The Court of Appeal
Criminal Division

Review of the Legal Year
2008 / 2009

Review of the period October 2008 to September 2009

Introduction by the Lord Chief Justice

The publication of this Report marks not only a year in the life of the Court of Appeal, Criminal Division, but also, co-incidentally, the first anniversary of my appointment as Lord Chief Justice. It has been an interesting and active year for both of us.

This year also saw the retirement of Lord Justice Latham both as a Judge of the Court of Appeal and as Vice President of the Court of Appeal, Criminal Division. We shall greatly miss his active but calm leadership of the Court, in what has become an increasingly difficult and complex area of judicial responsibility. In his place I welcome Lord Justice Hughes whose energetic commitment to the work of the Court is already making itself felt, not least in the provision of judicial reading time and his contribution to the work of five judge courts. An increase in the selective deployment of five judge constitutions, with a consequent reduction in the number of cases where the Court has felt it necessary to certify a point of law of general public importance, a pre-requisite for an appeal to the House of Lords or the Supreme Court, has I think been useful in providing particularly authoritative decisions on some very difficult issues.

As can be seen from the Report itself, among the issues on which the Court has given guidance, in relation to sentencing, are dwelling house burglaries and crimes involving the use of firearms or knives. It has also considered, notably, the use of anonymous witnesses in the light of the Criminal Evidence (Witness Anonymity) Act 2008 (now been made permanent in the Coroners & Justice Act 2009), and the jurisprudence of the European Court of Human Rights in relation to the admission of hearsay evidence.

Perhaps three other matters call for specific mention. First, the Court has shown its ability to respond with remarkable speed to urgent cases, whether in relation to short sentences or interlocutory appeals, which involve a suspension of proceedings in the Crown Court. Second, with the invaluable assistance of Roger Venne, the staff of the Criminal Appeal Office and the continuing commitment of the judiciary, another reduction in the average waiting time for the hearing of conviction appeals has been achieved. Third, it may well be that the time has now come to revisit the proposal in Sir Robin Auld's report, Review of the Criminal Courts of England and Wales, in which he argued for the codification of the sentencing powers of the criminal Courts.

Lord Judge

Lord Chief Justice of England and Wales

1 Summary for the period October 2008 to September 2009

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 applications received by the Court is slightly less than that received last year. In total, 6769 applications have been received, compared with 6854 last year (a reduction of 85 cases). That decrease has been attributable to conviction applications; the Court received 5314 sentence applications and 1455 conviction applications. This was 1 more sentence application and 86 less conviction applications then those received in the previous year. The number of applications outstanding has dropped by 51 cases since last year (3135 compared to 3186) (see **Annex A**).

1.3 The average waiting time of cases disposed of by the Court over the previous 12 months was 9.4 months for conviction cases where leave to appeal was granted or the case referred to the full Court, and 4.3 months for sentence cases (see **Annex B**). In terms of the conviction cases, that represents a reduction of 0.3 months in the average waiting time compared to cases in the preceding year, whilst for sentence only cases the average waiting time has increased by 0.3 months. The Court remains committed to reducing waiting times. Work still needs to be done though to reduce waiting times further, especially in respect of conviction cases.

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 1366 conviction applications were dealt with in the reporting year, of those 286 appellants were granted leave to appeal by a single Judge, 34 had their application referred to the full Court by a single Judge and 82 had their application referred to the full Court by the Registrar. 964 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, 1266 appellants were granted leave to appeal by a single Judge, 86 had their application referred to the Court by a single Judge and 415 had their application referred to the Court by the Registrar. 2970 applications for leave to appeal against sentence were refused by a single Judge (see **Annex C**).

1.6 Of the 431 appeals against conviction which were heard by the Court this year, 184 (43%) were allowed and 247 (57%) dismissed. Of the 1891 appeals against sentence which were heard by the Court this year, 1400 (74%) were allowed and 491 (26%) 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 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 average, 12% of conviction applications received and 29% of sentence applications received are successful. When one considers that approximately 10% of all cases (conviction or sentence) dealt with at the Crown Court are appealed to the Court of Appeal Criminal Division, the percentage of Crown Court decisions that are overturned is very low.

This clearly demonstrates good reason for confidence in the criminal justice system, especially as some of the appeals that are successful are based on information or evidence which was not available at trial.

1.7 This year, the Attorney-General has referred for the Court's consideration 95 potentially unduly lenient sentences pursuant to section 36 Criminal Justice Act 1988. This is an increase of 18 cases compared with the previous year, but still substantially less than the 134 such cases in the year 2006/2007. Of those cases dealt with by the full Court, 75% have resulted in an increase in the defendant's sentence. The Court has in some cases held that substantial increases in sentence are appropriate. For example in ***Attorney General's References (No. 65 of 2008) sub nom R v Pearson*** [2008] EWCA Crim 3135 the Court increased a sentence of 5 years' imprisonment for causing death by dangerous driving to 10 years'. Also of note is ***Attorney General's References (No. 7 of 2009) sub nom R v McMorris*** [2009] EWCA Crim 1490, a case involving the multiple rape of 16 year old girl which resulted in caustic soda being thrown in her face. The applicant's sentences of 7 years concurrent on two rape counts and 2 years consecutive on a s.20 were increased to 11 and 3 years respectively, thus increasing the total sentence from 9 years to 14 years. Conversely, in some cases the Court held that a trial judge well aware of the normal sentencing range was entitled on the facts to depart from it and to exercise conscious clemency.

1.8 There was an increase overall in the number of applications which were made under some jurisdiction other than the Criminal Appeal Act 1968. During the period of this review, there was a slight decrease in the number of cases where the Prosecution exercised its right of appeal (26 this year as compared to 29 last year). The number of interlocutory applications increased by 38% from 16 to 22 cases. Although still a relatively small number of cases compared to the bulk of the Court's business, these applications often have to be listed at very short notice which can mean that the Court's lists have to be completely re-organised to accommodate them. For example, the case of "H" – an interlocutory application pursuant to s.9(11) Criminal Justice Act 1987 – was received by the Court, prepared for hearing, listed and judgment given within a period of only 7 days. An even swifter example was that of a prosecution appeal pursuant to s58 Criminal Justice Act 2003 which was determined by the Court within 24 hours of receipt (particularly important in that case as the jury in the Crown Court were still sworn). These examples demonstrate the Court's ability to respond with urgency when the need arises, but also underline the vital importance of confining interlocutory appeals to those properly suitable to the process: see R v CII.[2009] EWCA Crim B1.

1.9 Annex E shows the proportion of all cases heard by the Court during this period. 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.

1.10 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 time of a hearing will depend on many factors such as the nature and complexity of the case, the need to receive witness evidence and representation. If the Court is only hearing sentence appeals, as many as ten may be listed in one day.

1.11 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
2003-2004	798	339	1300	540	256	93
2004-2005	765	301	1317	496	194	94
2005-2006	758	287	1283	482	242	92
2006-2007	743	384	1293	495	247	95
2007-2008	725	360	1178	439	258	89
2008-2009	728	340	1221	498	310	128

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

1.12 The number of sitting days for Lord Justices has been similar to that of last year. Lord Justices have a higher proportion of administrative days to court days in comparison to the other Judges, the reason for this is that they have other leadership roles and extra judicial commitments such as membership of the Judicial Appointments Commission, and are required to write virtually all the reserved judgments in complex cases. The increase in sitting days for Circuit Judges (52 days) demonstrates the heavy demand for High Court judges in other Divisions.

1.13 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.

1.14 The Court has regularly sat in six constitutions, with the exception of the summer vacation. In an attempt to ensure the average waiting times of cases was not adversely affected by the summer vacation, some 48 constitutions sat during that period.

1.15 Three Lord Justices of Appeal retired this year Lord Justice Latham, Vice President Court of Appeal Criminal Division, Lord Justice Gage and Lord Justice Tuckey. Their contribution to the work of the Court, the first as Vice President, has been invaluable and I wish them well in the future. Four High Court judges were elevated to the Court of Appeal this year and will sit in the Criminal Division – Lord Justices Aikens, Elias, Goldring and Jackson. Lord Justice Hughes succeeded Lord Justice Latham as Vice President.

1.16 This year showed a similar number of directions hearings in comparison to the previous year from (98 compared with 95). This is the product of continued focus by the Criminal Appeal Office lawyers on case management and the aim to ensure the proper progression of cases without the need to take up valuable Court time. There are some cases which require a firmer hand, sometimes because solicitors or counsel fail to comply with proper requests from the office. The Registrar will in those, and indeed other circumstances give directions either in writing or direct that Counsel attend for an oral hearing before him.

1.17 This year saw a reduction in claims for public funding. 6458 bills of costs were received compared to 7180 in the previous year; £13.24m was claimed compared to £15.03m. In total, £8.85m was paid out. A larger percentage of the total bills received (9% compared to 7.7% last year) was in excess of £4,000. There was however a decrease in the number of bills in excess of £50,000 26 (0.4% of the total number received) this year compared with 37 (0.5%) last year.

2 Criminal Appeal Office Organisation

2.1 The Court is supported by the Registrar and the staff of the Criminal Appeal Office, comprising some 33 lawyers (some of whom work part-time) and 85 administrative staff. The office is structured into four different casework groups, one of which deals exclusively with sentence cases. 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. Also, Staff advise appellants and their legal representatives on matters of procedure and deal with a huge volume of correspondence and telephone queries. 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 public service.

2.2 Lawyers at the Criminal Appeal Office work closely with the Registrar to ensure that cases are guided through the appeal process efficiently and justly. They provide case summaries to the Court and practitioners. They also provide advice on procedural matters to practitioners and applicants in person. Within the Office, there are also specialist senior lawyers, who deal with the more complex cases, prosecution appeals against terminating rulings, interlocutory applications and other ad hoc matters. Their specialist knowledge, often gained over many years practice within the office, is invaluable for the proper conduct and case progression of what are often very complex and/or urgent cases.

2.3 Dedicated teams of administrative staff support the lawyers and are responsible for the preparation and progression of the majority of sentence only cases, obtaining advice from Criminal Appeal Office 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.

2.4 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 where in many instances, the staff of the Criminal Appeal office are the first to identify that a sentence is in fact unlawful and to draw that to the attention of the parties and the Court.

2.5 The legal team is headed by four Senior Legal Managers (across three roles), 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. The administrative team is headed by the Court Manager and her Deputy, who are responsible for office finance, systems and compliance with departmental objectives.

2.6 The Registrar and Judiciary are also assisted by Michael Catterson, Legal Information and Dissemination Lawyer and Victoria Froggatt, Registrar's Staff Lawyer.

