

Sentence Appeals in Victoria

Second Statistical Research Report

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Sentence Appeals in Victoria

Second Statistical Research Report

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Contributors

Authors

Dennis Byles and Paul McGorrery

Sentencing Advisory Council

Chair

Arie Freiberg AM

Deputy-Chair

Lisa Ward

Council Directors

Carmel Arthur

Hugh de Kretser

Fiona Dowsley

Helen Fatouros

David Grace QC

John Griffin PSM

Sherril Handley

Brendan Kissane QC

Shane Patton

Barbara Rozenes (resigned March 2018)

Geoff Wilkinson OAM (resigned June 2018)

Chief Executive Officer

Cynthia Marwood

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Background and research questions

One of the main roles of the Court of Appeal in Victoria is to review sentences on appeal from the County Court or the trial division of the Supreme Court and correct any errors identified in the sentencing process. In addition to remedying any identified errors, the Court of Appeal's decisions provide guidance to courts on sentencing matters and help maintain public confidence in the criminal justice system.¹

This report identifies all cases that were originally sentenced in the County and Supreme Courts (the higher courts) from 1 July 2013 to 30 June 2014 (the index year), and describes the outcomes in those cases in which sentences were appealed and finalised from 1 July 2013 to 31 December 2016 (the reference period).

Using that sample of cases, this report answers the following questions:

- What proportion of cases sentenced in the higher courts in 2013–14 resulted in a sentence appeal during the reference period?
- What proportion of sentence appeals were initiated by the offender, the Crown (the prosecution) or both the offender and the Crown?
- What original sentence types and lengths were most likely to be appealed?
- Which offence types were most likely to be involved in a sentence appeal?
- What changes were made to the original sentence after a successful sentence appeal (including both the total effective sentence and the non-parole period)?

The Council has previously published a report on sentence appeals in Victoria (the 2012 report), which examined various aspects of the criminal appeals process between 1996 and 2011.² In the lead up to that report, there were concerns about the backlog of criminal appeals, many of them appeals against sentence.³

Prior to the present report:

- the *Criminal Procedure Act 2009* (Vic) became firmly established, creating a more restrictive test for courts in determining whether to grant leave to appeal against sentence;⁴
- the Supreme Court implemented reforms in 2011 to its own appeals processes, imposing a stricter requirement of 28 days to file an application for leave to appeal and permitting judges to determine *on the papers* (without the need for oral arguments) whether to grant leave to appeal;⁵
- the Supreme Court made further reforms in 2012, allowing the Court of Appeal to concurrently determine leave to appeal alongside the substantive appeal (if leave is granted) in certain cases;⁶

1. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 966.

2. Sentencing Advisory Council, *Sentence Appeals in Victoria: Statistical Research Report* (2012).

3. *Ibid* 1, 5–6.

4. Previously, courts could grant leave to appeal solely on the basis of a reasonably arguable ground of appeal (*R v Raad* [2006] VSCA 67 (24 March 2006)), whereas courts must now also consider whether there is a reasonable prospect of a different sentence being imposed if the appeal is successful: *Criminal Procedure Act 2009* (Vic) ss 280(1), 289(1).

5. *Criminal Procedure Act 2009* (Vic) ss 275(1), 279(1), 284(1); Supreme Court of Victoria, *Practice Direction No. 2 of 2011: Court of Appeal: Criminal Appeals* (2011). See also the revised practice note, which retains the 28-day time limit: Supreme Court of Victoria, *Practice Note SC CA 1: Criminal Appeals* (2017).

6. Supreme Court of Victoria, *Court of Appeal Newsletter No. 4 – December 2012* (2012) 1.

- the Supreme Court conducted an audit of all active criminal appeal cases in January 2011, identifying matters that should have been dismissed or abandoned or that required expediting or special management;⁷
- in 2014 the High Court prohibited prosecutors from providing sentencing courts with submissions about sentencing ranges in the absence of express legislative permission to do so;⁸ and
- Victoria Legal Aid made reforms to better ensure that only meritorious appeals receive funding.⁹

These changes, particularly the court-initiated reforms to appeal processes,¹⁰ have led to a significant reduction in both the number of pending appeals and the time it takes to finalise those matters.

For example:

- pending criminal appeals in the Court of Appeal decreased from a peak of 548 in 2009–10 to 170 in 2016–17;
- the median time to finalise appeals against conviction (including appeals against both conviction and sentence) halved from 19.4 months in 2010–11 to 9.5 months in 2016–17; and
- the median time to finalise appeals against sentence more than halved from 12.5 months in 2010–11 to 5.5 months in 2016–17.¹¹

The purpose of this report is to provide a statistical update to the 2012 report and to determine any changes to sentence appeals in Victoria since the previous report, such as who initiates sentence appeals, the sentence types most commonly subject to appeal, the offence types most commonly involved in sentence appeals and the outcomes of those appeals.

This report may also offer a useful point of comparison for future research. For example, in October 2017 the High Court delivered its judgment in *Director of Public Prosecutions v Dalglish*.¹² In that case, the Director of Public Prosecutions had appealed against an offender's sentence for multiple charges of incest and sexual assault, submitting that too much weight had been given to current sentencing practices for those offences, such that the sentence imposed did not adequately reflect contemporary community expectations. The High Court agreed and found that Victorian courts had been giving too much weight to current sentencing practices, which are just one of the factors that courts are required to take into account when imposing a sentence.¹³ The High Court also held that where current sentencing practices are shown to be in error, courts should change their practices *immediately*, not incrementally.¹⁴ Given the potential significance of this decision, it may be useful in future research to examine the effect of *Dalglish*, as well as other reforms such as standard sentences,¹⁵ on sentence appeals in Victoria.

7. Supreme Court of Victoria, *2010–11 Annual Report* (2011) 49, 80.

8. *Barbaro v The Queen* [2014] HCA 2 (12 February 2014). This may have contributed to a slight increase in the number of sentence appeals by the Director of Public Prosecutions, given that the original sentencing court could no longer be assisted in avoiding appealable error. In Queensland, legislation now expressly permits courts to receive sentencing submissions about the sentence, or the range of sentences, that a party considers appropriate for the court to impose: *Penalties and Sentences Act 1992* (Qld) s 15.

9. Victoria Legal Aid, *Criminal Appeals Review* (2014) 23–29.

10. See for example, Productivity Commission, *Report on Government Services 2017: Volume C, Chapter 7* (2018) 10 (Table 7A.19) ('the reforms introduced by the Court of Appeal in 2011–12 continue to allow the timely finalisation of appeals avoiding the accumulation of backlogs').

11. Supreme Court of Victoria, *2016–17 Annual Report* (2017) 19; Supreme Court of Victoria (2011), above n 7, 49.

12. *Director of Public Prosecutions v Dalglish (A Pseudonym)* [2017] HCA 41 (11 October 2017).

13. *Sentencing Act 1991* (Vic) s 5(2)(b).

14. See for example, *Carter (A Pseudonym) v The Queen* [2018] VSCA 88 (11 April 2018); *Director of Public Prosecutions v Weybury* [2018] VSCA 120 (14 May 2018).

15. *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic).

Framework for sentence appeals

In the higher courts in Victoria, sentence appeals can be initiated by either the offender (the convicted person) or the Director of Public Prosecutions (the Crown). The process for each is described in detail below and illustrated in Figure 1 (offender appeals, page 6) and Figure 2 (Crown appeals, page 7).

Offender sentence appeals

An offender sentenced in the higher courts may apply to the Court of Appeal for leave (permission) to appeal their sentence.¹⁶ The offender must normally file a notice of application for leave to appeal within 28 days of the original sentence (unless an extension is granted).¹⁷ The application must 'specifically and concisely' state the ground of appeal and include a written case in support of the application.¹⁸ The Registrar of the Supreme Court must then within seven days provide the respondent (the prosecution) with a copy of the notice of application for leave to appeal.¹⁹

Sentences may be appealed in Victoria on two bases:

- *Specific error*, which arises when there is an identifiable error in the sentencing process, such as the sentencing judge acting upon a wrong principle of law, allowing irrelevant matters to affect the decision, mistaking the facts or failing to take into account a relevant consideration.²⁰
- *Non-specific error*, which arises when there is no identifiable error in the sentencing process, but the sentence is so unreasonable as to justify appellate interference.²¹ The most commonly alleged non-specific error in offender sentence appeals in Victoria is manifest excess,²² such that the sentence is clearly outside the range of permissible sentences open to the sentencing judge.²³

16. *Criminal Procedure Act 2009* (Vic) s 278.

