The Court of Appeal
Criminal Division

Review of the Legal Year
2009 / 2010

Review of the period October 2009 to September 2010

Introduction by the Lord Chief Justice

This is the second annual review of the work of the Court of Appeal (Criminal Division) since my appointment as Lord Chief Justice. It has been another year of unremitting commitment to the administration of criminal justice. That is as it should be. What remains less tolerable is the continuing burden of comprehending and applying impenetrable legislation, primarily but not exclusively in relation to sentencing. The search for the legislative intention in the context of criminal justice legislation makes unreasonable demands on the intellectual efforts of judges and lawyers. It all takes time, very much more time than it took even a decade ago, to grapple with the difficulties. The difficulties are not confined to the workings of this Court: they apply to every Crown Court and Magistrates' Court throughout the jurisdiction. The search for principle takes longer and longer, and in the meantime cases awaiting trial are delayed, to the disadvantage of the defendants awaiting trial, the witnesses to the events which bring the defendants to court, and the victims of those alleged crimes. It would be comforting to believe that the problems have now been solved, and that we can look forward to a year of quiet application of well understood and established principles. That will not happen. It is, for example, inevitable that some extremely vexing questions will arise as we struggle to follow the legislative intention which removed the former partial defence to murder (provocation) and replaced it with the new concept of "loss of control", with its qualifying triggers.

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 perhaps fails to convey that the Court has faced an increasing number of appeals against both sentence and conviction, and applications for leave to appeal against sentence and conviction, and that the number of sitting days in the court has been increased in order to try and ensure that these cases are dealt with as quickly as reasonably practicable. The process does not come without a price in the form of increased pressures elsewhere.

The efficient disposal of the work of the Court depends on the lawyers and staff working in the office, presided over with his unchanging, cheerful efficiency by Roger Venne, and by the commitment and dedication of the judges sitting in the court, who cope with its burdens by working late into the night and at the weekends, so that they are fully prepared for the hearings. The pressures are unrelenting.

The Vice President of the Court, Hughes LJ and I are profoundly grateful to all of those who have enabled the Court to fulfill its responsibilities to the administration of criminal justice.

Lord Judge

Lord Chief Justice of England and Wales

1 Summary for the period October 2009 to September 2010

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 has increased in comparison with those received last year. In total, 7133 applications have been received, compared with 6769 last year (an increase of 364 cases). The majority of the increase (339 cases) has been attributable to sentence applications; the Court having received 5653 sentence applications and 1480 conviction applications. This was 339 more sentence applications and 25 more conviction applications then those received in the previous year. The number of applications outstanding has increased by 211 cases since last year (3346 compared to 3135). (see **Annex A**).

1.3 The average waiting time of cases disposed of by the Court over the previous 12 months was 10.1 months for conviction cases where leave to appeal was granted or the case referred to the full Court, and 5 months for sentence cases (see **Annex B**). In terms of the conviction cases, that represents an increase of 0.7 months in the average waiting time compared with cases in the preceding year, in sentence only cases the average waiting time has similarly increased by 0.7 months. The Court is committed to reducing waiting times and is constantly appraising its systems of work, especially against the background of reduced resources. The increase in waiting time this year may also in part be attributable to the increased number of applications lodged.

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 1114 conviction applications were dealt with in the reporting year (252 less than the proceeding year), of those 226 appellants were granted leave to appeal by a single Judge, 20 had their application referred to the full Court by a single Judge and 89 had their application referred to the full Court by the Registrar. 779 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, 1156 appellants were granted leave to appeal by a single Judge, 54 had their application referred to the Court by a single Judge and 378 had their application referred to the Court by the Registrar. 2522 applications for leave to appeal against sentence were refused by a single Judge. (see **Annex C**).

1.6 The Lord Justices of Appeal and the High Court Judges have read papers and sat in court for considerably more days than in the preceding year. The result of which has been an increase of 302 (57 conviction, 245 sentence) in the number of cases heard.

1.7 Of the 488 appeals against conviction (i.e. where leave to appeal was granted) which were heard by the Court this year, 171 (35%) were allowed and 317 (65%) dismissed. Of the 2136 appeals against sentence which were heard by the Court this year, 1484 (70%) were allowed and 652 (30%) were dismissed. It is difficult to quantify the success or otherwise of appeals in terms of the number of cases received by the Court, as those received in a given year, far outnumber those dealt with by the full Court because not all cases will proceed that far through the process. Analysing the results of the Court compared to its intake of cases over a three year period gives a clearer idea of the success rate. On average, 12% of conviction applications received and 28% 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. (see Annex D).

1.8 This year, the Attorney-General has referred for the Court's consideration 108 potentially unduly lenient sentences pursuant to section 36 Criminal Justice Act 1988. This is an increase of 13 cases compared with the previous year, but still less than the 134 such cases in the year 2006/2007. Of those cases dealt with by the full Court, 74% have resulted in an increase in the defendant's sentence.

1.9 There was also an increase overall in the number of applications which were made under some jurisdiction other than that conferred by the Criminal Appeal Act 1968. There were 26 cases where the Prosecution exercised its right of appeal (the same number as last year). The number of interlocutory applications increased from 22 to 28 cases. Although still a relatively small number of cases compared with 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, In ***R v George; R v Burns; R v Burnett; R v Crawley [2010] EWCA Crim 1148***, the trial judge made a ruling in favour of the prosecution on 20th April 2010. Immediately thereafter, the Court received an urgent interlocutory application from the defendant appealing that ruling. The application was dismissed by the Court on 22nd April, enabling the trial to commence on 26th April.

1.10 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.

1.11 The number and type of cases heard by the Court can vary considerably over a given year. Hearings can last anything from 15 minutes to days depending on their nature. The length of 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 twelve may be listed in one day.

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

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

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

1.13 The number of sitting days for Lord Justices has increased. 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 such as membership of the Judicial Appointments Commission and other extra judicial commitments.

1.14 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.

1.15 The Court has regularly sat in six constitutions, with the exception of the summer vacation. In an attempt to ensure the average waiting time of cases was not adversely affected by the summer vacation and that backlogs of work were not accumulating within the Office, some 52 constitutions sat during that period and over 600 applications for leave to appeal were allocated to single Judges for consideration. This demonstrates the Court's continued commitment to the progress of cases.

1.16 Three Lord Justices of Appeal retired this year Lord Justice Keene, Lord Justice Scott Baker and Lord Justice Waller. Their contribution to the work of the Court has been invaluable and we wish them well in the future. Three High Court judges were elevated to the Court of Appeal this year and will sit in the Criminal Division – Lord Justices Gross, Pitchford, and Tomlinson.

1.17 This year showed a slight increase in the number of directions hearings in comparison with the previous year from (106 compared with 98). This shows the continued focus of the Criminal Appeal Office lawyers on case management to ensure the proper progression of cases without the need to take up valuable Court time. There are of course some cases which require a firmer hand, regrettably because at times 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 require that Counsel attend for an oral hearing before him.

1.18 In terms of costs, this year once again saw a reduction in claims for public funding. 6186 bills of costs were received compared with 6458 in the previous year and 7180 the year before that; £11.59m was claimed compared with £13.24m. In total, £7.27m was paid out. A smaller percentage of the total bills received (8.2% compared to 9% last year) were in excess of £4,000. There was however an increase in the number of bills received which were in excess of £50,000 34 (0.5% of the total number received) this year compared with 26 (0.4%) last year. The total number of bills received this year represents a 4.2% decrease on last year.

1.19 There have been three small but significant legislative changes which will assist the Court in the efficient disposal of its business.

1.20 The first, section 110 of the Coroners and Justice Act 2009, empowers the Registrar to make a direction in appeals conducted under the Criminal Appeal Act, 1968 (ie. appeals against conviction and/or sentence) that the appellant appear by live-link. This power is additional to that already given to the Court and a single Judge of the Court but, in many cases, it will operate to lighten the burdens of the Court and single Judges, leaving them free to concentrate upon the merits of appeals and applications.

1.21 The second, section 140 of the Coroners and Justice Act 2009 permits the Court, when allowing an appeal by a defendant against a Confiscation Order, to remit the matter to the Crown Court for redetermination. The Court is empowered to give directions binding on the Crown Court in its further consideration of the matter. This new power may be of utility where a Confiscation Order has been made on a flawed basis or where either the amount of benefit or the realisable assets have been misdetermined and possibly complex factual matters remain to be explored to reach a correct determination of either or both. In appropriate cases, it enables the Court to pass the responsibility for determining factual or evidential matters to the Crown Court, the tribunal best fitted for that task.

1.22 The third enabling provision is of broader application, permitting the giving of evidence in all criminal proceedings by video link by any witness other than the defendant. This is likely to be of particular use for witnesses with limited availability (such as expert witnesses) or those who might find physical attendance at court difficult but who did not qualify under previously existing provisions.

1.23 Additionally, as part of the Government's reintroduction of means-testing into the system of Representation Orders in the Crown Court, the Court was regretfully divested of its power to make a Representation Order when quashing a conviction and ordering a retrial. Applications for Representation Orders in such circumstances are now made to the Magistrates' Court at Highbury Corner where appropriately trained staff are available to deal with the assessment of means.

2 Criminal Appeal Office Organisation

2.1 The Court is supported by the Registrar and the staff of the Criminal Appeal Office, comprising some 30 lawyers (some of whom work part-time) and 88 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. 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 The legal team at the Criminal Appeal Office is headed by four Senior Legal Managers (across three roles). The casework lawyers 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 The Senior Legal Managers also have responsibility for the development and maintenance of best practice and procedure in the Criminal Appeal Office and the maintenance of the specialist legal skills for CAO lawyers. Office procedures are reviewed to ensure compliance with any new relevant legislation, rules or authority. The holders of this post also provide guidance to external users by speaking at external seminars and conferences and providing training events for the legal professions.

2.4 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.

2.5 The Court is very grateful for the invaluable contribution made by the Registrar and his staff who 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 draw that to the attention of the parties and the Court. This was the case in ***R v Qayum [2010] EWCA 2237***, a case in which Lord Justice Hooper commented *"This is another of a significant number of cases where an unlawful sentence is identified for the first time by a member of the staff of the Criminal Appeal Office. We would like to stress on behalf of the court the role played by the Criminal Appeal Office in this area in particular. But for that identification, it may well be that this appellant would have been serving and continue to be serving an unlawful sentence"*.