2.7 The Legal Information and Dissemination Lawyer reviews all of the conviction appeals listed before the Court and distributes each week to the senior judiciary and within the Criminal Appeal Office a list, 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. Regularly throughout the year on the Registrar's behalf, he distributes to the judiciary and to the staff of the Criminal Appeal Office a Bulletin digesting statutory changes, 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.

2.8 The Registrar's Staff Lawyer works directly to the Registrar assisting him and the Judiciary with any matters which require a legal input, whether that be advice, research, co-ordination of special courts or liaison with external stakeholders. She also acts as Permanent Editor of this review.

3 Cases of Note

3.1 The senior judges of the Court together with the Registrar and his staff, look out for cases raising novel or important points of law or procedure. Such cases may be listed individually or in batches and possibly before a constitution of five Judges. It is not possible to report here on every case over which the CACD presides, but there follows a selection of cases of note.

3.2 In ***R v Mayers & others*** [2008] EWCA Crim 2989 a five-judge Court considered the provisions of the Criminal Evidence (Witness Anonymity) Act 2008 which came into force on the 21st July 2008. The Court observed that the Act was intended to balance the countervailing interests which arose in every criminal trial. It held that in such cases the obligations of the prosecution went much further than ordinary duties of disclosure and a detailed investigation into the background of each potential anonymous witness would almost inevitably be required. Nothing in the Act diminished the overriding responsibility of the trial judge to ensure that the proceedings were conducted fairly and the Judge should give consideration at the conclusion of the prosecution and defence cases as to whether a properly directed jury could safely convict. The Court held that witness relocation could only be a practicable alternative in the rarest of circumstances.

3.3 When considering appeals the CACD would make its own objective assessment as to whether the trial was fair even if at the time the Judge made the order it was reasonable and appropriate. An anonymity order could only be made where all of three conditions were satisfied: (1) that the measures in the order would be necessary to protect the safety of a person or prevent serious damage to property or to prevent real harm to the public interest; (2) that the taking of such measures would be consistent with a fair trial; and (3) that it was in the interests of justice to make the order. When deciding whether these conditions were met the Court had to have regard to the considerations in section 5 of The Act. None of the considerations set out in Section 5 outweighed the other. The focus of the considerations in section 5 was the protection of the interests of the defendant. The introduction of anonymous hearsay evidence was still not permitted.

3.4 The Act is due to expire on 31st December 2009. See now the Coroners and Justice Act 2009.

3.5 Another five-judge court sat in March 2009 in to consider the effect of the decisions of the European Court of Human Rights in ***Al Khawaja v UK and Tahery v UK*** [2009] ECHR 26766/05 26766/05 & 22228/06 20th January, 2009 on the admission of hearsay evidence. In ***R v Horncastle & others*** [2009] EWCA Crim 964 the Court rejected the adoption of a test as to whether the hearsay was the "sole or decisive" evidence on grounds of principle and practice. There was no reason to suppose that all critical hearsay was potentially unreliable in the absence of testing; reliability did not depend upon importance. Nor was there invariably any reason to suppose that the fact-finder could not be trusted to assess the weight of such evidence. Points of law were certified for the House of Lords and leave to appeal granted (at the time of publication, no judgment has been handed down by the Supreme Court).

3.6 Although there have been no legislative changes of any substance which have impacted upon the work of the CACD in the reviewing year, the Court continues to give guidance on the interpretation of new offences and provisions.

3.7 The case of ***Khan & others*** [2009] EWCA Crim 2 gave the Court the opportunity to provide guidance on the interpretation of the offence of causing or allowing the death of a vulnerable person in the household contrary to s.5(1) of the Domestic Violence, Crime and Victims Act 2004. The deceased (R) was the 19 year old wife of S. She spoke no English and was completely dependent on S and his family with whom she lived. S severely beat and inflicted fatal injuries on R having violently abused her for weeks. Dismissing the appeal, the Court considered the meaning of "vulnerable adult". Adults or those over the age of 16 were vulnerable if their ability to protect themselves from 'violence, abuse or neglect' was significantly impaired. The state of vulnerability did not need to be long-standing or permanent. Membership of the same household of the vulnerable adult was a necessary but not sufficient condition of liability and would be a question of fact. There had to be frequent contact between the household member and the eventual victim. The Crown had to show that the defendant was either aware of or ought to have been aware of, the risk of serious physical harm and foresaw or ought to have foreseen, the occurrence of the unlawful act/course of conduct which resulted in death. The defendant could not be convicted unless he or she failed to take steps which could reasonably have been expected of them in the given the circumstances. The duty imposed by the Act was to protect against **serious** physical harm (synonymous with grievous bodily harm under the OAPA 1861).

3.8 The case of ***R v Whittle & others*** [2008] EWCA Crim 2560 was the first case in which the Court had to consider sentencing for cartel offences under s188, Enterprise Act 2002. The appellants had pleaded guilty to a cartel offence in relation to price fixing specialist marine equipment. The circumstances of the appeal were unusual because the appellants had all been arrested in the US, had co-operated with the US authorities and had entered into formal plea agreements there. Those agreements provided for their prosecution both in the US and the UK and for agreed custodial sentences to be imposed in the US criminal proceedings, but allowed a day for day offset of any custodial sentence imposed in England against any custodial sentence imposed in the US. The effect of these agreements was to ensure that the appellants would not have to serve any time in a US prison provided sentences of at least the length agreed with the US authorities were imposed by an English Court.

3.9 Having been sentenced in England to periods longer than the periods agreed with the US authorities, the appellants sought only to persuade the Court to reduce their sentences to the periods agreed with the US authorities. The Court acceded to those submissions but expressed some doubt as to propriety of a US prosecutor seeking to inhibit the way in which counsel might represent their clients in a UK court. In those circumstances it was not appropriate to lay down sentencing guidelines for the offence.

3.10 In ***R v Z*** [2009] EWCA Crim 20 the Court had to consider what it described as "probably unintended and unanticipated consequences" of the hearsay provisions of the Act. Section 114(1) of the Act comprehensively restricted the circumstances in which hearsay evidence may be admitted. In a case where the allegations were of historic sexual abuse of a child, the Crown sought to adduce evidence of the appellant's bad character – evidence from two other persons (one dead, one unwilling to give evidence) that the appellant had raped them. The Crown sought to adduce hearsay evidence of allegations made by the unwilling witness to third persons. Had she given live evidence, there could have been no complaint as to its admission, being relevant both as to propensity and to correct a false impression. None of the conditions

in s116(2) applied to the witness and in considering whether the interests of justice test in s114(1)(d) was satisfied, the Court had to have regard to the factors set out in s114(2). The judge should, when giving his ruling, make clear that he had taken them into account. s114(1)(d) should be applied cautiously since its effect was to circumvent s116 but it was not to be so narrowly applied that it had no effect. The Court commented that an application to adduce hearsay evidence of disputed serious misconduct as bad character evidence was most certainly not conventional and should not have been treated as straightforward.

3.11 The issue of bad character evidence, and its potential impact on the conduct of a trial, was dealt with in ***R v O'Dowd*** [2009] EWCA Crim 905. The Court was deeply critical of a trial of a single defendant (of a number of offences arising out of a single incident) which had lasted over six months where the issues had been relatively simple. One of the causes of the protracted length of the trial had been the introduction of bad character evidence relating to alleged incidents in respect of three other complainants. The first had resulted in acquittal, the second, conviction, and the third in a stay for abuse of process. The Court commented that if ever there was a case to illustrate the dangers of satellite litigation through the introduction of evidence of bad character, this was it. The Court drew attention to the overriding objective, to the to the judge's wide powers of case management under the Criminal Procedure Rules, and to the use of s74 PACE, in respect of the previous conviction.

3.12 In ***R. v Carr*** [2008] EWCA Crim 1283 the Court considered the exercise of judicial discretion in refusing to admit evidence of a witness's bad character. The defendant and victim were members of two rival families. Defence counsel applied under s.100 Criminal Justice Act 2003 to admit evidence that the victim's brother had been involved in a shooting incident in which an associate of the appellant's family had been shot. The trial judge refused the application and on appeal the Court concluded that the Judge had been entitled to take account of the fact that, even if the defendant had been permitted to cross-examine the witness, it would not have advanced matters materially from the defendant's point of view. As in O'Dowd, the Court was mindful of the danger of 'satellite litigation'.

3.13 s.5(5) Criminal Procedure and Investigations Act 1996 provides that an accused must give a defence statement to the crown court and the prosecutor. In ***Essa*** [2009] EWCA Crim 43 the Court, on being told that the absence of a Defence Case Statement was the result of advice both from solicitors and counsel, observed that it was at a loss to understand how any lawyer could properly give such advice to a defendant in the face of the legislation. It was not open to those who advised defendants to pick and choose which statutory rules they would and would not obey.

3.14 Trial by jury is key to the administration of criminal justice and one of the functions of a trial judge is to ensure that the jury members are able to carry out their functions fairly and properly. It is open to a trial judge to discharge whole juries or up to three individual jurors in certain circumstances. In the case of ***LS*** [2009] EWCA Crim 104 the Court considered whether the discharge of a juror during jury deliberations impacted on the safety of the conviction. The case involved historic allegations of familial sexual abuse. At the close of the evidence, one juror revealed that she had been the subject of sexual abuse as a child. Having questioned her in the presence of counsel, the trial Judge declined to discharge her, ruling that she had displayed a responsible attitude in drawing the matter to the court's attention. She had demonstrated that she was concerned to give the defendant a fair and impartial trial,

unprejudiced by her own experiences. The Court held that such a decision was within the range open to the judge and could not be interfered with. Subsequently, during the jury's retirement, another juror – who was distressed - revealed that she had also been the victim of abuse. On that occasion, the Judge discharged that juror but declined to discharge the entire jury. The mere fact that one juror had not taken part in the entirety of the jury's deliberations was insufficient to require the discharge of the entire jury. Further, the discharge of a juror during the deliberations did not render verdicts unlawful or necessarily unsafe.

3.15 The Court did not consider that a direction to the remaining jurors to disregard anything contributed by the discharged juror to their deliberations prior to discharge was correct. It was a direction which was impossible or wrong to obey, however, it did not render the verdicts unsafe in the instant case.