17. *Criminal Procedure Act 2009* (Vic) s 279(1). An application for an extension of time is first considered by the Registrar, who may grant or refuse it: *Criminal Procedure Act 2009* (Vic) s 313(1); *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 2.23(1). If the Registrar refuses, the offender can elect to have the application determined by the Court of Appeal: *Criminal Procedure Act 2009* (Vic) s 313(2); *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 2.23(3).

18. *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 2.05(4).

19. *Criminal Procedure Act 2009* (Vic) s 279(2).

20. Freiberg (2014), above n 1, 996.

21. *Ibid.*

22. Christopher Corns, Susan Borg and Adrian Castle, *Criminal Appeals and Reviews in Victoria* (2017) 269; Freiberg (2014), above n 1, 997; Sarah Krasnostein and Arie Freiberg, 'Manifest Error: Grounds for Review' (2012) 36 *Australian Bar Review* 54; Sentencing Advisory Council (2012), above n 2, 92, 94.

23. See for example, *Director of Public Prosecutions v Karazisis* [2010] VSCA 350 (17 December 2010) [127]; *R v MacNeil-Brown* [2008] VSCA 190 (24 September 2008) [60]. Considerable weight is given to the original sentencing judge's initial exercise of judicial discretion (*House v The King* [1936] HCA 40 (17 August 1936)) such that appellate interference is only justified if the sentence is 'obviously – not merely arguably – too severe or too lenient': *R v Taylor and O'Meally* (1958) VR 285, 289.

Upon receipt of an offender's application, the Court of Appeal, normally constituted by a single judge,²⁴ may grant or refuse leave to appeal.²⁵ The court may refuse an application for leave to appeal if there is no reasonable prospect of a less severe sentence being imposed.²⁶ The court also retains discretion to refuse an application for leave to appeal even if the court might otherwise impose a lesser sentence or there might be an error in the original sentence.²⁷ In these circumstances, however, the court may still correct any identified errors in the sentence despite refusing leave to appeal.²⁸ If the court refuses leave to appeal, the offender is given an opportunity to renew their application for leave to appeal and to have the matter considered again,²⁹ but only if leave to appeal was refused by a single judge.³⁰

If leave to appeal is granted, the Court of Appeal, normally constituted by two or three (but occasionally five) judges, then hears the sentence appeal and may either dismiss or allow it. The court must allow the sentence appeal if it is satisfied both that an error exists in the original sentence and that a different sentence should be imposed.³¹ If the Court of Appeal determines that a different sentence should be imposed but that sentence is more severe than the original sentence, it must warn the offender as early as possible during the proceedings.³²

If the court then allows the sentence appeal, it must set aside the sentence imposed by the original sentencing court, and either impose the sentence that it considers appropriate (resentence the offender) or remit the matter to the original sentencing court for resentencing.³³

Crown appeals

Unlike offenders, the Director of Public Prosecutions does not need to apply for leave to appeal. Instead, the Director of Public Prosecutions can file a notice of appeal directly with the Court of Appeal, normally within 28 days of the original sentence (unless an extension is granted).³⁴ When the Director of Public Prosecutions files a notice of appeal, this is referred to as a *Crown appeal*.

The Director of Public Prosecutions may only file a notice of appeal if he or she considers that there is an error in the original sentence, that a different sentence should be imposed, and that bringing an appeal is in the public interest.³⁵ Further guidance is provided in the *Policy of the Director of Public Prosecutions*, which states that the Director will only bring an appeal if satisfied that all applicable statutory criteria are established and there is a reasonable prospect that the appeal will succeed.³⁶

24. *Criminal Procedure Act 2009* (Vic) s 315(1) specifically empowers single Judges of Appeal to determine whether to grant or refuse leave to appeal.

25. In deciding whether to refer an application for leave to appeal to one or two judges, the Registrar considers whether the sentence appears unlawful, whether the appeal raises a novel question of law and whether there is a need for 'efficient and expeditious dispatch of applications': Supreme Court of Victoria, *Practice Direction No 2 of 2011: Court of Appeal: Criminal Appeals* (2011) 13–14.

26. *Criminal Procedure Act 2009* (Vic) s 280(1). See further, *Corns, Borg and Castle* (2017), above n 22, 318–319. The Court of Appeal may, however, grant leave to appeal if there are specific errors relating to individual sentences and/or orders for cumulation and concurrency, even if the total effective sentence remains the same: *Ludeman v The Queen* [2010] VSCA 333 (10 December 2010).

27. *Criminal Procedure Act 2009* (Vic) s 280(2). See for example, *R v McGrath* [2018] VSCA 134 (25 May 2018).

28. *Criminal Procedure Act 2009* (Vic) s 280(3).

29. *Criminal Procedure Act 2009* (Vic) s 315(2); *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 2.08.

30. *Criminal Procedure Act 2009* (Vic) s 315(2).

31. *Criminal Procedure Act 2009* (Vic) s 281(1).

32. *Criminal Procedure Act 2009* (Vic) s 281(3).

33. *Criminal Procedure Act 2009* (Vic) s 286.

34. *Criminal Procedure Act 2009* (Vic) s 288(1).

35. *Criminal Procedure Act 2009* (Vic) s 287. A number of factors that must be taken into account in determining whether an appeal is in the public interest are outlined in the Director's policy: Office of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (2017) 2–4.

36. Office of Public Prosecutions (2017), above n 35, 38.

Previously, Crown appeals were considered rare and exceptional.³⁷ Such appeals were only to be brought, and were only to be allowed by the court, in cases in which the inadequacy of the sentence was 'clear and egregious' and was so disproportionate to the offending that it would 'undermine public confidence in the ability of the courts to play their part in determining the commission of crimes'.³⁸

That test has since been relaxed. The test for bringing or allowing a Crown appeal now only requires either specific error (as described above) or non-specific error in the form of *manifest inadequacy* (in addition to the requirement that a different sentence should be imposed).³⁹ It is no longer necessary for the error in the sentence to be 'clear and egregious' to such an extent that it would 'undermine public confidence' in the courts. Indeed, in the 2012 report the Council found that whereas eight Crown Appeals were heard in 2000–01 and 10 were heard in 2001–02, between 2002–03 and 2009–10 an average of 32 Crown appeals were heard each year (at a relatively stable rate).⁴⁰ In addition, the *Criminal Procedure Act 2009* (Vic) abolished the common law principle of double jeopardy in Crown appeals, which previously allowed the appellate court when resentencing to take into account the distress and anxiety that a Crown appeal caused to a respondent.⁴¹ Abolishing this principle would have increased the scope for successful Crown appeals.

If the Director of Public Prosecutions satisfies the court that there is an error in the original sentence and a different sentence should be imposed, the court must set aside the original sentence and impose the sentence it considers appropriate.⁴² The court does, however, retain a *residual discretion* to dismiss the appeal even if it considers the sentence to be manifestly inadequate.⁴³ Reasons for doing so might include 'delay, parity, the totality principle, rehabilitation, and fault on the part of the [prosecution]'.⁴⁴ If the Court of Appeal determines that a new sentence should be imposed, it may not remit a successful Crown appeal to the original sentencing court, as it may for a successful offender sentence appeal; instead, it must conduct any resentencing itself.⁴⁵

37. *R v Clarke* (1996) 2 VR 520; *Everett v The Queen* [1994] HCA 49 (26 October 1994).

38. *Director of Public Prosecutions v Bright* [2006] VSCA 147 (7 July 2006) [10]; *R v Clarke* (1996) 2 VR 520; *Everett v The Queen* [1994] HCA 49 (26 October 1994).

39. *Director of Public Prosecutions v O'Neill* [2015] VSCA 325 (2 December 2015). It would still, however, be necessary to establish that a different sentence would be imposed as a result of correcting that error.

40. Sentencing Advisory Council (2012), above n 2, 65, 68–72. See also Richard Edney, 'The Rise and Rise of Crown Appeals in Victoria' (2004) 28 *Criminal Law Journal* 351.

41. See for example, *Director of Public Prosecutions v Borg* [2013] VSCA 181 (22 July 2013) [19]; *Director of Public Prosecutions v Karazisis* [2010] VSCA 350 (17 December 2010).

