In the Court of Appeal (Criminal Division) 2017-18

Contents

Introduction

The dedication of the Court of Appeal (Criminal Division) to the administration of criminal justice remains impressive. The judiciary and the Criminal Appeal Office staff who support them, have a considerable workload and I am immensely grateful for their continued commitment.

The criminal justice system has faced much criticism in recent times, but it is vital that the integrity of the Court of Appeal (Criminal Division) is maintained.

Over the year the Criminal Appeal Office received in the region of 5,000 new conviction and sentence applications. The number of applications lodged by litigants in person continues to increase and invariably such applications take up more time and lawyer resources within the Criminal Appeal Office and impose greater strain upon the system as a whole. However, it is important that litigants in person are not seen as a burden on the Court and that they receive access to justice. The steps taken by the Registrar to give additional help and support to litigants in person are to be welcomed.

The Court has heard several high-profile cases including appeals and applications based on the Supreme Court's judgment in ***Jogee*** (in which the Supreme Court changed the law of joint enterprise). Further, the Court has sat in special constitutions to consider and clarify particularly complex areas of the law, including the householder defence in Section 76 of the Criminal Justice and Immigration Act 2008, sentencing of historic sexual offences, terrorism and victims of human trafficking.

Disparate and complex sentencing legislation remains a cause for concern for all who work in the criminal justice system. It is currently being addressed by the Law Commission in their work on the draft Sentencing Code. On too many occasions, an unlawful sentence is imposed in the Crown Court and the mistake only noticed by a lawyer in the Court of Appeal Office when an appeal (on other grounds) is lodged. Lawyers from the Criminal Appeal Office have given valuable support to the Law Commission but it is vital that sentences imposed at first instance are lawful and clear.

My particular thanks this year must go to Master Egan QC. For the last 6 years, among many other responsibilities, he has served the Court with vigour and good humour in the demanding role of Registrar. This has involved him in ultimate responsibility for running the office and looking after those who have worked in it, but also discharging a significant judicial function, in particular by identifying the cases which need urgent consideration, or which raise issues of importance to the criminal justice system. He has been held in great respect and with warm affection by us all. His

successor, Master Beldam, has a wealth of experience in this jurisdiction and I am confident that we remain in safe hands.

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

Lord Burnett

Lord Chief Justice of England and Wales

A Reflection:

The Vice President of the Court of Appeal (Criminal Division)

I would particularly wish to offer, and pay tribute, to Lord Justice Treacy who retired last year, and who for four and a half years chaired the Sentencing Council. He was appointed to the Court of Appeal in 2012 and thereafter sat in this Court on a regular basis. His contribution to the Criminal Law has been significant. He will be missed and we wish him well.

We were all also saddened by the death of Sir Christopher Pitchford, who sat as a Lord Justice of Appeal from 2010 to 2017. His intellectual ability and his personal dedication to the work of the Court were exceptional.

The working life of a Judge of the Court of Appeal is relentless and I would like to give my personal thanks to all those Judges who regularly sit and contribute to the smooth running of the CACD. Together they ensure the thousands of applications lodged each year are properly and fairly determined in a timely fashion.

It is an often forgotten feature of the CACD that Judges routinely give judgment on cases the same day they are heard. This is only possible through effective preparation of cases and the partnership which has grown up between the Judges and the support provided by the Criminal Appeal Office. I am extremely grateful to the lawyers and the staff in the Office who do their very best, often in difficult circumstances, to enable the Judges to maintain the very high standards we have come to expect.

The role of the single Judge in filtering unmeritorious applications before the Court remains of critical importance but over the years the Court has seen a significant increase in applications where new grounds of appeal have been lodged, after refusal of the written application for leave to appeal by the single Judge exercising his or her powers under Section 31 of the Criminal Appeal Act 1968. This is effectively a new application which has never been considered by a Judge. As I said in my judgment in ***R v James & Ors*** *[2018] EWCA Crim 285*, there will be occasions when legitimate grounds of appeal are identified by fresh lawyers that trial lawyers have missed, and miscarriages of justice have

been avoided. However, such occasions are rare and all too frequently totally unmeritorious applications take up the precious time and resources of the staff and Judges of the Court of Appeal (Criminal Division). The time and resources of the Court should be spent preparing and considering applications from applicants with arguable grounds of appeal.

Discouraging unmeritious applications remains a constant issue for the Court, but this also has to be balanced against not discouraging potential applicants from lodging an application at all. This can be particularly challenging where applicants are acting in person

In conclusion, I am delighted to welcome Master Beldam as the new Registrar of Criminal Appeals. Master Beldam has worked in the Criminal Appeal Office for over 20 years and is co-author of "The Court of Appeal Criminal Division – A Practitioner's Guide," which has recently been published in a 2nd Edition and offers practitioners (and Judges) invaluable assistance.

I know that both her unrivalled experience in this jurisdiction and her proven commitment to the Office and the Court, will help us to meet any future challenges head on.

Lady Justice Hallett

Vice President of the Court of Appeal Criminal Division

Overview of the Year

Master Beldam, Registrar of Criminal Appeals

During Master Egan's time as Registrar, the landscape in relation to criminal appeals changed considerably.

Not only did the CACD see an increased number of applications by litigants in person, but also a rise in the number of applications supported by fresh counsel. Various procedural changes, needed to meet such challenges were implemented with Master Egan's support. In particular he will be remembered as the driving force for the changes implemented by the cases of ***R v Achogbuo [2014]*** *EWCA Crim 567*, emphasising the need to provide an objective and independent view of the factual basis upon which grounds of appeal were based, and ***R v McCook*** *[2014] EWCA Crim 734*, which laid down the procedure to be followed by fresh legal representatives. The requirement of due diligence, with use of the waiver of privilege procedure where necessary, is now well established and ensures that the court's time is not wasted on wholly misconceived applications.

It is inevitable that the landscape will continue to change and provide further challenges for the Judges who sit in CACD and the staff of the CAO. I have no doubt that the Judges and staff, both legal and administrative, will step up to meet those challenges and I also have no doubt that I will be grateful for all their support as I embark on my new role.

I am look forward to working closely with the Senior Judiciary and the Senior Legal Managers to make sure that the CACD continues to be able to deal with its heavy workload both efficiently and justly.

Master Beldam

Registrar of Criminal Appeals

The work of the Criminal Appeal Office

The Criminal Appeal Office ("CAO") is located at the Royal Courts of Justice, in close proximity to the courts and Judges that it serves. Lawyers at the CAO work closely with the Registrar of Criminal Appeals to ensure that cases are guided through the appeal process efficiently and justly. The lawyers provide case summaries pursuant to the Practice Direction, which are invaluable to the Court and practitioners. The summaries are entirely objective and do not provide advice on the merits of a case, but they highlight and crystallise the salient issues in order to assist the Court. In addition, the lawyers give advice on procedural matters to practitioners, and also to litigants in person, which often involve the provision of advice on how Grounds of Appeal can comply with the relevant Rules and avoid being excessively prolix.

The CAO lawyers are supported by dedicated teams of administrative staff who obtain advice from CAO lawyers as necessary and exercise case management functions. In addition to core functions such as the listing of cases, there is a team of specialist administrative staff dedicated to writing case summaries on all but the most complex sentence cases. Administrative staff also provide essential back office support and deal with some specialist matters such as the assessment of costs. Court clerks sit as the Registrar in Court.

Acting on behalf of the Registrar, CAO staff play a proactive role in preparing cases for the Single Judge and the Full Court. One clear example of this is in respect of unlawful sentences. In some instances, deficiencies in information given to the sentencing court coupled with misunderstandings of disparate and complex sentencing provisions have led to a number of unlawful sentences not being identified until grounds of appeal (sometimes against conviction only) have been lodged with the Court. In such instances the staff of the CAO are often the first to identify that a sentence is in fact unlawful and draw that to the attention of the parties and the Court.

The legal team is headed by three Senior Legal Managers, who are responsible for the throughput of all work in the CACD. Their work however is not confined to the management of staff and work, but also encompasses specialist internal and external training. In addition to being responsible for the promotion of best practice within the CAO, the Senior Legal Managers have an important role in assisting the Registrar in carrying out her statutory functions.

Applications by Litigants in Person

The number of Litigants in Person in the criminal courts has been growing substantially and this is also reflected in the Court of Appeal Criminal Division:

	Applications supported/settled by legal representatives	Litigants in Person	Total	% Own Grounds
2013	5,227	193	6,581	2.9%
2014	5,800	303	6,104	5.0%
2015	5,482	441	5,923	7.4%
2016	5,239	575	5,814	9.9%
2017	5,062	622	5,684	10.9%

From 2014 to 2017, the number of applications submitted by Litigants in Person to the Court has doubled. Litigants in Person now represent 10% of applications and are growing.

Litigants in Person use more judicial and administrative resources because they are unfamiliar with both the law and the procedure of the Court. Invariably they often engage in voluminous written/telephone correspondence with staff and they use more lawyer resources within the Criminal Appeal Office (all conviction cases where there is a Litigant in Person are currently allocated to a lawyer as the case progression officer). The Court itself and individual single Judges have also felt the strain of what can often be voluminous and un-particularised grounds of appeal, sometimes running into hundreds of pages.

