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By mistakes we learn?
**— A review of criminal appeals
against sentence**

By Jessica Jacobson

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Forward

“Let the punishment fit the crime”

A justice system that works is one where mistakes can be easily, and fairly painlessly, corrected. The worst mistakes are wrongful convictions, but wrong sentences can also have devastating consequences on people’s lives. If individuals are imprisoned, when they should have got a community sentence, or are sentenced to more years in prison than is proportionate for their crimes, the harm done is immense. Sentences which are overturned and reduced get less publicity than wrongful convictions, and probably inspire less public sympathy. But disproportionate sentences are unjust and there must be an effective means of appealing such sentences if the system is to retain credibility.

There is a crying need for someone to shine a light on criminal appeals to sentence. This is an almost entirely unresearched subject, but indications are that the system is creaking. Dr Jessica Jacobson has done a short review for Transform Justice of the data on criminal appeals to sentence and asked some legal practitioners how well the system is working. Not very, was the answer.

Legal aid fees for appeal work were a key concern. Solicitors are paid only £170 to prepare an appeal to a Magistrates’ Court sentence. Lawyers appealing from the Crown Court are paid by the hour but the rate has not gone up in 10 years. The legal aid reforms face solicitors and barristers with a 17.5% cut to their fees. Already they can end up working for very little on appeals. This cut may make working on appeals one of the worst paid aspects of their work. Less scrupulous lawyers may only pay lip service in telling clients of their right to appeal.

It’s all too easy to persuade offenders not to appeal. If they appeal from the magistrates’ court, their sentence could go up; if they were given a short prison sentence, it may be nearly over by the time the appeal comes to court; and if they lose their appeal they can be faced with paying £250 towards costs. And many offenders, however unfair they think their sentence, can’t face the court process again.

Does the relatively low number of appeals to sentence indicate that sentences are generally right? Or does it merely signal how great are the disincentives to appealing? And how adequate are the systems by which magistrates and judges can learn from successful appeals against their sentences? This study is too small to come to firm conclusions about these questions. But it does highlight some important concerns and we hope it will be the starting point of some more extensive research into a vital but little discussed or understood element of the criminal justice system.

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1. Introduction

This report sets out the findings of a review of the sentence appeals system in England and Wales. The study was undertaken on behalf of the charity Transform Justice, and was funded by the Hadley Trust.

Background

In any jurisdiction, the system of criminal law defines certain acts as illegal, meaning that they are viewed as sufficiently damaging to society to merit intervention by the state when they are committed. It also sets out a structure by which the state determines whether illegal acts have been committed, and administers punishments for these acts.

In England and Wales, the magistrates' courts and the Crown Court have primary responsibility for determining whether and which illegal acts have been committed and administering the appropriate punishments. These courts operate within a wider civil and criminal courts structure which also includes the county courts, High Court, Court of Appeal and Supreme Court. In accordance with the principle of the separation of powers, the courts operate independently of the executive (the government) and legislature (Parliament). Scrutiny and oversight of the work of magistrates' courts and the Crown Court is carried out by higher courts, through the appeals process. Appeals are thus an integral element of the system of administration of criminal justice, and a fair and effective appeals process is a prerequisite for a fair and effective legal system.

The function of an appeals system within any institution can be described as concerning:

the supervision of inferior decision-makers by superior ones, with a view to providing the values of accuracy, fairness, consistency, and a mechanism for the generation of rules (Nobles and Schiff, 2002: 676).

In line with this definition, the criminal appeals system can be said to have two main purposes – as suggested by Lord Justice Auld in his 2001 *Review of the Criminal Courts of England and Wales*, citing Lord Woolf:¹

¹ Lord Woolf described the legal appeals process in these terms in his 1996 report on the civil justice system, *Access to Justice*.

The first [purpose] is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of engendering public confidence in the administration of justice by making those corrections and in clarifying and developing the law.

The criminal appeals system of England and Wales is complex, and has evolved through a succession of legislative acts. At its heart is the Court of Appeal, established by the Judicature Act of 1873. This has a civil as well as a criminal division, and sits in London at the Royal Courts of Justice. The Court of Appeal hears appeals from the Crown Court, while appeals from magistrates' courts are heard in the Crown Court, under the Magistrates' Courts Act 1980. The Supreme Court, housed in Middlesex Guildhall in Westminster, is the final court of appeal for criminal cases, having taken this role from the House of Lords in 2009 (under the provisions of the Constitutional Reform Act 2005).

Aims of the study

The criminal appeals system deals primarily with two types of decision-making in the criminal courts: decisions on conviction, and sentencing decisions. This report is concerned with sentence appeals only. Sentence appeals are potentially relevant to a much greater proportion of defendants than conviction appeals, since the large majority of people who appear before the courts plead guilty². Sentence appeals have much significance also for the wider public, for whom the sentencing of offenders is an abiding concern; and for the economy, given the drain on the public purse of the growing prison population. Another reason for the focus of this study on sentence appeals is that while the appeals system generally is under-researched, what little research has been conducted to date has tended to look at appeals against conviction.

This review considered three key questions:

- What is the process by which sentences can be appealed?
- How many appeals against sentence are launched every year, and with what results?

² In 2011, 70% of defendants who had been sent or committed for trial at the Crown Court pleaded guilty (MoJ, 2012). In 2011/12, 68% of all defendants dealt with at magistrates' courts pleaded guilty, while just 4% were convicted after trial (the most common other case outcomes were proofs in absence [14%] and discontinuances [10%]) (CPS, 2012).

- To what extent is the sentencing appeals system able to achieve its purposes of correcting wrong decisions, clarifying the law, and engendering confidence in justice?

These questions have been addressed through a review of the existing research literature on the criminal appeals system; a review of published data on criminal appeals, supplemented by requests to the Ministry of Justice and Legal Services Commission for additional data; and a series of interviews with expert respondents. The respondents included one academic; three criminal solicitors; one criminal barrister; a Youth Court magistrate; and two judges and two members of the administrative staff at one Crown Court. In addition to the interviews, informal discussions were held with a small number of other judges and recorders at the Crown Court, and two other barristers.

Chapter 2 of this report will address the first of the research questions: that is, it will provide an overview of the processes by which sentences are appealed. The chapter that follows will present a summary of the existing data on appeal hearings and outcomes. Chapter 4 will then consider the third of the research questions. This is a broad question, which a short review of this kind can only begin to unpack – hence the chapter will proceed by identifying some of the key issues that have emerged from the research conducted to date, and suggest areas that would benefit from further, more in-depth study.

2. Appeals against sentence: the process

There is, effectively, one system for appealing against sentences passed in magistrates' courts and another system for appeals against Crown Court sentences. Each is described in turn below. This is followed by a brief discussion of Attorney-General references for unduly lenient sentences.³

Sentence appeals from magistrates' courts

Magistrates' courts are a central component of the criminal justice system and deal with around 95% of all cases. During 2011, this amounted to 1,735,000 criminal cases (MoJ, 2012). Magistrates' sentencing powers are limited to six months' custody, or up to 12 months' in total for more than one offence.