3.16 In ***R v Erskine*** [2009] EWCA Crim 1425 the appellant sought to argue that his convictions for the murder of seven elderly and vulnerable people in their own homes should be quashed and substituted with convictions for manslaughter on the grounds of diminished responsibility. In order to establish diminished responsibility (a matter not relied upon at trial) the appellant sought leave to call fresh expert evidence. The Court made use of its powers (under s23(4) CAA, 1968) to direct the taking of evidence on commission. Where there was no issue as to credit the use of the power could obviate real listing difficulties; it enabled the areas of disagreement between experts to be identified and refined; transcripts of the evidence given having been provided, it enabled a sharper focus on the evidence and its relevance to the submissions, comfortably shortening the hearing. Counsel found the availability of the entirety of the expert evidence in advance of the hearing advantageous. In future, when directions were given in cases involving expert evidence, in addition to the usual directions as to exchange of reports and a meeting of experts, consideration should be given to whether expert evidence should be heard on commission by a member of the constitution which would hear the appeal or whether it should be heard immediately prior to the legal argument as part of one continuous hearing.

3.17 The decision whether to admit fresh evidence is case and fact specific. The discretion is wide but focused on the interests of justice. The fact that fresh evidence relates to an issue not raised at trial does not automatically preclude its reception but, absent a reasonable and persuasive explanation, it is unlikely that the interests of justice test would be satisfied. Where it was sought to raise diminished responsibility for the first time on appeal, it should normally be necessary to refer the Court to no more than s23 itself and to the approach set out in R v CCRC ex p Pearson [2000] 1 Cr. App. R. 141. If reference to earlier decisions or historical analysis was needed, the review in ***Erskine*** would normally suffice. The Court would normally expect the parties to provide a detailed analysis of the facts to assist it in the application of the statutory test.

3.18 The case also gave the Court the opportunity to consider the practical matter of citation of authorities. The Court deprecated the lengthy citation of authority where the exercise of its powers was largely fact specific. Only an authority which established a principle should be cited. Reference should not be made to cases which merely illustrated or restated a principle. Advocates must expect to be required to justify the citation of each authority relied upon. In sentence cases, where a Guideline had been issued, pre-Guideline cases and those after it which made no reference to it were unlikely to be of assistance.

3.19 In ***R v Gore & Maher*** [2009] EWCA Crim 1424 the Court held that the issue of fixed penalty notices for being drunk and disorderly (s.91 Criminal Justice Act 1967) and for behaviour likely to cause harassment alarm or distress (s.5 of the Public Order Act 1986) did not render a subsequent prosecution for inflicting grievous bodily harm arising from the same series of events an abuse of process. The police, having attended a street altercation during which the victim seemed to receive no serious injuries, relied upon reports at the scene and issued the appellants with the respective fixed penalty notices. It later transpired that the victim had suffered a fractured elbow necessitating two operations. The appellants were prosecuted for inflicting grievous bodily harm, which is not an offence for which a fixed penalty notice can be issued. This prosecution was not an abuse. It was clear that the provisions of the Criminal Justice and Police Act 2001 in relation to fixed penalty notices only precluded a prosecution for an offence in relation to which a notice was issued. Nothing in that Act suggested that the issue of a penalty notice asserting one offence, and the payment of the penalty, relieved the recipient of further proceedings if it became apparent that a more serious, and in particular a non-penalty offence, had been committed.

3.20 The sentencing of dangerous offenders is something which continues to exercise the Court, not least because of the various regimes that apply depending on whether a defendant was sentenced pre-4th April 2005, between 4th April and 13th July 2008 or on or after 14 July 2008. In November 2008, in ***R. v Stannard & Ors*** [2008] EWCA Crim 2789, three unconnected appeals against sentence were listed together to enable the Court to clarify a number of issues arising from these different regimes. In any case in which a specified or serious specified offence had been committed after the relevant date, the Judge had to apply the 2003 Act provisions, taking account of all available information, which of course included the pre-4th April offences. Where the judge concluded that the offender posed the requisite risk to the public, and imposed a sentence of imprisonment for public protection or an extended sentence, the earlier offences should be dealt with by imposing concurrent determinate sentences rather than by imposing no separate penalty as an order for no penalty tended to convey to the victim that the court did not properly address the impact of the crimes. Where an indeterminate sentence of imprisonment for public protection or an extended sentence was imposed on one or more counts, it was a well established principle that the totality of the offending may properly be reflected in the duration of the notional term.

3.21 In ***C & others*** [2008] EWCA Crim 2790, nine unrelated cases were listed together to enable the Court consider the modifications made by the Criminal Justice and Immigration Act 2008 to the Dangerous Offender provisions within Chapter 5, Part 12, Criminal Justice Act 2003 and applicable to defendants sentenced on or after the 14th July 2008 (irrespective of the date of the offence or the date of conviction). The amendments did not impinge on the principle that a sentencing court must have regard to the protection of the public when considering sentence. Life imprisonment remained mandatory if the offence (or associated offences) justified it, but there was now an element of judicial discretion where previously there had been obligation to impose specific sentences. The overarching test of "significant risk of serious harm by the commission of further specified offences" remained unchanged. There was however no longer a statutory presumption of dangerousness arising from previous convictions. To impose a sentence of imprisonment for public protection, two conditions must now be met: that the offender had previously been convicted of one of the particularly grave offences listed in Schedule 15A (a list far shorter than the original list of "specified offences"); and secondly, that

the actual custodial period to be served was to be at least 2 years (leaving aside any reduction in that period for time already served on remand). It was permissible for that minimum term to take account of the totality of the offending before the court. The Court concluded that extended sentences of imprisonment were no longer limited to adults being sentenced for "specified offences" where the maximum sentence was less than 10 years' imprisonment, but instead, available for all "specified offences". The Court observed that imprisonment for public protection was the second most draconian sentence available to the Court and should not be imposed where the overall sentencing package provided adequate protection.

3.22 In its first reported decision of 2009, the Court in the consolidated appeals of ***R v Saw & others*** [2009] EWCA Crim 1 re-examined earlier guidance (***R v McInerney; R v Keating*** [2003] 2 Cr App R(S) 240) regarding sentencing for offences of dwelling house burglary and provided fresh guidance. The Court stated that the starting point must always be that burglary of a home was a serious offence and particular focus was required on the impact on those living in the property. It was as much an offence against the person as against the property. The sentence should reflect the serious adverse consequences suffered by victims even where unintended. Each offence needed to be individually assessed as the intrinsic seriousness varied substantially. Although keen not to provide an exhaustive list, the Court reviewed a number of common aggravating features which focused on the impact of the offence on the victim or the culpability of the offender or a combination of the two.

3.23 The Court held that any domestic burglary which exhibited any of the common aggravating features should normally attract a custodial sentence. Limited raised culpability or impact would involve a sentence in the range of 9 to 18 months. Seriously raised culpability or serious impact would be in the range of 2 years and upwards. A third domestic burglary attracted a minimum three year sentence: this was not a starting point and seriously raised culpability or impact would justify a longer sentence. There would be some cases where a non-custodial sentence might be appropriate, for example in the case of a youthful first offender or the offender who had a real prospect of turning his back on crime or breaking the addiction which had led him into crime. Such a chance would only rarely be given more than once.

3.24 In October 2008, the Court heard three separate applications by the Attorney-General for leave to refer sentences involving injury caused by the use of a knife as unduly lenient under s36, Criminal Justice Act 1988. In ***Attorney-General's Reference (No's. 49 of 2008)*** [2008] EWCA Crim 2304 the sentence in each case was substantially increased. It was important to repeat what had been said in ***R v Bleazard & Povey*** [2008] EWCA Crim 1261 and to add "Those who carry knives in the street and then use them to wound and injure must expect severe punishment - no ifs, no buts, no perhaps. We must do what we can to eradicate this dreadful knife problem."

3.25 The case of ***R v Hughes*** [2009] EWCA Crim 841 was unusual as it was an application for leave to appeal against sentence on grounds of fresh medical evidence following a successful reference by the Attorney-General in 2003 when H's sentence of 5 years' imprisonment was substituted by a discretionary life sentence; the appellant had never previously lodged an application for leave to appeal against sentence. The Court first had to consider whether in fact it had jurisdiction to hear the matter and concluded that where an applicant had not previously sought to exercise the right of appeal given by ss.9 or 10 Criminal Appeal Act 1968 to a single Judge, there was no statutory bar in that Act to prevent the Court from receiving an application for

leave to appeal. Nevertheless, it did not follow that the Court would entertain such an appeal. Any such application required leave and would, almost by definition, require an extension of time – which was not a formality and would be granted only where there was good reason. Since the Court's powers on the reference were at large, it would make good sense for the right of appeal provided by s.9 to be removed but statutory amendment was necessary to achieve that result.

3.26 In ***R v Riding*** [2009] EWCA Crim 892 the Court considered what amounted to a "lawful object" pursuant to s.4 of the Explosive Substances Act 1883. The appellant had made a pipe bomb containing explosives drained from a number of fireworks. A firework-type cord fuse had been inserted into one end. If it had exploded it would have had the potential to generate substantial shrapnel and serious injury. At trial it was the appellant's case that he had made the bomb out of simple curiosity to see whether he could do it. He did not ignite it, although had used an explosive powder to make it rather than an inert material, such as sand. Counsel on the appellant's behalf submitted that a "lawful object" meant the absence of criminal purpose rather than a positive object which was lawful. The Court disagreed and was satisfied that it meant the latter and mere curiosity could not be a lawful object in the making of a lethal pipe bomb.

3.27 In ***R v Bannister*** [2009] EWCA Crim 1571 the Court considered the position of a police driver who claimed that his specialist driving skills should be taken into account when judging his standard of driving. He had been convicted of dangerous driving due to traveling at high speeds on a motorway during torrential rain. His car aquaplaned and crashed into a small copse of trees at the motorway's edge. The Court concluded that taking into account the driving skills of a particular driver was inconsistent with the objective test of the competent and careful driver set out in the statute. If the driver's special skill was taken into account then the standard being applied was that of the driver with special skills rather than that of the competent and careful driver - effectively re-writing the test Parliament had clearly laid down. It was possible for a good driving record to be relevant to credibility, but the fact that such evidence was admitted could not affect the test to be applied to the question of the standard of driving.

3.28 In ***R v Pola*** [2009] EWCA Crim 655 the Court considered what amounted to an "employer" where the appellant had been convicted of an offence of failing to discharge a duty as an employer contrary to section 33(1)(a) of the Health and Safety at Work Act 1974. He had been in charge of the building of a house extension. A number of unqualified Slovakian nationals were paid per day to work at the site. They were casual workers and there was evidence that they were not obliged to turn up every day. One of the workers suffered severe brain injuries and permanent disabilities following an accident at the site. The Court had to consider whether or not there was evidence on which a reasonable jury could conclude that the appellant was an employer. There was evidence that once a worker had turned up at the beginning of the day he was under an obligation to remain at work until the end of that working day, and it was for that day's work that he was paid. The Court concluded that there was therefore evidence upon which the jury could have reasonably concluded that the appellant was an employer.