However, it is important that the Litigants in Person are not seen as a burden on the Court and that they can access justice. Most Litigants in Person in this jurisdiction are in custody and they have additional hurdles as a consequence. Accordingly the Registrar has implemented a strategy to give additional help and support to Litigants in Person. This strategy includes giving more information and advice about what grounds of appeal should look like and information on the Court process. It is contained in a leaflet “Help for Applicants” which has been specifically written by the Criminal Appeal Office for Litigants in Person in custody.

This strategy has been fully supported by the judiciary and to further improve access to justice for Litigants in Person, an Easy Read Form NG (Conviction) is currently being developed through the Criminal Procedure Rules Committee.

Cases of Note

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

Substantial Injustice, Exceptional Leave to Appeal & Change of Law

The requirement for an applicant to demonstrate "substantial injustice" in order to obtain "exceptional leave to appeal out of time" in "change of law" cases has received much attention in the wake of the judgment in **R v Jogee, Ruddock v The Queen** [2016] UKSC 8, [2016] UKPC 7. In its judgment, the Supreme Court approved the practice of the Court of Appeal, described by Lord Bingham in ***Hawkins [1997]*** *1 Cr App R 234*, of asking whether any substantial injustice had been done. That a change in the law in itself, was not sufficient to render a conviction unsafe was reaffirmed in **R v Johnson & Others** [2016] EWCA Crim 1613. There was "a high threshold" and the burden lay on the applicant to demonstrate that a substantial injustice would be done.

The Court has recognised that appeals against conviction in change of law cases involve significant social and public considerations which go well beyond a narrow focus of an individual conviction. There is an inherent tension in the competing public interests of finality and certainty in the administration of criminal justice as against the injustice of securing convictions based on an erroneous understanding of the criminal law.

The general rule applied by the Court of Appeal has been that without special or particular reasons, an application for leave to appeal out of time on change of law grounds will not be granted (***R v Cottrell & Fletcher*** *[2008] 1 Cr. App. R 7*). This requirement has not only been applied to "change of law" cases, but also where the grounds rely upon a "sharpened appreciation of unchanged law" or an "improved understanding of the unchanged law" (***Welsh & Ors [2015]*** *EWCA Crim 1516). In* ***R v Agera; R v Lansana*** *[2017] EWCA Crim 740* and ***R v Casterton & Quinn*** *[2017] EWCA Crim 1071)*, the Court confirmed that an application to amend the grounds of appeal, outside the 28 period, in order to add new grounds based on a change in the law, also required exceptional leave.

In ***R v YMH*** *[2017] EWCA Crim 2086*, the Court rejected the proposition that *Ordu* (infra) could be read to imply that exceptional leave would be required in cases where the decision did not turn on a

change in law; there was no rationale for extending the requirement for exceptional leave to other cases.

In ***R v K [2017]*** *EWCA Crim 486,* the Court underlined the distinction between circumstances where an applicant seeks to challenge his conviction after pleading guilty where he been not been properly advised as to the availability of a defence (where the substantial injustice test would not apply, e.g. *YMH*); and circumstances where the guilty plea has been entered on the basis of correct advice in accordance with prevailing law (where the substantial injustice test would apply, e.g. ***Ordu***).

What is Substantial Injustice?

In ***Ordu*** *[2017] EWCA Crim 4*, the Court had to determine an application for an extension of time of eight years and three months. The applicant had pleaded guilty to possessing identity documents with intent. The Court approached the extension of time question on the basis that if leave were given, the appeal would succeed. The Court drew a distinction between the "*substantial injustice*" test applied at the stage of determining whether to grant an extension of time and the "*clear injustice*" test used in determining the safety of a conviction in appeals following a guilty plea (identified in ***R v. Boal*** *(1992) 95 Cr. App. R. 272*). The Court concluded that "*In short, the tests are described by ostensibly similar verbal formulations but they are different things*".

In determining the question in *Ordu*, the Court said that the continuing impact of a wrongful conviction would be highly material of whether its continuation involved a substantial injustice. Although the law had changed after the applicant's conviction so that he would have had a defence, he had been released from prison, his licence had expired and the conviction was spent. Apart from the stigma of having suffered conviction and the unpleasant experience of serving four and a half months in a prison (some ten years earlier), there were no continuing consequences of his conviction. Quashing the conviction would not make any practical difference and therefore no substantial injustice would occur if the appeal were not allowed to proceed.

On the other hand, the Court in ***R v GS*** *[2018] EWCA Crim 1824* distinguished the position of the applicant who had been a victim of trafficking and had immigration proceedings outstanding, from the position of the applicant in ***Ordu***. Her application also depended upon a change in the law and establishing substantial injustice if leave was refused. The Court recognised that there had been a material change between the very limited legal recognition of the rights of victims of trafficking in

2007 and the position in 2018, which was more than simply a development in the existing law. The difference between the CPS guidance in 2007 and 2013 was stark. The Court held that if the applicant could demonstrate that her conviction was arguably unsafe, then she should be allowed to challenge it. Her conviction and period of imprisonment was a risk to her immigration status when her leave to remain as a refugee was next considered in 2020. That risk constituted a substantial injustice if she was precluded from challenging her conviction because of the requirement to obtain exceptional leave.

In Summary

(i) If the application for leave to appeal is made in time, there is no need for an extension of time in order to grant leave. If leave is granted, the Court will apply the section 2 Criminal Appeal Act 1968 safety test.

(ii) If the application for leave to appeal is made out of time, is it a "change of law" case?

(iii) If it is not a "change of law" case, then the general extension of time principles apply. Is it in the "interests of justice" to grant the extension.

(iv) If it is not a "change of law" case, but the applicant seeking the extension of time pleaded guilty and may have been deprived of a good defence in law which was available to him or her at the time (e.g. because of bad legal advice), then the "Boal" test should be applied. Has a "clear injustice" been done?

(v) If it is a "change of law" case, then has the applicant seeking the extension of time demonstrated that he or she would suffer "substantial injustice" if leave to appeal were not granted?

(vi) If the applicant seeking an extension of time has demonstrated he or she would suffer "substantial injustice", then leave to appeal out of time may, exceptionally, be granted. If exceptional leave is granted, then the safety test in s.2 Criminal Appeal Act 1968 applies.

(vii) If the applicant seeking an extension of time has not demonstrated "substantial injustice", leave to appeal out of time should be refused.

Procedure

Written directions for the jury

In ***R v. Kay*** *[2017] EWCA Crim 2214* the Court once again impressed upon judges of the Crown Court that the use of written directions and/or routes to verdict were of great assistance to juries and that the procedure set out in CPD VI 26K.12 should be followed. This was echoed in another case, ***R v. Atta-Dankwa*** *[2018] EWCA Crim 320*, which came before the Court.

Grounds of Appeal lodged post-single judge

The Court in ***James and Others*** *[2018] EWCA Crim 285* dealt with four unrelated applications for leave to appeal where fresh Counsel had lodged new grounds of appeal after refusal of the written applications for leave to appeal by the single judge. Following a review of the various authorities and statutory provisions the Court considered the procedure which should be adopted in such cases. The Criminal Practice Direction at CPD IX Appeal 39C has accordingly been amended.

Re-opening a final determination

In ***R v Hockey*** *[2017] EWCA Crim 742* the Court considered the jurisdiction of the Court to re-open a final determination. This involved a detailed analysis of ***R v Yasain*** *[2015] EWCA Crim 1277*, when the Court initially considered the circumstances in which a final determination of the Criminal Division could be re-opened. Two established categories of cases were identified:

(1) Where the decision has **not been entered into the record** it was agreed the Court had a wide power to revise any order pronounced.

(2) Where the decision had been entered into the record, but either:

a. On a proper analysis **the order was a nullity** (as in ***R v Majewski*** *(1976) 62 Cr App 5);* or

b. There had been some **defect in procedure which may have led to a real injustice** (following the line of authority set out in ***R v Daniel*** *(1977) 64 Cr App R 50, [1977] QB 364).*

The Court, in both ***Yasain*** and ***Hockey***, then went on to consider a third category of cases based on the principles set out in ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2003] QB 528.

(3) Where the decision had been entered into the record, but it was necessary for the Court to re-open that decision in order to avoid real injustice, the appellate Court had an implicit power/jurisdiction to re-open the case in exceptional circumstances, where there was no other effective remedy.

In ***R v. Bhadresh Babulal Gohil and Ellias Nimoh Preko*** *[2018] EWCA Crim 140* the Court again considered *inter alia* the jurisdiction to re-open a final determination of the Court of Appeal (Criminal Division) and gave a comprehensive review of the existing authorities.

Criminal Law

Loss of self-control - "circumstances of the defendant" - Section 54 Coroners and Justice Act 2009

In ***R v. Rejamski and Gassman*** *[2017] EWCA Crim 2061*, two otherwise unrelated cases were heard together to consider the extent to which a mental disorder can be relevant to an assessment of "*the circumstances of the defendant*", when considering the partial defence of loss of control provided by s.54(1) Coroners and Justice Act 2009 ("the CAJA 2009"). In that case the Court conducted a thorough review of the legislation and case law.