2.6 Following the publication of "A Guide to Commencing Proceedings in the Court of Appeal" which provided a succinct guide to starting an appeal, the Senior Legal Managers with responsibility for best practice have given various lectures, supported by written notes, on the practice and procedure of the CACD. These have focused on the importance of case management, the use of respondent's notices and the invaluable guidance provided by the Criminal Procedure Rules. It is hoped that the dissemination of materials in this way, will lead to the Court seeing an improvement in the presentation of grounds of appeal, which still too often fail to meet the requirements of the rules. Another area where guidance has been given is on the growing numbers of rights of appeal outside the Criminal Appeal Act. The variety of forms, Acts and statutory instruments which need to be considered are not always consistent in approach. The Senior Legal Managers were invited to present one of the Winter Lectures to the Criminal Bar Association and they recently ran a series of lectures, aimed at the junior bar and accredited for CPD, which has been very warmly received. It is the success of these lectures which has led to plans to provide further lectures about the practical procedure of the CACD to the circuits. An invitation by the Law Society and local chambers to speak in Bristol showed that there is an audience for such events outside London and that in the past the needs of the provincial bar may have sometimes been overlooked.

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

2.8 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.

2.9 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 for inclusion in special or guidance courts. 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 heard, but there follows a selection of cases of note.

3.2 Since the coming into force of the relevant provisions within the Criminal Justice Act 2003, the admissibility of hearsay and bad character evidence have been considered by the Court in many cases. They are areas which often form the basis of grounds of appeal.

3.3 The Court gave consideration to the unfair use of bad character in ***R. v. Eyidah [2010] EWCA Crim 987***. The appellant, a civil servant working at a job centre, had knowingly counter-signed three fraudulent passport applications. Evidence of various documents (County Court judgments, rent arrears, bills, loans and unpaid parking fines) found at the appellant's house which had, for the most part, absolutely nothing to do with the three counts of making an untrue statement for the purpose of obtaining a passport, should never have been admitted, either under the Criminal Justice Act 2003, s.101(1)(d) as evidence of propensity, or as evidence to correct a false impression under section 101(1)(f). The Court concluded that care should be taken to ensure that the jury is not deluged with a mass of prejudicial material and insofar as any of the material may properly have been admitted (as showing that the appellant had been using a false identity) it should have been the subject of careful directions in the summing up.

3.4 During the reporting period, the Court has, in a number of cases, considered the admissibility of evidence of the bad character of a person other than the defendant as provided for by section 100(1) of the Criminal Justice Act 2003

3.5 In ***R v Braithwaite [2010] EWCA Crim 1082*** the appellant stood trial for murder and the issue was self defence. The Judge admitted some bad character evidence in respect of prosecution witnesses namely convictions, cautions and penalty notices but declined to admit material contained in police crime reports. The Court was quite satisfied that the Judge was correct in his ruling. A police report relating to an allegation of criminal behaviour on the part of the witness, which remained unproven, was most unlikely to have substantial probative value. It was at best hearsay and if there was no complainant prepared to support the allegation it was of limited probative value.

3.6 The Court also analysed the application of s.100 in ***R v Brewster & Cromwell [2010] EWCA Crim 1194*** and held that the first question for consideration under section 100(1)(b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. Just because a witness has convictions does not mean that the opposing party is entitled to attack his credibility. If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue.

3.7 Whether convictions have persuasive value on the issue of creditworthiness will depend principally on their nature, number and age. In order to qualify for admission in evidence, however, the conviction need not demonstrate any tendency towards dishonesty or

untruthfulness (the court here preferring the decision in ***R. v. Stephenson*** to that in ***R. v. S***). The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness's creditworthiness.

3.8 The admissibility of hearsay and the application of the provisions within section 114 Criminal Justice Act 2003 were considered by the Court in ***R v Ibrahim [2010] EWCA Crim 1176***. The appellant was convicted of rape. The hearsay evidence comprised statements made by a witness who was close to the doorway where the rape occurred. This witness gave false details to the police and when she was eventually traced and interviewed she refused to give a statement and would not confirm anything she had seen or heard. She had also apparently told a member of the public who tried to assist the complainant that she had seen what had happened but had been too scared to approach on her own. The jury had no basis upon which to judge what part of the evidence was reliable and what was not. The witness was opposed to giving assistance which, the Court observed, if anything, gave an indication of a lack of reliability. The appellant was unable to deal with the evidence because there was no way of knowing exactly what it was that may have made the witness scared. The witness was in any event vague and the jury would have been involved in speculation as to what it was she meant or saw. Although the Court concluded the evidence had been wrongly admitted, it did not affect the outcome of the trial.

3.9 In ***R v Fox [2010] EWCA Crim 1280*** the Court concluded that the trial judge was wrong to rule as admissible a transcript of an anonymous 999 telephone call. Although the Criminal Evidence (Witness Anonymity) Act 2008 was primarily concerned with Anonymity Orders in relation to witnesses called to give live evidence, its implications went more widely than this. In ***R v Mayers [2008] EWCA 2989*** careful consideration had been given to the relationship between the new statutory code for anonymous witnesses and the hearsay provisions of the Criminal Justice Act 2003. There is no basis at common law or under the 2003 Act or the 2008 Act upon which anonymous hearsay evidence can be admitted. The evidence of the 999 call in this case was indisputably anonymous hearsay evidence.

3.10 In ***R v Banaszek [2010] EWCA Crim 1076***, the Court considered the inter-play between provocation and an assessment of a defendant as dangerous under section 229 Criminal Justice Act 2003. The appellant had been convicted of manslaughter by reason of provocation. The Court rejected the submission that the jury's verdict was incompatible with a finding that the appellant was a dangerous offender. A person who kills under provocation could still be dangerous.

3.11 In ***R v Gilham [2009] EWCA Crim 2293*** the appellant had been convicted of an offence contrary to section 296ZB of the Copyright Designs and Patents Act 1988 in that he had imported and sold modification computer chips ("modchips") permitting the playing of counterfeit games on proprietary games consoles. The issue upon appeal was whether the playing of a counterfeit DVD involved substantial copying of a copyright work. The Court confirmed that copyright subsisted in each image stored and that viewing an image on a screen amounted to sufficient copying to contravene the provisions. It was irrelevant that a display on a screen was only seen for an instant. A transient copy sufficed. It followed that the appellant was rightly convicted.

3.12 The Court strongly endorsed the observations made by Jacob LJ in ***R v Higgs [2008] EWCA Crim 1324*** urging that recondite issues of copyright law should not be tried in a criminal trial before a jury. Cases which involved difficult questions of copyright law should be tried before the specialist judges of the Chancery Division where injunctive relief was available which could be enforced by proceedings for contempt of court. If substantial profits had been made from criminal conduct, proceedings for the civil recovery of the proceeds of his crimes may be brought under Part 5 of the Proceeds of Crime Act 2002.

3.13 A case which received significant press attention this year was ***R v Barker [2010] EWCA Crim 4*** which gave the Court the opportunity to analyse the principles which applied to the giving of evidence by young children in criminal proceedings. The child in question (X) gave evidence when aged about four and a half years about events which occurred before her third birthday.

3.14 The Court held there was no basis to justify interfering with the Judge's decision that X was competent and remained so after her evidence was concluded. Despite justified concerns about some aspects of the way in which it was conducted, the ABE interview showed a guileless child, too naive and innocent for any deficiencies in her evidence to remain undiscovered. X was not only a competent witness but a compelling one. The Court held that the old misconceptions about the competence of young children no longer applied. The current principles were governed by s.53 Youth Justice and Criminal Evidence Act 1999. There were no special presumptions or preconceptions. There was no implicit stigma that the evidence of children was somehow less reliable than that of adults. The question was entirely witness specific; provided the witness could understand the questions put to him and give understandable answers he was competent. It was not open to a Judge, in considering the issue of competency, to go beyond the statutory criteria. It was however, open to a Judge to re-analyse the test at the conclusion of a child's evidence.

3.15 Another case concerning the evidence of witnesses was ***R v Watts [2010] EWCA Crim 1824*** where each of the four complainants had severe disabilities and, at the time of trial, they could not communicate verbally. The appellant complained that the nature of their disabilities resulted in counsel being unable to cross-examine them which in turn led to an unfair trial. The unfairness was further compounded by his complaint that the initial allegations of serious sexual abuse had not been fairly investigated.

3.16 Having examined the unusual features and difficulties in the case, the Court held it was ultimately for the jury to assess the reliability of the complainants in the light of such support as the jury believed that evidence received from other sources.

3.17 In ***R v Popescu [2010] EWCA Crim 1230***, the Court considered the circumstances in which the jury would be properly permitted to retain a transcript of a complainant's "Achieving Best Evidence" interview, which stood as her evidence in chief. The practices and safeguards which have been developed in relation to the use of transcripts by the jury are all founded on the principle of the right of the defendant in a criminal trial to have a fair trial, with no unfair procedural or evidential advantage being given to the prosecution.

3.18 The Court gave some guidance: The general rule must be that great care must be taken before a jury is given transcripts of an ABE interview at all, even whilst the video is being shown. It should only be given after discussion of the issue between the judge and counsel in the absence of the jury, and then it should only be done if there is a very good reason for it. Secondly,

the judge must warn the jury, when they are provided with the transcripts, to take care to examine the video as it is shown, not least because of the importance of the demeanour of the witness in giving evidence. Thirdly, the transcript should, save perhaps in very exceptional circumstances, be withdrawn from the jury once the ABE video evidence in chief has been given. Fourthly, if the transcripts are retained during cross examination, then they should be recovered once the witness had finished his or her evidence. The general rule must be that the jury should not thereafter have the transcripts again. Fifthly however, if the jury are permitted to have sight of the transcript again, it must be for a very good reason and again be discussed with counsel in the jury's absence and the judge should give a ruling on it. Finally, the jury should not, except perhaps in exceptional circumstances, be permitted to retire with the transcripts. Those exceptional circumstances will usually only be present if the defence positively wants the jury to have the transcript and the judge is satisfied that there are very good reasons why the jury should retire with the transcripts.

3.19 Witness anonymity was the subject matter in ***R v Khan & Ors [2010] EWCA Crim 1692***. The appellants were each convicted of offences of murder and wounding with intent. The appellants complained that the sole and decisive prosecution witness was allowed to give evidence anonymously, and the trial was unfair as a result of the learned Judge's ruling preventing the defence from making enquiries of anonymous eye witnesses that had been abandoned by the prosecution.

3.20 The Court held that at the time of the trial, applications for witness anonymity fell to be considered under the Criminal Evidence (Witness Anonymity) Act 2008 and the Court's task was to follow the statutory provision as explained in ***Mayers and others [2008] EWCA Crim 2989***. The Court concluded that the trial was not unfair.

3.21 In ***R v Henderson, Butler & Oyediran [2010] EWCA Crim 1269***, the Court dealt with three appeals against conviction in so-called "shaken baby syndrome" cases, where fresh expert evidence not adduced at trial was relied upon. The Court observed that justice in such cases depended upon proper advance preparation and case management and control of evidence from the outset.