For the most part, appeals of magistrates' court decisions are heard by the Crown Court. There are some further and additional routes by which magistrates' court sentences can be appealed, which are pursued relatively rarely. These are described in Appendix A of this report, which also includes a diagram of the appeals processes.

Any defendant (and the parent or guardian of a young offender) has an automatic right of appeal to the Crown Court against a sentence passed at a magistrates' court, provided a notice of appeal is lodged within 21 days of sentencing. Pending the appeal, the defendant will usually be required to start serving the sentence. An appellant's lawyer can apply to the magistrates' court or Crown Court for bail, if custody has been imposed; but it is unlikely that this will be granted. The prosecution has no right to appeal a magistrates' court sentence, but may be able to challenge the sentence through the High Court (see Appendix A).

Crown Court appeal hearings and outcomes

The Crown Court will consider an appeal of a magistrates' court sentence by way of a full re-hearing. The Court should comprise a High Court judge, circuit judge or recorder (as the presiding judge), plus two to four magistrates who were not concerned with the original case. Where an appeal from the Youth Court is being heard, all the magistrates must be qualified to sit in the Youth Court. At the appeal hearing, the magistrates sit as judges of the Crown

³ Much of the material presented in this chapter is drawn from Taylor (2012). Other sources of information used here include Justice (2011) and the CPS, http://www.cps.gov.uk/legal/a_to_c/appeals_to_the_court_of_appeal/.

Court and are expected to participate fully in decision-making, but must follow the presiding judge on matters of law.

The Crown Court is expected to determine the appropriate sentence for the offence under consideration without taking into account what sentence was originally passed by the magistrates' court. One of the following scenarios will then arise:

- The Crown Court opts for a significantly different sentence to the original sentence. In this case, the appeal is allowed and the new sentence is passed. The new sentence may be harsher than the original sentence imposed by the magistrates' court, but is limited to the magistrates' powers of sentencing.
- The Crown Court opts for a sentence which is the same as or similar to the original magistrates' court sentence. In this case, the appeal will be dismissed.
- The Crown Court opts to remit the case back to the magistrates' court for sentencing, with its opinion.

Whatever the outcome of the appeal, the presiding judge should give the reasons for the Court's decision.

Funding and costs

An appeal against a sentence passed in a magistrates' court can be funded by legal aid if the appellant passes the interest of justice test (which concerns the merits of the case) and the means test for Crown Court cases. The appellant, through his or her lawyer, must apply for fresh funding for the appeal.

Appellants who meet both the interests of justice and means test criteria are issued with a Representation Order and do not pay any contribution towards the costs of the appeal. Those who meet the interests of justice criteria but have disposable income above the means test threshold are issued with a Representation Order together with a notice that they are liable to pay a contribution to costs on conclusion of appeal, depending on the outcome. If the appeal is subsequently abandoned or dismissed, the defendant is required to pay a contribution of £250.

Once a Representation Order is granted, a fixed fee for litigation work on the appeal is payable under the Litigators' Graduated Fee scheme, and a fixed daily rate for advocacy work under the Advocates' Graduated Fee Scheme. However, with regard to the latter, the

barrister can ask for additional payments on the grounds that the fixed rate is insufficient. Appellants whose case does not meet the interests of justice criteria must pay for legal representation (unless they can find a lawyer prepared to work on a pro bono basis) or represent themselves.

Sentence appeals from the Crown Court

The Crown Court deals with cases at the serious end of the spectrum of offending. Defendants sentenced in the Crown Court include those who have pleaded guilty to, or been found guilty of, offences heard at the Crown Court; and those who have pleaded guilty or been found guilty at the magistrates' court but have been committed to the Crown Court for sentencing because of the seriousness of the offences. Appeals against sentences passed in the Crown Court are heard by the Court of Appeal (Criminal Division). Cases can thereafter be appealed to the Supreme Court. For more details, and a diagram of routes of appeal from the Crown Court, see Appendix B.

A defendant who wishes to appeal his or her Crown Court sentence does not have an automatic right to appeal, but must first apply to the Court of Appeal for leave to appeal (unless the sentencing judge certifies that the sentence is fit for appeal, which occurs infrequently). The application for leave must normally be made within 28 days of sentencing.

The leave application is considered by a 'single judge' of the Court of Appeal, in a paper-based review. If the single judge grants leave to appeal, the case will be listed for a full Court of Appeal hearing. If leave is refused, a renewed application for leave can be submitted within 14 days, and this will then be determined by the full Court of Appeal: that is, two or three judges who will read the papers and announce the decision in open court. If the renewed application is refused, the appeal cannot be taken any further.

An application for bail pending appeal can be made to the Court of Appeal; this is usually considered by the single judge at the same time as s/he considers the application for leave to appeal. If refused, the bail application can be referred to the full Court.

Court of Appeal hearings and outcomes

If leave for appeal is granted, the appeal is heard by the full Court of Appeal in public. An appeal against sentence can be heard by two or three judges. The appellant will usually be represented by a barrister, who may be the same barrister as in the original case, although the appellant can ask the Criminal Appeal Office to instruct another. Alternatively the

appellant can represent him/herself. The prosecution will also be represented by a barrister. The appellant has the right to attend the hearing from custody, in person or via video-link.

The Appeal does not take the form of a re-hearing (unlike an appeal heard in the Crown Court), but is rather a review of the original sentencing process, and includes consideration of points and any new materials submitted by counsel. The Court's task is to determine whether or not the defendant should be sentenced differently to how s/he was originally sentenced. The Court will generally allow the appeal 'where some statutory or procedural requirement is not complied with, where the sentence is wrong in principle, or where the sentence is manifestly excessive or grossly disproportionate' (Taylor, 2012: para 10.22).

If the Court allows the appeal, it has the option of quashing the original sentence and replacing it with the sentence it deems appropriate; or simply quashing the original sentence. The Court cannot increase the original sentence. However, the Court can make a 'loss of time direction if the single judge rejects the appellant's initial application for leave to appeal, or if a renewed application for leave is rejected by the full Court. A loss of time direction means that time spent in custody between the date of the leave application and the date of refusal of the application does not count towards the appellant's sentence. The single judge or full Court has discretion over whether and how much time should be 'lost'. No loss of time direction can be made if leave to appeal is granted, whatever the subsequent outcome of the appeal.

While the large majority of Court of Appeal decisions concern only the specific case before it, the Court can consider several cases together for the purpose of producing general guidance for sentencers in the form of guideline judgements.

Funding

If the appellant has had legal aid in the original Crown Court hearing, the Crown Court Representation Order will cover the provision of legal advice on appeal – including the lodging of grounds of appeal if the initial advice is in favour of pursuing an appeal.

If leave to appeal is granted by the single judge, legal aid for the appeal hearing is also granted if it was requested in the application for leave, without means testing. The legal aid provided for the appeal hearing is generally limited to counsel. If the single judge refuses leave to appeal, there is no right to public funding for a renewed application for leave; thus an appellant who wishes to be represented at the renewal hearing must pay for counsel or find a pro bono barrister.