***Ghosh*: dishonesty**

In ***R v Ghosh*** *[1982] QB 1053*, the approach to dishonesty was twin tracked. First, the fact-finder must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. Second, if so, whether the defendant must have realised that ordinary honest people would so regard his behaviour. That test is very different from that which is used in civil proceedings. The law on this topic both in civil and criminal law was analysed in the decision of the Supreme Court in ***Ivey v Genting Casinos (UK) Ltd t/a***

Crockfords *[2017] UKSC 67*. Although there have been no Court of Appeal cases on this matter since the handing down of this judgment, the President of the Queen's Bench Division said in ***DPP v. Patterson*** *[2017] EWHC 2820 (Admin*), a Divisional Court case, that although certain observations in the Supreme Court were obiter and as a matter of strict precedent the Court of Appeal (Criminal Division) was bound by *Ghosh*, the terms of the unanimous observations of the Supreme Court, which did not shy from asserting that *Ghosh* does not correctly represent the law, it was difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.

Nitrous Oxide

In ***Chapman and Others*** *[2017] EWCA Crim 319* the Court considered whether nitrous oxide is an "exempted substance" for the purposes of the Psychoactive Substances Act 2016 ("the 2016 Act") because it is a "medicinal product" within the meaning of that term as defined by the Human Medicines Regulations 2012 (S.I. 2012/1916) ("the 2012 Regulations"). The Court said that the underlying purpose of the 2016 Act was to criminalise the production, supply, offering for supply, export and import and possession with intent to supply of psychoactive substances not otherwise caught by the drugs legislation. It was directed at what had become known as 'legal highs' (such as synthetic drugs known as spice and mamba). The legislative technique adopted was not to list substances to which the 2016 Act applied, as is done with controlled drugs for the purposes of the Misuse of Drugs Act 1971("the 1971 Act"). The Court said that whilst nitrous oxide could undoubtedly be used for medicinal purposes, the term *'medicinal product'* leading to a substance being classed as an *'exempted substance'* for the purposes of the Psychoactive Substances Act 2016 had to be interpreted in conformity with its meaning in European Law from which the term was transposed into Regulation 2 of the Human Medicines Regulations 2012 (SI 2012/1916). The Court followed existing authority from the Court of Justice of the European Union in the case of *D & G (C-358/13, C-181/4) CJEU.*

Judge's interventions

In ***Inns and Another*** *[2018] EWCA Crim 1081* the Court dealt with an appeal in which there was significant criticisms of the interventions made by the trial judge whilst one of the appellants (husband and wife) gave evidence. The Court dismissed the appeal and made general comments *inter alia* about the judge's role in asking questions.

Modern Slavery Act 2015

In ***Gega and Another*** *[2018] EWCA Crim 667* the Court dealt with appeals which raised a common issue as to whether the legal (or persuasive) burden of proof rests on the defendant when a defence is raised under section 45 of the Modern Slavery Act 2015 ("the 2015 Act"), or whether the defendant bears only an evidential burden with the prosecution having to disprove to the criminal standard one or more of the elements of the defence.

The Court concluded:

> "In our judgment, section 45 of the 2015 Act does not bear the interpretation urged by the prosecution upon, and accepted by, the judges below. It does not implicitly require the defendant to bear the legal or persuasive burden of proof of any element of the defence. The burden on a defendant is evidential. It is for the defendant to raise evidence of each of those elements and for the prosecution to disprove one or more of them to the criminal standard in the usual way".

Section 4 Contempt of Court Act 1981

In ***Sarker v. BBC*** *[2018] EWCA Crim 1341* an order was made under Section 4(2) of the Contempt of Court Act 1981 prohibiting publication of any report of the trial until after the jury returned its verdict. On appeal by the BBC (supported by other news organisations) the Court said:

> "These points serve to underline the importance of judges giving careful scrutiny to any application for reporting restrictions. There is comprehensive assistance in "*Reporting Restrictions in the Criminal Courts*"[1] published by the Judicial College and prepared in collaboration with the Media Lawyers Association, the News Media Association and the Society of Editors. This guide covers all types of reporting restrictions. Part 4.5 deals with postponement orders under section 4(2). As we have noted, the principal textbooks on criminal practice and procedure, *Blackstone* and *Archbold,* also provide guidance on reporting restrictions.

> The general application of the very strong common law principle of open justice has the result that for individual judges and practitioners, cases in which reporting restrictions of this sort are considered are relatively rare. In itself that exemplifies the importance of all concerned proceeding with caution only after a careful examination of the underlying principles".

Contempt of Court

The appellant in ***Re: Yaxley Lennon (aka. Tommy Robinson)*** *[2018] EWCA Crim 1856* was committed to prison for a total of 13 months for breach of an order made under section 4(2) of the Contempt of Court Act 1981. In considering the appeal the Court gave guidance on the law of contempt.

Disclosure

In ***R v. Kelly (Lee Paul)*** *[2018] EWCA Crim 1893* the Court was concerned with a drugs conspiracy and more particularly an application for disclosure as to the methods employed by an expert to gain access to an encrypted mobile. The Court, in dismissing the appeal, said that there was a high level of public interest in withholding the precise methodology by which a prosecution expert had been able to bypass the encryption software on a mobile phone said to have been used by a drug dealer, and the judge had been entitled not to require that information to be disclosed because a fair trial was still possible without it.

Confiscation

In ***Hayes*** *[2018] EWCA Crim 682* the Court considered a confiscation appeal where the issue was: To what extent can the family services which an individual provides as wife and mother constitute valuable consideration for the purposes of s. 78(1) of the Proceeds of Crime Act 2002 ("the 2002 Act")? The Court concluded:

> "The 2002 Act provides no definition, as such, of the word "gift" or the word "consideration". But what at least is plain from s. 78 (1) is, first, that the value of the property is to be assessed at the time of transfer; second, that the consideration must have

value and must have value in the sense of being capable of being assessed in money terms in a way which can then, as necessary, be utilised in accordance with the mathematical approach stipulated in s. 78 (2); and, third, that while at common law the adequacy of any consideration provided under an agreement is rarely to be investigated by the courts, such a matter is precisely the subject of focus for the purpose of s. 78 (1). If the consideration is of a value significantly less than the value of the property transferred then s. 78 (1) deems there to have been a "gift".

Sentencing

Sexual Harm Prevention Orders (SHPOs)

Orders of this type (and its predecessor the Sexual Offences Prevention Order) have been the subject of considerable observations by the Court. In ***R v Parsons and Morgan*** *[2017] EWCA Crim 2163* the Court (Gross LJ., Teare, Kerr JJ.) concluded that the guidance in ***R. v Smith*** *[2011] EWCA Crim 1772* (which dealt with SOPOs) remained generally sound and should continue to be followed. However, developments in technology and changes in everyday living called for an adapted and targeted approach in relation to risk management monitoring software, cloud storage and encryption software [30].

The Court went on to consider, blanket bans on internet access and the use of cloud storage [23]- [25], risk management monitoring software [16] – [19] and encryption software [27] – [28].

The Court was unwilling to conclude that a blanket ban on internet access could never be justified, but such a prohibition would be appropriate only in the most exceptional cases. In all other cases, a blanket ban would be unrealistic, oppressive and disproportionate – cutting off the offender from too much of everyday, legitimate living [10].

The following guidance was provided;

i) First, as with SOPOs, no order should be made by way of SHPO unless *necessary* to protect the public from sexual harm as set out in the statutory language. If an order is necessary, then the prohibitions imposed must be *effective*; if not, the statutory purpose will not be achieved.

ii) Secondly and equally, any SHPO prohibitions imposed must be *clear* and *realistic*. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.

iii) Thirdly, as re-stated by ***R v NC [2016]*** *EWCA Crim 1448*, none of the SHPO terms must be oppressive and, overall, the terms must be proportionate.

iv) Fourthly, any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances [5].

1. A person subject to an SHPO is automatically subject to notification requirements (section 103G(1)). An SHPO must operate in tandem with the statutory notification scheme. It must not therefore conflict with the notification requirements; and it is not normally a legitimate use of an SHPO to use it simply to extend the notification requirements prescribed by law. An SHPO should not be made for an indefinite period, unless the court is satisfied of the need to do so. It should not be made indefinite without careful consideration or as a mere default option. Where an indefinite order is made, unless it is obvious, reasons (even if brief) should be given as to why it is necessary (see ***R v McLellan and Bingley*** *[2017] EWCA Crim 1464* at [25]).

It is necessary recognise that the SHPO legislation defines "child" as a person under 18 (rather than under 16) [30].

Historic Sexual Offending

In ***R v Forbes*** *[2016] EWCA Crim 1388* it was held that the relevant maximum penalty is the maximum penalty available for the offence at the date of the commission of the offence. There is an exception to the general principle where the offender could not have received any form of custodial sentence at the time he committed the offence; in which case Article 7 and principles of common law fairness mandate that a custodial sentence should not be imposed if a custodial sentence is subsequently available at the time of sentence: see *Forbes* [13] and [111] – [121]. The limited extent of the exception was confirmed in ***R v L*** *[2017] EWCA Crim 43.*

In ***R v LDG*** *[2018] EWCA Crim 2264* (Sharp LJ., Foskett and Nicol JJ.) the appellant pleaded guilty to

sexual offences committed in the 1970s when he was 11 years old. The appellant received imprisonment (the maximum sentence at the time, for an adult, was 5 years). However, at the date of the commission of the offence no custodial sentence would have been available for an 11 year old and therefore a custodial sentence should not have been imposed. The sentence was quashed and, as the appellant had served time in custody, a conditional discharge was imposed.

The case serves a reminder for those involved in the sentencing process to be vigilant. Furthermore, one of the "Overarching Principles" set out in the Review of Efficiency in Criminal Proceedings (2015) is "getting it right first time." Omissions at first instance potentially undermine the integrity of the criminal justice system (see *Thompson* discussed below).