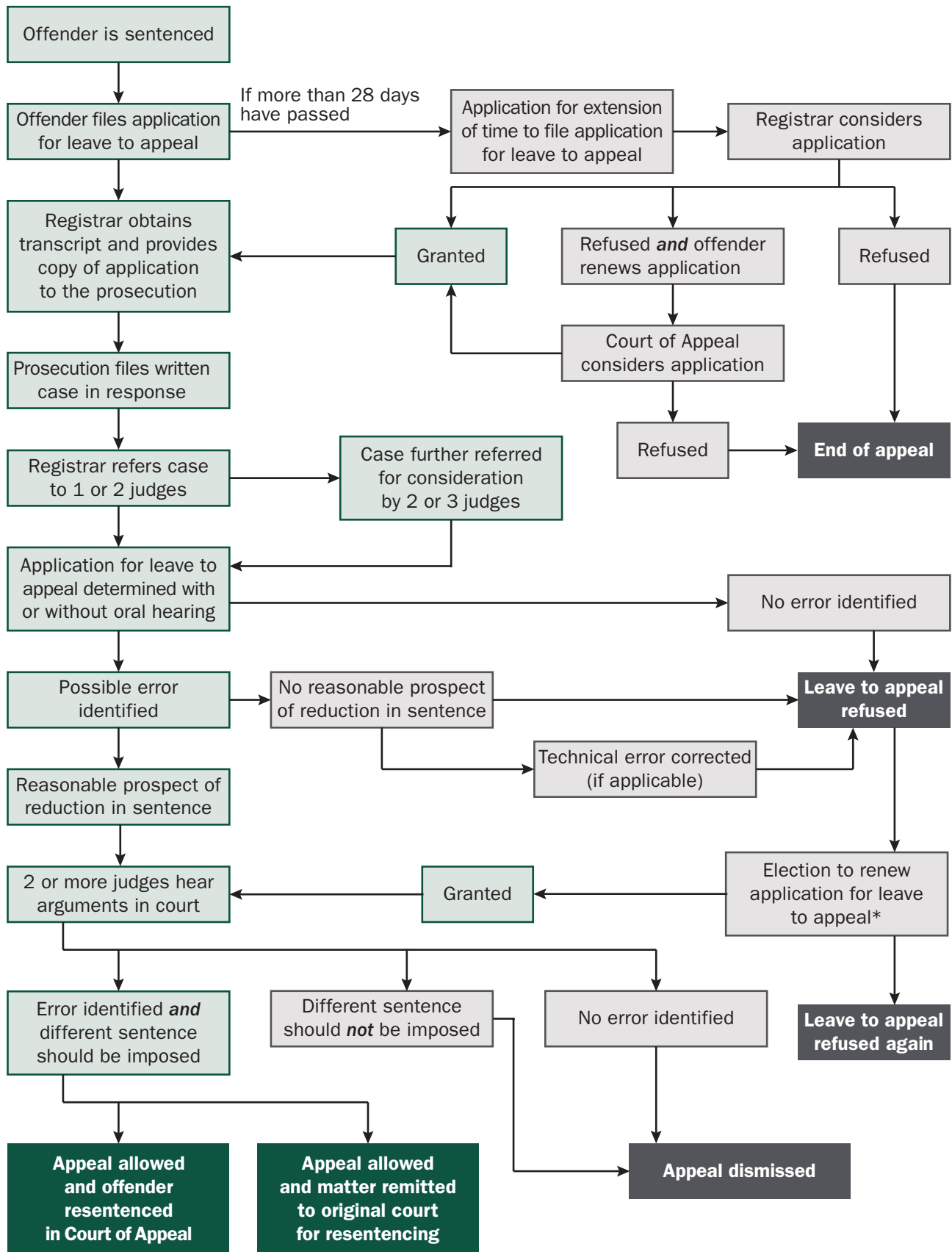
42. *Criminal Procedure Act 2009* (Vic) s 289.

43. *Director of Public Prosecutions v Karazisis* [2010] VSCA 350 (17 December 2010); Department of Justice, *Criminal Procedure Act 2009: Legislative Guide* (2010) 261. This power has traditionally been exercised rarely. It was exercised only nine times in the two years between 2007–08 and 2008–09: Sentencing Advisory Council (2012), above n 2, 27.

44. *Director of Public Prosecutions v Karazisis* [2010] VSCA 350 (17 December 2010) [104].

45. *Criminal Procedure Act 2009* (Vic) s 290.

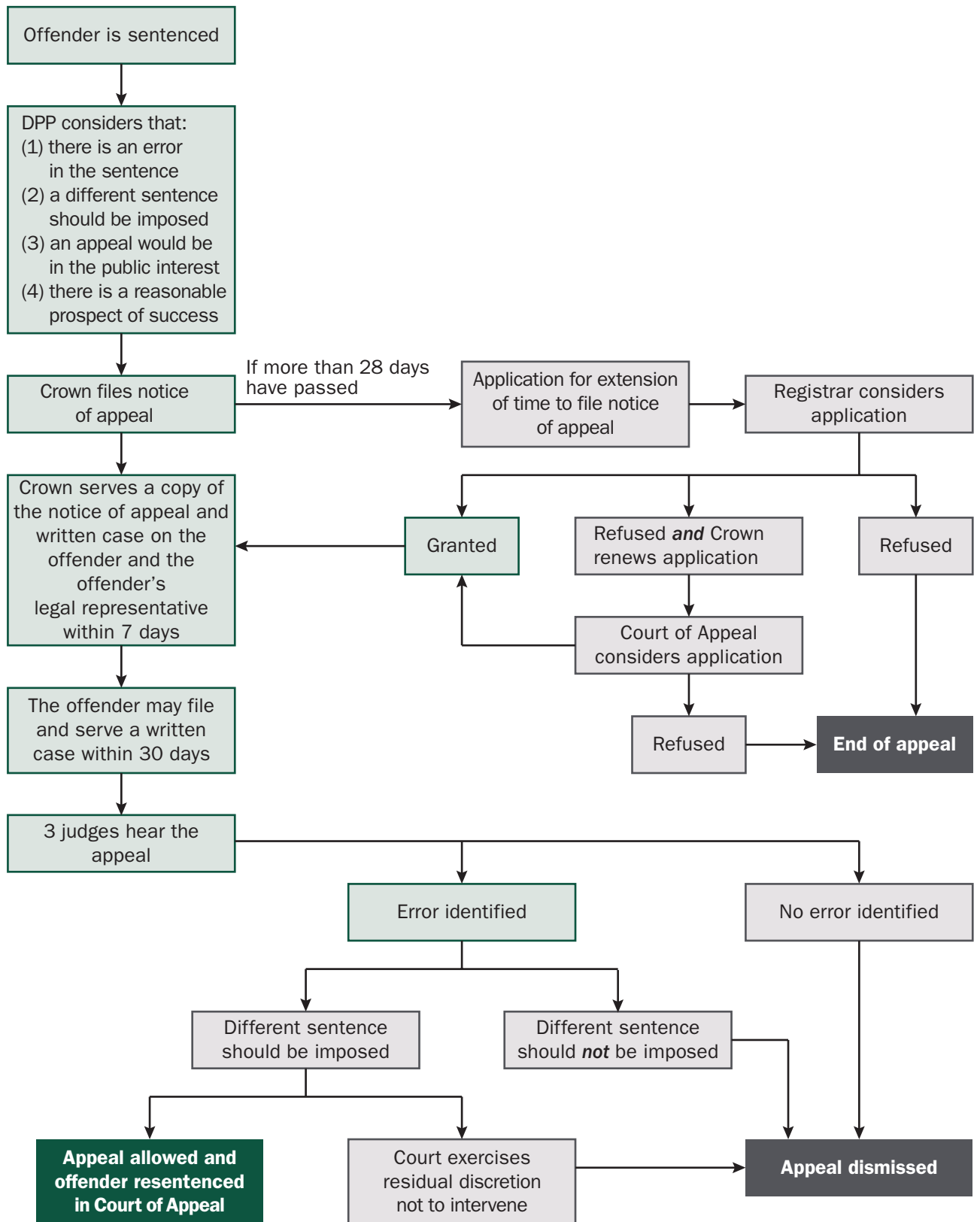
Figure 1: Process for offender appeals in Victoria⁴⁶



*Only available if leave to appeal previously determined by one judge

46. In practice, not all the steps in Figure 1 are required in each case. For instance, in some cases the issue of whether leave to appeal should be granted is determined alongside the substantive appeal.

Figure 2: Process for Crown appeals in Victoria



What can be appealed in a sentence appeal?