3.22 The Court concluded that a realistic possibility of an unknown cause should not be overlooked and, where it existed, the jury should have been reminded of it and directed that they could not convict if they had not excluded any realistic possibility of such an unknown cause. The jury also needed to have guidance as to how to approach conflicting expert evidence. Juries should not be left to flounder in the formation of a general impression but should be directed as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon from that which should be rejected.

3.23 In ***R v A & others [2010] EWCA Crim 1622*** the Court gave further consideration to the appropriate direction in a case of joint enterprise where there was an agreed common purpose to assault the victim but that assault (or one of the individual acts comprised within it) resulted in the victim's death.

3.24 An interesting case was ***R v Ahmed [2010] EWCA Crim 1949*** which considered the meaning of "a thing" within s.59 of the Offences Against the Person Act 1861 where a defendant was charged with an offence of supplying or procuring an instrument or thing, knowing that it was intended to be unlawfully used or employed with intent to procure the miscarriage of a woman.

3.25 The appellant had tricked his wife who was over three months pregnant and could only speak Urdu, into attending an appointment at a clinic to terminate her pregnancy. Acting as her interpreter, he misrepresented her wishes to medical staff. Shortly before the procedure an Urdu speaking nurse explained to the appellant's wife that she was about to have a termination. The complainant became distressed and stated that the appellant had told her she was attending for a minor operation to remove blisters from her ovaries which were endangering her baby.

3.26 The prosecution case was that the "thing" in question was the surgical procedure knowing that it was intended to be used unlawfully to procure a miscarriage. The Court held that the act of procuring the miscarriage of a woman's child did not, by itself, amount to an offence known to English law, the "thing" supplied or procured had to be some sort of article or object and could not include a medical procedure.

3.27 The right of a landowner to remove a trespasser from their property was the issue for consideration by the Court in ***R v Burns [2010] EWCA Crim 102***. Where an individual, in this case, a prostitute had entered the appellant's car as an invited passenger on the basis of a mutual understanding that when their dealings were completed he would drive her back to where he collected her, the use of force by the appellant to remove her from his car was unlawful, and could not be pleaded as a "defence" to an allegation of assault in respect of his forcible ejection of her. The right of a landowner to remove a trespasser from his property could not be extended by analogy to a motor vehicle.

3.28 In ***R v Hussain [2010] EWCA Crim 970*** the Court considered the presumption of territorial effect in relation to the offence of Possession of a controlled drug of Class C with intent to supply. Drugs and counterfeit medicines had been found at the appellant's home address from which he ran a business buying and selling such medicines. He did not have the required Home Office licence. Allowing the appeal, the Court accepted two submissions made on the appellant's behalf; firstly that transfer to a courier did not fall within the definition of "supply." The Court took the opportunity to observe that it mattered not whether the said courier was simply a temporary custodian who was to transfer the drugs back to the person he got them from or whether he was to arrange onward delivery to a third party. It mattered not whether a courier acted for profit. Secondly, where the intention of the alleged supplier was to supply a customer outside of England and Wales (as was the appellant's case), no offence could be committed. In order to convict him the Crown had to prove his intention to supply within the jurisdiction; the Judge had not directed the jury in those terms. *R v Seymour* [2008] 1 AC 713 applied.

3.29 In ***R v Curtis [2010] EWCA Crim 123*** the Court had an opportunity to consider the interpretation of the offence of putting a person in fear of violence under s. 4(1) Protection from Harassment Act 1997. The offence was said to have been committed during a period of nine months when the appellant and his partner were cohabiting. Theirs was a volatile relationship with incidents of arguments and violence and the complainant gave evidence that she was frightened of the appellant. She complained of 6 incidents of harassment which were said to constitute a course of conduct under s.1 of the Act. In between the arguments, their relationship went well. Allowing the appeal, the Court held that it was correct for the assessment of a defendant's conduct for the purposes of s.1 to involve consideration of whether the conduct amounted to a course of conduct but that conduct must also be found to constitute harassment. The two limbs were inter-related. An analysis of the course of conduct,

including the frequency of acts, might well throw light on whether it amounted to harassment. Granting the appeal, the Court noted the incidents complained of were far from trivial and significant force was on occasion used. However they were spontaneous outbursts of ill-temper and bad behaviour interspersed with considerable periods of affectionate life. They could not be described as a course of conduct of harassment. The Court did not exclude the possibility that harassment could include harassment of a co-habitee.

3.30 In ***R v Bell [2010] EWCA Crim 3*** the Court held there was no rule forbidding a second re-trial following 2 failures by a jury to agree. Dismissing the appeal, the Court held that where the prosecution sought a second re-trial it remained open to the trial judge, on an application to stay proceedings as an abuse of process, to consider the question of whether or not the proposed second re-trial would be oppressive and unjust. The correct approach was to consider whether the interests of justice would be served by a second re-trial. However, the jurisdiction which permitted a second re-trial should be exercised in limited circumstances and should be restricted to those cases where a crime of extreme gravity had undoubtedly occurred and the evidence against the defendant remained strong.

3.31 In ***R v Zaman [2010] EWCA Crim 209*** the Court held that where the appellant had pleaded guilty to assisting an offender and the offender had subsequently been acquitted of the offence, that did not render the appellant's conviction unsafe. The assistance in question was helping a conspirator to leave the scene. It was not suggested on the appellant's behalf that his plea was equivocal but rather that his conviction was unsafe because the person he was alleged to have assisted was not an offender at all in respect of the specified offence. His plea was on the basis of belief rather than knowledge and the acquittal showed it was a mistaken belief. The Court held that by his plea the appellant had conceded not that the offender might have committed the offence, but that he had in fact done so. Whether his state of mind was one of knowledge or belief was immaterial.

3.32 During the reporting period the CACD has sat on four occasions with a five Judge constitution to hear thirteen cases. In ***R v Magro; R v Bissett; R v Smith; R v Varma [2010] EWCA Crim 1575*** the Court considered the discretion of a five judge constitution of the CACD to decide that a previous decision of Court should not be treated as a binding decision when it is wrong. This was the approach adopted by the Court in *R v Simpson* [2004] QB 118. The exercise of this discretion is sometimes necessary to address the consequences arising from the heavy burdens of a court which often sits in different constitutions, addressing identical or similar problems without full argument, leaving uncertainty about the true position, or where such a group of decisions depends on an original decision which was itself reached per incuriam, or where the question relates to purely procedural or sentencing decisions. What *Simpson* did not establish however, is that a five judge constitution is entitled to disregard or deprive the only previous decision of the three judge constitution of the court of its authority on a distinct and clearly identified point of law, reached after full argument and close analysis of the relevant legislative provisions. This principle applies with particular emphasis when the consequences of doing so would be to the disadvantage of the defendant.

3.33 In ***R v Gnango [2010] EWCA Crim 1691*** a five-judge Court had to consider what it described as a novel and difficult issue: the criminal liability of a person engaged in a public "shoot-out" with a rival where an innocent bystander was killed by a bullet from the rival's gun. The appeal against the murder conviction turned on whether the appellant was guilty of murder when the fatal shot was fired at him rather than by him.

3.34 The Court considered whether or not the appellant and his rival were both guilty of affray on the basis of joint enterprise; proof of that alone was insufficient. It was necessary to show that they agreed to it and shared a common purpose in committing it; the Court concluded that it was insufficient for the jury to conclude that it was enough to constitute a common purpose that both intended to fight each other. Were it so, every participant in every fight would be guilty of everything his opponent(s) foreseeably did even if the violence of the opponent was much greater than that which he or his associates were prepared to engage in. Mere participation in the affray with foresight but without a joint enterprise would not suffice for a conviction.

3.35 The Court identified two questions of policy: the first, whether justice required the imposition of liability in cases of genuinely agreed duels by acceptance that there can be a "plain vanilla" joint enterprise between opposing persons if they agree not only to hit but also to be hit; and second, the wider implications for criminal liability for death or injury or damage which occurs in the course of a fight between two gangs.

3.36 Rule 68.6 of the Criminal Procedure Rules 2010 makes provision for the Registrar to require the Crown to provide a Respondent's Notice in a number of circumstances. In ***R v Bryan [2009] EWCA Crim 2291*** the Court was critical of the prosecution in its response to a request for such a Notice. It was essential that the prosecution gave the matter high priority and responded fully within the time permitted by the rules or any extension permitted by the Registrar or the Court. The Court is pleased to note that the Crown Prosecution Service has set up a specialist appeals unit and it is hoped that their involvement in cases will mitigate such problems in the future.

3.37 In ***R v X [2010] EWCA Crim 2368*** the Court considered its own powers and the powers of the Crown Court in dealing with a bail application where the Court had quashed a conviction and ordered a retrial. The defendant's appeal against his two convictions for wounding with intent had been successful; the Court had ordered a retrial on both counts and remanded the defendant in custody. Re-arraignment on a fresh indictment was to take place within two months. The Court directed that any application for bail be made to the Crown Court. The Court noted the reason for that direction had been that the Crown Court would have more information regarding the appropriate conditions pertaining to the defendant and also the likely time of the trial, which itself might impact on the conditions of bail. When the bail application came before the Crown Court Judge, he noted that the indictment had not yet been signed and held the view the Crown Court did not have jurisdiction. In addition, there was a concern that the retrial had not yet been allocated to a particular Crown Court.

3.38 The Court observed that an application for bail in one Crown Court did not preclude the Presiding Judge of the Circuit nominating another for trial. As for the construction of the powers of the CACD, there was no doubt that when it disposed of the appeal it had the power to grant or refuse bail. Once an indictment had been served the jurisdiction of the Court of Appeal ceased. The jurisdiction of the Crown Court to grant bail was stated in the clearest terms in s.80(1)(c) Supreme Courts Act 1981. There were many circumstances in which a case was within the jurisdiction of the Crown Court without an indictment being preferred. This was one such circumstance. In the instant case the effect of the Court's Order regarding the retrial had been to place the defendant back into the jurisdiction of the Crown Court, albeit that the precise location had yet to be determined. Equally, when ordering a retrial, unless the Court expressly retained jurisdiction to deal with bail any subsequent applicant fell to be made to the Crown Court.