In ***R v AM*** *[2018] EWCA Crim 279* (VPCACD., Sweeney and Russell JJ.) the difficulty in ascertaining whether a custodial sentence was historically available was highlighted at [19] - [23]. Useful guidance in this regard can be found in the Current Sentencing Practice at L8-1900, which details the available custodial sentences for those aged 10-17 from 1954 to the present day.

The scope of s.11 (3) Criminal Appeal Act 1968

In ***R v Thompson*** *[2018] EWCA Crim 639* a specially convened Court (PQBD., Treacy LJ., Carr, Yip JJ. and Sir Peter Openshaw) heard four unrelated appeals together to consider: the scope of s.11 (3) Criminal Appeal Act 1968 (statutory restriction on appellants being treated more severely on appeal than in the court below) and whether consecutive extension periods pursuant to (s.226A/s.226B CJA 2003) may exceed the statutory maximum periods for a single offence (5 years for specified violent offences or 8 years for specified sexual offences).

Where engaged the provisions of s.236A CJA 2003 (special custodial sentences for offenders of particular concern) are mandatory (see ***R v Fruen*** *[2016] Crim LR 676* [6] and [27]). An offender sentenced to a standard determinate sentence is released at the halfway stage without his case being considered by the Parole Board. Offenders sentenced pursuant to s.236A CJA 2003 (special custodial sentence for offenders of particular concern) and s.226A/226B (extended determinate sentences) are not released at the half-way stage; the Parole Board considers release at the half way stage (in respect of s.236A prisoners) and after two thirds of the custodial term (in respect of s.226A/s.226B prisoners). If

not released by the Parole Board earlier, offenders may serve the whole custodial term. Thus the sentence is potentially more severe than a standard determinate sentence.

It is open to the CACD to restructure a sentence where the sentence passed by the Crown Court was unlawful in that it did not comply with the mandatory requirements of s.236A or if the Crown Court inadvertently failed to appreciate that an extended determinate sentence was available. However, the Court is required by s.11(3) of the Criminal Appeal Act 1968 to ensure. *'that, taking the case as a whole, the appellant is not more severely dealt with on appeal'*. In *Thompson and others* the Court held that a contemplated restructured sentence should be tested for severity by reference to the impact of the sentence on the offender. That includes fact-specific consideration of entitlement (or otherwise) to automatic release, of eligibility for parole, liability to recall on licence and of any ancillary orders imposed. If the sentence cannot be restructured in such a way that, taking the case as a whole, the appellant is not more severely dealt with, then the original sentence must remain, even if it does not comply with the mandatory requirements of s.236A.

The CACD is a court of review and may not be able to substitute a sentence that the offending warranted. The statutory restriction is in place to ensure that those with meritorious appeals are not dissuaded from lodging an appeal and the restriction underlines the importance of ensuring that the statutory regime is fully appreciated at first instance. A failure to impose the appropriate sentence thwarts the will of parliament and potentially undermines the public's faith in the criminal justice process.

The Court held that it is open to the court, in an appropriate (albeit exceptional) case to impose consecutive extended sentences where the total extended licence was in excess of the maximum licence period for a single offence. That option should not, of course, be deployed to create what could be considered as the equivalent of life licence or one that is otherwise oppressive in nature
[29].

Schedule 2 of the Criminal Appeal Act 1968

In ***R v KPR*** *[2018] EWCA Crim 2537* the appellant was originally sentenced to standard determinate sentences totalling 17 years. The mandatory provisions of s.236A CJA 2003 (discussed in *Thompson)* had been overlooked. The convictions were quashed by the CACD and a retrial was ordered. The appellant was convicted and resentenced to 17 years, pursuant to section 236A CJA 2003 comprising a custodial term of 16 years and an extended licence of 1 year. Concurrent standard determinate sentences were imposed on the other counts.

Schedule 2 (1) Criminal Appeal Act 1968 provides that following a retrial the sentencing court, *'may pass in respect of the offence any sentence authorised by law, not being a sentence of greater severity than that passed on the original conviction.'*

The court held that following the retrial the court was obliged to impose a sentence pursuant to s.236A CJA 2003 but had to take account of the differing release regimes to ensure the sentence was not of greater severity. This was an exception to the general principle that early release, licence and their various ramifications should be left out of account on sentencing: see ***R v Round*** *[2009] 2 Cr App R (S) 292; [2009] EWCA Crim 2667* at [44] per Hughes LJ, reaffirmed in ***R v Burkinskas*** *[2014] 1 WLR 4209; [2014] EWCA Crim 334* at [38]-[39].

The relevance of maturity in the sentencing process

In ***R v Clarke*** *[2018] EWCA Crim 185* the Court (LCJ., Warby and Dove JJ.) noted that;
"Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in ***R v Peters*** *[2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101 is an example of its application: see paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. 'The Age of Adolescence': thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."*

The point was further emphasised in ***R v Hobbs and DM*** *[2018] EWCA Crim 1003.*

Section six of "Sentencing Children and Young People: Overarching Principles" deals with the position where a significant age threshold is crossed. Suffice to say the youth and maturity of an offender are factors that must be considered in the sentencing process.

Technology and Reform in the Court of Appeal (Criminal Division)

Reform is ongoing in the Court of Appeal (Criminal Division). The Courts and Tribunals Modernisation Programme has made much progress in crime, including the introduction of the Common Platform and the Single Justice Service project in the Magistrates' Court.

The Court of Appeal (Criminal Division) remains committed to working towards a paperless system as part of the Reform process. The introduction of the Digital Case System ("DCS") in the Crown Court has been successful and many cases in the Crown Court take place with the use of electronic bundles. Parties can serve documents by uploading them to the system and can view all the relevant documents for that case online. DCS will be developed further over the next 12 months and it is anticipated that the system will eventually be used to facilitate paperless bundles in the CACD.

The use of DCS in the CACD will further be aided by the provision of Wi-Fi in the Royal Courts of Justice (RCJ). This will be introduced, in various parts of the building, throughout 2019. Once activated this will be a significant step in digital working in the CACD as well as being a useful tool to any visitor at the RCJ.

The CACD is now equipped with a number of video-link booths which can be used by advocates to have pre- and post-appeal consultations with their clients. Almost all appellants now appear via video link. This in itself has been a considerable development. A consequence of this, however, is that the situation often rises whereby counsel are unable to speak to their client because of the lack of facilities to do so at the RCJ. In extreme examples the courtroom could be vacated to allow counsel to speak, privately, with their client. The use of this video-link booths addresses that problem and places the CACD on a par with the provisions available at the Crown Court. Advocates can now communicate confidentially with their client.

Further, over the last 12 months the CACD has made use of video-links to facilitate witnesses giving evidence from abroad and from Crown Courts, either to avoid or to reduce unnecessary travel.

The CACD now also has "Clickshare" available in a number of courtrooms. "Clickshare" is a wireless presentation system that operates in the same way as it does in the Crown Court. Parties can connect devices (including laptops, tablets and smartphones) to the in-court system and present documents,

images or videos on the screens in the courtroom. The CACD no longer relies on CCTV being played through DVD players; this removes entirely issues regarding formatting.

October 2018 saw changes to the procedure by which applications are lodged with the CACD (see Crim PR 39.2). Previously any prospective applicant lodged a Form NG with the Crown Court, who would in turn forward the application to the Criminal Appeal Office along with a copy of any relevant papers. Thereafter the Registrar would request any additional documents from the Crown Court.

Now applications are lodged directly with the Criminal Appeal Office. Additionally applications for leave to appeal can be lodged electronically with the CAO. The benefits to this new process are manifold. No longer do applications spend time in the Crown Court before they make their way to the CACD. Any defects or ineffective applications can be addressed immediately. Also, in tandem with the use of DCS to access Crown Court documents, many applications are ready for consideration by a single judge much sooner than they would have been under the previous procedure.

It is anticipated that there will be further developments over the course of the next 12 months and the commitment to using technology to improve the efficiency of the administration of justice is to be welcomed.

Contacts

Over the reporting year the Registrar of Criminal Appeals was delighted to welcome the following visitors:

November 2017 – 3 Judges on the European Judicial Training Network (EJTN) from Spain, France and Hungary.

March 2018 – A delegation of Judges from Greece.

April 2018 – A delegation of Judges from Sri Lanka.

May 2018 – A delegation of Judges from Thailand.

June 2018 – Students from Syracuse University, New York

October 2018 – A delegation of Judges from Taiwan, a delegation of Judicial Officers from Ukraine and Canada and three Judges on the EJTN programme from Bulgaria, Germany and Sweden.

The Registrar also welcomed judicial visitors from Kyrgyzstan (Penal Reform International) in November 2018.

Summary and Statistics

1st October 2017 to 30th September 2018

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

The reduction in the number of cases received by the Court on an annual basis has continued with a total of 4830 applications received. This has allowed the office to make a significant decrease in the number of cases outstanding, although this does not seem to have had the expected impact upon average waiting times (See Annex A & B), this reflects the increased complexity of the cases which are lodged.

The majority of the applications for leave to appeal are determined by a single Judge, though some are referred directly to the full Court by the Registrar. In the reporting year, out of a total 920 conviction applications considered, leave was granted for 84 applications (9%), with 100 referred (11%) and 736 (80%) refused. Over the year, 2767 sentence applications were considered, 626 (23%) were granted, 163 (6%) referred and 71% were refused (See Annex C).