Attorney-General references for unduly lenient sentences

The prosecution has no right to appeal a Crown Court sentencing decision to the Court of Appeal. However, the Crown Prosecution Service or any other interested party (including the victim, member of the public, pressure group or MP) can ask the Attorney-General (AG) to refer a sentence to the Court of Appeal on grounds of undue lenience. Only sentences for 'relevant offences' can be referred by the AG; these include all indictable only offences, and some either-way offences as specified in orders made by the Home Secretary.

If the AG feels the case merits consideration by the Court of Appeal, he must first apply for leave to refer it. This application must be made within 28 days of sentencing. The Court of Appeal will only give leave to refer if it believes the original sentence to be arguably unduly lenient. If leave to refer is granted, the Court of Appeal then holds a hearing at which it will first decide if the sentence was too lenient, and then if it was *unduly* lenient. The test for undue lenience is high: an unduly lenient sentence is generally one where the judge has passed a sentence that is very substantially shorter than would be expected, or has made a significant error of law.

If the Court of Appeal decides that the sentence was unduly lenient, it must decide whether to increase the sentence and, if so, by how much. Some decisions are limited to the specifics of the case; in others, the Court of Appeal may provide guidance on the general level of sentencing appropriate for the offence.

A defendant must be informed in advance of the hearing that his sentence may be amended. If he is in custody, he has the right to attend the hearing; and if he is to be represented by a barrister who will be presenting an argument to the Court, legal aid will cover the reasonable costs of this.

Following a Court of Appeal decision on a referred case, it can be further referred by the AG or the defendant to the Supreme Court if it concerns a point of law of general public importance.

3. Appeals against sentence: the figures

This chapter provides Ministry of Justice data on sentence appeals. The chapter deals with, in turn, appeals against magistrates' court decisions heard in the Crown Court; Court of Appeal hearings of appeals against Crown Court decisions; and Attorney-General references for unduly lenient sentences.

Sentence appeals heard in the Crown Court

Table 3.1 shows the total number of magistrates' sentence appeals dealt with by the Crown Court over the years 2006-2011. It is clear from the table that the number of appeals heard has been broadly consistent in this six year period – ranging between a low of just under 6,200 in 2011 and a high of around 6,800 in 2009. The proportion of appeals allowed has been remarkably consistent – varying very narrowly between 45% and 47%.

Table 3.1: Sentence appeals heard at Crown Court, 2006-2011

Year	Total	Allowed	Dismissed	Abandoned ¹ or otherwise disposed ²	% allowed
2006	6,533	3,071	1,826	1,636	47%
2007	6,288	2,830	1,802	1,656	45%
2008	6,568	2,955	1,802	1,811	45%
2009	6,838	3,065	1,918	1,855	45%
2010	6,295	2,960	1,839	1,496	47%
2011	6,186	2,828	1,792	1,566	46%

Source: Ministry of Justice *Judicial and Court Statistics, 2010 & 2011*, Chapter 4

Notes:

1 Includes both abandoned in court and abandoned before court appearance

2 Includes those remitted back to magistrates' courts

Table 3.2 sets the preceding figures on appeal hearings in context by giving the numbers of defendants sentenced in the magistrates' courts from 2006 to 2011. The total number of defendants declined by about 10% over this period. The table also shows the number of appeals heard at Crown Court as a percentage of defendants who were sentenced – which amounted to approximately 0.5% in each year.

Table 3.2: Defendants sentenced in magistrates' courts, 2006-11

Year	No. sentenced	No. sentenced to custody	No. appeals heard in CC	Appeals heard as % of all defendants sentenced
2006	1,343,985	53,431	6,533	0.49%
2007	1,333,236	51,172	6,288	0.47%
2008	1,273,236	50,348	6,568	0.52%
2009	1,312,315	48,429	6,838	0.52%
2010	1,263,396	48,904	6,295	0.50%
2011	1,197,087	46,035	6,186	0.52%

Source: Ministry of Justice *Criminal Justice Statistics 2011*, Sentencing Tables Dec 2011

The legal representation status of appellants in the Crown Court in 2011 is shown in Table 3.2. From these figures, we can see that of adult appellants for whom status is known, 44% were legally aided, while 50% were privately represented and 6% unrepresented. Perhaps surprisingly, unrepresented adults do not have a markedly lower success rate than others.

Table 3.3: Legal representation status of sentence appellants at Crown Court, 2011

Age group	Legal representation status	Appeals against sentence			
		Total	Allowed (% of total)	Dismissed	Abandoned ¹ or otherwise disposed ²
Adult	Legally aided	1,695	808 (48%)	468	419
	Privately funded	1,941	807 (42%)	528	606
	Unrepresented	220	98 (45%)	68	54
	Unknown	1,705	804 (47%)	541	360
Child	Legally aided	266	142 (53%)	92	32
	Privately funded	162	71 (44%)	48	43
	Unrepresented	1	1 (100%)		
	Unknown	50	22 (44%)	7	21
Age unknown	Legally aided	5	3 (60%)	1	1
	Privately funded	60	38 (63%)	13	9
	Unrepresented	6	2 (33%)	2	2
	Unknown	74	32 (40%)	24	18

Source: HM Courts and Tribunals Service CREST system (provided on 21.8.12 in response to direct inquiry submitted to MoJ)

Notes:

- 1 Includes both abandoned in court and abandoned before court appearance
- 2 Includes those remitted back to magistrates' courts

The total cost of legal aid on sentence appeal cases heard in the Crown Court amounts to over half a million pounds in each of the past three years, as shown in Table 3.4.

Table 3.4: Legal aid costs for sentence appeals in Crown Court, 2009/10 – 2011/12

Year	Total spend	No. cases
2009/10	£578,000	3,474
2010/11	£530,000	2665
2011/12	£568,000	2,800

Source: Data provided by Legal Services Commission, 13.9.12, in response to direct inquiry

Sentence appeals heard in the Court of Appeal

As discussed above, there is a two-stage process to appealing to the Court of Appeal, with the appellant having first to apply for leave to appeal. Table 3.5 shows the numbers of applications for leave to appeal against sentence that were received by the Court of Appeal, and the numbers granted by the single judge and on renewal. The figures reveal that the number of applications for leave has increased slowly over the six years since 2006, and the proportion granted has fluctuated to some extent – hitting its lowest level, at 26%, in 2011.

Table 3.5: Applications to the Court of Appeal for leave to appeal sentence, 2006-2011

Year	Total received	Granted by single judge	Granted by full court on renewal	% granted (single judge or on renewal)
2006	5,082	1,261	425	33%
2007	5,087	1,363	519	37%
2008	5,422	1,204	663	34%
2009	5,443	1,298	429	32%
2010	5,454	1,184	500	31%
2011	5,623	1,063	425	26%

Source: Ministry of Justice *Judicial and Court Statistics, 2010 & 2011*, Chapter 7

The results of sentence appeals heard by the full Court of Appeal are shown in Table 3.6. The number of appeals heard remained fairly steady over 2006-11, while the proportion of those allowed ranged from a low of 67% (in 2011) to a high of 75% (in 2008).