Sentence

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

3.30 In ***R v Clarke*** [2009] EWCA Crim 1074 the Court held that it was not permissible to make a Confiscation Order following an absolute or conditional discharge. Such an order plainly constituted punishment and could not be made once the statutory prerequisite to the making of an order of discharge (that "it is inexpedient to inflict punishment") had been fulfilled.

3.31 In determining an application for leave to appeal against a Confiscation Order in a case where the single Judge had been deceived into believing that the appellant did not understand English and that a schedule of assets had been put before the judge who made the confiscation order without the appellant's knowledge, the full Court could revoke that leave and refuse it. This was the finding of the Court in ***R v Pate***l [2009] EWCA Crim 1133 where the matter was listed before it for directions. On that hearing, it was apparent to the Court that the appellant had no language difficulties and had been fully aware of the schedule of assets and its contents which had formed the basis of an agreement as to the amount of his realisable assets. He could not subsequently be permitted to resile from that agreement.

3.32 **Section 240 of the Criminal Justice Act 2003** provides for remand time directions when sentencing. The Court has been concerned with the needless expenditure incurred in conducting what is effectively an administrative process where the specified number of days spent on remand have been incorrectly stated in sentencing. See for example ***Bentall*** [2009] EWCA Crim 1730 where the CCRC had been obliged to make a reference.

3.33 In order to avoid unnecessary applications being made to CACD, where the only issue was the correct time spent on remand, trial judges should use the following formula (as set out in ***R v Johnston & Nnaji*** [2009] EWCA Crim 468) when passing sentence:

"The defendant will receive full credit for the full period of time spent in custody on remand or half the time spent under curfew if the curfew qualified under the provisions of s240A. On the information before me the period was…..days but if this period is mistaken, this court will order an amendment of the record for the correct period to be recorded".

3.34 Sections 21 and 22 of the Criminal Justice and Immigration Act 2008 (in force since 3rd November 2008) inserted a new section 240A into the Criminal Justice Act 2003. s.240A requires the court, when sentencing an offender for an offence committed on or after 4 April 2005, to make a direction that time spent remanded on bail whilst subject to an electronically monitored curfew condition will count as time served as part of the subsequent custodial sentence. In ***R v Barrett*** [2009] EWCA Crim 2213 the Court held that in terms of any entitlement to credit for time spent on bail, the position of an offender on bail and subject to a curfew was not analogous to that of an offender on bail, subject to a curfew **and** electronically tagged within the meaning of the s.240A. In sentencing an offender in the former category a judge was entitled to refuse to give credit for time spent on bail subject to a curfew.

4 Other types of Appeal

4.1 In addition to appeals against sentence and conviction, there are some 20 other types of appeal within the jurisdiction of the Court of Appeal Criminal Division. These cases are managed in the main by the Senior Lawyer group. They include amongst other things the prosecution's general right of appeal in respect of rulings under s.58 Criminal Justice Act 2003; interlocutory appeals against rulings in Preparatory Hearings; appeals in relation to restraint orders under s. 43 Proceeds of Crime Act 2002; prosecution appeals against the making of a confiscation order or where the court declines to make one (save on reconsideration of benefit) under s.31 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 s.45 (5) and (9) Criminal Justice Act 2003 and s.47 Criminal Justice 2003; applications for a retrial for a serious offence; and applications with respect to reporting restrictions and open justice under s.159 Criminal Justice Act 1988.

4.2 The right of appeal given to the prosecutor under s58 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 26 such applications in the year under review.

4.3 In ***B & T*** [2009] EWCA Crim 99, the Court considered whether a case management decision (such as, in this case, whether or not to break a fixture where the complainant and eye witnesses were abroad) constituted a "terminating ruling" for the purposes of s.58 of the Criminal Justice Act 2003. It may constitute a terminating ruling, but whether or not it did had to be examined in the light of all the relevant facts. It did not become one merely because the Crown treated it as such and was prepared to give the acquittal undertaking required by s.58(4). Having refused the Crown's application for leave to appeal, the Court exercised its power pursuant to s.58(12) to order the acquittal of the defendants.

4.4 In ***Mattu*** [2009] EWCA Crim 1483 the subject of the appeal was the trial judge's ruling with regard a submission of abuse of process. It was held that where, on a charge of conspiracy to import Class A drugs, a carefully prepared and detailed basis of plea had been agreed between the prosecution and the defence, and approved by the court, first, for the purposes of giving an indication as to sentence and, secondly, for deciding upon sentence, it would be an abuse of process to prosecute related money laundering matters where the case the prosecution sought to advance was wholly inconsistent with that basis; the basis of plea had achieved a status which precluded the prosecution from attempting to go behind it. The Court observed that there might be cases where, for example, fresh evidence emerged and circumstances changed, in which it would be possible for the prosecution to circumvent an agreed basis of plea.

4.5 In ***M*** [2008] EWCA Crim 2751 the Court considered whether a preliminary ruling as to the competence or otherwise of a witness was reasonable. In this case, having heard expert evidence and spoken directly to the witness via video-link, a nine year old witness with the language understanding of a five year old was found by the judge not to be competent to give evidence. The Court held that if a judge concluded at the outset that a witness was not competent, it was not unreasonable to rule so at that stage. Where of course a Judge ruled a witness was or might be competent, it was a matter to keep under review whilst the witness gave evidence.

4.6 The Court received 22 Interlocutory applications in the reviewing year. By their very nature they are often urgent and can result in the Court having to accommodate them at very short notice – a necessity which has a knock-on effect on the Court's existing business.

4.7 In ***Chisholm*** [2008] EWCA Crim 3228 the Court declined to permit an Interlocutory appeal designed to challenge anonymity orders where it was unclear whether the criteria for holding a preparatory hearing had been met. It made clear that witness anonymity orders should not ordinarily be the subject matter of interlocutory appeals. Until the trial was under way and it could be seen what the real issues were and the way in which the defendants were affected by the anonymity order in their ability to deal with the evidence, there was no proper way in which the fairness of the trial could be evaluated. That was something with which the trial Judge was equipped to deal and, if necessary, if there were convictions, for the Court of Appeal to assess.

4.8 Section 44 of the Criminal Justice Act 2003 makes provision for trial without jury in certain circumstances - if the judge was satisfied (to the criminal standard) that there was evidence of a real and present danger that jury tampering would occur and that notwithstanding any preventative steps which could be taken, the likelihood of tampering was so substantial that it was necessary in the interests of justice to conduct the trial without a jury. The case of ***R v T & others*** [2009] EWCA Crim 1035 ultimately became the first such case to be heard without a jury. The presiding judge initially refused the application and the Crown sought to appeal that decision. Such an application had to be conducted within the context of a "preparatory hearing" and gave rise to rights of interlocutory appeal. In reversing this decision the CACD considered that on the evidence, the protective packages (of measures to reduce the risk of jury tampering) did not sufficiently address the potential problem of interference with jurors and, even if they did, it would be unreasonable to impose that package with its drain on financial resources and police manpower and unfair to impose on individual jurors the additional burdens consequent on it.

4.9 In allowing the trial to be conducted without a jury the CACD observed that trial by jury was a right available to be exercised by a defendant unless that right were circumscribed by express legislation. The constitutional responsibilities of the jury were flouted if the integrity of the jury was compromised. Any attempt at interference with the jury constituted an abuse of the process.

4.10 In ***G (G) and B (S)*** [2009] EWCA Crim 1207 the respondents had been acquitted of active participation in murder by shooting. A third man was convicted, having been disbelieved in his evidence that he was not there. Subsequently the third man offered himself to the police as an informant and entered into an agreement pursuant to section 74 Serious Organised Crime and Police Act 2005; he made a statement implicating the respondents in the murder of which they were acquitted and sought a reduction in his sentence. The prosecution applied under s76 CJA 2003 for an order quashing the acquittals and directing a retrial, contending that his changed evidence amounted to compelling new evidence within that Act.

4.11 The Court stated it was not enough that the new evidence would, if offered at the trial, have presented the defendant with a case to answer. There being powerful reasons why there ought normally to be a single trial, it is only where there is compelling new evidence of guilt, of the kind which cannot realistically be disputed, that the exceptional step of quashing an acquittal will be justified. In deciding whether it is in the interests of justice to order a retrial, the specific

considerations set out in section 79(2) are not exhaustive. The jurisdiction is concerned with the question whether there should be a retrial because the acquittal is transparently wrong and is damaging to the criminal justice system. Where an application is founded upon evidence of a cynical and manipulative accomplice, it is conceivable it will pass the test, but commonly (as in this case) it will flounder on the reliability test in section 78(3)(a) because of the difficulty in knowing whether such a witness, with a clear purpose of his own to serve by being seen to co-operate with the authorities, was telling the truth.

5 Terrorism

5.1 In ***R v Lambert*** [2009] EWCA Crim 700 the Court considered the issue of consent to commence a prosecution under the Terrorism Act 2000. The consent of the Attorney General had followed a plea before venue hearing. The Court held that there was no warrant given by the language of s.25 Prosecution of Offences Act 1985 to conclude that it permitted more than the arrest, charge and remand of a person without the consent of the Attorney General or Director of Public Prosecutions; it covered actions that needed to be taken to apprehend the offender and detain him if there was not time to obtain permission. It did not permit anything more to be done. Even if, on a wider reading of s.25(1), something of substance was required to happen, a plea before venue was a hearing of substance.

5.2 The meaning of "possession" within section 57 of the Terrorism Act 2000 is something which continues to exercise the Court. In ***R v Altimimi*** [2008] EWCA Crim 2829 consideration was given to whether or not A possessed material which clearly "related to" terrorist activity. The said material was made of up of a number of computer files containing information such as instructions for the making of a detonator and an explosive device; guidance and instructions on the creation of and use of chemicals, explosives and bombing strategies; instructions for the making of a nail bomb; an organisational chart entitled "Mujahideen Strategy". The prosecution case was that A was a person who had the material on his computer ready to be used if and when either he or others considered it appropriate to do so. Counsel for A submitted that section 57 of the Terrorism Act 2000 should be construed to mean that the jury had to be satisfied that there was some direct connection between the material and a proposed act of terrorism. Upholding the convictions, the Court held that the inevitable consequence of the jury's verdicts in this case was that the only conclusion that could be reached from possession of the material was indeed that A intended to use it.