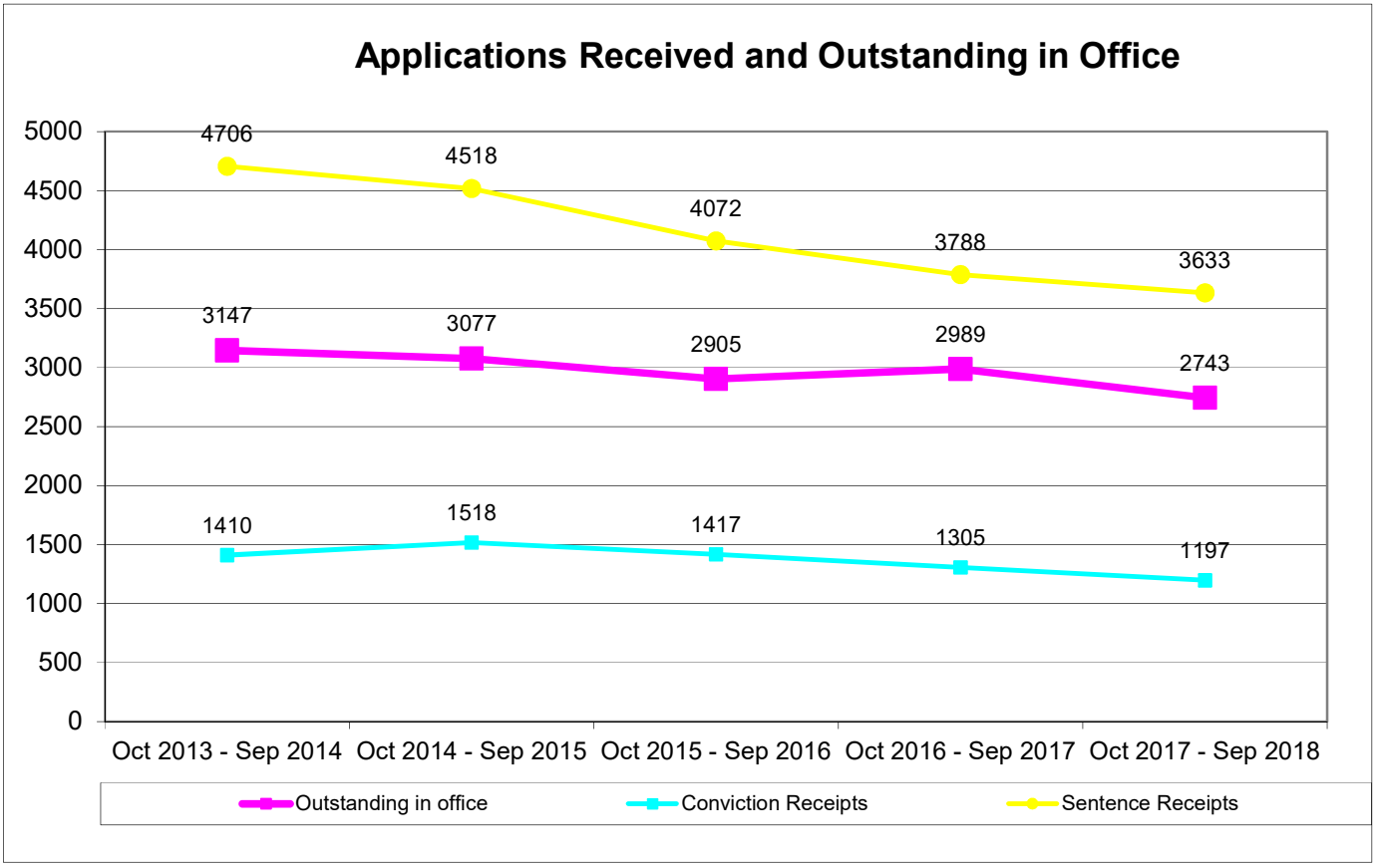
Of the 191 conviction appeals heard by the full Court, 79 (41%) were allowed. This represents a decrease of 24 cases from the preceding year. The corresponding figures for sentence appeals heard by the full Court was 1,220 (an increase of 37) of which 777 (64%) were allowed (See Annex D).

Renewed applications for leave to appeal against both conviction and sentence, accounted for 47% of the hearings in the reporting year. Of these, the full Court granted leave to appeal in 69 conviction applications, representing 16% of those renewed applications. The Court granted leave in 257 renewed applications for leave to appeal against sentence, representing 32% of those renewals (See Annex E).

It is difficult to quantify the success rate of appeals, because those received in each reporting period are not necessarily concluded with in the same reporting period. However, it can be seen that over the

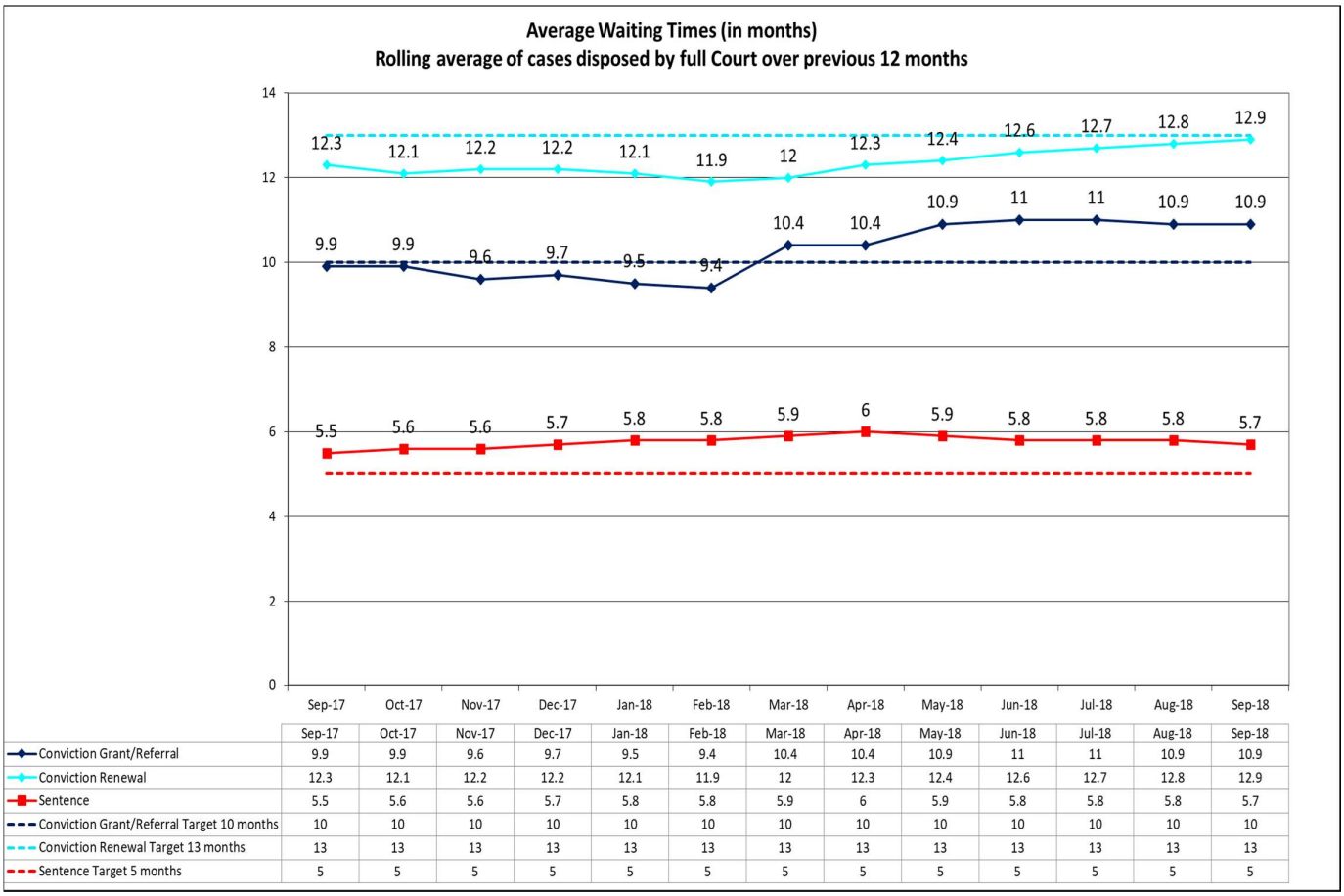
last five years the number of successful conviction appeals has been between 7 and 10% when considered as a percentage of the applications received. For sentence appeals it is between 21 and 23% (See Annex F).