Table 3.6: Results of sentence appeals heard by Court of Appeal, 2006-11

Year	No. heard	No. allowed	% allowed	Allowed as % of all leave applications
2006	1,966	1,391	71%	27%
2007	2,251	1,632	73%	32%
2008	2,094	1,567	75%	29%
2009	1,887	1,372	73%	25%
2010	2,081	1,456	70%	27%
2011	2,073	1,386	67%	25%

Source: Ministry of Justice Judicial and Court Statistics, 2010 & 2011, Chapter 7

The number of individuals sentenced in the Crown Court rose rapidly from 76,586 in 2006 to 102,162 in 2011. As shown in Table 3.7, over this period the number of sentence appeals heard in the Court of Appeal, as a proportion of all individuals sentenced, fluctuated between around 2% and 2.75%.

Table 3.7: Defendants sentenced in Crown Court, 2006-11

Year	No. sentenced	No. sentenced to custody	No. appeals heard in CoA	Appeals heard as % of all defendants sentenced
2006	76,586	42,586	1,966	2.57%
2007	81,506	44,034	2,251	2.76%
2008	88,828	49,177	2,094	2.36%
2009	94,590	51,802	1,887	1.99%
2010	101,951	52,609	2,081	2.04%
2011	102,164	56,663	2,073	2.03%

Source: Ministry of Justice *Criminal Justice Statistics 2011*, Sentencing Tables Dec 2011

Little information is available on the legal representation status of Court of Appeal appellants, and associated legal aid costs. However, the Legal Services Commission, in response to an inquiry submitted for this study, stated that the following were the legal aid costs for sentencing appeal cases taken to the Court of Appeal in 2011/12 (data supplied on 21.9.12):

- £567,539 for litigation (under the Litigator Graduated Fee Scheme), covering 2,800 cases

- £354,394 for advocacy (under the Advocacy Graduated Fee Scheme), covering 2,652 cases.

Attorney-General References for unduly lenient sentences

Table 3.8 provides details on offenders referred to the Attorney-General's Office (AGO) over the years 2001-2011. Here it can be seen, for example, that in 2011 a total of 377 offenders had their cases referred to the AGO, of which 299 fell within the remit of AG references and were considered by the office. The AGO applied to the Court of Appeal for leave to refer 121 of them, of which four were withdrawn – leaving a total of 117 applications to be considered by the Court.

The numbers of referrals to the AGO and subsequent applications for leave to the Court of Appeal fluctuate quite significantly over the 11-year period. However, relative to defence appeals against sentence, the level of referrals and applications is low overall: 2004 saw the highest number of referrals to the AGO, at 420; and 2001 saw the most applications for leave to refer, at 145.

Table 3.8: Referrals to the Attorney-General's Office, 2001-2011

Year	No. offenders ¹				
	Referred to AGO	Considered by AGO	Application to CoA for leave to refer	Withdrawn application	Application considered by CoA
2001	277	240	160	15	145
2002	340	290	148	9	139
2003	315	270	102	6	96
2004	420	398	159	22	137
2005	389	352	127	19	108
2006	382	359	160	16	144
2007	342	320	113	7	106
2008	274	248	80	9	71
2009	369	311	118	10	108
2010	342	256	90	13	77
2011	377	299	121	4	117

Source: Attorney General's Office website:
<http://www.attorneygeneral.gov.uk/ULS/Pages/Statistics.aspx>

Note:

1 In a case with more than one defendant, each offender is referred separately. The 117 sentences referred in 2011 were from 78 cases.

Table 3.9 has figures on outcomes of Attorney-General references. This table reveals that, each year, leave to refer is granted in the large majority of cases which reach the stage of consideration by the Court of Appeal; and, subsequently, the sentence is usually determined to be unduly lenient.

Table 3.9: Outcomes of Attorney-General references, 2001-2011

Year	No. offenders				
	Application considered by CoA	Leave granted	Determined unduly lenient	Sentence increased	Sentence determined not unduly lenient ¹
2001	145	137	124	91	21
2002	139	137	120	94	19
2003	96	91	88	78	8
2004	137	131	108	87	29
2005	108	99	82	67	26
2006	144	136	113	108	31
2007	106	96	86	75	20
2008	71	69	57	52	14
2009	108	102	77	71	31
2010	77	74	65	60	12
2011	117	108	97	94	20

Source: Attorney General's Office website:

<http://www.attorneygeneral.gov.uk/ULS/Pages/Statistics.aspx>

Note:

1 Either when application for leave is considered or at full hearing.

4. Questioning the sentencing appeals process

In the introduction to this report, it was argued that a fair and effective criminal justice system depends in part on the existence of a fair and effective system of criminal appeals. The appeals system is said to have two main purposes: first, the private purpose of correcting wrong decisions; secondly, the public purpose of building confidence in justice by making corrections and clarifying the law.

What does a criminal appeals system need in order to be fair and effective, and to achieve its purposes? The findings of this study suggest that there are three main requirements of the system:

- Decision-making by the judicial bodies within the appeals system must be fair and consistent;
- The system must be accessible;
- The system must enhance accountability within the courts and between the courts and the wider public.

Given the small scale of this review, it is not possible here to consider the above requirements, and the extent to which the appeals system meets them, in a comprehensive way. Nevertheless, various issues relevant to each of them have emerged over the course of the study, and are discussed below. This chapter ends with some suggestions concerning possible avenues for further research.

It should be noted that the three requirements listed above apply to the criminal appeals system as a whole; however, in line with the overall focus of this study, the discussion that follows is mainly concerned with sentencing appeals.

Fair and consistent decision-making

It is extremely difficult to assess whether decision-making on sentencing appeals is fair and consistent, because there is a fundamental lack of information on which any such

assessment could be made. The Ministry of Justice does not hold centralised data on sentence types appealed and sentence reductions applied following successful appeals.⁴

A small proportion of Court of Appeal decisions (on sentence and conviction) are published in various series of law reports, but these tend to be only those cases that provide some guidance on legal principles or contribute to development or interpretation of the law. One lawyer interviewed for this study complained that looking for reports of Court of Appeal decisions is 'like a random fishing exercise'; and, along with another lawyer, voiced a general frustration that advocacy in court and the provision of legal advice on appeals is hampered by the lack of information on appeal outcomes. Transcripts of all Court of Appeal decisions made since 1996, whether formally reported or not, are available through the (subscription) online database Casetrack. However, Casetrack does not allow for particular categories of judgement – such as decisions on sentence appeals – to be easily extracted and reviewed.⁵

Decisions on sentence appeals heard in the Crown Court are not published at all, and no transcripts of judgements are available (unless individually ordered and paid for). The only available data on Crown Court appeal decision-making are aggregate figures on numbers of appeals and appeal outcomes – as reproduced, with respect to sentencing cases, in the preceding chapter of this report.