Sentence

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

3.40 ***R v Magro; R v Bissett; R v Smith; R v Varma [2010] EWCA Crim 1575*** concerned five unconnected appeals against confiscation orders which were listed together to enable the Court to consider the jurisdiction of the Crown Court to make Confiscation Orders when the sentencing decision involved an absolute or conditional discharge. The applications were received following the CACD decision in *R v Clarke* [2009] EWCA Crim 1074 that the imposition of an absolute or conditional discharge precluded the making of a Confiscation Order. Until that decision, the power of the Crown Court to make a confiscation order in these circumstances had not been questioned. The Court held that but for the decision in *Clarke*, the Court would have rejected the appeals. However, the Court was bound by *Clarke*. Following an application by the Crown, the Court certified that a point of law of general public importance was involved in the decision, the terms of the question to be certified being: *Does the Crown Court have power to make a Confiscation Order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge in respect of that offence?*

3.41 In ***R v Hussain [2010] EWCA Crim 94*** the Court considered a highly publicised appeal in which the appellant and his family had been the victim of an armed robbery in their home. The appellant had given chase to the escaping robbers causing one grievous bodily harm in the process. It was rare to see men of the quality of the appellant in court for offences of serious violence and although he was rightly prosecuted, given the intensity of provocation and emotional anguish he received as a victim of crime, in such an exceptional case a suspended sentence of imprisonment was appropriate.

3.42 In the case of ***R v Bevens [2009] EWCA Crim 2554*** the Court considered the sufficiency of a reduction in the appellant's sentence for murder (life imprisonment with a minimum term of 26 years) and conspiracy to supply controlled drugs (7 years' imprisonment concurrent) following his entering into a statutory agreement with a prosecutor pursuant to section 74 of the Serious Organised Crime and Police Act 2005 (the 2005 Act). The appellant had given evidence in relation to a corrupt police officer, as a result of which the specified minimum term for the offence of murder was reduced by 5 years. The Court concluded that the reduction was sufficient on the basis that although the applicant had assisted in the successful prosecution of a corrupt police officer he had deliberately elected not to provide evidence in relation to a man who was present with him during the murder. The differences between a criminal giving evidence against a corrupt officer and giving evidence against a murderer who has shot his victim dead were obvious. The applicant was a career criminal and knew exactly what he was doing. He balanced the risks that he was prepared to take and his level of co-operation was completely calculated and far from full. If he had helped to bring others to justice he would have been entitled to seek, and would no doubt have obtained, a higher discount.

3.43 Three unconnected appeals against sentence were listed together to enable the Court to consider sentencing for murder where the weapon which inflicted the fatal injury was a knife. In ***R v AM, R v Kika and R v Siddique [2009] EWCA Crim 2544*** each applicant was sentenced to life imprisonment or custody for life and sought unsuccessfully to argue that the minimum term in his individual case (respectively, 14, 19 and 21 years) was manifestly excessive. The Court referred to the broad considerations in relation to the prevalence of knife crime and

repeated the principles outlined in *R v Povey* [2008] 1 Cr.App.R.(S) 42. The question in these cases was how the application of those principles should be reflected when the ultimate offence is murder. Consideration of the seriousness of the crime required the court to have regard to the general principles in Schedule 21 of the Criminal Justice Act 2003. Schedule 21 was silent or unspecific about cases of murder resulting from the misuse of knives. The only weapons expressly identified were firearms and explosives. It was not therefore unreasonable for it to be suggested that the absence of any specific reference to the use of a knife should mean that the appropriate starting point should not be the same as it would be if the murder had been caused by a firearm or an explosive. It was always an aggravating feature of any case involving injury that the injury or death has resulted from the use of a knife or any other weapon. These three cases involved utterly innocent victims. The result was desolated and devastated parents and families. Deaths in these circumstances outrage and horrify the collective conscience of the community as a whole. The Court repeated, and stated that it would continue to repeat until the message was heeded, that anyone who goes into a public place armed with a knife or any other weapon and uses it to kill or to cause injury must anticipate condign punishment.

3.44 The imposition of requirements when suspending a sentence was considered by the Court in ***R v Young [2009] EWCA 2576***. The applicant was convicted of breaching a Restraining Order and was sentenced to 12 months' detention in a Young Offender Institution suspended for 6 months with a requirement of residence for 48 hours at a specified address. The Registrar referred the application to the Court and posed the question whether the sentence was lawful given that the residence requirement was the only one imposed, or whether the Court must impose at least one requirement of no less than six months in duration. The Court held that a requirement that would take substantially less than six months did not render the suspension of the sentence unlawful. However, it was clear that the residence requirement was imposed by the Judge purely as a device to enable the suspension of the sentence. Such an approach ran counter to the intention of Parliament in reintroducing the power to suspend a sentence. Parliament intended for the power to ordinarily only be exercised with requirements directed at addressing, controlling or moderating the offending behaviour. To impose a 48 hour residence requirement could not sensibly be said to have such an effect. It was therefore inappropriate to adopt such an approach.

3.45 Defendants who fall to be sentenced for offences committed before the 4th April 2005, where the offence was committed whilst on licence (thus before the expiry of the full term of an earlier sentence of imprisonment) are subject to the provisions of s.116 of the Powers of Criminal Courts (Sentencing) Act 2000 (return to custody). This provision was repealed by s.332 of the Criminal Justice Act 2003 but its application was preserved under transitional provisions for offences. All offences committed after 4th April 2005 are now governed by s.265(1) of the Criminal Justice Act 2003, which prohibits a term of imprisonment that is to commence on the expiry of a period of recall. Section 20 of the Criminal Justice and Immigration Act 2008 has since introduced subsection 265(1A) which stated that subsection 265(1) also applied to terms of imprisonment for offences committed before 4th April 2005.

3.46 In ***R v Williams [2009] EWCA Crim 2111*** the applicant had pleaded guilty to possession of cocaine and acquiring criminal property, offences committed before the expiry of the full term of an earlier sentence of imprisonment and so he was also ordered to be returned to custody under the 2000 Act. It was argued on his behalf that s.265(1A) had the effect of bringing to an end the transitional provisions to order a defendant to return to prison pursuant to s.116. The Court dismissed this ground of appeal on the basis that there was no statutory intent to

repeal s.116 and that the 2008 Act amended s.116(7) of the 2000 Act to expressly preserve the powers under s.116. That amended subsection states that the courts shall not be prevented by s.265 of the CJA 2003 from making any direction pursuant to s.116. However, s.116 did not now apply to long term Criminal Justice Act 1991 prisoners who were released under the new section 33(1A). But s.116 still applied to two types of Criminal Justice Act 1991 prisoners who were outside section 33(1A):

i) Those whose sentence included a sentence imposed for one of the offences specified in Schedule 15 of the CJA 2003; and,

ii) Those who had been released on licence before 9th June 2008 when the relevant part of the 2008 Act came into effect.

3.47 In ***R v Costello [2010] EWCA Crim 371*** the Court considered the partial repeal of the Crown Court's power to make return to custody orders, consecutive to another sentence (an order under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 that the defendant serve the remainder of his licence period first, if he has committed an offence in breach of his licence). Given that this power had been repealed, the Court held that the sentencing Judge could not increase the length of a sentence to circumvent the repeal of the provision.

3.48 In ***R v Ghulam [2009] EWCA Crim 2285*** the Court considered an appeal against sentence on the grounds that the appellant had been unfit to plead. On the first day of trial, counsel for the appellant applied to have the trial adjourned on the basis of a letter from a psychiatrist indicating that the appellant suffered from an anxiety and depressive disorder and that standing trial would cause his mental health to deteriorate further, there was no indication that the appellant was unfit to plead; the Judge refused the application to adjourn. The trial proceeded and the appellant gave evidence. During the Judge's summing up, counsel for the appellant applied to discharge the jury; the basis of the application was a more detailed letter from the same doctor who was of the opinion that the appellant was unable to provide instructions or give evidence as his capability to defend himself was very limited due to his mental health. He concluded that the appellant was not fit to plead. This was the only medical evidence before the court. The Judge refused the application to discharge the jury on the basis that he was unable to accept that the appellant was unfit following his own observation of him throughout the trial. Counsel for the appellant submitted upon appeal that the correct procedure, pursuant to s.4 of the Criminal Procedure (Insanity) Act 1964, would have been for the Judge to discharge the jury and then give directions for the question of fitness to be tried by him or another Judge. The Court dismissed the appeal on the basis that the determination was one of whether a person was unfit to be tried. It did not therefore preclude a determination that a person was fit to be tried in circumstances where there was not the evidence of two or more registered medical practitioners as required by s.4(6) of the Act. The Judge was entitled to consider whether the appellant was fit to be tried on the basis of the evidence of the single doctor.

3.49 In ***R v Dos Santos & Dos Santos [2010] EWCA Crim 1916*** the Court rejected arguments that it should approach differently sentencing for drugs offences where the drug in question was the Class A drug methylamphetamine (crystal meth) as opposed to any other Class A drug. The Court was told that currently the use of this drug was not as widespread as the use of other more familiar Class A drugs, and that trading in the drug was therefore likely to be restricted. Also, that it was a drug which could not be "cut" or adulterated in any way, and therefore there

was no scope for wider misuse by dealers, in effect reducing the drug content of whatever it was they proposed to distribute and sell on to members of the public who wished to buy. Both arguments were rejected. Parliament having decided that methylamphetamine and crystal meth are Class A drugs, the Court must approach it as a Class A drug so classified. Guidance about the way in which the Court should approach cases involving misuse of methylamphetamine and crystal meth is provided by earlier and different cases relating to Class A drugs.

3.50 In ***R v Harvey [2010] EWCA Crim 1317***, the appellant pleaded guilty to manslaughter after killing his wife by throwing a television remote control which made contact with her neck. The appellant was unaware that the deceased had a weakness of the vertebral artery and his unlawful act resulted in her death. The Court concluded that in assessing the appellant's culpability for his crime, the Court must examine the consequences of his conduct, even if that consequence was very unlikely or almost accidental (following R v Appleby [2009] EWCA Crim 2693). However, they concluded that the sentencing Judge attached too much weight to the appellant's previous convictions and the Court also attached weight to the fact that the deceased could have died at any time by simply turning her head.

3.51 Section 36 Criminal Justice Act 1988 enables the Attorney-General to refer to the Court for consideration sentences which are potentially unduly lenient.

3.52 Two such cases which were referred by the Attorney-General were ***R v Appleby*** and ***R v Bryan & Roberts***, they were listed together with ***R v Cowles & Cowles*** before a five-judge constitution (***[2009] EWCA Crim 2693***) to give the Court the opportunity to reconsider the approach to sentencing in cases of manslaughter when, notwithstanding that the defendant intended neither to kill nor to cause the deceased grievous bodily harm, he is convicted of manslaughter on the basis that the death was as a consequence of an act of unlawful violence.