Annex A


Applications Received and Outstanding in Office
5000
4500
4000
3500
3000
2500
2000
1500
1000
500
0
4706
4518
4072
3788
3633
3147
3077
2905
2989
2743
1410
1518
1417
1305
1197
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018
Outstanding in office
Conviction Receipts
Sentence Receipts

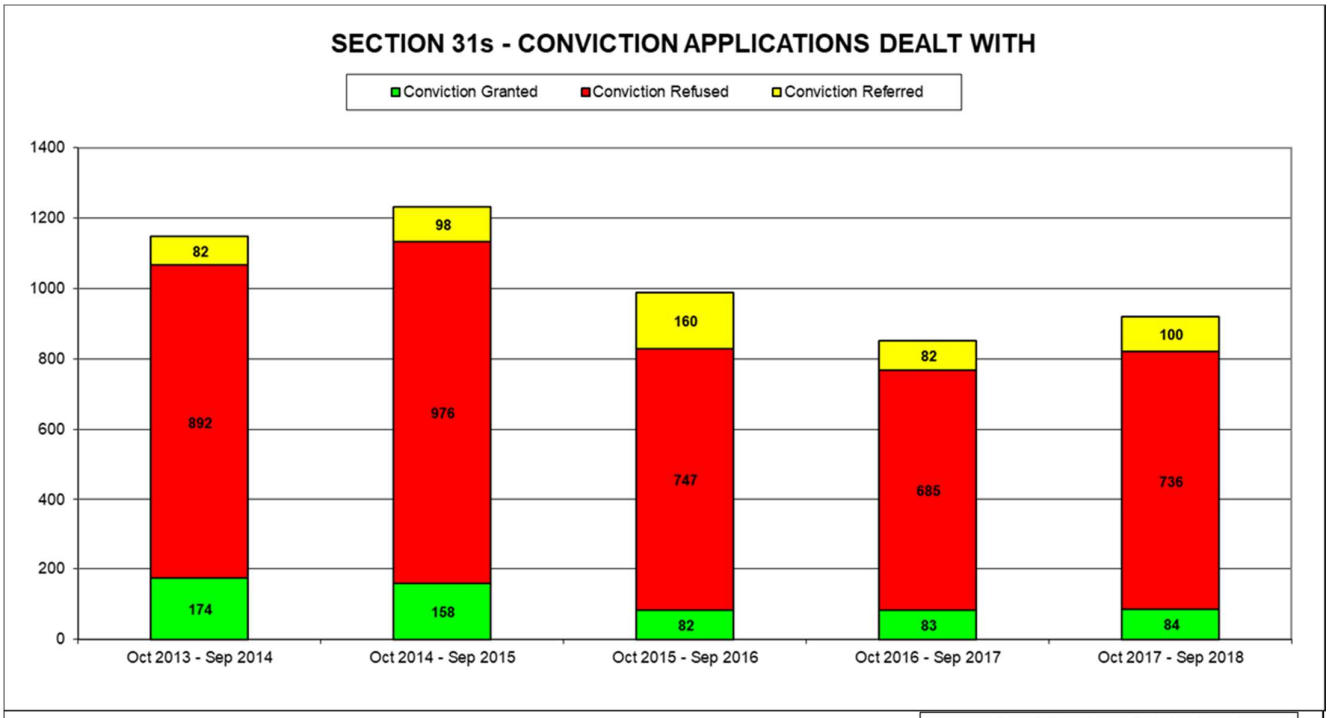
AnnexB

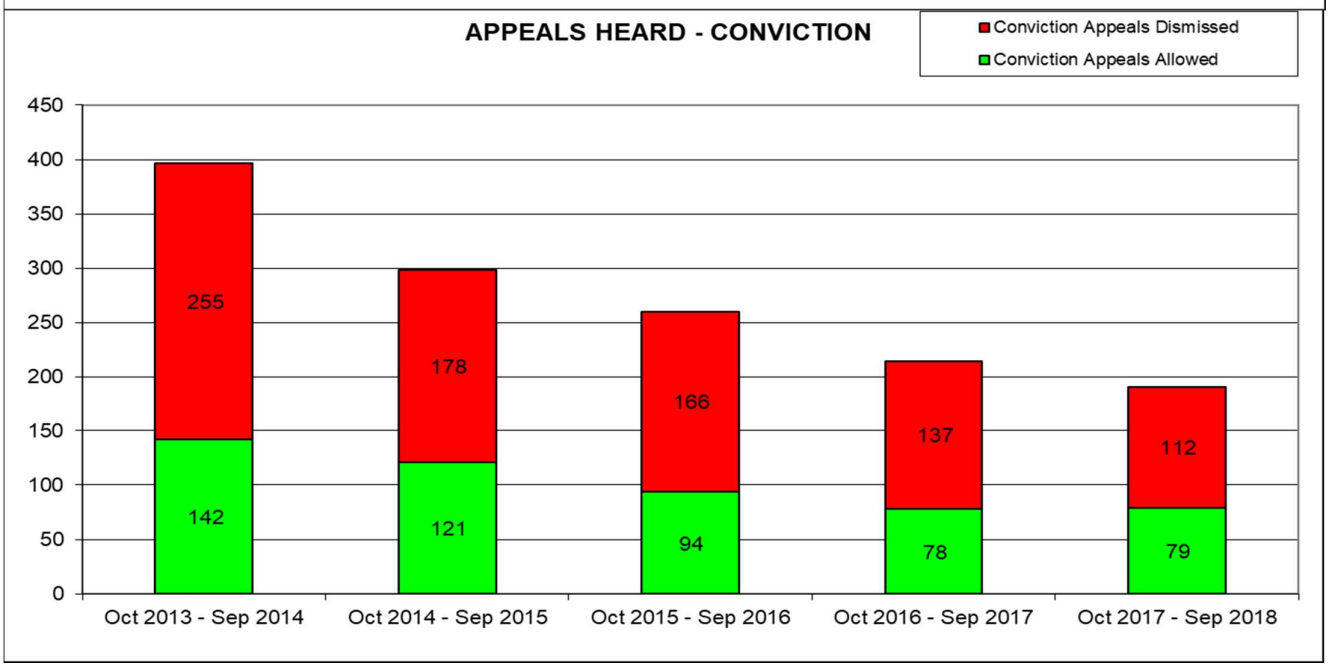
Annex B



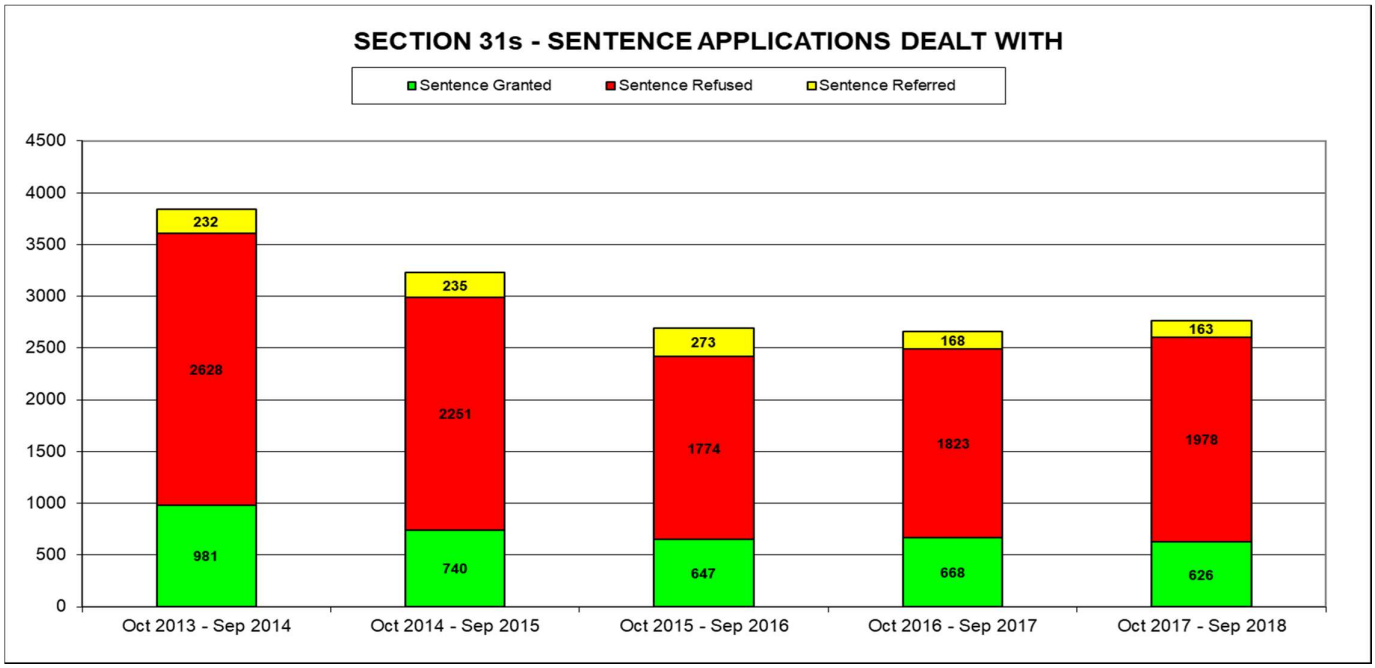
	Sep-17	Oct-17	Nov-17	Dec-17	Jan-18	Feb-18	Mar-18	Apr-18	May-18	Jun-18	Jul-18	Aug-18	Sep-18
Conviction Grant/Referral	9.9	9.9	9.6	9.7	9.5	9.4	10.4	10.4	10.9	11	11	10.9	10.9
Conviction Renewal	12.3	12.1	12.2	12.2	12.1	11.9	12	12.3	12.4	12.6	12.7	12.8	12.9
Sentence	5.5	5.6	5.6	5.7	5.8	5.8	5.9	6	5.9	5.8	5.8	5.8	5.7
Conviction Grant/Referral Target 10 months	10	10	10	10	10	10	10	10	10	10	10	10	10
Conviction Renewal Target 13 months	13	13	13	13	13	13	13	13	13	13	13	13	13
Sentence Target 5 months	5	5	5	5	5	5	5	5	5	5	5	5	5