Criticisms of appeal decision-making

Some of the respondents interviewed for this study raised concerns about what they perceive to be inconsistency of decision-making in the Court of Appeal and in Crown Court appeal hearings. One respondent, a lawyer, went further than this: arguing that Court of Appeal decisions are often 'arbitrary' and have the effect of creating 'bad law'. It was also suggested that any Crown Court appeal hearing can be compromised by the fact that the magistrates sitting on the case may be from the same bench as those who originally passed sentence – as is increasingly likely to occur following the recent amalgamation of many local benches. Another respondent argued that Court of Appeal judges can be constrained in their decision-making by a certain sense of loyalty to Crown Court judges.

⁴ According to a Ministry of Justice response (21.9.12) to a Freedom of Information request submitted for this study, these data could be obtained only through a manual search of locally-held court and case files.

⁵ <http://casetrack.com>. Casetrack can be searched for individual judgements, and also provides a list of all recently completed criminal cases in the Court of Appeal.

The lack of data on appeal decisions, at both Crown Court and Court of Appeal levels, means that it is not possible to evaluate respondents' concerns about inconsistency and possible bias. However, the common criticism of the Court of Appeal that it is 'grotesquely overworked' (Spencer, 2006), and hence its decision-making extremely rushed, lends weight to some of these concerns. In his *Review of the Criminal Courts* (2001), Lord Justice Auld wrote of the great speed at which judges of the Court of Appeal must work, which makes it 'difficult for them to apply and develop the law in a principled and consistent manner' (Chapter 12, para 84). Consequently, one of LJ Auld's recommendations for the Court of Appeal was that it should

'slow down' - its judges should be allowed more time for preparation and judgment writing as part of their sitting plan, and appeal hearings should be less rushed so as to allow advocates adequate time to deploy their arguments and judges to consider them (Chapter 12, para 101).

If the criticisms concerning overwork and rushed decision-making are true of the Court of Appeal generally, they are likely to be all the more true of its work on sentencing appeals, given that:

Sentencing appeals are the Cinderella of the appellate system. Typically they are listed en bloc, heard in a hurry, approached on a case-by-case basis, and give rise to a limited amount of consistent principle. Advocates can contribute to change by preparing careful skeletons and drawing attention to the issues and principles. But the Court of Appeal does not always have sufficient time to allow for any very sophisticated argument – save perhaps in cases involving Attorney-General Reference and guideline sentencing cases (Taylor, 2012: para 10.39).

And how much more might concerns about rushed and arbitrary decision-making be applicable to the largely hidden appeal work (on convictions and sentencing alike) of the Crown Court?

Although the summary appellate process is by far the largest part of the system, with over six times more appeals than from trial on indictment, it is very much the poor relation of the Court of Appeal and has traditionally been almost completely neglected in official reviews and academic research (Roberts and Malleson, 2002).

Accessibility

In one sense, it can be said that the magistrates' courts appeals process is highly accessible, given that every defendant has an automatic right to appeal, and there is legal aid provision (within various constraints). Appeals from Crown Court to the Court of Appeal are less accessible in that there is no automatic right of appeal; but any individual can apply for leave to appeal and, again, legal aid is available.

Bearing in mind this accessibility of the system, it is interesting to look again at the data in the preceding chapter on sentencing appeal hearings and applications for leave to appeal. In 2011, there were just under 1.2 million sentences passed in magistrates' courts, but only around 6,000 appeals against sentence heard in the Crown Court. Even if one considers custodial sentences only, of which around 46,000 were passed in magistrates' courts in 2011 (and which are more likely than non-custodial sentences to be appealed), the appeal rate looks low. In the Crown Court, more than 100,000 people were sentenced (more than 55,000 to custody) in 2011, but just 5,634 applications for leave to appeal were submitted.

Whether the seemingly low rates of appeal should be interpreted as problematic is an open question. Given the relatively high success rate of sentencing appeals at both levels, as also documented in the preceding chapter, it could be argued that the 'right' cases are, by and large, being appealed. (Although the remarkably consistent rate of allowed sentencing appeals heard at Crown Court – between 45% and 47% each year between 2006 and 2011 – itself begs some questions about how this consistency is achieved.) Moreover, a substantially higher rate would likely cause an array of practical difficulties for the courts, especially as the Court of Appeal is already said to be very over-burdened. On the other hand, some of the existing research literature and anecdotal evidence from respondents interviewed for this study suggest that defendants typically encounter a range of barriers to launching appeals against sentence – with the effect that appeal 'rights' are undermined, and the accessibility of the system in theory is not reflected in how it works in practice. The lack of accessibility of the criminal appeals process generally is described by Roberts and Malleson (2002) as its 'invisible weakness'.

Barriers to appealing would seem to relate to three main factors: first, lack of access to legal representation and good quality legal advice; secondly, defendants' general resistance to the idea of appealing; thirdly, the complexity of the appeals system.

Lack of access to legal advice and representation

Among the lawyers who were interviewed for this study, there was a view that the fixed fees payable to lawyers for appeal work, under current legal aid provisions, are so low as to be a serious disincentive to taking on this kind of work. One lawyer complained that the fees are 'absolutely absurd'. It was said also that it can be particularly difficult for a defendant to find new legal representation for an appeal, if s/he is unhappy with the lawyer who initially represented him/her: most legal firms have very little interest in taking on any new appeal cases, unless they are likely to be high profile, which the vast majority of sentencing appeals are not.

Similarly, Arkinstall (2004) reports that a general shortage of criminal lawyers, the complexities of appeal work, and low legal aid payments all contribute to the situation where defendants wishing to appeal can struggle to get legal advice. These difficulties relating to legal representation could have implications for the quality of legal advice offered to potential appellants. Research conducted by Plotnikoff and Woolfson (1993) in support of the Royal Commission on Criminal Justice found that advice offered on criminal appeals was often poorly informed and was of highly variable quality; the extent to which this is still the case is difficult to assess in the absence of more recent studies.

Defendants' reluctance to appeal

The lawyers interviewed for this study spoke of many defendants being generally reluctant to proceed with an appeal – even those facing severe sentences where an appeal could stand a reasonable chance of success. This reluctance derives in part from defendants' awareness of the risks associated with an appeal. For those who have been sentenced in magistrates' courts, the main risks are being required to contribute £250 to the costs of a failed appeal (although this does not apply to individuals who pass the means test for legal aid), or having their sentence increased rather than decreased by the Crown Court (although this apparently occurs very rarely). For appellants originally sentenced in the Crown Court, the main risk, although, again, not a great one, is that the Court of Appeal will make a 'loss of time' direction. It is possible, of course, that some defendants – because of inaccurate legal advice or their own anxiety - may over-estimate or exaggerate the risks of having to contribute to costs, having their sentence increased, or suffering a loss of time direction.