The right to appeal a *sentence* under the *Criminal Procedure Act 2009* (Vic) applies to the individual sentences imposed for each offence, any orders for cumulation or concurrency on those individual sentences, the non-parole period and ancillary orders.⁴⁷ The right to appeal does not, however, extend to what is often referred to as the *total effective sentence*⁴⁸ of the case, because the *Criminal Procedure Act 2009* (Vic) does not define the total effective sentence as a *sentence*.⁴⁹ The total effective sentence is simply the result of the constituent parts of a case, and it is the parts that are most properly subject to appellate review. As the Court of Appeal wrote in *Ludeman v The Queen*, a complaint about the total effective sentence 'should be framed by reference to the individual sentences (if any) which the applicant seeks to impugn, as well as any order(s) for cumulation which will be attacked'.⁵⁰

47. *Ludeman v The Queen* [2010] VSCA 333 (10 December 2010).

48. The total effective sentence is the overall sentence imposed on an offender for all their charges at the one hearing. It takes into account whether the court has ordered individual sentences for each charge to be served concurrently (at the same time) or cumulatively (one after another).

49. *Criminal Procedure Act 2009* (Vic) s 3 (definition of 'sentence'). The definition of *sentence* includes sex offender registration orders issued under the *Sex Offenders Registration Act 2004* (Vic) s 11 and certain orders under the *Road Safety Act 1986* (Vic) ss 84S–84T.

50. *Ludeman v The Queen* [2010] VSCA 333 (10 December 2010) [56] (describing arguments about cumulation as 'the real battleground' of sentence appeals).

Previous research and data publications

One of the primary objectives of the 2012 report was to 'address the absence of data available on the operation of sentence appeals' in Victoria as there was 'little published research' on the subject prior to that report.⁵¹ Since publication of the 2012 report, Victoria Legal Aid has published a review of criminal appeals,⁵² the Supreme Court and the Productivity Commission have continued to record certain data about criminal appeal lodgements and finalisations, and a number of criminal law practitioners and academics have expanded the available literature on criminal appeals in Victoria.⁵³

Sentence Appeals in Victoria: Statistical Research Report (2012)

In March 2012, the Council published *Sentence Appeals in Victoria: Statistical Research Report* (the 2012 report), examining data on sentencing decisions by the Court of Appeal.⁵⁴ The 2012 report was prompted by a request from the President of the Court of Appeal for the Council to produce a statistical report on sentence appeals. At the time there was concern about the growing backlog of appeals in the Court of Appeal (due to an 'influx of appeals' being lodged).⁵⁵

The 2012 report includes extensive statistical and policy analysis of sentence appeals in Victoria from 1996 to 2011. Some of the key findings of the report include:

- in the five years to 2009–10, the number of criminal appeals lodged each year rose from 416 to 555;⁵⁶
- in 2008, the majority of criminal appeals (more than 80%) were appeals against sentence only;⁵⁷
- in the two years to 30 June 2009:
 - the majority of sentence appeals were initiated by offenders (80%);⁵⁸
 - the most common sentence type appealed was imprisonment, and this was true for both offenders (98%) and the Crown (76%);⁵⁹
 - the most common principal proven offences in offender sentence appeals were serious drug offences (23%) and sexual offences (16%);

51. Sentencing Advisory Council (2012), above n 2, 1–2.

52. Victoria Legal Aid (2014), above n 9, 23–29.

53. See especially Corns, Borg and Castle (2017), above n 22. See also Freiberg (2014), above n 1; Krasnostein and Freiberg (2012), above n 22.

54. Sentencing Advisory Council (2012), above n 2.

55. Supreme Court of Victoria, *2009–10 Annual Report* (2010) 1.

56. Sentencing Advisory Council (2012), above n 2, 38. By comparison, in 2015–16, there were 360 criminal appeal lodgements: Productivity Commission (2018), above n 10, 10 (Table 7A.19).

57. Sentencing Advisory Council (2012), above n 2, 50 (this was based on 2008 data only).

58. *Ibid* 88.

59. *Ibid* 89. *Imprisonment* includes partially suspended sentences (5% for offenders and 8% for the Crown), because partially suspended sentences involve an immediate custodial component.

- the most common principal proven offences in Crown appeals were assault offences (30%) and sexual offences (20%);⁶⁰
- a number of successful offender sentence appeals resulted in no change to the total effective sentence (20%);⁶¹ and
- in the five years to 31 December 2010:
 - 62% of applications for leave to appeal were granted (527 of 849);
 - 55% of finalised offender sentence appeals were successful (366 of 671); and
 - 52% of Crown appeals were successful (86 of 165).⁶²

Criminal Appeals Review (2014)

In 2014, Victoria Legal Aid published its *Criminal Appeals Review*,⁶³ the objective of which was to 'determine whether there was a pattern which would warrant changes to the [funding] eligibility guidelines and administrative processes for appeals against sentence'.⁶⁴

The report found that, as a result of the decrease in the backlog of sentence appeals, there was a reduction in sentence appeals lodged and a reduction in the median time to finalise sentence appeals. In the two years to 2014:

- the number of Victoria Legal Aid funded applications for leave to appeal against sentence each year decreased from 147 to 108;
- the amount spent on professional fees decreased from \$485,000 to \$161,000; and
- the appeals team was reduced from four full-time lawyers to two.⁶⁵

The report further found that:

- approximately 4% of all sentences in serious criminal cases were varied on appeal;⁶⁶
- the most common argument made in offender sentence appeals was that the sentence was manifestly excessive (over two-thirds of all cases reviewed) and in a majority of those cases (60%), the argument was unsuccessful;⁶⁷ and
- where leave to appeal was granted, a new sentence was imposed in 69% of cases.⁶⁸

60. Ibid 49 (serious drug offences were the principal proven offence in 22.8% of offender appeals and 9.1% of Crown appeals, and assault offences were the principal proven offence in 13.2% of offender appeals and 29.9% of Crown appeals).

61. Ibid 116. In 16 of the 22 cases in which the total effective sentence was unchanged, the non-parole period was reduced, and in the remaining six cases the sentences on individual charges were changed without affecting the total effective sentence: ibid 116–117.

62. Ibid 61, 67, 69.

63. Victoria Legal Aid (2014), above n 9.

64. Ibid 6.

65. Ibid 11.

66. Ibid 14.

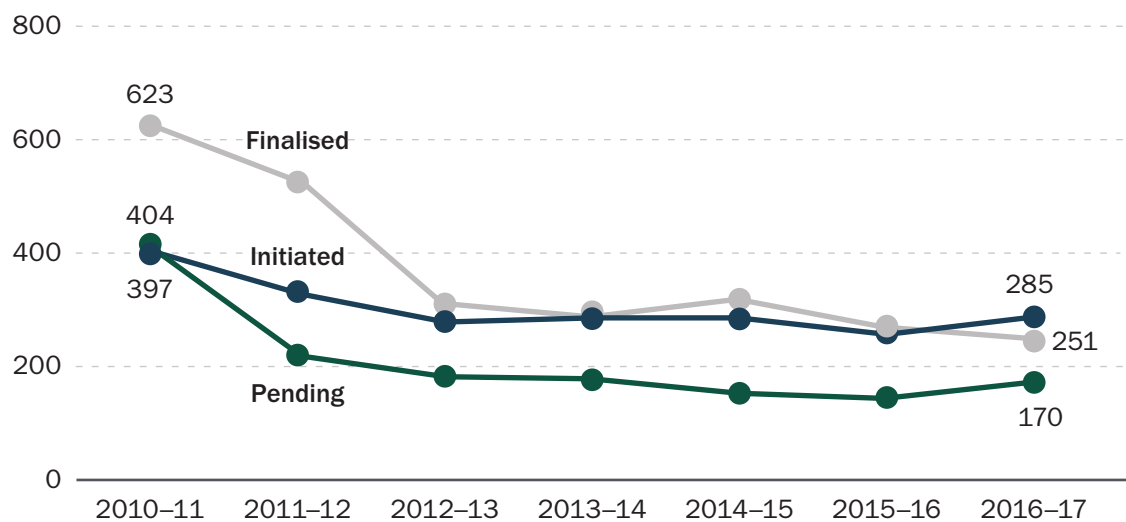
67. Ibid 18.

68. Ibid 19.

Supreme Court of Victoria annual reports (2011–2017)

Since the Supreme Court's 2010–11 Annual Report, the number of appeals – initiated, finalised and pending – has decreased, particularly between 2010–11 and 2012–13 (Figure 3). In the six years to 2016–17, the number of *initiated* criminal appeals decreased from 397 to 285, the number of *pending* criminal appeals decreased from 404 to 170, and the number of *finalised* criminal appeals decreased from 623 to 251. The most recent financial year was the only one in the period during which the number of appeals initiated outnumbered the number of appeals finalised.