3.53 Appleby was convicted of murder. The sentence was referred by the Attorney-General on the basis that the sentence was too lenient. The trial Judge had been concerned about the disparity between Appelby's sentence and that of his co-accused, who was convicted of manslaughter, and as a result reduced Appleby's sentence from 9 years to 6 years. The other two appeals against sentence concerned death resulting from violence in which no weapon was used and which, but for the death of the victim, would have been categorised as assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 or inflicting grievous bodily harm contrary to section 20 of the 1861 Act.

3.54 The Court reviewed previous case law in unlawful act manslaughter cases and concluded that, for the future, they doubted the value of reference to any sentencing decisions prior to the case of ***R v Furby [2006] Cr.App.R (S) 8***. Furby provides an illuminating example of facts which demonstrate that a sentence at the lower end of the scale may be appropriate. The basis upon which unlawful act manslaughter cases should proceed is that any crimes which result in death should be treated more seriously, not so as to equate the sentencing in unlawful act manslaughter with the sentence levels suggested in Schedule 21 of the Criminal Justice Act 2003, but so as to ensure that the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is for manslaughter, should, in accordance with legislative intention, be given greater weight. If in future it is necessary to examine sentencing decisions prior to Furby they should be examined with the clear understanding that none of the decisions the Court had seen had proceeded on this basis.

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. 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 Court received 28 interlocutory applications in the period of review. 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 often has a knock on effect on the Court's existing business.

4.3 Two issues pertaining to section 188 Enterprise Act 2002 (cartel offences) have been dealt with by the Court in interlocutory applications during the period of review.

4.4 In ***R v IB [2009] EWCA Crim 2575*** the Court considered an interlocutory appeal which raised a jurisdictional issue concerning the application of section 188 Enterprise Act 2002. The defendant was charged with the offence of dishonestly agreeing to effect a price fixing arrangement between two companies. It was argued that although the statute created a new criminal offence triable on indictment, nevertheless the effect of European legislation (Council Regulation (EC) No 1/2003 ("the Modernisation Regulation")), was that the Crown Court had no jurisdiction to try the matter. If the cartel in question bore on trade within the EU (which it did) only the Competition Authority duly designated by the UK Government under that Regulation (in this case is the Office of Fair Trading) had any powers of enforcement. The Court upheld the decision of the judge in the Crown Court in ruling against that contention and held that section 188 Enterprise Act 2002 is not within the expression "national competition law" in the particular sense in which that expression is used within the Modernisation Regulation.

4.5 In ***R v George; R v Burns; R v Burnett; R v Crawley [2010] EWCA Crim 1148***, the Court considered the requirement for 'dishonesty' concerning cartel offences and agreements to fix prices, and held that to establish criminal liability the prosecution need only prove that the defendant had entered into an agreement dishonestly; there was no requirement for mutual dishonesty on the part of both the defendant and another individual.

4.6 The right of appeal given to the prosecutor under section 58 of the Criminal Justice Act 2003 is commonly referred to as a right of appeal against "terminating rulings", although the Act does not use that term and section 58 creates a "General right of appeal in respect of rulings". The Court has received 26 such applications in the year under review.

4.7 In ***R v NT [2010] EWCA Crim 711*** the Court held that provisions of section 58 were mandatory and the prosecution's failure to give the undertaking required by section 58(8) at the relevant time meant that it lost its right to appeal under the section. The Court had

no inherent jurisdiction to hear an appeal by the prosecution against a terminating ruling. Therefore, subject to the possible exercise by the prosecution of its power to appeal under section 58, the trial was at an end. Jurisdiction did not arise unless the prosecution had complied with the pre-conditions that enabled the appeal to be brought. In effect section 58(8) required the prosecution to undertake that if the conditions in section 58(9) were fulfilled the defendant would be acquitted.

4.8 In ***R v SH [2010] EWCA Crim 1931***, the Court made it clear that where the Crown had complied with the provisions of section 58, the provisions of section 59 of the Act (which allows for the adjournment of the trial or the discharge of the jury) were mandatory and the trial Judge had no power to carry on with the trial without awaiting the outcome of the appeal.

4.9 In ***R v C; R v M and R v H [2009] EWCA Crim 2614*** the Court held that there was no jurisdiction to hear an appeal against a terminating ruling that acquitted three defendants in circumstances where, pursuant to section 58, the prosecution did not inform the Crown Court when communicating its intention to appeal, that the defendants should be acquitted if the appeal did not proceed.

4.10 In ***RCPO v C [2010] EWCA Crim 97*** the Court held that it was inappropriate to interfere with a trial judge's decision to stay proceedings relating to alleged offences of money laundering where he had concluded that a fair trial was not possible on the ground that undue delay had created incurable prejudice to the defendant. The judge had accurately stated the principles upon which he should act and explained the basis for his decision. The question was not whether any member of CACD would have reached the same decision as the trial judge but whether his decision could not reasonably have been reached.

4.11 In ***LR [2010] EWCA Crim 924*** the Court stated that the simple starting point was that orders made by Crown Court judges must be obeyed. The trial judge had been right to stay the trial concerning the making and possession of indecent photographs of a child, as an abuse of process when the prosecution declined to comply with the judge's order that copies of the images be provided for his and the defence's use. Arrangements to provide defence lawyers with indecent images of children for the sole purpose of discharging their professional responsibilities to their client, and the acceptance by them of access to such material for that purpose, could not, in any circumstances, be regarded as criminal.

4.12 Article 4 of the Court Martial (Prosecution Appeals) Order 2009 provides the service equivalent of section 58. ***R v JB & SB [2010] EWCA Crim 2092*** concerned a ruling of the Vice Judge Advocate General that proceedings be stayed as an abuse of process. The offences were rape, buggery and as an alternative indecent assault which were alleged to have occurred in Cyprus in 1988 when the complainant was aged about 12 and the two accused about 13. They were all children of service personnel and the two accused were subject to military law by virtue of s. 209(2) Army Act 1955. The Court Martial Appeal Court reversed the decision of the VJAG. This matter was listed before the Court within a week of receipt as the Court Martial Board had been retained pending the decision of the Court.

4.13 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.

4.14 In two cases ***J, S & M [2010] EWCA Crim 1755 and KS [2010] EWCA Crim 1756***, the Court considered appeals against interlocutory decisions that the trials should be conducted by a judge alone and quashed the orders. Although there was statutory provision allowing for a trial without a jury, the Court affirmed that this was always a last resort and only ordered when the Court was sure that the statutory conditions were fulfilled. The confident expectation had to be that the jury would perform its duties with its custom determination to do justice.

4.15 Section 31 of Proceeds of Crime Act 2002 provides the Prosecution with a right of appeal against the making of (or failure to make) a Confiscation Order. In two separate cases where the Crown Court judges, for different reasons, had declined to make an Order the Court considered appeals by the prosecution to overturn the judges' decisions and remit the matters back to the Crown Court.

4.16 ***RCPO v Iqbal [2010] EWCA Crim 376*** concerned an appeal against a decision of the Crown Court that it had no jurisdiction to make a confiscation order where an application for confiscation was made by the prosecution, but no proceedings were taken until after the expiry of two years from the date of conviction, and no application for an extension of the period of postponement had been made within the two year period. The CACD dismissed the appeal. The wording of section 14 Proceeds of Crime Act 2002 made it quite clear that Parliament intended to give prosecutors a longer period than the six months provided for under the earlier legislation. At the same time, however, it intended to make it clear that any application to extend a period of postponement had to be made before the two-year permitted period expired.

4.17 ***R v Neish [2010] EWCA Crim 1011*** the CACD considered the decision of the Crown Court judge to decline to make a Confiscation Order and held that the decision of a judge to relist a hearing in confiscation proceedings constituted a postponement for the purposes of the Proceeds of Crime Act 2002 s.14(1)(b) so that the court was not deprived of jurisdiction to continue the confiscation proceedings. Listing was a judicial function and listing officers made the necessary arrangements on behalf of the judiciary. The decision to put the hearing back to a later date constituted a postponement. It was affected well within the two-year permitted period defined in s.14(5). Unless the continuation of confiscation proceedings would contravene an unequivocal statutory provision, there was no reason why technical errors which caused no prejudice to the defendant should prevent their continuation. No statutory provision had been contravened in the instant case and the case was remitted to the Crown Court for the judge to determine the confiscation issue.

4.18 Confiscation was again the subject matter of an appeal in the case of ***R v Modjiri [2010] EWCA Crim 892*** when it was held that an offender's beneficial interest in a jointly-owned property should be taken into account when making a Confiscation Order under the Proceeds of Crime Act 2002, even though that beneficial interest could not be realised without selling the whole property. The possibility that the offender would not obtain an order for sale of the whole property did not affect or diminish its market value when assessing the value of that beneficial interest. The Court allowed an appeal by the Crown against a decision that a beneficial interest in property held by M had no value when considering the amount available for the purposes of a Confiscation Order. The Court noted that the appeal raised a point of considerable practical importance (for example where an offender's only asset was a 50% share in a very valuable house) and that an order for sale could be obtained under the Trusts of Land and Appointment of Trustees Act 1996 without the agreement of the trustees.

4.19 The issue of the imposition of Serious Crime Prevention Orders fell to be considered in the cases of ***R v Hancox & Duffy [2010] EWCA Crim 102***. Orders were made against the appellants following their convictions for conspiracy to produce large quantities of counterfeit banknotes. Notes with a value of just under £2 million had been recovered from the operation. H was aged 81 at the time of the offence and had a number of serious health conditions; D was aged 57 at the time of the offence. Both had been assessed by a probation officer as posing a low risk of reoffending. The orders prevented, amongst other things, H and D from owning a scanner. D was required to notify the details of any mobile telephone or internet provider used by him. They argued that these restrictions were disproportionate. The Court held that the restrictions placed on them under the Serious Crime Prevention Orders were proportionate to their roles in the offence of counterfeiting and the risk of future offending, and were properly designed to serve the purpose of disrupting or preventing their involvement in any further serious crime under the Serious Crime Act 2007 s.19.

4.20 Section 74 of the Serious Organised Crime and Police Act 2005 provides for an appeal (by either the Crown or the defendant) against a review of sentence following assistance given to a prosecutor.

4.21 In ***D [2010] EWCA Crim 1485*** the Court considered the appropriate level of discount where the applicant had entered into an agreement under the Serious Organised Crime and Police Act 2005, under which he agreed to provide considerable intelligence relating to drug trafficking, but did not agree to give evidence against anyone. He complied with the agreement and provided accurate information which resulted in a number of inquiries as well as some general disruption of criminal activity. The applicant's case was referred to the Crown Court for a review of sentence under the Serious Organised Crime and Police Act 2005 s.74(3) and his sentence was reduced by about 25%. He applied to the CACD for leave to appeal that reduction arguing that he was entitled to a discount of 50 to 66%. The CACD held that the sentencing decision in each case was fact-specific. As a matter of principle, the extent of any discount must be based on the value to the administration of justice of the performance by the defendant of his statutory agreement, and not on the simple fact that the agreement, so far as it went, had been performed. The agreement into which he entered was much less comprehensive than it might have been, and certainly much less comprehensive than the agreement entered into and performed by the defendants in *R v P; R v Blackburn* [2007] EWCA Crim 2290. It would therefore be surprising if he were entitled to the same level of discount. There was no basis for interfering with the decision of the Crown Court.