Another cause of defendants' reluctance to appeal is the very limited availability of bail pending appeal for those already in custody.⁶ What this means in practice is that a sentence appeal may be deemed worthless by a defendant serving a short custodial sentence, since the sentence may be completed or close to completion by the time the appeal is heard. Indeed, a successful appeal in this scenario could result in the defendant having the custodial sentence replaced with a community sentence, which would then have to be served in its entirety.

According to the lawyer respondents, the reluctance of defendants to appeal can also stem from a general apathy or resignation. This can express itself in the attitude of 'wanting to get on with it' when a sentence is passed, whatever the nature of the sentence, rather than engage in further battles with the criminal justice system. A lawyer with youth expertise commented that this is particularly true of child defendants, who are likely to be immensely bored and frustrated by the court process, and are usually keen to avoid having to return to court.

The complexity of the criminal appeals system

A more general limit to accessibility of the appeals process is the complexity of the criminal appeals system as a whole, with its entirely different routes of appeals against magistrates' court and Crown Court decisions, and various further appeal options. An 'over-complicated and muddled' (Spencer, 2006) system of this kind is intimidating and lacks transparency. Recognising this, LJ Auld's *Review of the Criminal Courts* made a strong case for streamlining the entire appeals process - although his recommendations in this regard have largely not been acted upon. An illustration of the complexity of the appeals process is the fact that a booklet produced by the organisation Justice on *How to Appeal* (2011), which covers (conviction and sentencing) appeals from the Crown Court alone, is over 50 pages in length.

Accountability

It is, in large part, by enhancing the accountability of sentencing decision-making in the criminal courts that the appeals system (as it relates to sentencing) can achieve its 'public' purpose of engendering confidence in justice. There are different aspects to this accountability. Magistrates and district judges should be held accountable for individual

⁶ The lack of bail provision for defendants pending appeal is described by Spencer (2006) as 'a feature of our system which, in my experience, our colleagues from continental Europe find both shocking and astonishing'.

sentencing decisions by the appeal work of the Crown Court; while Crown Court judges and recorders should be held accountable by the Court of Appeal. More broadly, the appeals system should strengthen the accountability of sentencers towards other professionals and practitioners in the criminal justice system; court users; and the wider public.

With regard to public accountability in the broader sense, it is surely undermined by the lack of public information about appeal decisions on sentencing, and the great complexity of the appeals system, discussed above: an absence of knowledge and understanding necessarily means an absence of accountability.

In recent years, the development of an increasingly structured system of sentencing guidelines – first by the Sentencing Guidelines Council, and since 2010 by the Sentencing Council - is intended to make the sentencing process in general more accountable. The implications of the guidelines for the sentencing appeals system have not yet been explored in a systematic way; and it remains to be seen whether the interplay between guidelines and appeal decision-making will add to the ambiguity and complexity of the appeals process or, conversely, make the process more transparent.

But what of accountability at the level of individual sentencers and cases? The appeals system will only enhance accountability at this level if there are mechanisms in place for feedback of appeal decisions to the lower courts. Anecdotal evidence collected for this study from discussions with sentencers and Crown Court administrative staff indicates that such mechanisms are limited.

Feedback of Crown Court appeal decisions to magistrates' courts

An experienced magistrate interviewed for this study reported that magistrates and district judges are not informed in advance if any of their sentencing decisions are being appealed to the Crown Court (unless they ask about a specific sentence, or they get a 'hint' from one of the legal advisors). After an appeal is heard, he said, there is no routine notification of the result to the sentencers, despite the fact that most magistrates, and the wider bench, would be keen to know 'because clearly it's very useful – it's education to know whether you're getting it right or not'. The information is available if one makes an effort to find out, or if one hears by chance, but there is no formal mechanism for feedback. A lawyer respondent likewise commented on the lack of feedback on appeal results to magistrates' courts – a situation he described as 'really sad' and 'a waste of money', since it permits the courts to keep repeating the same mistakes.

However, judges and administrative staff at a large Crown Court said in interview that appeal decisions made in the Court are routinely notified to the relevant magistrates' courts. This notification is undertaken via a standard form which is completed and sent out by the court's general office or by the clerk who has attended the hearing. There was some disagreement among the Crown Court respondents about whether or not the standard form is meant to include the reasons for the court's decision. (These reasons are stated in open court by the presiding judge, but are not usually written down unless the judge does so.) There was also uncertainty among the Crown Court respondents about whether and how notifications of appeal results are made available to individual magistrates and district judges; and one judge acknowledged that recent cuts to the administrative support provided to magistrates' courts may make internal communication of appeal outcomes difficult.

It was also apparent from the interviews at the Crown Court that there is no routine oversight or discussion of appeal decision-making within the court. Those discussions that do take place are ad hoc and informal.

Feedback of Court of Appeal decisions on sentencing to the Crown Court

The interviews with administrative staff and sentencers at the Crown Court revealed some differences of opinion and lack of clarity about the processes by which sentencers are notified of Court of Appeal decisions concerning 'their' cases. It is clear, however, that the Crown Court's general office always has notice that an application for leave to appeal has been submitted: in all cases, the application must first be sent to the Crown Court, which then forwards the necessary documentation to the Criminal Appeal Office. In general, the sentencer who originally dealt with the case will not be informed about the application at this stage.

It seems that the Crown Court general office is usually notified by the Court of Appeal of the outcome of the application for leave to appeal, and thereafter (where applicable) of the outcome of the full appeal hearing. In many or most cases, the individual sentencer who passed the original sentence also receives notification – via email if s/he is a full-time judge, or by letter (forwarded by the Crown Court office) if s/he is a recorder. The level of detail included with such notifications may vary; but in the case of full appeal hearings, a transcription of the judgement tends to be included. However, none of the Crown Court respondents interviewed for this study knew whether this system of notifications is reasonably fool-proof, or whether a significant proportion of outcome notifications are not received by the office and/or the sentencer. While it would be possible for the court's general

office to check initial applications for leave against outcomes subsequently received, this has not been undertaken.

It was apparent also from the discussions at the Crown Court that the court does not undertake any kind of general audit of appeals lodged against the decisions of its sentencers; nor did there seem to be any particular appetite for such an audit. At most, a recent Court of Appeal decision may be discussed by the judges over lunch, on an entirely informal basis. It was suggested that most Crown Court sentencers are relaxed about the prospect of having their decisions challenged through an appeal, and simply accept that some of their sentences are bound to be reduced in due course. 'It's their prerogative', one judge commented of the Court of Appeal. He also indicated that he had very little idea of how many times his sentences had been successfully appealed over the years, but mentioned in vague terms that there are 'search engines' into which one can enter one's name to look for Court of Appeal decisions.

However, sentencers' attitudes towards Attorney-General references for unduly lenient sentences may be somewhat different from their attitudes towards defence appeals. The system of notification of Attorney-General references (which are, of course, very much fewer in number than defence appeals) appears to be more clear-cut and comprehensive. It seems that individual sentencers are routinely informed in advance of a Court of Appeal's hearing on an Attorney-General's reference (as well as being informed of the outcome), and indeed are given the opportunity to submit information concerning the case to the Court. There are indications that judges tend to be more troubled or irritated if a sentence is increased following a reference than if a sentence is reduced following a defence appeal. There is also more general awareness of Court of Appeal decisions on Attorney-General references, as a national list of such decisions – described by one judge as the 'list of shame, which I've been on twice!' – is apparently circulated to Crown Courts on an annual basis.

