1341
1213
980
920
735
785
678
614
498
Oct 2011 - Sep 2012
Oct 2012 - Sep 2013
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016

Annex H


Conviction old cases - outstanding over 10/13 months
BY APPELLANT
BY CASE
140
120
100
80
60
40
20
0
117
104
113
119
115
117
124
119
89
85
96
113
73
67
71
76
74
74
76
74
63
60
64
73
Oct-15
Nov-15
Dec-15
Jan-16
Feb-16
Mar-16
Apr-16
May-16
Jun-16
Jul-16
Aug-16
Sep-16


Sentence old cases - outstanding over 5 months
BY APPELLANT
BY CASE
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140
120
100
80
60
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20
0
110
107
145
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136
122
121
108
98
112
141
150
91
90
122
118
110
107
105
97
83
97
109
118
Oct-15
Nov-15
Dec-15
Jan-16
Feb-16
Mar-16
Apr-16
May-16
Jun-16
Jul-16
Aug-16
Sep-16