5.3 In March 2009, the Court considered the scope of section 5 of the Terrorism Act 2006. In ***R v Roddis*** [2009] EWCA Crim 585 R was convicted of engaging in the preparation of an act of terrorism, having been in possession of readily available bomb making ingredients and recipes, various computer files and handwritten documents relating to explosives and bombs and a number of video clips depicting beheadings carried out by terrorists and the bombing of the Iraqi Parliament. At trial it was asserted that R was a harmless individual with a harmless interest in the military and firework type explosives and an idle curiosity leading to an interest in Arabic dress, the Koran and the videos of Jihadist activity. Refusing his application for leave to appeal against conviction (on the grounds that s.5 should be construed as necessarily involving something more than simple possession if it was to be fitted in to the framework of other offences), the full Court was of the view that some caution needed to be exercised in the mass of anti terrorist legislation that exists in making any assumptions as to the exact Parliamentary intent. Some overlap between offences undoubtedly existed. The Court found that the judge had properly directed the jury that the coincidence of intention and conduct was essential and had made it clear that the conduct in which the defendant was alleged to have engaged was that he had researched how to make home made explosives from the internet and purchased relevant ingredients to manufacture an improvised explosive device along with the nails and a fuse purchased for that purpose. It followed that the conduct left to the jury was not simply the acquisition of the ingredients, but what the indictment described as acquisition of knowledge. The real issue was the intent of the defendant.

5.4 Sentencing for an offence under s.5(1) was considered in ***R v Tabbakh*** [2009] EWCA Crim 464 and ***R v Parviz Khan*** [2009] EWCA Crim 1085. Tabbakh, having been convicted after a trial (the Crown's case being that T had compiled a set of bomb making instructions and had gone some but limited way towards assembling the ingredients; T's case being that he was intending to make some fireworks by way of a small business) was sentenced to 7 years' imprisonment (the trial judge having indicated that the sentence was reduced from one of 8 years to take into account his mental condition, the maximum sentence being life imprisonment). The Court held that a sentence of 8 years was neither manifestly excessive nor outside the permitted range for a defendant doing their best to make a bomb in this country with a view to terrorist acts; albeit without yet the necessary ingredients to make the bomb viable. The Court did not wish to lay down any general range for sentences of this kind.

5.5 In ***Khan's*** case, the Court held that a sentence of life imprisonment with a minimum term of 14 years was not manifestly excessive for an offence which involved a plan to identify and kidnap a Muslim soldier serving in the British Army and then behead him and send a film of that beheading to news networks throughout the world in order to undermine morale in the British Forces and strike a political blow to the Government, notwithstanding the fact that no particular soldier had been identified. The case satisfied the test for the imposition of life sentences as set out in R v Hodgson (1968) 52 CR App R (S) 113. K was a man of fanatical determination who had committed very grave offences and he represented a risk of very grave harm for a period which could not reliably be determined.

5.6 The interaction between section 6 and 8 of Terrorism Act 2006 were considered in the case of ***R v Da Costa and others*** [2009] EWCA Crim 482 and specifically whether or not it was necessary that the provider of the instruction or training knew that at least one of those receiving it intended to use the skills learned for terrorist purposes for the section 8 offence to be made out. After two weeks in retirement, the jury asked whether the s.8 offence lay in the defendant's knowingly attending the training, even if he had no intention of using that training for terrorism. That question raised the issue of whether they had understood that the s.6 offence required at least one person attending the event to intend to use the skills learned for terrorist purposes. In response to that specific question, the trial judge had directed that the test of whether a particular activity amounted to training was an objective one, but the person delivering the training had to know that one or more of those receiving it intended to use it for a terrorist purpose. Whilst the words of s.6(3)(b) were very wide, its breadth was a matter of policy for Parliament. Certainty was provided by the requirements in s.6(1)(b) that before he could be convicted, a defendant had to know that at least one of those he was training had the intention of putting the training to terrorist use. It was unarguable that the concept of terrorist training was so uncertain as to offend both the common law and the European Convention on Human Rights 1950 Art.7 and had to be read down in a manner that excluded fitness training from its scope.

5.7 In order for an offence under s.8 to be made out, it was not necessary that the provider of the training knew that at least one of those receiving it intended to use the skills learned for terrorist purposes. The words in section 8(1)(b) "of the type mentioned in section 6(1)" referred to the character of the training rather than to the state of mind of its provider.

5.8 Sentencing for Fundraising contrary to section 15(1) of the Terrorism Act 2000 is a subject which has been dealt with by the Court on a number of occasions in the reviewing year.

In ***R v Mutegombwa*** [2009] EWCA Crim 684 M was sentenced to 10 years' imprisonment following his conviction after trial. He had invited an undercover officer, who had infiltrated a terrorist group of which M was a member, to provide £256 to pay for a one way ticket to Nairobi for the purpose of committing a terrorist act. He told the officer that he would never see him again until judgment day. The Court held that although severe, the sentence could not be said to be manifestly excessive. The amount involved in the fund raising request was only one factor in the assessment of the overall culpability in a case of this kind. The degree of gravity of the terrorist purpose for which it is requested – in this case, a suicide bombing – was no less important. The judge was entitled to sentence the applicant on the basis that he was a dangerous young man whose intention was to carry out a suicide bombing with all the potential human carnage which that would involve. The funds requested were to facilitate that very purpose.

5.9 In ***R v Saleem & 5 Ors*** [2009] EWCA Crim 920 the appellants appealed against their sentences of various lengths following their convictions for terrorism offences of fundraising and inciting terrorism contrary to sections 15(1) and 59(1) & (2)(a) of the Terrorism Act 2000. The offenders had been members of, or associated with, a banned Islamic organisation and had made highly emotive speeches at a mosque during Ramadan and at a time when Coalition forces had been attempting to establish control over insurgent activity in Iraq.

5.10 The sentences were all reduced on appeal. There had been no evidence that any funds had been collected or that an act of terrorism had been committed abroad as a result of the incitement. Given the timing of the offences it was likely that S may have felt sincere and deep emotions about the part played by the Coalition forces. The defendants had not been punished for such feelings, nor for their association with the group, as it had not been a proscribed organisation at the relevant time, having disbanded some weeks before the speeches were made. S's sentence of three years and nine months' imprisonment for the s.59(1) & (2)(a) offence was replaced with a sentence of two years' imprisonment, which was to be served consecutively with another sentence of imprisonment that had been imposed in relation to another offence. The sentences passed on B and K were reduced from two-and-a-half years' imprisonment to 18 months' imprisonment in respect of the s.15 offence and from four and a half years to three years and six months for the s.59(1) & (2)(a) offence. The sentence of two years' imprisonment passed on H for the s.15(1) offence was replaced with one of 18 months'. M's sentence of two years for the s.15(1) offence was replaced with a sentence of nine months' imprisonment, which was to be served consecutively with another unrelated sentence.

5.11 Sentencing for offences pursuant to s.38B(2) Terrorism Act 2000 (failing to disclose information about acts of terrorism) and s.4(1) Criminal Law Act 1967 (assisting an offender) was considered in ***R v (1) Sherif (2) S Ali (3) M Ali (4) Mohamed (5) Abdurahman (6) Abdullahi*** [2008] EWCA Crim 2653. The appellants had failed to disclose information that they had prior to the intended bombings of the London transport system on July 21, 2005. Such information could have assisted in preventing the commission of an act of terrorism or could have helped in securing the bombers' arrest. All of the appellants were ultimately granted bail subject to an electronically monitored curfew. Four of them had been under 24-hour curfew and, therefore, had effectively been under house arrest. The sentences ranged from 17 years' imprisonment to 3 years in a young offender institution and consisted of concurrent as well as consecutive sentences.

5.12 The maximum sentence for offences under s.38B was five years' imprisonment. The maximum sentence was reserved for the worst type of offending, and there was no doubt that in the instant case the enormity of the crime and the dreadful risk that the bombers posed to public safety until they were arrested was capable in appropriate circumstances of justifying the imposition of the maximum sentence to either or to both limbs of s.38B. In many cases it would be the seriousness of the terrorist activity about which a defendant had failed to give information, rather than the extent of the information that could have been provided, which would affect the sentence. There was nothing wrong in principle with the imposition of consecutive sentences where both limbs of s.38B had been charged. However, where as in the instant case the offence of assisting an offender was charged, care needed to be taken to ensure that there was criminality over and above the failure to inform, if a consecutive sentence was to be justified. There was always a place for personal mitigation even in grave cases. There might be cases where the court might be able to show some understanding or mercy when a person, if vulnerable either because of their age or relationship with an offender, put loyalty before duties to the public. Further, until s.240A of the 2003 Act had come into force (it is now in force), a modest period of credit for time spent on remand under home curfew could be justified in cases such as the instant. Five of the six sentences were reduced and the Court imposed sentences of imprisonment of nine years (1), eight years (2), six years and nine months (3), 13 years (4) and four years and nine months (5). The sixth appeal was dismissed as three years in a young offender institution reflected more than adequately all of the mitigation available to the appellant and a five-year starting point was a generous one in all the circumstances.

5.13 Applying the foregoing Judgment, in ***R v Girma and others*** [2009] EWCA Crim 912 the Court held that s.4(1) offence (assisting an offender) did not add anything to the s.38B offence (failing to disclose information) and therefore the sentences in respect of those charges should run concurrently.

5.14 Sentencing for offences pursuant to section 57 Terrorism Act 2000 (possession of an article for a purpose connected with the commission, preparation or instigation of an act of terrorism) is something that the Court has considered again during the reviewing year. In ***R v Omar Altimimi*** [2008] EWCA Crim 2829 concurrent sentences of 9 years' imprisonment on each of six s.57 counts were upheld. It was clear from the jury's verdict that the material was material which the applicant had downloaded for a purpose. The sentencing judge had to look at the overall criminality involved. In doing so he had concluded that the appropriate overall sentence was one of 9 years' imprisonment. Refusing the application for leave to appeal against sentence, the Court held that the judge came to an overall conclusion as to the criminality, which could not be faulted.

5.15 In ***R v Worrell*** [2009] EWCA Crim 1431 the Court dismissed an appeal against consecutive sentences of 6 years and 15 months' imprisonment for respective offences of possessing articles for terrorist purposes contrary to section 57 of the Terrorism Act 2000 and causing racially aggravated intentional harassment alarm or distress. W had had significant quantities of racist and right-wing material and manuals on weapons and how to make bombs, together with bomb making ingredients. Although at the top end of the suggested sentencing range, a sentence of six years' imprisonment was not wrong in principle or manifestly excessive. It was not wrong for 15

months' imprisonment to have been imposed consecutively. The court was less concerned with the construction of the sentence than with the outcome. The two counts were quite separate conduct even though they were brought about from the same manifestation of hatred. The totality of the sentence was not wrong in principle or manifestly excessive.

6 The Role of the Criminal Cases Review Commission

6.1 The Criminal Cases Review Commission ("the CCRC") was established on 1 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.