Avenues for further research

Many issues have emerged through this study that warrant further, more in-depth research. More generally, the review has brought to light how very little is currently known about the sentencing appeals process. Scant information is available on sentence appeal decisions (including decisions to appeal) and outcomes; while certain procedural aspects of the system appear to be poorly defined and understood even by those working within the system. Most notably, perhaps, there seems to be virtually no scrutiny of, or even any

obvious means of scrutinising, appeal decision-making in the Crown Court. Given the fundamental importance of an effective and just system of appeals to the wider criminal justice system, the lack of knowledge is startling and should be addressed. Some of the most obvious gaps in knowledge apply to conviction as much as to sentencing appeals; but it is somewhat perplexing that the latter, while potentially of direct interest to a much larger proportion of people who appear before the courts, have been largely ignored by the limited research on criminal appeals that has been undertaken to date.

In broad terms, therefore, the case for further research on sentencing appeals is strong. Defining the parameters of such research is potentially a difficult task, given the very many diverse issues that could be addressed. The overarching aim of the research could be to address in greater detail the third question that was posed out the outset of this report, namely: to what extent is the sentencing appeals system able to achieve its purposes of correcting wrong decisions, clarifying the law, and engendering confidence in justice? And, building on this, to consider how the design and operation of the system could be improved in order that these purposes can be more easily achieved.

In line with this overarching aim, the research might address some or all of the following more specific - but nevertheless highly challenging - questions:

- How can information on appeal decision-making and outcomes (at individual case, court and aggregate levels) be made more accessible to sentencers, lawyers, court users, and the wider public?
- To what extent and in what ways can appeal decision-making feed into the training, development and practice of sentencers in both Crown and magistrates' courts?
- What are the legal and procedural barriers to the granting of bail pending appeal, and how can these be overcome?
- What are the factors that determine defendants' decisions whether or not to appeal against sentence?
- What are the factors that shape legal advice on appeals against sentence, and what is the quality and availability of legal advice and representation (both within and outside legal aid)?
- Where and how should the balance be struck between providing wide access to the sentencing appeals process and over-burdening the courts that must hear the appeals?

- What are the implications of sentencing guidelines for the operation and outcomes of the sentencing appeals process?
- What are the main areas of consistency and inconsistency in appeal decision-making?

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Appendix A: Other routes of appeal from magistrates' courts

Where a sentence passed in a magistrates' court is considered to be wrong in law or in excess of the magistrates' jurisdiction, rather than appealing to the Crown Court it may be possible to:

- appeal to the High Court (Administrative Court of the Queen's Bench Division) by way of case stated; or
- seek a judicial review of the magistrates' decision in the High Court.

Where an appeal of a sentencing decision has been heard by the Crown Court, the appeal decision can be challenged by the following routes:

- by way of case stated, to the High Court;
- by way of judicial review, at the High Court;
- an application for review by the Criminal Cases Review Commission (CCRC).⁷ If the application is successful, the CCRC will then refer the case back to the Crown Court.

Appeals to the High Court by way of case stated or judicial reviews in the High Court may thereafter be taken to the Supreme Court, which is the highest appeal court, if they concern points of law of general public importance.

The prosecution, unlike the defence, does not have a generic right to appeal a sentencing decision passed in a magistrates' court. However, the prosecution may be able to challenge a magistrates' court sentencing decision by way of case stated to the High Court or (in more limited circumstances) by seeking a judicial review in the High Court of the decision.

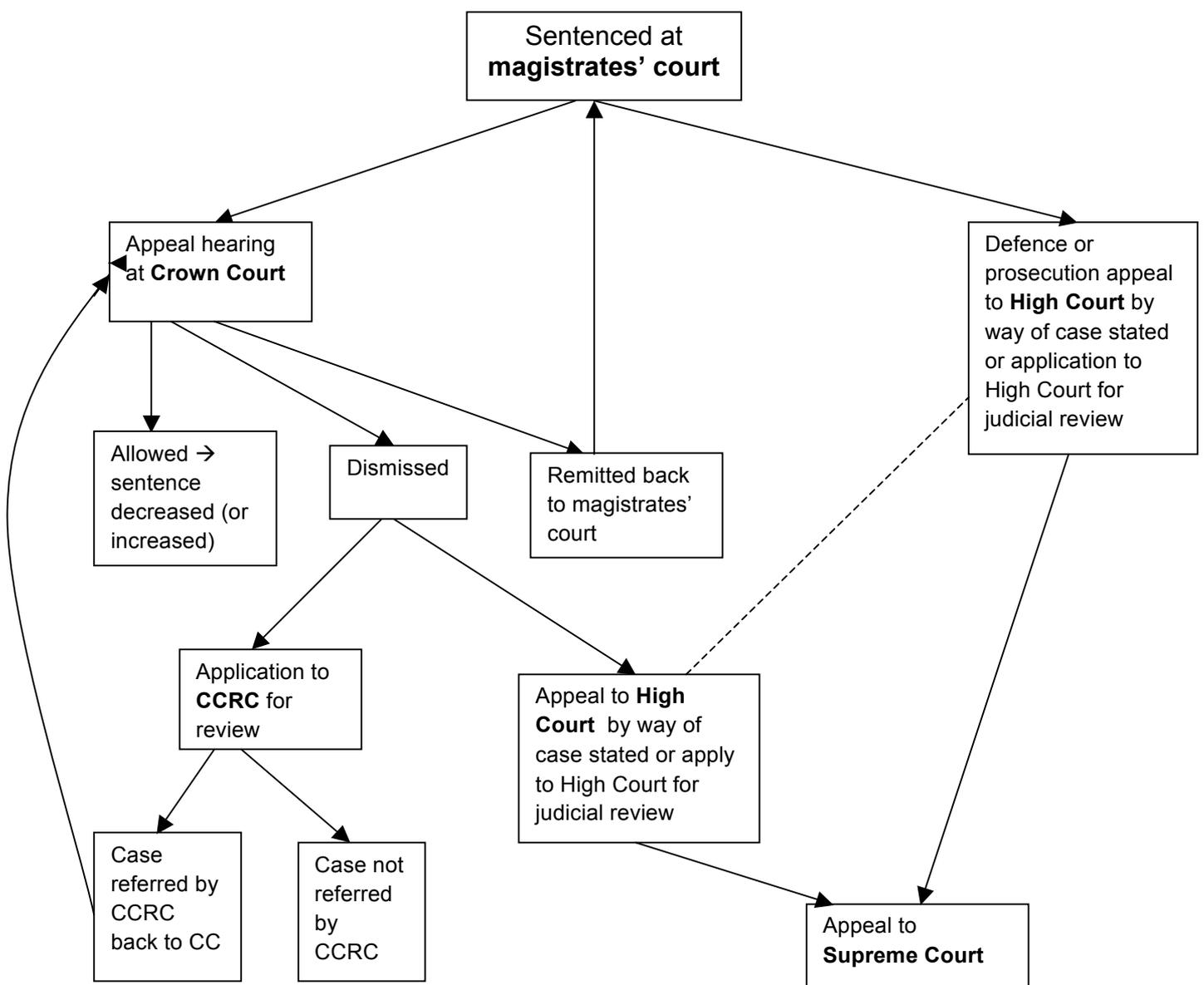
Relative to the numbers of magistrates' court appeals heard in the Crown Court (for details of which, see the next chapter), there are very few cases in which the aforementioned additional and further routes of appeal are pursued. In 2011, the High Court received 58 appeals by way of case stated from magistrates' courts; a figure which includes both defence and prosecution, and conviction and sentence, appeals. Thirty-six of these appeals were determined by the High Court, of which 14 were allowed. Thereafter 14 applications for