5 The role of the Criminal Cases Review Commission

5.1 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.

5.2 Over the reporting year, the CCRC referred 17 cases to the Court – 16 relating to appeals against conviction and 1 appeal against sentence (this represents an overall reduction of 17 compared to the previous reporting year). 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.

5.3 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.

5.4 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. In addition to referring cases to 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.

5.5 The CCRC's powers of investigation was particularly useful in the co-joined appeals of ***R v Thompson and others [2010] EWCA Crim 1623***, in which the Court gave guidance as to some of the issues which may arise when jury irregularity is alleged. Allegations of this kind rarely trouble the Court with the overwhelming majority of jury trials proceeding without any suggestion of irregularity. Trial by jury is key to the proper administration of criminal justice. It is imperative that the trial judge enables the jury to carry out its functions fairly and properly.

5.6 Where such an issue becomes apparent during the course of the trial, it must be addressed by the trial judge. More difficult problems arise where allegation of irregularity were made after the verdict was returned. Responsibility for examining such an allegation must be assumed by the Court of Appeal. Where the allegation related to the deliberations of the jury, this was generally forbidden territory but there were two exceptions: where there may have been a complete repudiation of the juror's oath or where extraneous material may have been introduced. In these cases the Court was greatly assisted by the Criminal Cases Review Commission which conducted the necessary enquiries of the jurors.

6 Contacts

6.1 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.

6.2 Over the last reporting year the Registrar has met with:

- Minister Gilmar Mendes, President of the Federal Supreme Court of Brazil who was accompanied by Mr. Luciano Fuck, Secretary-General of the Presidency of the Federal Supreme Court of Brazil and Mr. Eduardo Roxo, Head of the Chancery Brazilian Embassy in London
- Leiden Criminal Law Society
- Public prosecutors from the Qatar study group - Mr. Ali Mahmoud, Mr. Nasser Ali-Emadi, Mr. Mansoor Abdulla Al-Kaabi, Mr. Mubarak Shabib Al-Ramzani and Mr. Khalifa Sulaiman Al-Abdulla
- Visitors from RIPA International including
  Nicholas Francois Ohsan Bellepeau – President Industrial Court Mauritius,
  Justice Cromwell – Chief Judge Edo State High Court of Justice Nigeria,
  Justice Tinuola Akomolafe-Wilson – Chief Judge, Edo State High Court of Justice,
  Taye Omoruyi – Deputy Chief Registrar – Edo State High Court of Justice,
  Elizabeth Erhahon – Director Finance and Accounts Edo State High Court of Justice,
  Jude Bonte – Registrar Supreme Court Seychelles,
  Samwiri Wakhakha – judicial affairs officer Sudan
- Students from the Syracuse USA CPS Law Programme
- Delegation of legal staff from the Attorney General's Office, Indonesia
- A number of lawyers (Jordana Dray, Melissa Loncarevic, Nathalie de Quatrebarbes and Sandra Morin) from the Paris Bar Exchange also visited the Court.

6.3 The Registrar was also invited to meet with the Judiciary of the Supreme Court of Victoria, Australia. As a result of the Registrar's informative visit to Melbourne and the great deal of assistance he provided, the Chief Justice of the Supreme Court of Victoria has received Government approval and funding to remodel their appeal system in line with that of ours. Considerable changes will be made which will result in increasing the number of cases they hear and significantly reducing their current backlog of criminal appeals. The changes involve the appointment of a Registrar of Criminal Appeals and casework lawyers to intensively manage appeals and prepare them for hearing. Rob Hulls, Deputy Premier and Attorney-General said *"This ground breaking approach by the Court will ensure criminal appeals are handled and heard more expeditiously through active case management which means more of the work is done before the judges get involved. I congratulate the Supreme Court for adopting this new approach, which will be a model for the rest of Australia and will enhance the speed of justice without diminishing its quality"*.

6.4 The CACD User Group remains a useful and important forum for discussing topical issues concerning the work of the Court and changes to practice and procedure. The meetings which are relaxed and relatively informal, provide a valuable opportunity for court users to meet those directly involved in the administration of the Court and members of the senior judiciary.

6.5 Last year, in addition to the attendance of Lord Justice Hughes, the Vice-President of the CACD and chair of the meeting, the group was grateful for the attendance of Lord Justice Hooper who contributed fully to the lively meeting which included, amongst other things, discussions on the respective roles of the Registrar and the Legal Services Commission in the public funding of cases before the Court; the 'use and abuse' of interlocutory appeals; CAO and CCRC closer co-operation and the setting up of the new CPS appeals unit.

6.6 The User Group members include practitioners of appellate law, counsel and solicitors, representatives of the CCRC, the CPS, the Probation Service and Law Reporters. As ever, the success of the meetings stems from their diversity and breadth of experience, and above all from their willingness to participate.

7 Looking to the future

7.1 The Registrar welcomed the decision of the DPP to set up a dedicated Crown Prosecution Service Appeals Unit, to deal with appeals from the Crown Court to the CACD as well as appeals to the Administrative Court and Supreme Court. The establishment of such a unit will lead to a cadre of experience and expertise in appeal cases which will, in turn, lead to an enhanced service to the Court. One important feature is that the unit will provide a single link between the Criminal Appeal Office and the various Witness Care Units. It is hoped this will improve communications between agencies and benefit victims and their families.

7.2 A protocol has been agreed between the Registrar and the DPP. Meetings have taken place at various levels to ensure the smooth implementation of the phased introduction. Lawyers from the unit have also attended a training event at the RCJ and met lawyers from the CAO. Administrative staff from the Unit have also visited a number of the offices in the CAO to understand the procedures of the CAO and CACD.

7.3 The CAO remains committed to providing an efficient service to the Court and its users. Its processes are always being analysed to ensure the most efficient use of resources. The Office is under the same financial pressures as the wider public sector. In real terms most of its budget consists of an allocation for staff salaries and in the current financial climate the management teams are endeavouring to ensure the continued provision of the best service possible with reduced resources. Some examples of attempts to identify better working practices have already been investigated. In one of the conviction casework groups, a restructure of the administrative staff has been piloted. The team has comprised of fewer staff but at a higher grade to see whether or not better support can be provided to the legal team.

7.4 The Court continues to take advantage of the increased technology in terms of video-link facilities. Since the introduction of the Registrar's power to direct a hearing via video-link pursuant to section 110 Coroners and Justice Act 2009 the Court has seen an increased use of video-linked hearings (some 128 to various locations including 35 prisons) to enable appellants and witnesses to give evidence without having to come to the RCJ. Two cases required the setting up of international video-links, one to the USA and one to India. The cost of International links is substantial, for example a link to India or Pakistan is over £1000 per hour in addition to a possible charge for the rental of the overseas location and equipment. These costs however have to be weighed up against the significant cost in getting the witness to the RCJ resulting in an overall saving. The technology has also been useful to assist in the giving of evidence by a vulnerable witness; on one occasion the Court received evidence from a witness from their home as they had significant health problems and could not attend Court.

7.5 It is possible to set up video-links with connections to up to four different locations at any one time. This has proved useful in cases involving more than one appellant (where each appeared from different prisons via video-link). Counsel is also permitted to appear by video-link and in one such case where this was arranged, it meant the very minimum disruption to a Crown Court trial where counsel was appearing in Birmingham. 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.

7.6 The Court has this year utilised Skype© as an alternative to the conventional form of video link. It is a useful alternative and significantly cheaper. The use of Skype© could enable witnesses to give evidence from a wider range of locations, and avoid them having to travel to special conference facilities as all that is needed is a quiet room and a computer connected to the Internet.

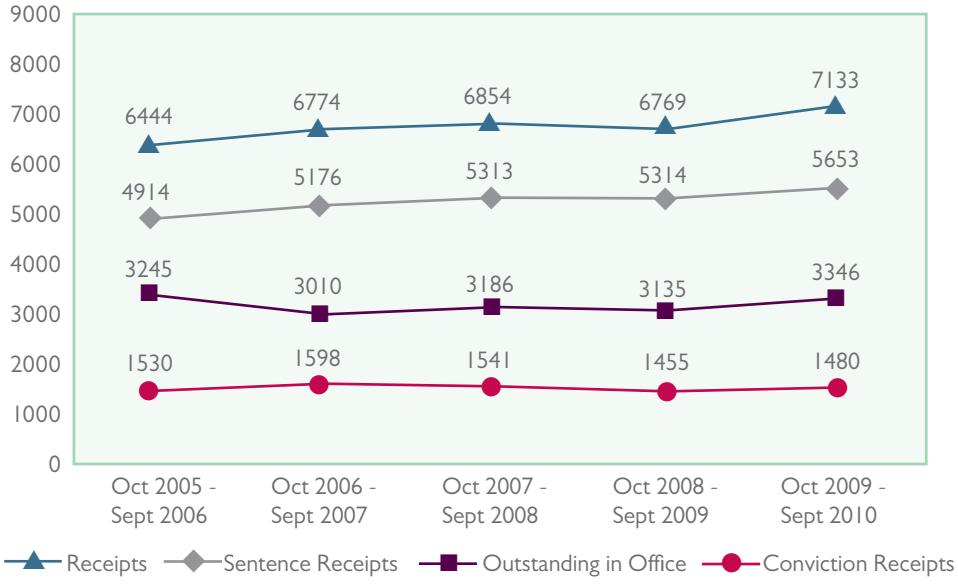
7.7 A comprehensive guide (the Yellow Guide) to reporting restrictions in the CACD will shortly be published based on the guidelines previously agreed with the Newspaper Society, Society of Editors and Times Newspapers and published by the Judicial Studies Board. The guide will provide guidance and clarity to both court users and the Court itself as to the various powers and orders available to the Court to protect of witnesses and victims as appropriate and to ensure that any future trials are fair, whilst balancing the important requirement for justice to be seen to be done openly and for the work of the Court to be transparent and open to scrutiny.