6.2 Over the reporting year, the CCRC referred 33 cases to the Court – 23 relating to appeals against conviction and 10 in relation to appeals against sentence. Although a relatively small number of cases in comparison to the total number of applications received, these cases are notoriously complex and their referral is usually the final stage of a lengthy investigation where the CCRC concludes that there is a "real possibility" that the conviction or sentence would not be upheld. The cases represent less than 4% of the cases considered by the CCRC each year.

6.3 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. This can result in additional delays if further investigation and additional transcripts and documents are required for the Court. Leave to appeal is required in respect of the additional grounds which may mean that additional Court time will be required to consider the issue of leave.

6.4 A number of cases that are referred by the CCRC are not opposed by the Crown. This highlights the thorough work of the Commission. Of the 13 appeals against conviction which were determined by the Court in the reporting year, 11 were allowed and of the 4 appeals against sentence 3 were allowed.

6.5 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 itself 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 initially referred to the Court by the CCRC.

6.6 This year the Court had occasion to bring a particular case to the attention of the CCRC and assist at every stage to have the matter determined as expeditiously as possible. In the case of ***R v Hodgson*** [2009] EWCA Crim 490, an application for leave to appeal was received in respect of a conviction in 1982 for murder; the victim had also been raped. The appellant was serving a life sentence. DNA evidence was not available at the original trial but DNA tests carried out in 2009 revealed the DNA found was not a match with the appellant. The Crown had indicated that they would not oppose the application. On receipt of the application, the Criminal Appeal Office lawyer discovered the appellant had previously had an unsuccessful appeal. Contact was therefore made with the appellant's legal representatives and the CCRC to enable the CCRC to refer the matter back to the Court swiftly. The CCRC referred the case back to the Court on 5th March 2009 and the matter was listed before the Court on 18th March 2009 when the appellant's conviction was quashed. The speed with which this case was brought to a conclusion highlights the excellent working relationship the Court has with the Commission.

6.7 Many of these cases are referred by the CCRC because fresh evidence or new argument has come to light many years after the conviction. For example, in the case of ***R v Lawless*** [2009] EWCA Crim 1308, there was fresh psychological expert evidence that the appellant, who had been convicted of murder, on the basis of his own admissions to various witnesses, was a pathological liar. Experts (on both sides) concluded that the appellant suffered from pathological attention-seeking behaviour. His various confessions may have taken the form of a pathological need for attention rather than bravado. His conviction was quashed. If the jury had heard this evidence at trial it might have affected their assessment of the reliability of the various confessions made by the appellant and their verdict might have been different.

6.8 This year saw the retirement of Professor Zellick, Chairman of the CCRC whose valuable contribution over the years has been instrumental in the success of the Court's unique relationship with the Commission. The Court wishes him well in his retirement. We welcome Richard Foster CBE who took over as Chairman of the Commission in November 2008 and very much look forward to an ongoing excellent working relationship with him and his colleagues.

7 Contacts

7.1 The Registrar continued to welcome a number of judicial and academic visitors from overseas. The visits help to build and strengthen global relations and international understanding of our legal system.

7.2 Over the last reporting year the Registrar has met with and hosted visits from:

- Judge Petruszynski from Poland, Mr Justice Raus from the Malaysian Court of Appeal and Senior Court Official Madam Rozilah Salleh
- Mr Justice Young from the Court of Appeal New Zealand
- Mr Justice Cummins, the Principal Judge of the Criminal Division of the Supreme Court, Australia
- Mr Justice David Ashley a Court of Appeal Judge of the Supreme Court of Victoria, Australia
- Mr Justice Richard Chesterton, a Judge of the Queensland Court of Appeal
- Visit by the Superior Council of Magistracy of the Republic of Romania RIPA International consisting of a Justice from the Court of Appeal, Bahamas; Senior Magistrates from Brunei; Administrative Personnel from Ghana; the Director MOJ Ghana; the Director and Administrator, Federal Ministry of Justice, Nigeria; the Master and Registrar from Sierra Leone; the Deputy Registrar, Botswana; Regional Registrars from Ghana; a Judge from Malawi; Deputy Director General and Senior Registrar Maldives, Assistant Studies Fellow from Nigeria, Chief Justice of the Peshawar High Court, Pakistan; Chief Justice of Balochistan High Court, Pakistan; 5 judges of the High Court, Pakistan, Deputy Chairperson, Tanzania, Principal Judge and Registrar, Uganda.
- Students from the Syracuse CPS Summer Law Programme
- Richard Schneider and the Wake Forest Students, North Carolina.

7.3 The CACD User Group has continued to be an important forum for discussing the practical effects of changes in law and procedure upon the work of the CACD. 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, Revenue and Customs Prosecutions Office, the Office of the Attorney General, the Probation Service, Law Reporters and senior CAO staff.

7.4 Amongst the topics under discussion this year has been the need for ever higher standards of case management in order to keep pace with the increasing complexity of cases presented before the CACD. The Vice- President urged all who presented and prepared such cases to adhere to Rule 68 Criminal Procedure Rules and raised the question of avoiding late service of papers upon the Court. The Group agreed that practitioners should aim to serve all papers at least two clear days before the hearing and to keep Skeleton Arguments ‘skeletal’.

8 Looking to the future

8.1 This year saw the publication of an up to date "Guide to Commencing Proceedings in the Court of Appeal Criminal Division" (the Blue Guide), the previous edition having been published in 1997. Since then the jurisdiction of the Court has expanded to encompass a variety of diverse applications and appeals by the defence, the Crown and other interested parties. This guide is available at all Crown Courts and will no doubt prove an invaluable aide memoir for practitioners and a useful resource to appellants and others who may be unfamiliar with the Court's practice and procedure.

8.2 Rule 68.3(1) sets out the information that must be contained in the appeal notice. It is crucial that the provisions of the rule are followed. The Rule is reproduced in full in the Blue Guide, yet the Court continues to receive applications for leave where solicitors or counsel have failed to follow the Rule and omitted important information which the Court requires. It is hoped that this is an area where the Court will see improvement.

8.3 Over the past year the staff within the Criminal Appeal Office have undertaken a number of exercises to analyse case progression processes. In conjunction with the Royal Courts of Justice LEAN team, events have been held to look at specific processes throughout the "lifetime" of a case, to identify if there are any areas where processes might be improved. Some changes have already been introduced, for example, the use of scanners and enhanced electronic document storage facilities. The aim is to reduce file movement and enable persons working on files to view important documentation without having to see the file. In a listed building such as the RCJ, where members of staff may be working some distance from where paper files are stored, this will ensure a more efficient use of time. In the forthcoming year, it is hoped that other processes will be considered and improved upon, in the continuing commitment to provide an efficient service to the Court and its users.

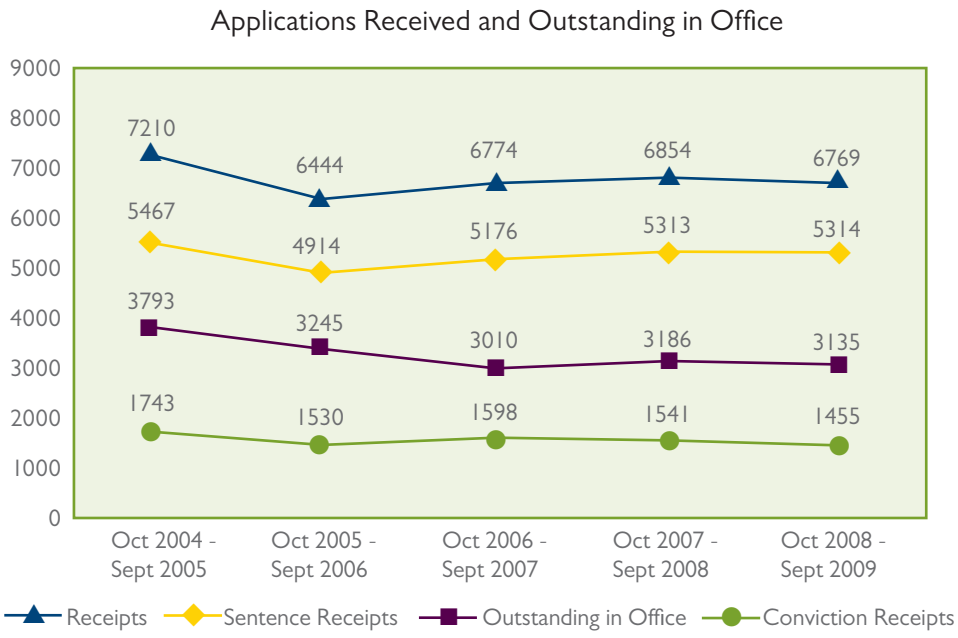
8.4 This year has seen an increased use of video-linked hearings to enable appellants and witnesses to give evidence without having to come to the RCJ. It is hoped that we will see more use of such technology over the years to come, with the result that processes are speeded up and costs are saved.

8.5 The Court continues to be committed to the service provided to victims of crime. The Registrar's staff liaise directly with Witness Care Units who are responsible for forwarding information on to victims, for example that an appellant is to be released on bail or that there will be a substantive hearing before the full Court of Appeal. They are also notified of the date of the hearing and provided with a copy of the Order made by the Court. If attending an appeal hearing, victims and their families are able to utilise separate waiting rooms and seating in Court.