⁷ The Criminal Cases Review Commission (CCRC) is an independent public body set up in March 1997 by the Criminal Appeal Act 1995, as the last mechanism by which a sentence or conviction can be challenged.

appeal were presented from the High Court to the Supreme Court, of which seven were allowed. In the same year, the High Court disposed of 51 applications for judicial review of criminal decisions (of all kinds) by magistrates' courts, of which 14 were allowed (MoJ, 2012).

Figure A, below, depicts the various routes by which a sentence passed at a magistrates' court can be appealed.

Figure A: Appeals from magistrates' courts



Appendix B: Other routes of appeal from the Crown Court

If an appeal is dismissed by the Court of Appeal, the appellant can appeal to the Supreme Court, but must apply for leave to do so from either the Court of Appeal or the Supreme Court itself. This application will be successful only if a point of law of general public importance is involved, and it is considered important for this point to be addressed by the Supreme Court. In 2011, only two applications for leave to appeal Court of Appeal decisions (sentencing and/or conviction) were presented to the Supreme Court (MoJ, 2012).

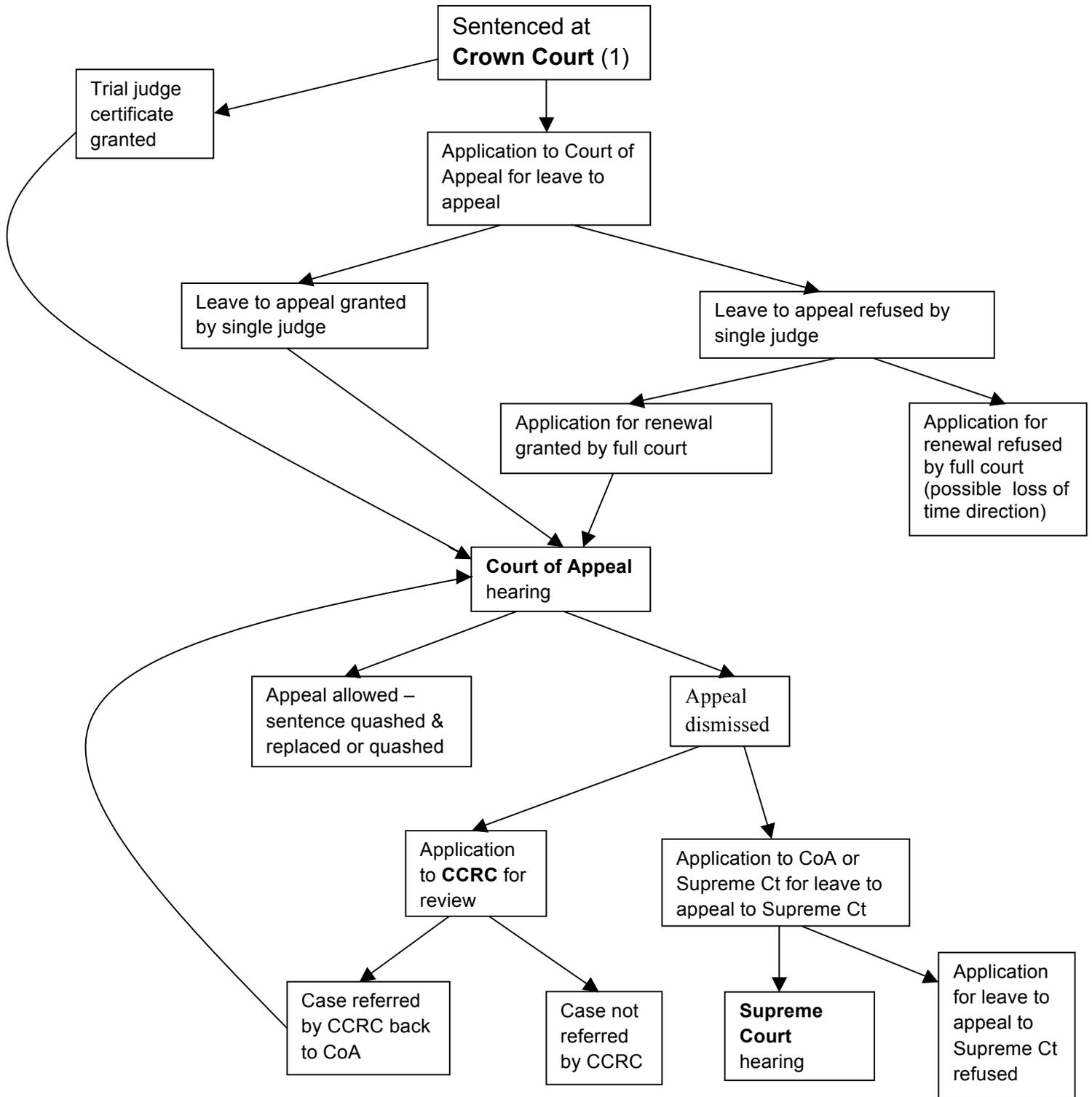
Another option for an appellant whose appeal has been dismissed by the Court of Appeal is to apply to the CCRC for review. The CCRC may then refer the case back to the Court of Appeal. The year 2011/12 saw the CCRC refer three sentence appeal cases to the Court of Appeal (CCRC, 2012).

Unlike magistrates' court decisions, decisions by the Crown Court 'in matters relating to trial on indictment' cannot be reviewed by the High Court either through judicial review or by way of case stated. There is some lack of clarity over the meaning of 'matters relating to trial on indictment'; and, in practice, 'the courts have been reluctant to interpret [this expression] as imposing a total ban on the High Court entertaining challenges to decisions of the Crown Court exercising its first instance jurisdiction' (Law Commission, 2007).⁸ However, by and large it is not possible for Crown Court (non-appeal) sentencing decisions to be challenged in the High Court.

Figure B, below, depicts the routes by which a sentence passed at the Crown Court court can be appealed.

⁸ See also Law Commission (2010).

Figure B: Appeals from the Crown Court



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