Figure 3: Number of initiated, pending and finalised appeals in the Victorian Court of Appeal, 2010–11 to 2016–17⁶⁹



69. This figure is based on data sourced from annual reports of the Supreme Court of Victoria: Supreme Court of Victoria, 'Annual Reports' (supremecourt.vic.gov.au, 2018) <<https://www.supremecourt.vic.gov.au/annual-reports>> at 1 June 2018.

Methodology

This report examines all cases originally sentenced in the higher courts during the 2013–14 financial year (the index year) and Court of Appeal decisions from 1 July 2013 to 31 December 2016 (the reference period).

The availability of appeals data to 31 December 2016 influenced the choice of 2013–14 as the index year for the original sentences. There is inevitably some lag between the original sentence and the appeal judgment. The Council's analysis in its 2012 report found that 95% of sentence appeals were resolved within two and a half years of the original sentencing date. Examining the cases sentenced in 2013–14 allows for a minimum two-and-a-half-year follow-up period for a case that was sentenced on 30 June 2014, and a three-and-a-half-year follow-up period for a case that was sentenced on 1 July 2013. The choice of 2013–14 is therefore designed to ensure that the vast majority of sentence appeals are captured in the analysis.

The data on original sentences imposed in the higher courts is drawn from the Higher Courts Sentencing Database, provided by the Strategic Analysis and Review team at Court Services Victoria.

The data on appeals is based on information from notification of appeal forms provided by the Court of Appeal as well as Court of Appeal decisions published on the Australasian Legal Information Institute (AustLII).

Determining if leave to appeal was granted

Offenders often file multiple grounds of appeal against a sentence. Where the Court of Appeal has granted leave to appeal in relation to one or more grounds of appeal, this is recorded as *leave granted*. Similarly, where one or more grounds of appeal have been granted leave but only some have been successful, this is coded as *allowed*.

This report therefore identifies all cases in which there was at least one successful ground of appeal, but it does not identify any unsuccessful grounds of appeal in those same cases. The grounds of appeal (successful or unsuccessful) are also not specified as this is beyond the scope of the report.

Further, where the Court of Appeal has exercised its power to correct a technical error but has otherwise dismissed the appeal, this is recorded as an unsuccessful appeal.

Determining offence categories

Offences in this report have been coded using the Australian and New Zealand Standard Offence Classification (ANZSOC).⁷⁰

Classifying criminal offences is a complex exercise, and sometimes important details can be lost in the process. Offences have been categorised based on the *offence charged*, irrespective of whether the context of the offending behaviour might suggest another categorisation. The offence of aggravated burglary, for example, has been categorised as a *burglary offence* even though some aggravated burglaries may involve an offence against the person or a sexual offence.⁷¹

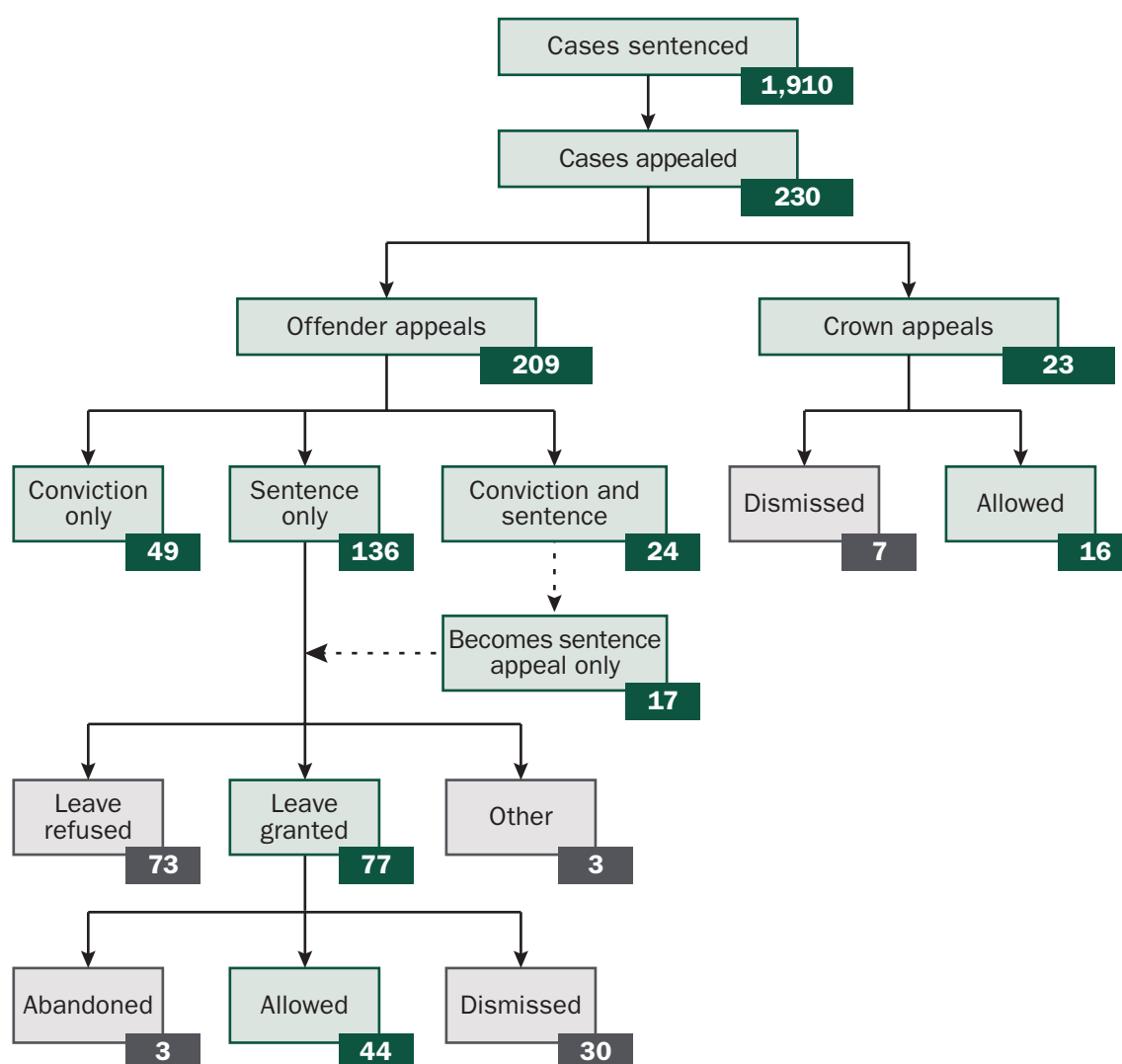
70. Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (2011).

71. For more information on types of aggravated burglary, see Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011), which describes four types: confrontational aggravated burglary, intimate relationship aggravated burglary, aggravated burglary related to an offence of robbery or theft, and aggravated burglary related to a sexual offence. The Court of Appeal cited these types of aggravated burglary extensively in *Hogarth v The Queen* [2012] VSCA 302 (18 December 2012).

Data findings

In 2013–14, the higher courts sentenced 1,910 cases in relation to 7,237 proven charges.⁷² As shown in Figure 4, of the 1,910 cases, 230 cases were subject to appeal after finalisation (12%), and 60 cases included a successful sentence appeal (3% of all cases), comprising 44 offender sentence appeals and 16 Crown appeals.

Figure 4: Number of cases sentenced in the higher courts in 2013–14 and number of cases appealed and finalised by 31 December 2016, by results of appeals



72. A recent Council report states that 6,979 charges were proven in the higher courts in 2013–14: Sentencing Advisory Council, *Secondary Offences in Victoria* (2017) 48. The discrepancy (258 charges) between that report and the current one is a result of methodological differences. The *Secondary Offences* report only includes charges that still have a finding of guilt after appeals have been finalised, and excludes Commonwealth sentences, orders under the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 2005* (Vic) and charges that were dismissed.

Table 1 provides a breakdown, by offence category, of the 7,237 charges and shows the number and percentage of those charges that were part of appeal proceedings. This invariably overestimates the number of offences that were actually subject to appeal. In many cases, offenders appeal the sentence or conviction relating to only some of the charges, or none at all, instead appealing another order such as the non-parole period. That said, where an appeal results in a successful change to conviction or sentence, charges that were not *directly* the subject of an appeal may still be *indirectly* involved, particularly in orders for cumulation on any resentencing. Therefore, including these charges in Table 1 still provides an indication of the types of matters handled by the Court of Appeal.