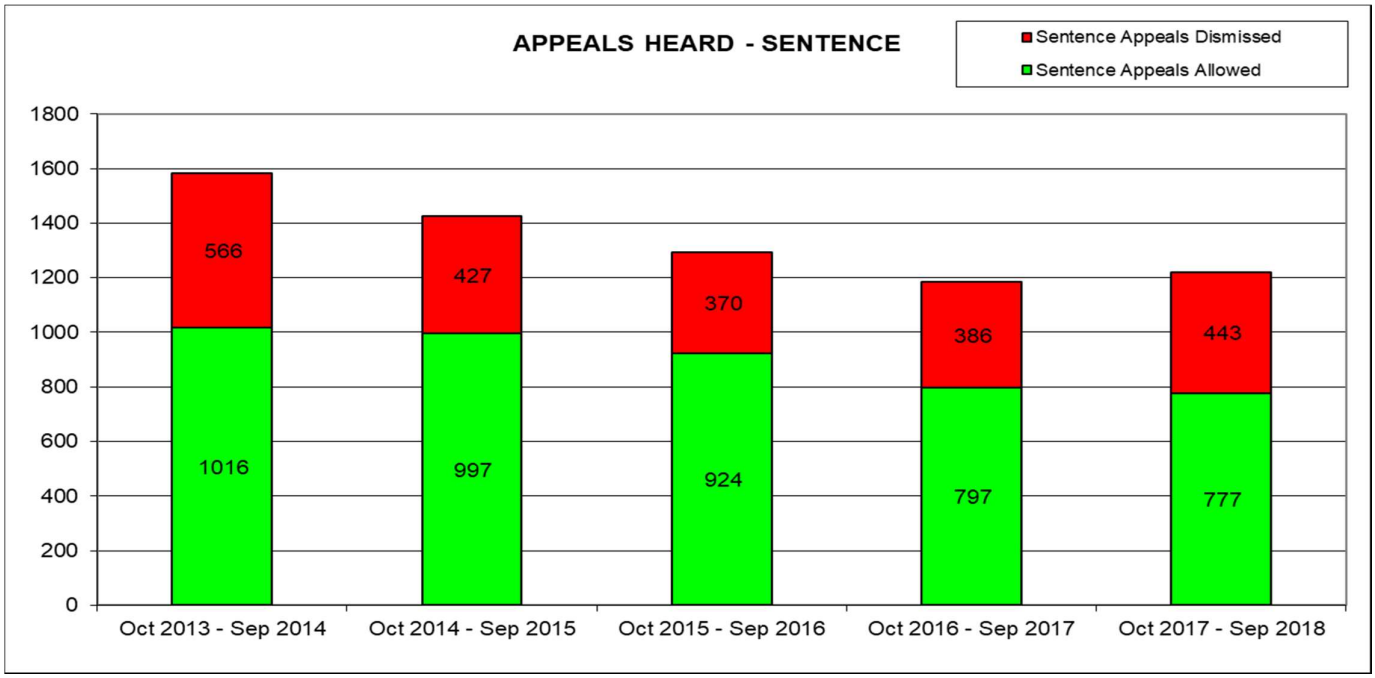
Annex C


SECTION 31s - CONVICTION APPLICATIONS DEALT WITH
Conviction Granted
Conviction Refused
Conviction Referred
1400
1200
1000
800
600
400
200
0
82
892
174
98
976
158
160
747
82
82
685
83
100
736
84
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018

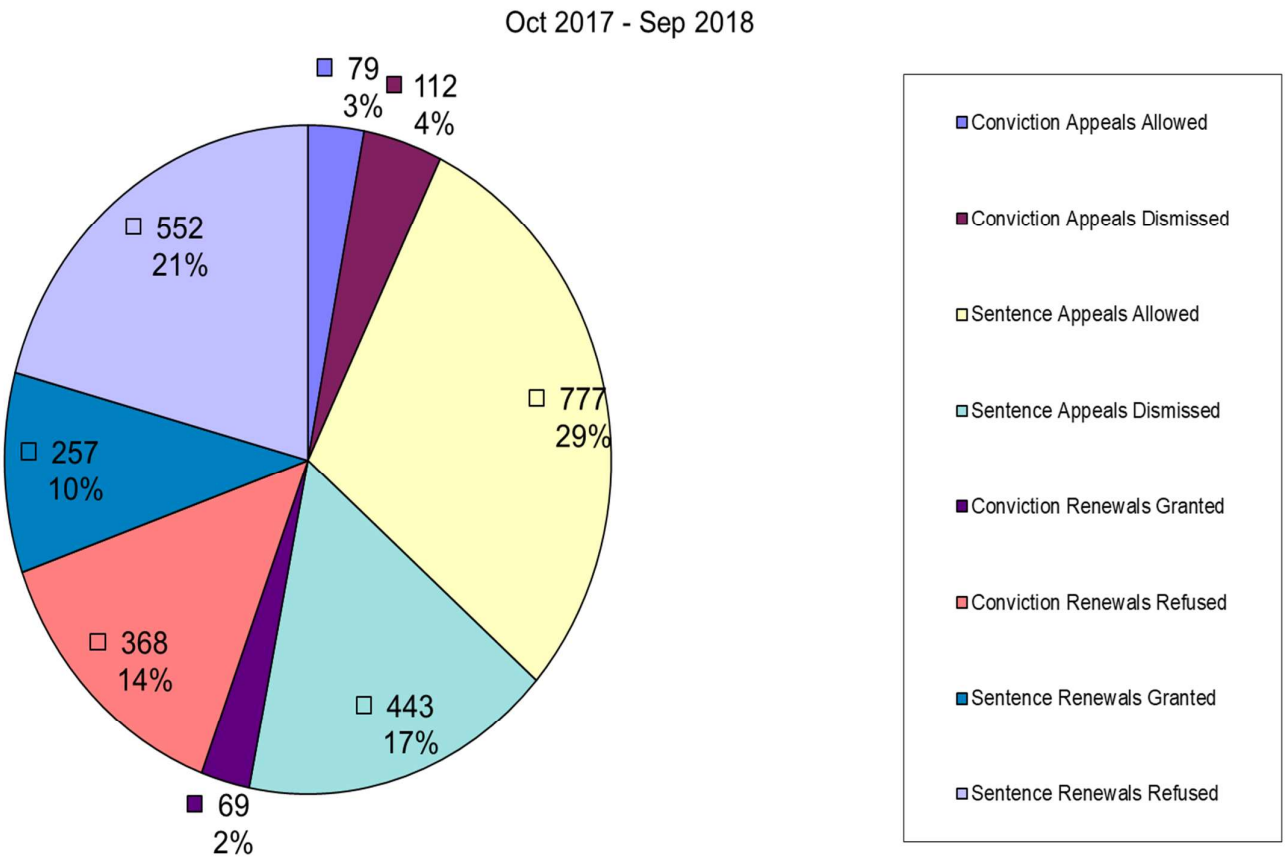

APPEALS HEARD - CONVICTION
Conviction Appeals Dismissed
Conviction Appeals Allowed
450
400
350
300
250
200
150
100
50
0
255
142
178
121
166
94
137
78
112
79
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018

Annex D


SECTION 31s - SENTENCE APPLICATIONS DEALT WITH
Sentence Granted
Sentence Refused
Sentence Referred
4500
4000
3500
3000
2500
2000
1500
1000
500
0
232
2628
981
235
2251
740
273
1774
647
168
1823
668
163
1978
626
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018