Lord Judge
Lord Chief Justice of England and Wales

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

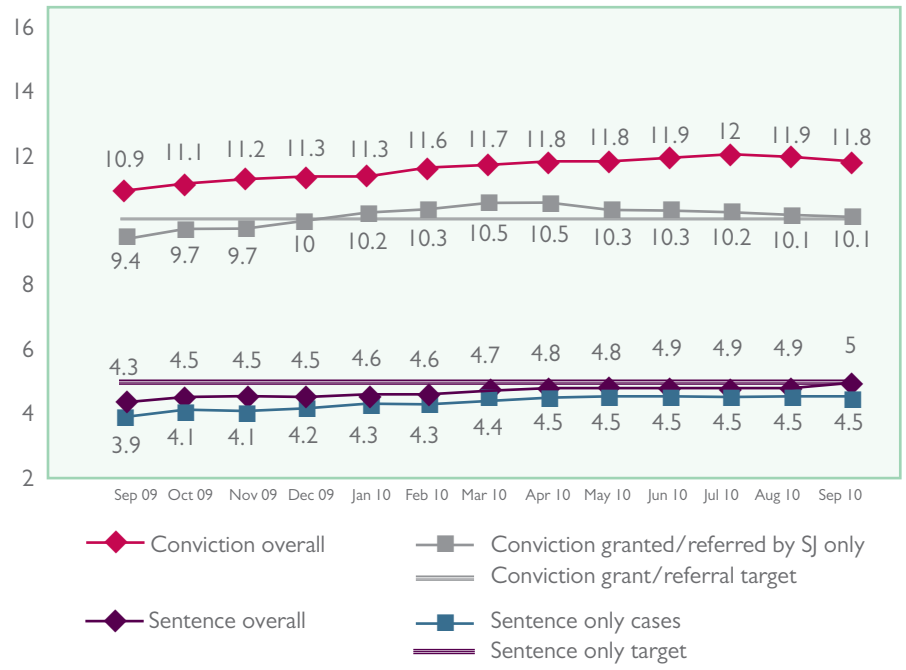
Annex A

Applications Received and Outstanding in Office

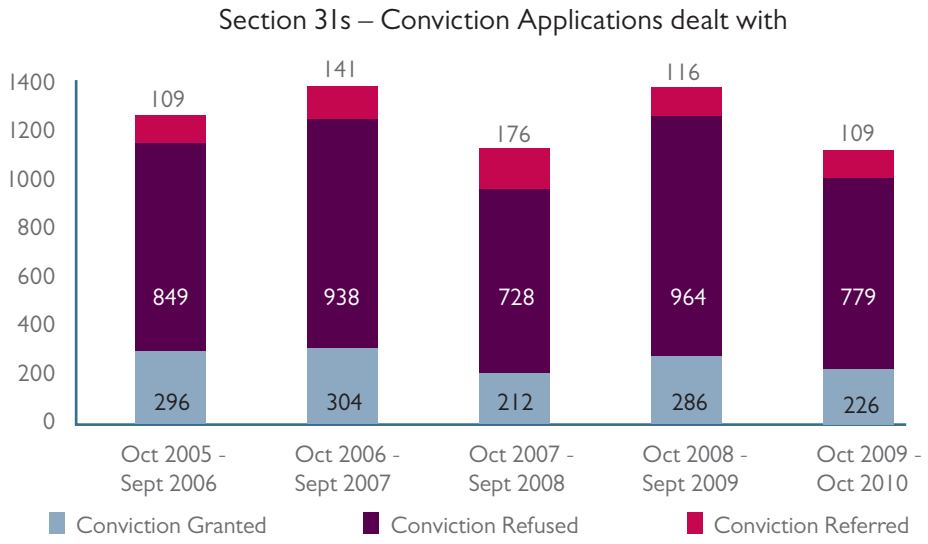


Annex B

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



Annex C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109
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116
109
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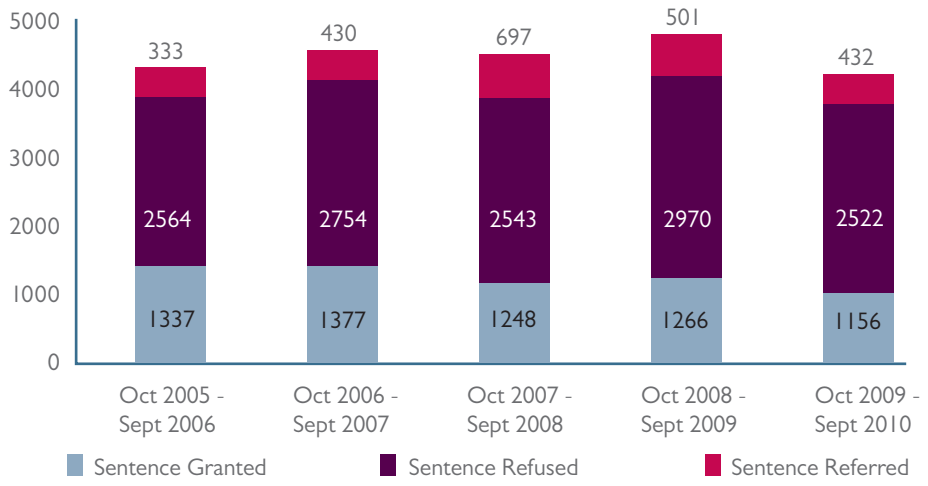
964
779
296
304
212
286
226
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Oct 2010
Conviction Granted
Conviction Refused
Conviction Referred


Section 31s – Sentence Applications dealt with
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3000
2000
1000
0
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430
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501
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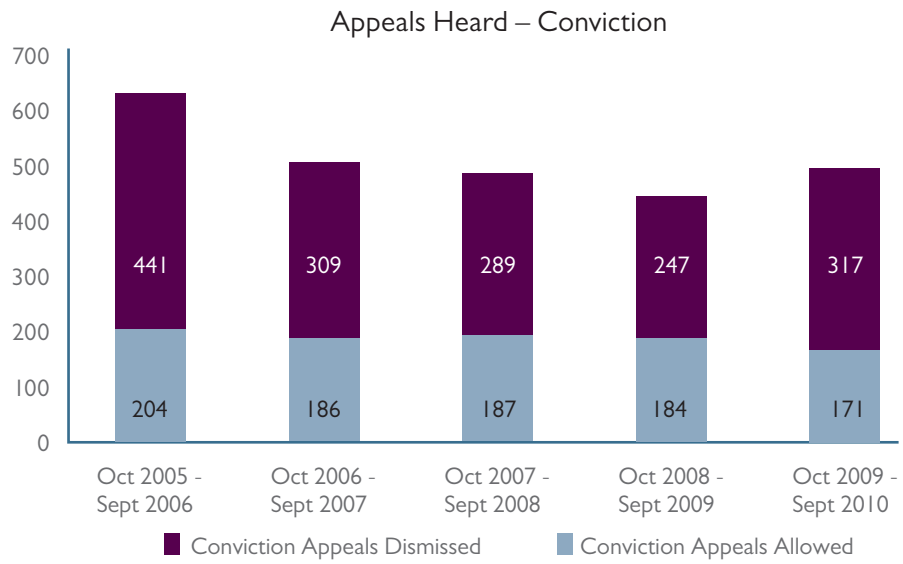
2543
2970
2522
1337
1377
1248
1266
1156
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Sentence Granted
Sentence Refused
Sentence Referred

Annex D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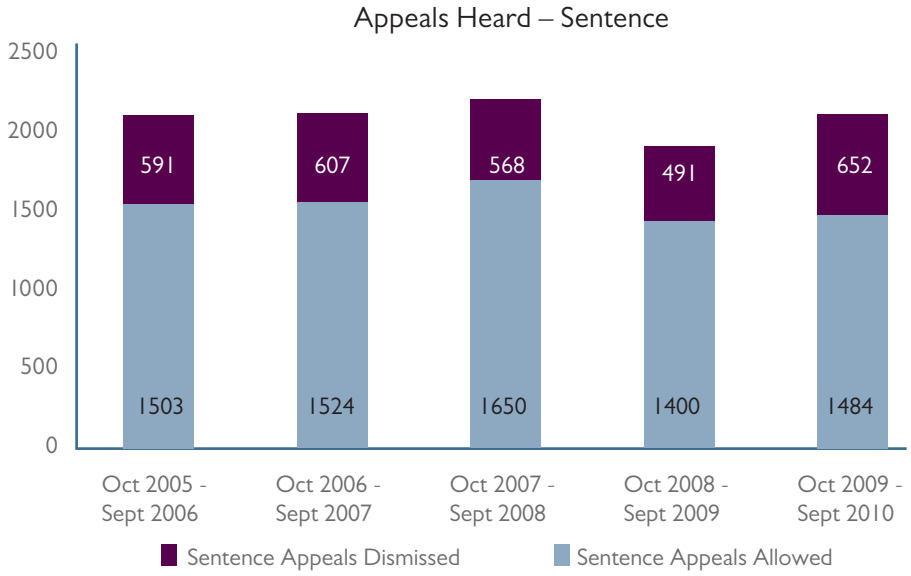
400
300
200
100
0
441
309
289
247
317
204
186
187
184
171
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Conviction Appeals Dismissed
Conviction Appeals Allowed


Appeals Heard – Sentence
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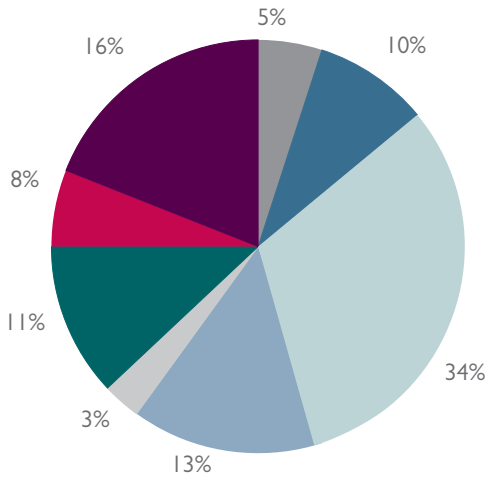
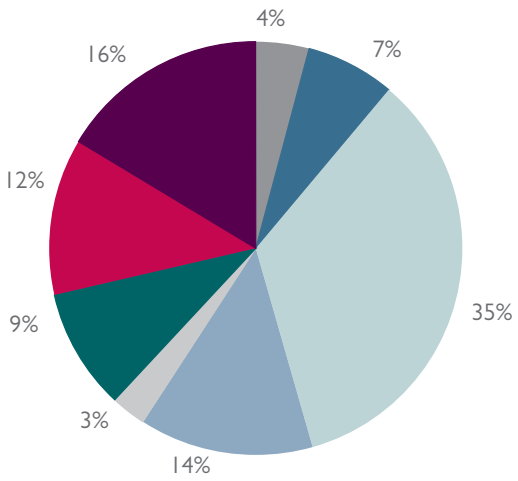
2000
1500
1000
500
0
591
607
568
491
652
1503
1524
1650
1400
1484
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Sentence Appeals Dismissed
Sentence Appeals Allowed