Table 1 also includes all appeals, not just sentence appeals. That is, it also includes conviction appeals, combined conviction and sentence appeals, and appeals resulting in no substantive changes to sentence or conviction.⁷³ Conviction appeals are included in Table 1 in order to provide a broad overview of all appeals before focusing on sentence appeals.

Table 1: Number and type of offences sentenced in the higher courts in 2013–14 and number and proportion of charges in appeal proceedings by 31 December 2016

Offence type	Number of charges	Number and percentage of charges in appeal proceedings	
Sexual offences	1,493	380	25.5%
Theft or related offences	913	116	12.7%
Fraud/deception offences	787	188	23.9%
Drug offences	771	122	15.8%
Acts intended to cause injury	676	84	12.4%
Robbery/extortion offences	588	23	3.9%
Burglary offences	411	65	15.8%
Justice procedures offences	295	20	6.8%
Weapons/explosives offences	285	53	18.6%
Abduction/harassment offences	244	33	13.5%
Property damage offences	209	20	9.6%
Acts endangering persons	170	18	10.6%
Traffic offences	157	21	13.4%
Public order offences	120	16	13.3%
Homicide offences	85	22	25.9%
Other offences	33	9	27.3%
Total offences	7,237	1,190	16.4%

73. No substantive change may result, for example, where leave to appeal is refused, where leave to appeal is granted but dismissed, where the appeal relates only to ancillary orders or where the appeal results in amendments to individual charges without affecting the overall total effective sentence.

The most common offence types sentenced in the higher courts in 2013–14 were sexual offences (1,493 of 7,237 charges or 21% of all charges) and theft or related offences, such as handling stolen goods or dealing with proceeds of crime (913 of 7,237 charges or 13%). A small number of charges (85 of 7,237 charges or 1%) were homicide offences.

The most common offence types in appeal proceedings, in terms of volume, were:

- sexual offences (380 charges);
- fraud/deception offences (188 charges); and
- drug offences (122 charges).

This is relatively unsurprising. These three offence types represent three of the four highest volume offence types sentenced. It is therefore to be expected that they also represent the highest volume offence types to be included in appeals.

This contrasts to the *proportion* of each offence type that were part of appeal proceedings. The most common offences in appeal proceedings (as a proportion of all charges sentenced) were:

- homicide offences (25.9% or 22 of 85 charges);
- sexual offences (25.5% or 380 of 1,493 charges); and
- fraud/deception offences (23.9% or 188 of 787 charges).

Again, this is mostly expected. The Council's previous research indicates that murder, sexual offences and some property offences tend to attract low levels of guilty pleas, in both number and proportion.⁷⁴ That is, offenders charged with these offences are less likely to plead guilty than offenders charged with other offences. This may be due to a number of factors, such as the lengthy imprisonment sentences imposed for most sexual and homicide offences and the stigma of being convicted of a sexual offence. Given the low rates at which offenders plead guilty to these offences, it is not surprising that offenders are also more likely to appeal any subsequent conviction or sentence if found guilty.

Who initiated the appeals?

Of the 1,910 cases sentenced in the higher courts in 2013–14, 230 were appealed and finalised by 31 December 2016. That is, 12% of all cases sentenced in the higher courts in 2013–14 were appealed and finalised during the reference period. Of the 230 cases, 209 (91%) were offender appeals (appeals against sentence, conviction or both), and 23 (10%) were Crown appeals. In two cases, both the offender and the Crown appealed the same case (these cases have been counted twice).⁷⁵

The most common type of appeal was a sentence appeal. This is to be expected as there are very limited circumstances in which the Crown can appeal anything other than the sentence.⁷⁶ In addition, a large proportion of offenders plead guilty in the higher courts,⁷⁷ and an offender who pleads guilty is unlikely to make, or to be successful in, a conviction appeal.⁷⁸

74. Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015) 28.

75. *Murrell v The Queen; Director of Public Prosecutions v Murrell* [2014] VSCA 337 (18 December 2014); *Meade v The Queen; Director of Public Prosecutions v Meade* [2015] VSCA 171 (26 June 2015).

76. See, however, *Director of Public Prosecutions No 1 of 2017* [2018] VSCA 69 (23 March 2018), in which the Crown referred a question of law (about the appropriateness of a judge's charge to the jury) to the Court of Appeal after the jury acquitted the offender. It is also not uncommon for the Crown to make an interlocutory appeal for a judicial decision mid-trial (before acquittal or conviction): see for example, *Director of Public Prosecutions v Paulino* [2017] VSCA 38 (6 March 2017).

77. Sentencing Advisory Council (2015), above n 74, 14–15. In the five years to 2013–14, 72.4% of proven charges in the Supreme Court and 84.6% of proven charges in the County Court were resolved by a guilty plea.

78. There are, however, limited circumstances in which an offender who pleads guilty can nevertheless appeal against their conviction: Corns, Borg and Castle (2017), above n 22, 220.

Offender appeals

Of the 209 offender appeals, 136 were applications for leave to appeal against sentence, 49 were applications for leave to appeal against conviction, and 24 were applications for leave to appeal against both conviction and sentence (Figure 5).

The focus of this report is sentence appeals. As a result, the 49 cases in which the offender appealed only their conviction are excluded from subsequent analysis. Similarly, cases in which an offender appealed both conviction and sentence and was successful in appealing one or more of their *convictions* (7 cases) are also excluded. This is because a successful conviction appeal almost always affects the total effective sentence.⁷⁹

The analysis includes the remaining appeals against both conviction and sentence where the conviction appeal was unsuccessful (17 cases), because once a conviction appeal is dismissed, the proceedings effectively become a sentence appeal. In total, this report examines 153 offender sentence appeals (Figure 6).

Figure 5: Types of appeals in cases sentenced in the higher courts in 2013–14 and appealed and finalised by 31 December 2016, by originating party

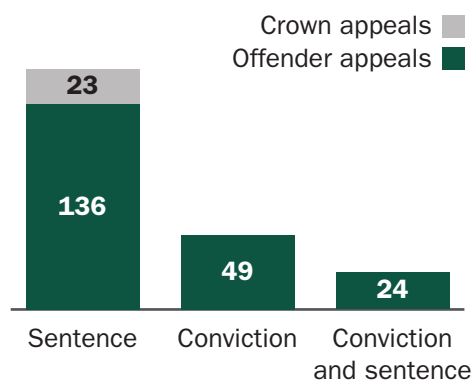
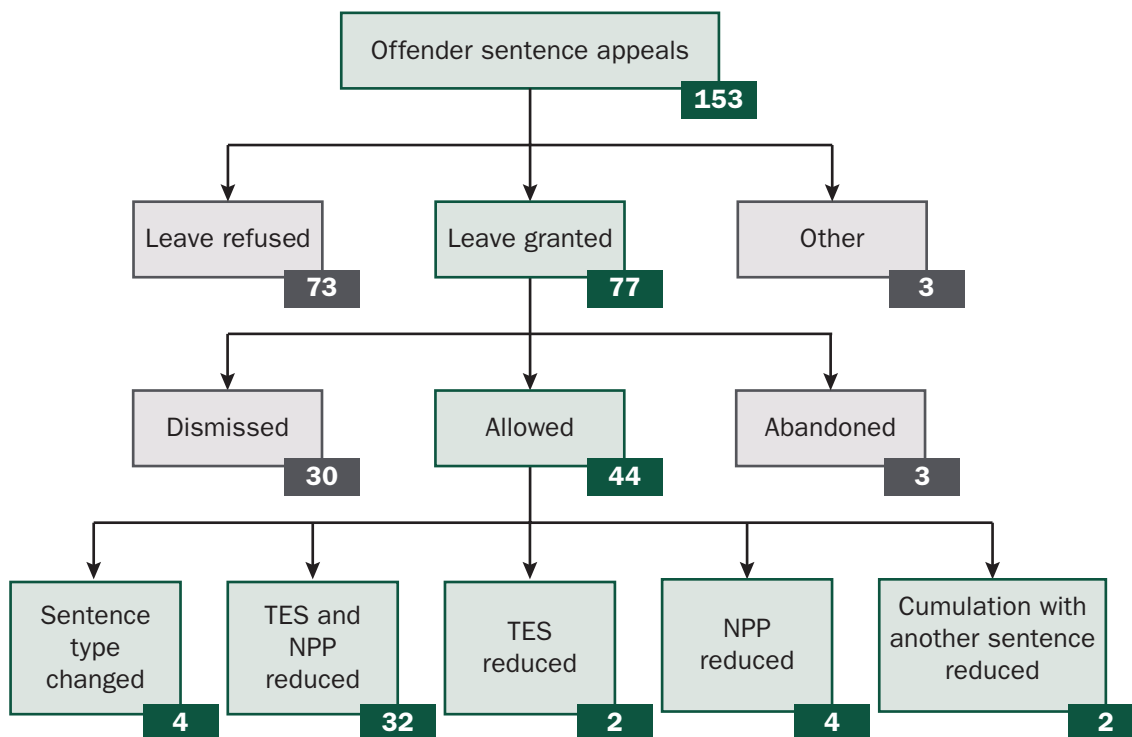


Figure 6: Results of offender sentence appeals in cases sentenced in the higher courts in 2013–14 and appealed and finalised by 31 December 2016⁸⁰



79. See *Criminal Procedure Act 2009* (Vic) s 277(5).

80. References to *other* outcomes in Figure 6 represent one sentence appeal that was abandoned before leave could be determined and two cases in which the court refused an application for an extension of time to file an appeal. The *TES* is the total effective sentence, and the *NPP* is the non-parole period.