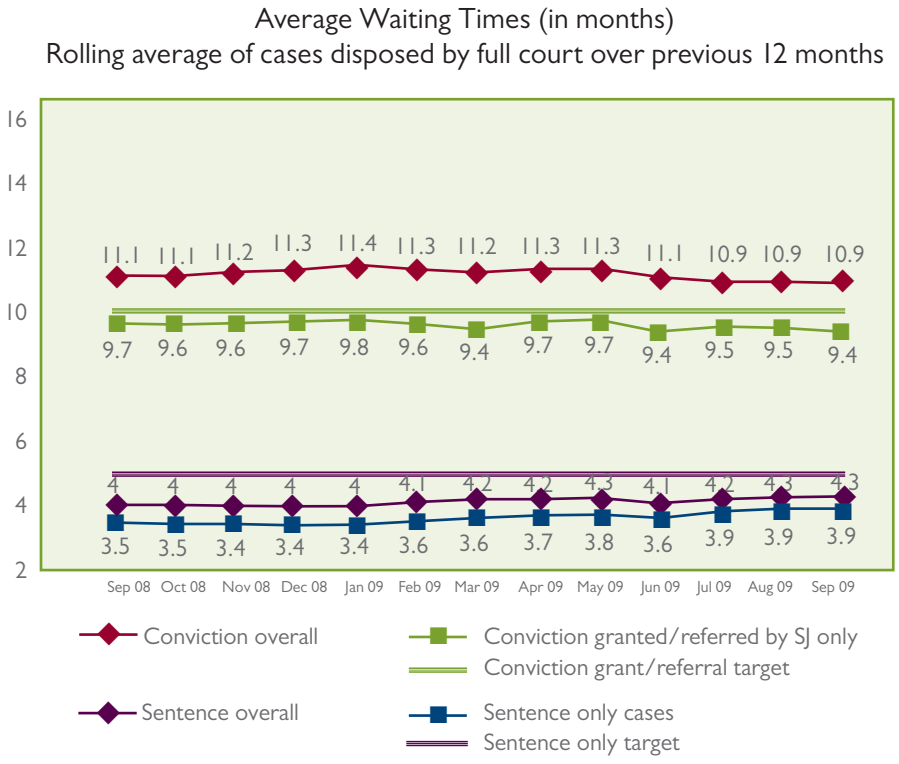
Lord Judge
Lord Chief Justice of England and Wales

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

Annex A

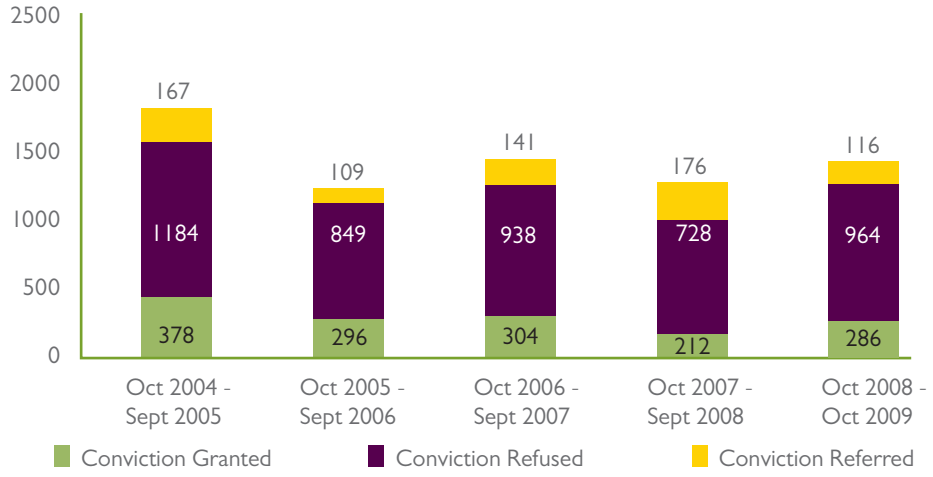


Annex B

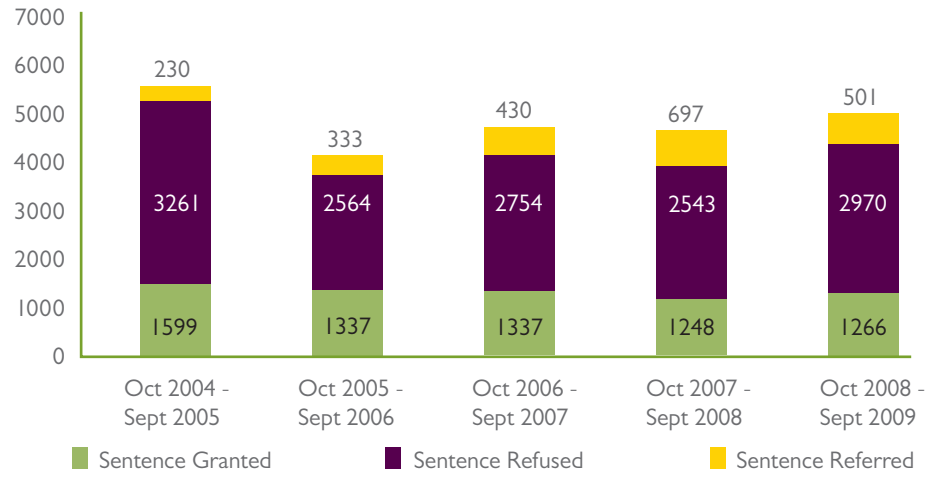


Annex C

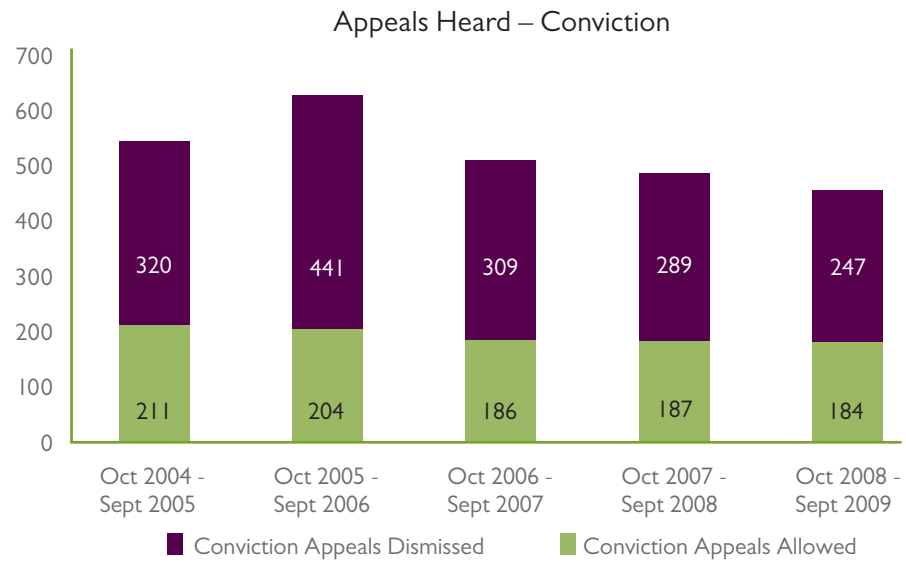
Section 31s – Conviction Applications dealt with

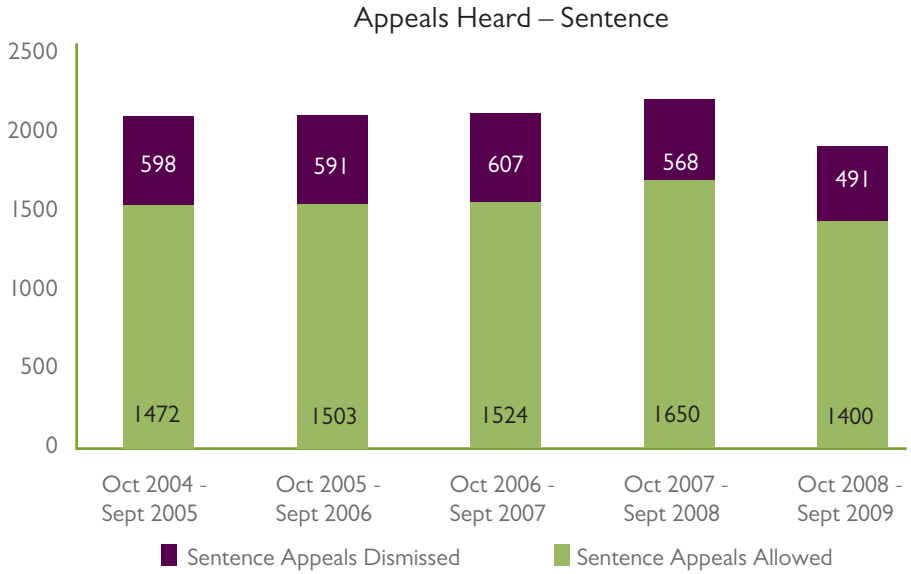


Section 31s – Sentence Applications dealt with



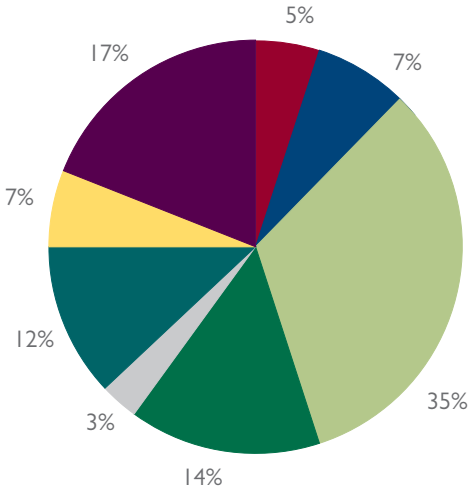
Annex D


Appeals Heard – Conviction
700
600
500
400
300
200
100
0
320
441
309
289
247
211
204
186
187
184
Oct 2004 - Sept 2005
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Conviction Appeals Dismissed
Conviction Appeals Allowed

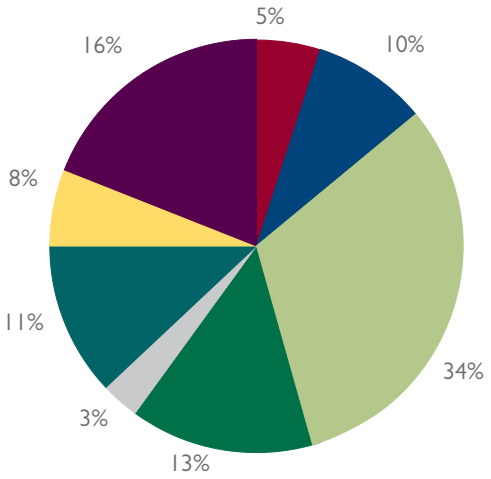

Appeals Heard – Sentence
2500
2000
1500
1000
500
0
598
591
607
568
491
1472
1503
1524
1650
1400
Oct 2004 - Sept 2005
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Sentence Appeals Dismissed
Sentence Appeals Allowed