Annex E

October 2005 - September 2006



October 2006 - September 2007



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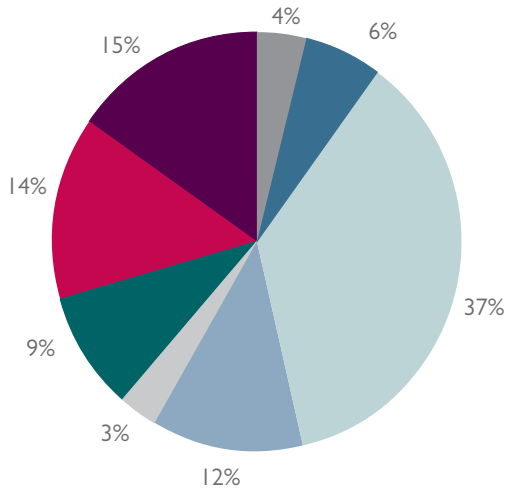
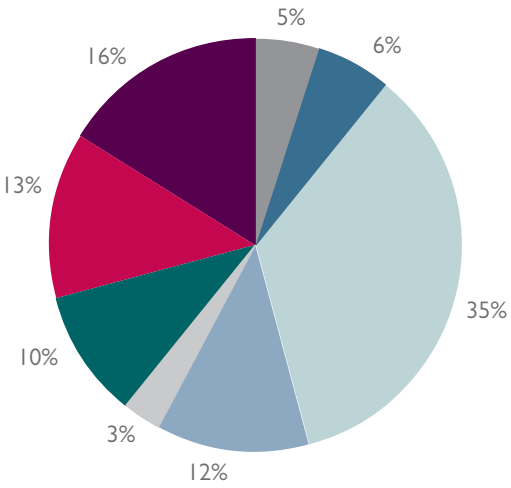
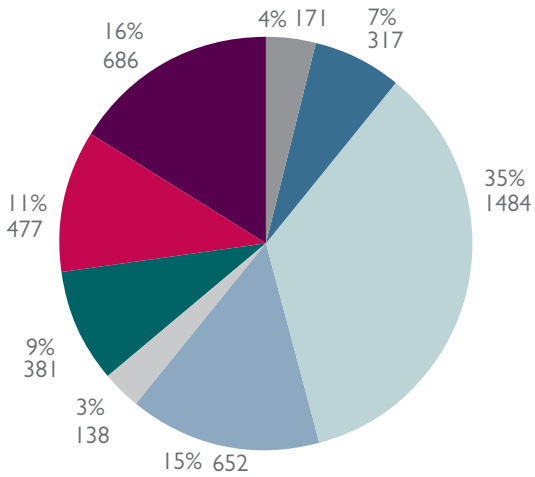
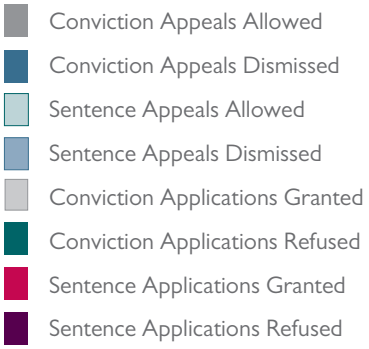


October 2008 - September 2009

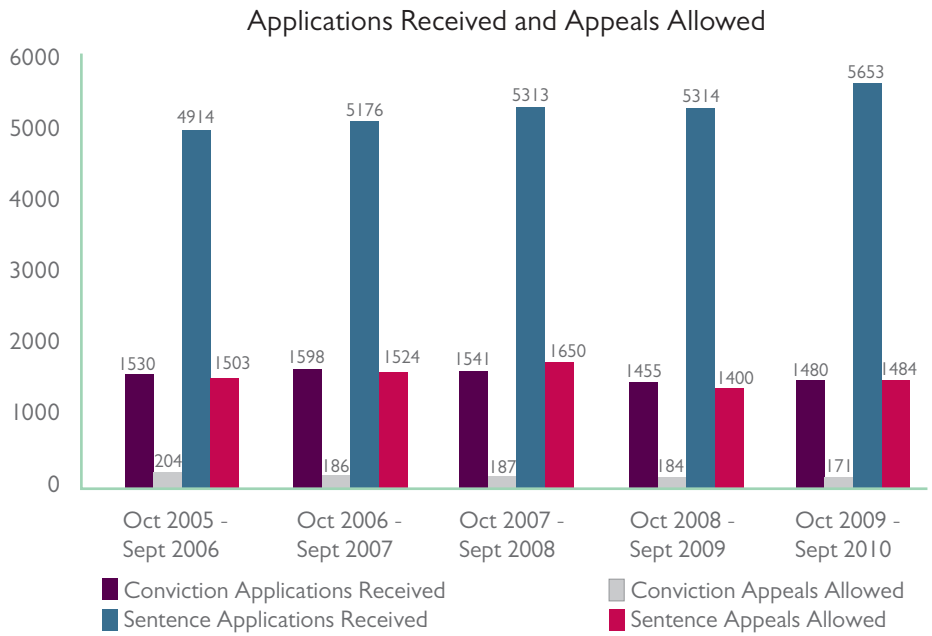


October 2009 - September 2010





Annex F


Applications Received and Appeals Allowed
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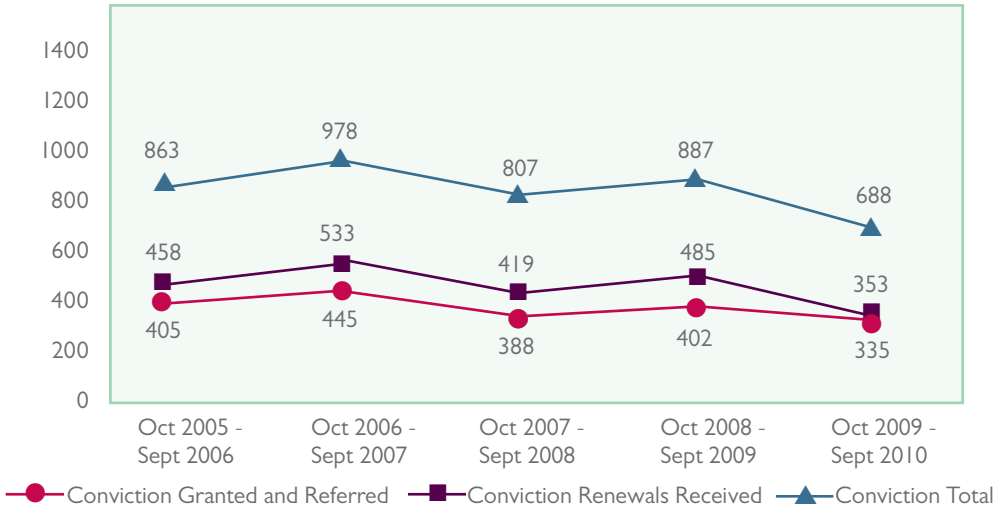
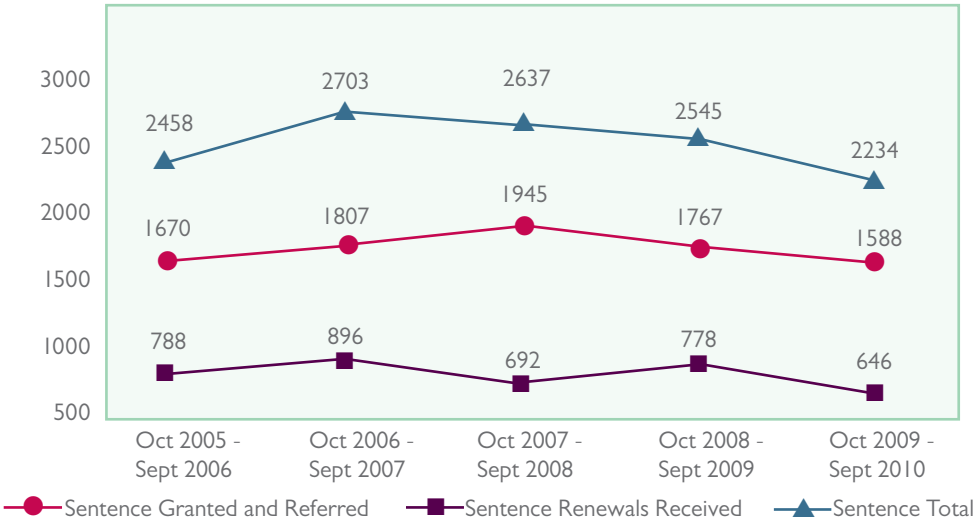
187
5313
1650
1455
184
5314
1400
1480
171
5653
1484
Oct 2005 - Sept 2006
Oct 2006 - Sept 2007
Oct 2007 - Sept 2008
Oct 2008 - Sept 2009
Oct 2009 - Sept 2010
Conviction Applications Received
Conviction Appeals Allowed
Sentence Applications Received
Sentence Appeals Allowed

Annex G

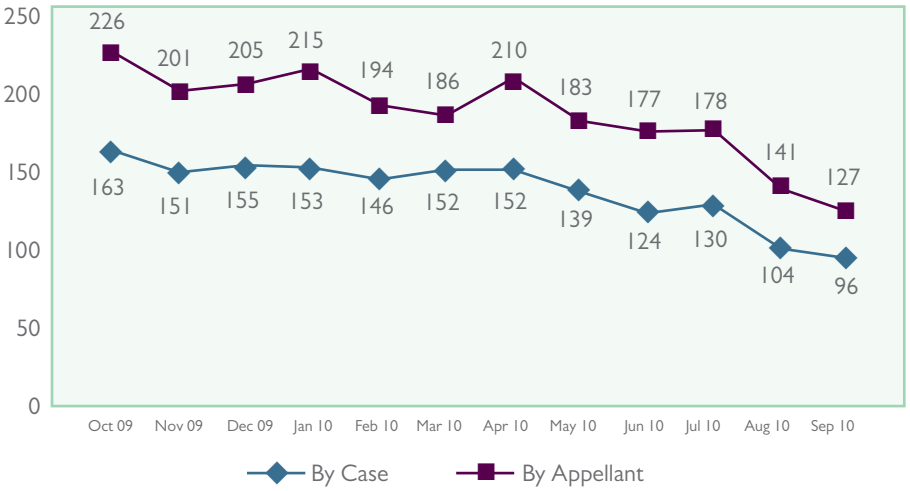
Applications Granted / Referred and Renewals Received (Conviction)



Applications Granted / Referred and Renewals Received (Sentence)



Conviction Old Cases – Outstanding over 8 months



Sentence Old Cases – Outstanding over 5 months