In just over half (50.3%) of the cases involving offender sentence appeals, the offender's application for leave to appeal was granted (77 cases), and in just under half of the cases, leave to appeal was refused (73 cases). In the remaining three cases, leave to appeal was neither granted nor refused. In two of these cases, the Court of Appeal refused applications for an extension of time to file a sentence appeal,⁸¹ and in one case the offender abandoned the sentence appeal before the court could determine whether to grant or refuse leave.

A number of offenders (in 19 cases) elected to renew their application for leave to appeal after it was initially refused.⁸² Of these 19 cases, leave to appeal was again refused in 11 cases, but it was granted in eight cases. Of these eight cases, the appeal was allowed in six cases⁸³ and dismissed in two cases.⁸⁴

Of the 77 successful applications for leave to appeal (including renewed applications for leave after initial refusal), the court allowed the appeal in 44 cases and dismissed the appeal in 30 cases,⁸⁵ and the offender abandoned or withdrew their appeal in the remaining three cases. As a result, only 2% (44) of the 1,910 sentences imposed in the higher courts in 2013–14 were successfully appealed by offenders.

Of the 44 successful offender sentence appeals, the sentence type was changed in four cases.⁸⁶ Of the remaining 40 cases, the total effective sentence length was reduced in all but six cases. In four of these six cases, the non-parole period was reduced.⁸⁷ In the remaining two cases, the total effective sentence and the non-parole period were essentially unchanged, but the level of cumulation between the appealed sentence and a previous sentence was amended, which had the effect of reducing the overall period of imprisonment that the offenders were required to serve.⁸⁸

Offence types in offender sentence appeals

The offenders in the 153 offender sentence appeals were originally sentenced for a total of 804 proven charges, 231 of which were included in successful offender appeals. There are two primary ways of analysing the offence types in those appeals. First, it is possible to analyse *all* proven offences in sentence appeals. In the 153 offender sentence appeals in this report, for instance, the most common offence types were fraud/deception offences (19% or 156 of 804 charges), sexual offences (18% or 143 of 804 charges) and theft or related offences (14% or 109 of 804 charges).

81. *Coleman v The Queen* [2014] VSCA 228 (17 September 2014); *Burns (A Pseudonym) v The Queen* [2016] VSCA 195 (11 August 2016).

82. In 29 cases, the person was ineligible to renew their application for leave to appeal because their original application had been heard by more than one judge: *Criminal Procedure Act 2009* (Vic) s 315(2).

83. Five of these are reported on AustLII: *Booth v The Queen* [2015] VSCA 51 (31 March 2015); *Chan & Another v The Queen* [2014] VSCA 301 (27 November 2014) (both offenders renewed their application for leave to appeal); *McPhee v The Queen* [2014] VSCA 156 (24 July 2014); *Altun v The Queen* [2014] VSCA 46 (25 March 2014).

84. *Binse v The Queen* [2016] VSCA 145 (22 June 2016); *Cotton (A Pseudonym) v The Queen* [2015] VSCA 103 (18 May 2015).

85. In two of these cases, the appellate court fixed a technical error: a reparation order in one case and a miscalculation of the offender's release date (by 11 days) in the other. Despite these amendments, the substantive sentence appeals were unsuccessful, and the cases were therefore coded as such: *Heathcote (A Pseudonym) v The Queen* [2014] VSCA 37 (13 March 2014); *Hayes v The Queen* [2014] VSCA 309 (2 December 2014). In another case, the Court of Appeal allowed the appeal and resentenced the offender before the High Court overturned the decision and the appeal was dismissed on remittal: *Pham v The Queen* [2014] VSCA 204 (5 September 2014); *R v Pham* [2015] HCA 39 (4 November 2015); *Pham v The Queen* [2016] VSCA 259 (28 October 2016).

86. A five-year community correction order was changed on appeal to a term of imprisonment equating to time served (the appellant was Fitzgerald in the Court of Appeal's guideline judgment decision): *Boulton & Others v The Queen* [2014] VSCA 342 (22 December 2014); a partially suspended sentence with a 12-month custodial component was changed on appeal to an imprisonment term of eight months: *Hendricks v The Queen* [2014] VSCA 185 (21 August 2014); a wholly suspended sentence was changed on appeal to a fine: *York (A Pseudonym) v The Queen* [2014] VSCA 224 (12 September 2014); and an imprisonment sentence of 15 months was changed on appeal to a partially suspended sentence with a four-month custodial component: *Smith v The Queen* [2014] VSCA 241 (1 October 2014).

87. For cases in which the non-parole period was reduced without affecting the total effective sentence, see *Hasmi v The Queen* [2014] VSCA 291 (19 November 2014); *Altun v The Queen* [2014] VSCA 46 (25 March 2014); *Suri v Director of Public Prosecutions (Cth)* [2014] VSCA 260 (24 October 2014); *Chan & Another v The Queen* [2014] VSCA 301 (27 November 2014).

88. One of these cases is reported on AustLII: *Saleem v The Queen* [2014] VSCA 190 (26 August 2014) [52].

These were also, unsurprisingly, the most common offences sentenced in the higher courts in 2013–14 (see Table 1, page 14). This approach of analysing all offences in sentence appeals may, however, misrepresent the types of cases that the Court of Appeal deals with. For instance, there may be numerous charges of obtaining property by deception in a single case,⁸⁹ such that there may be relatively few appeals involving such offences, despite being the most common offence type in offender sentence appeals.

For that reason, the second, and arguably more useful, way of analysing offence types in sentence appeals is to analyse the *principal proven offence* in each case (that is, the offence that attracted the most severe penalty in the case, and therefore best represents the criminality of the case as a whole). During the reference period, the most frequent principal proven offence types in offender sentence appeals were drug offences (28% of offender sentence appeals or 43 of 153 cases), acts intended to cause injury (18% or 28 of 153 cases) and sexual offences (14% or 22 of 153 cases). Similarly, in offender sentence appeals that were *successful*, the most common principal proven offence types were drug offences (34% or 15 of 44 cases), sexual offences (20% or 9 of 44 cases) and acts intended to cause injury (16% or 7 of 44 cases).

Sentence types in offender sentence appeals

The overwhelming majority of sentences appealed by offenders were immediate terms of imprisonment (141 of 153 offender sentence appeals; see Table 2). The remaining sentences were almost all *quasi*-custodial sentences, including nine partially suspended sentences,⁹⁰ two wholly suspended sentences⁹¹ and one community correction order.⁹² This is to be expected as a sentence that affects an offender's liberty tends to provide a strong incentive to appeal. Of the cases in which an imprisonment sentence was appealed, 41 (29%) were successful, representing just 4% of all imprisonment sentences (not just sentences that were appealed). The proportion of suspended sentences and community correction orders that were successfully appealed, as a proportion of the overall number of these orders imposed, was even lower, at less than 1%.

Table 2: Sentence types originally sentenced in the higher courts in 2013–14 and involved in offender sentence appeals during the reference period

Sentence type	Number and percentage of successful offender sentence appeals according to sentence type	
	As a proportion of all offender sentence appeals	As a proportion of all sentenced cases
Imprisonment	41 of 141 (29%)	41 of 1,140 (4%)
Partially suspended sentence	1 of 9 (11%)	1 of 124 (<1%)
Wholly suspended sentence	1 of 2 (50%)	1 of 201 (<1%)
Community correction order	1 of 1 (100%)	1 of 295 (<1%)

89. *Crimes Act 1958* (Vic) s 81.