Annex E

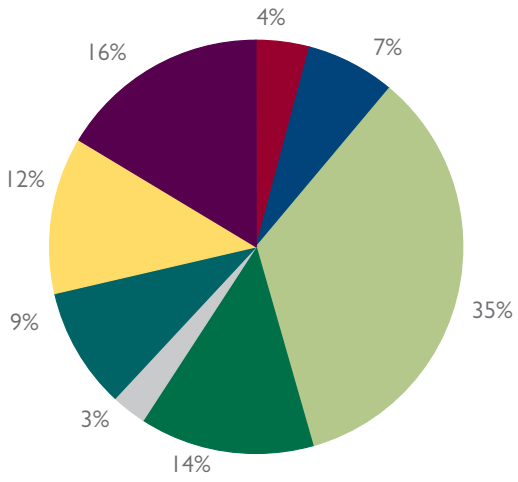
October 2004 - September 2005



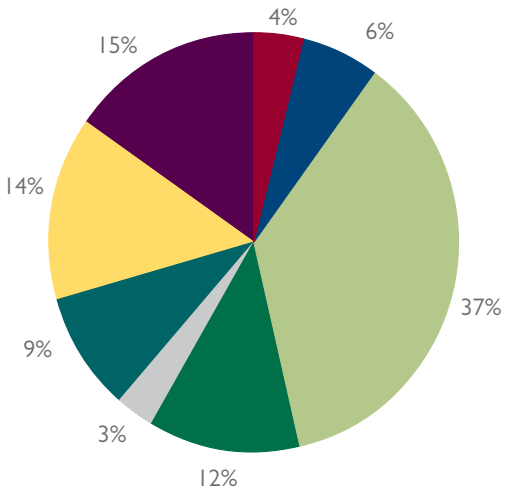
October 2005 - September 2006



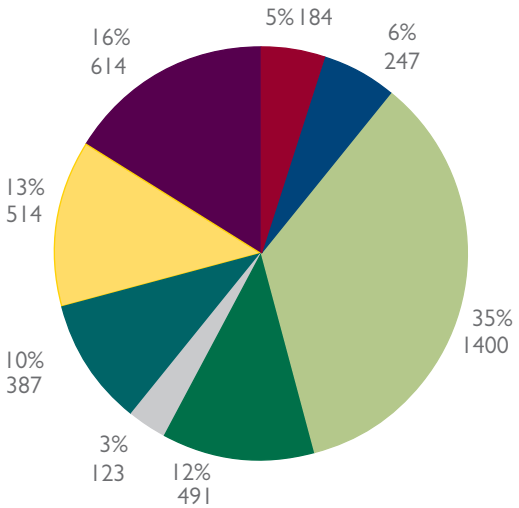
October 2006 - September 2007



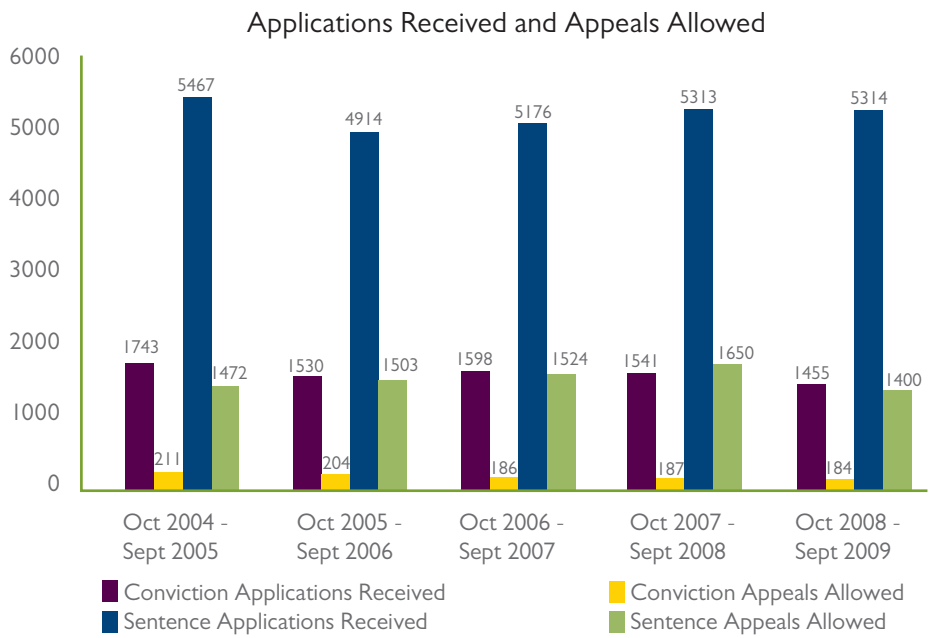
October 2007 - September 2008



October 2008 - September 2009



Annex F


Applications Received and Appeals Allowed
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4000
3000
2000
1000
0
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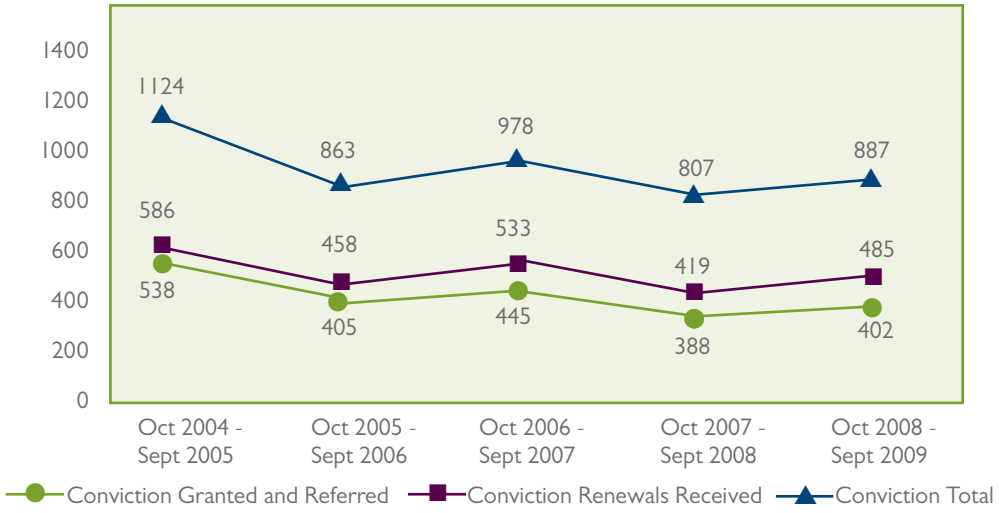
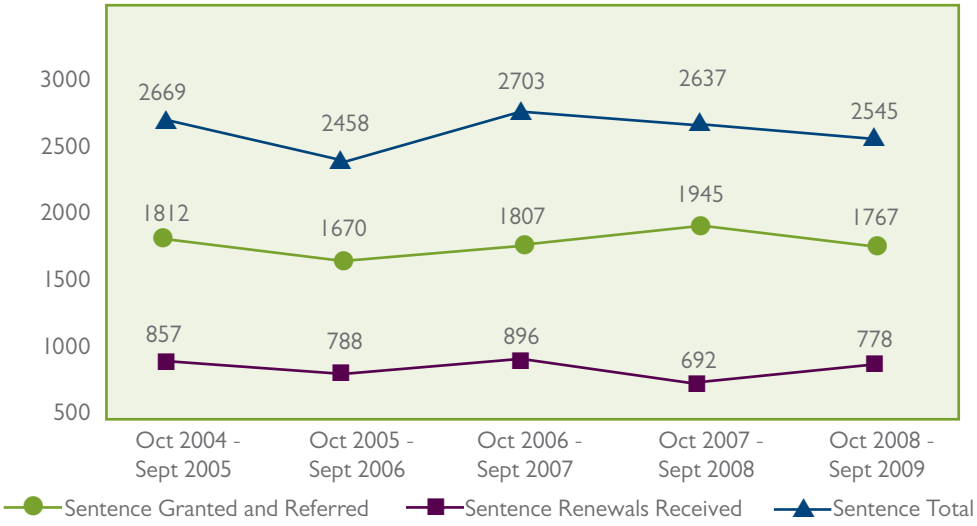
211
5467
1472
1530
204
4914
1503
1598
186
5176
1524
1541
187
5313
1650
1455
184
5314
1400
Oct 2004 - Sept 2005
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Conviction Applications Received
Sentence Applications Received
Conviction Appeals Allowed
Sentence Appeals Allowed

Annex G

Applications Granted / Referred and Renewals Received (Conviction)

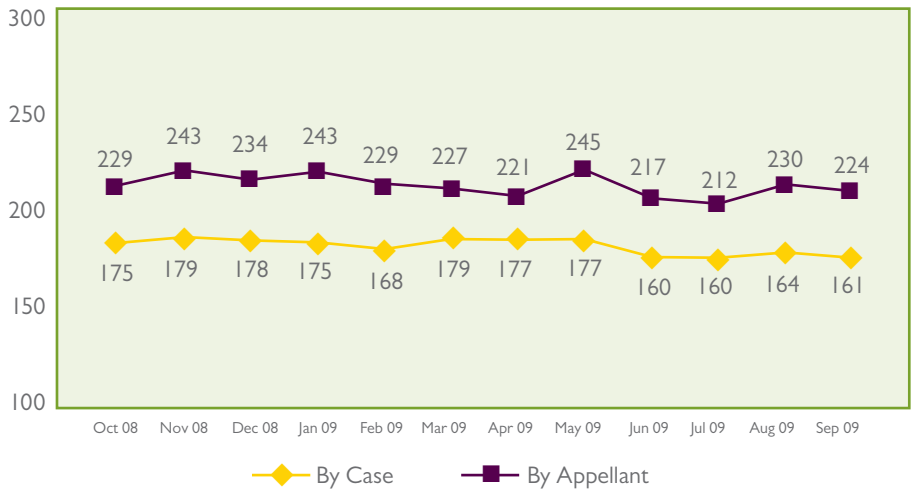


Applications Granted / Referred and Renewals Received (Sentence)

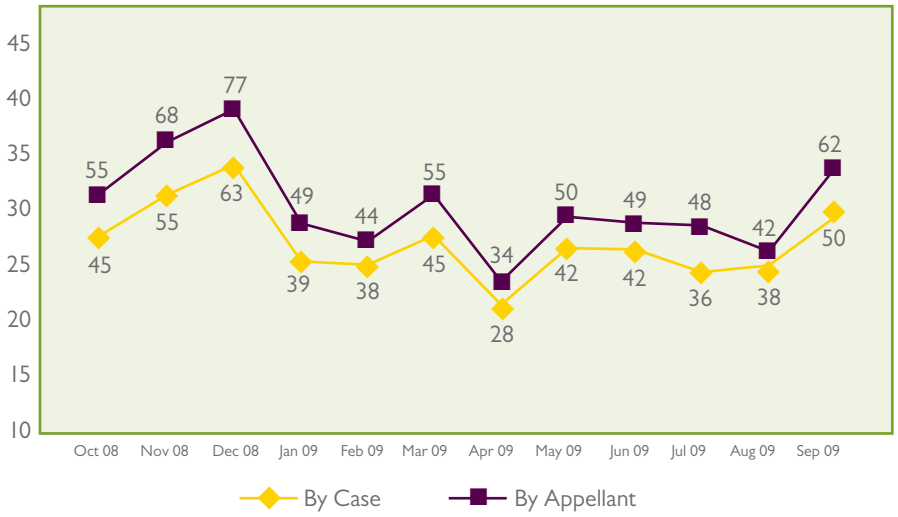


Annex H

Conviction Old Cases – Outstanding over 8 months



Sentence Old Cases – Outstanding over 5 months



The Court of Appeal
Criminal Division
Review of the Legal Year
2008 / 2009