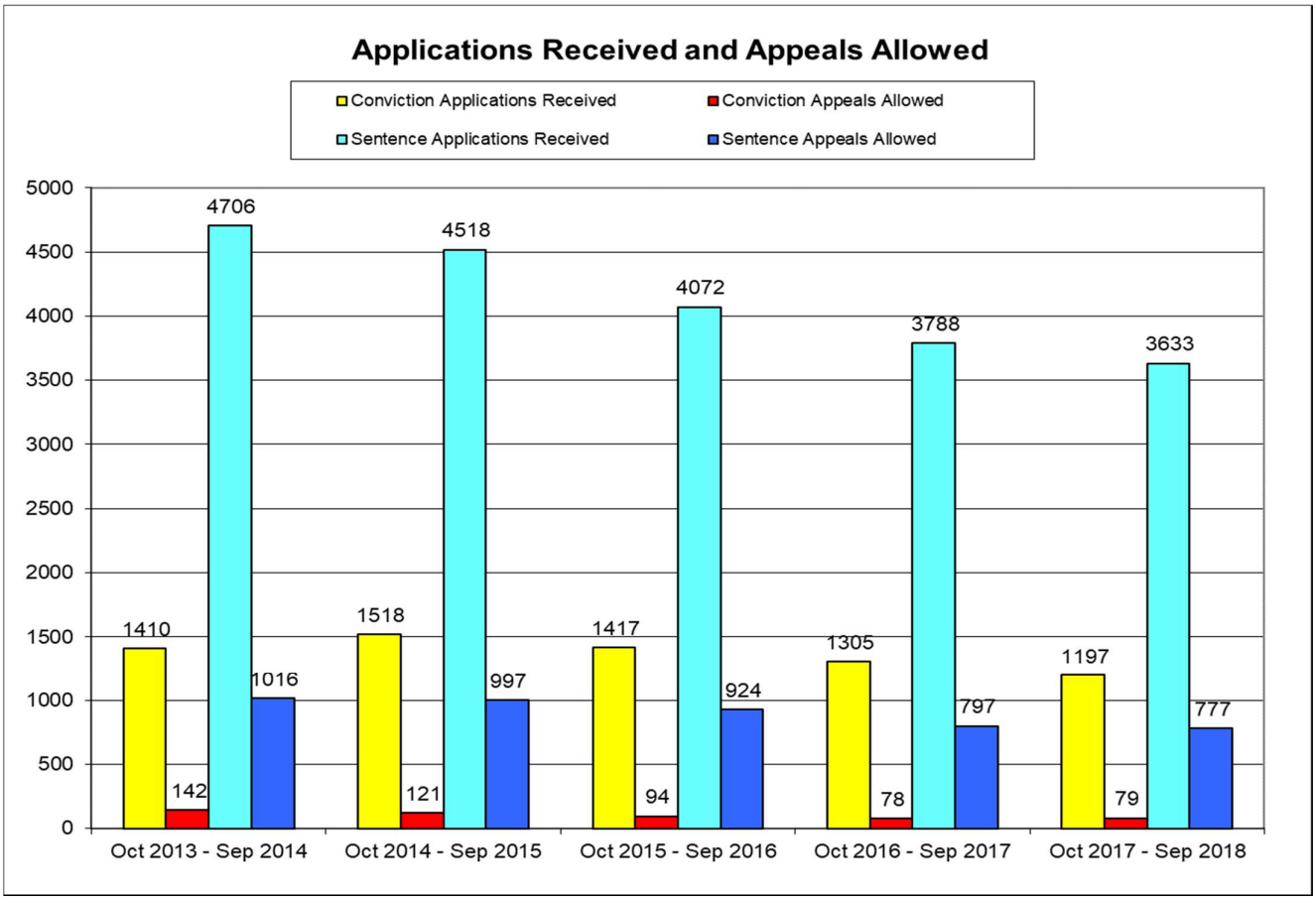

APPEALS HEARD - SENTENCE
Sentence Appeals Dismissed
Sentence Appeals Allowed
1800
1600
1400
1200
1000
800
600
400
200
0
566
1016
427
997
370
924
386
797
443
777
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018

Annex E

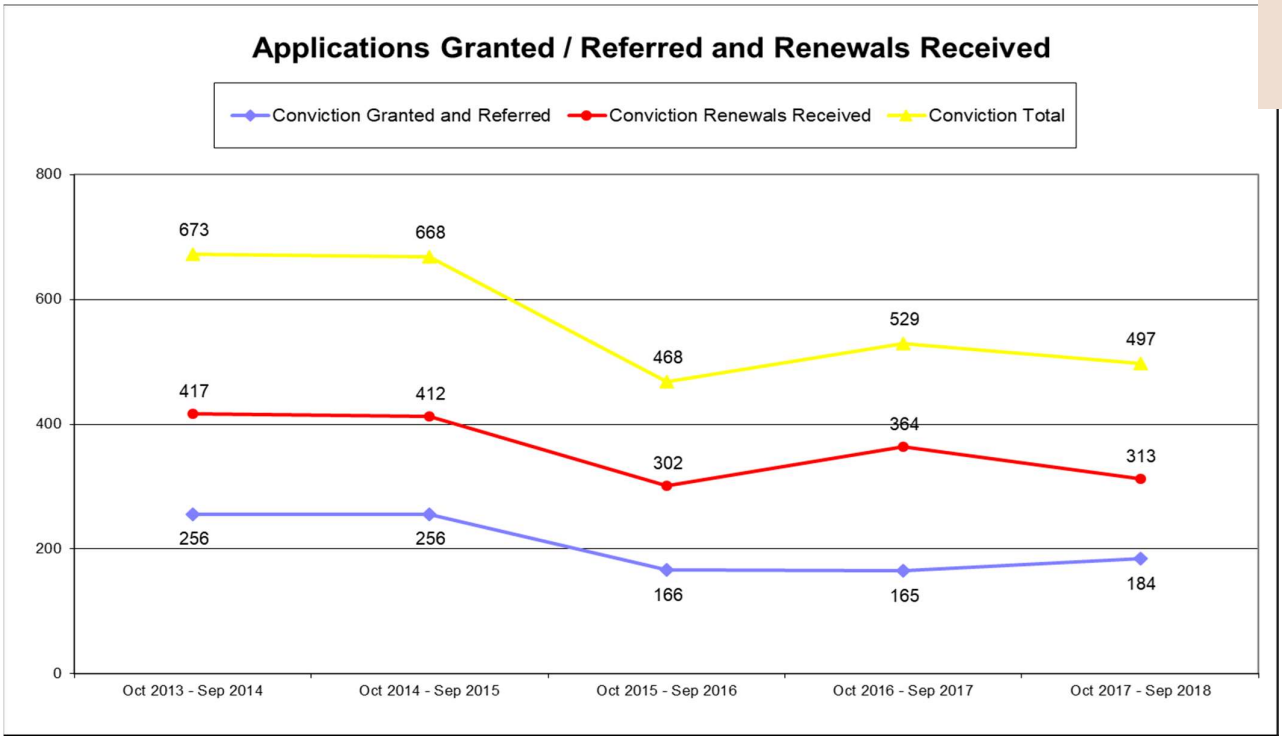

Oct 2017 - Sep 2018
79
3%
112
4%
552
21%
777
29%
257
10%
368
14%
443
17%
69
2%
Conviction Appeals Allowed
Conviction Appeals Dismissed
Sentence Appeals Allowed
Sentence Appeals Dismissed
Conviction Renewals Granted
Conviction Renewals Refused
Sentence Renewals Granted
Sentence Renewals Refused

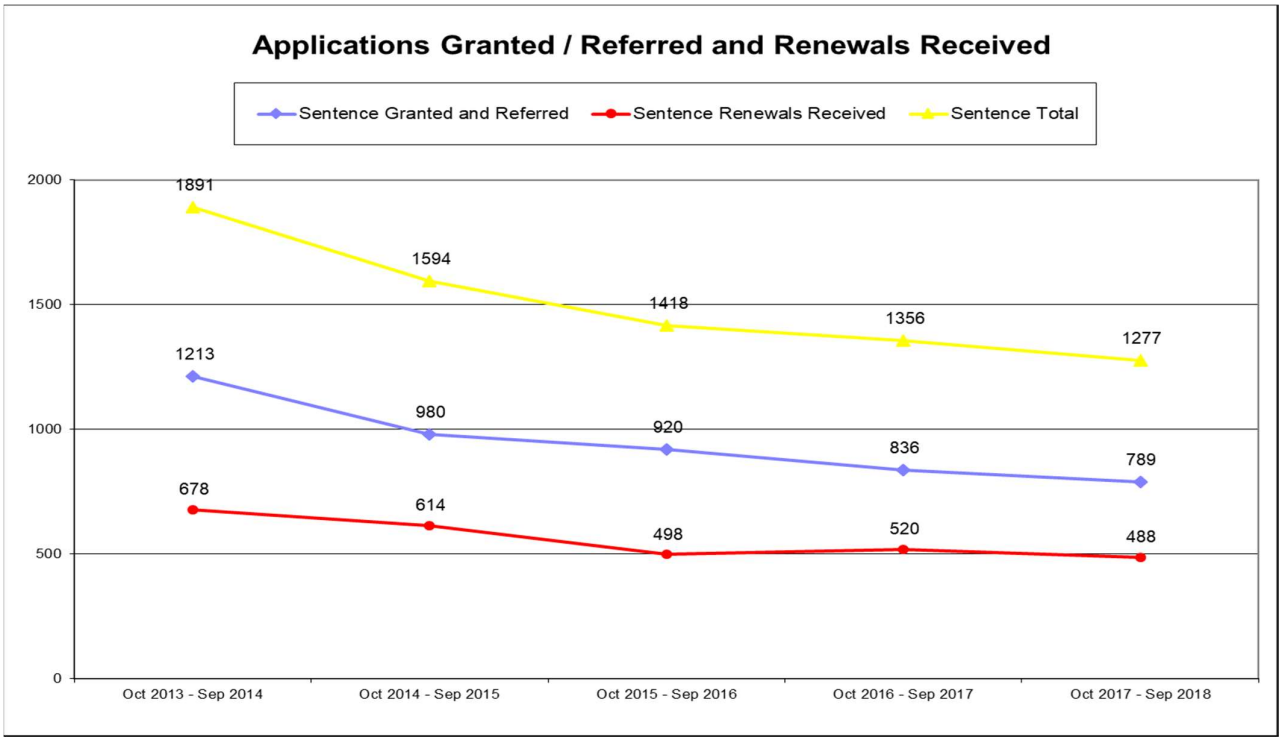
AnnexF

Annex F



Annex G


Applications Granted / Referred and Renewals Received
Conviction Granted and Referred
Conviction Renewals Received
Conviction Total
800
600
400
200
0
673
668
468
529
497
417
412
302
364
313
256
256
166
165
184
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018


Applications Granted / Referred and Renewals Received
Sentence Granted and Referred
Sentence Renewals Received
Sentence Total
2000
1500
1000
500
0
1891
1594
1418
1356
1277
1213
980
920
836
789
678
614
498
520
488
Oct 2013 - Sep 2014
Oct 2014 - Sep 2015
Oct 2015 - Sep 2016
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018

AnnexH

Annex H