90. *Ludwig v The Queen* [2015] VSCA 35 (10 March 2015); *Spjodic v The Queen* [2014] VSCA 251 (8 October 2014); *Hendricks v The Queen* [2014] VSCA 185 (21 August 2014); *Zhou v The Queen* [2014] VSCA 123 (20 June 2014).

91. *York (A Pseudonym) v The Queen* [2014] VSCA 224 (12 September 2014); *Mifsud v The Queen* [2014] VSCA 160 (24 July 2014).
Suspended sentences have since been abolished; no offences committed after 1 September 2014 may receive a suspended sentence: *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

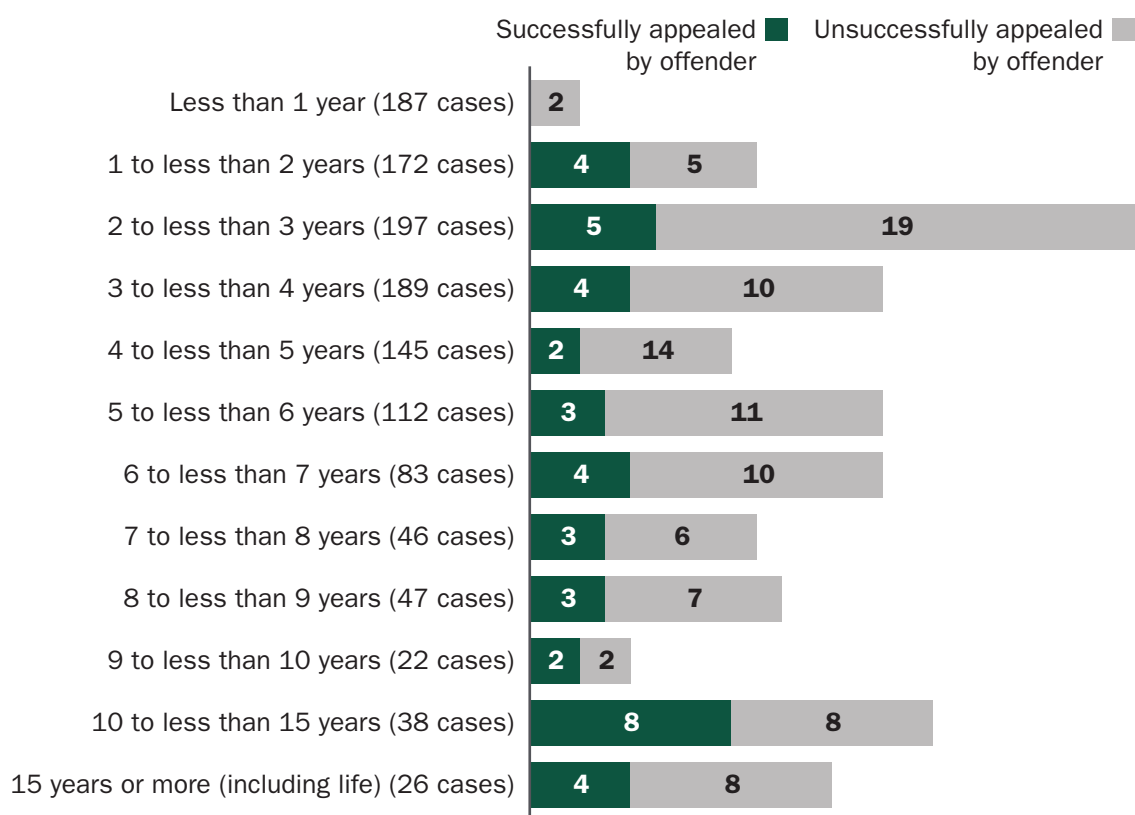
92. *Boulton & Others v The Queen* [2014] VSCA 342 (22 December 2014).

Imprisonment sentences in offender sentence appeals

Overall, offenders appealed against 12% of sentences imposed in the higher courts during 2013–14 that involved an immediate custodial component (150 of 1,264 cases).⁹³ Of these 150 cases, offenders were successful in appealing 42 cases, representing 28% of finalised appeals of custodial sentences or 3.3% of higher court cases that received imprisonment in 2013–14. Offenders were unsuccessful in 102 cases, meaning that either leave to appeal was refused or leave was granted but the appeal was subsequently dismissed. In addition, one offender withdrew their appeal before leave could be determined, three offenders abandoned their application after leave was granted, and two offenders sought an extension of time to apply for leave to appeal but were refused.

Figure 7 illustrates the original length of imprisonment sentences for both the 42 successful offender sentence appeals and the 102 unsuccessful offender sentence appeals. The imprisonment sentences subject to appeal ranged from six months (as the immediate custodial component of a partially suspended sentence) to life imprisonment. The most common length of imprisonment appealed was between two and less than three years (24 cases). The lengths of imprisonment that were most successfully appealed were between 10 and less than 15 years (a 50% success rate) and between nine and less than 10 years (also a 50% success rate). The length of imprisonment that was least successfully appealed was less than one year (a 0% success rate).

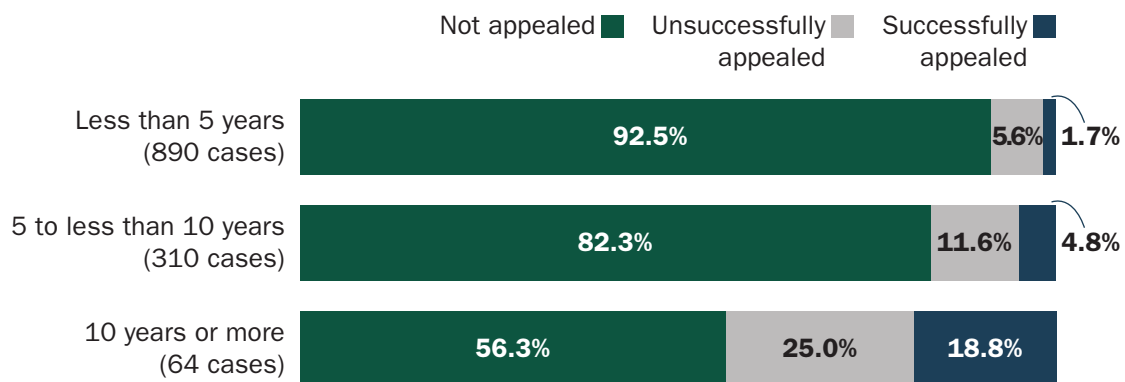
Figure 7: Imprisonment sentences imposed in the higher courts in 2013–14 and involved in offender sentence appeals finalised by 31 December 2016, by number of appeals, length of original sentence and outcome of appeal



93. The total number of cases with an immediate custodial component (1,264) comprises 87 partially suspended sentences with an immediate term of less than one year, 31 with an immediate term of between one and less than two years, and six with an immediate term of between two and less than three years. The remaining 1,140 cases were immediate (and non-suspended) terms of imprisonment. In cases in which the offender was sentenced to a partially suspended sentence (including a Commonwealth version of this sentence), the total effective sentence is coded as the immediate term of imprisonment to be served. Although 153 offender sentence appeals are examined in this report, three are excluded from this analysis of imprisonment sentences because two were appeals of wholly suspended sentences (no immediate custodial component) and one was an appeal of a community correction order.

Further, as shown in Figure 8, the likelihood of an offender appealing their imprisonment sentence increased as the length of the total effective sentence increased, as did the likelihood of an offender *successfully* appealing their imprisonment sentence. Of the 890 cases sentenced to a term of imprisonment of less than five years, **7.3%** (65) were appealed by the offender – 15 successfully and 50 unsuccessfully. Of the 64 cases sentenced to a term of imprisonment of 10 years or more, **43.8%** (28) were appealed by the offender – 12 successfully and 16 unsuccessfully.

Figure 8: Imprisonment sentences imposed in the higher courts in 2013–14 and involved in offender sentence appeals finalised by 31 December 2016, by length of original sentence, whether sentence was appealed and outcome of appeal⁹⁴



Changes to imprisonment sentences after successful offender sentence appeals

Of the 42 successful offender sentence appeals involving imprisonment sentences (including partially suspended sentences), none resulted in the offender being resentenced to a non-custodial sentence.

In six of those cases, the total effective sentence was unchanged after the appeal: in two cases, the court reduced the extent of cumulation between the appealed sentence and the sentence imposed in another case,⁹⁵ and in the remaining four cases, the court reduced the non-parole period.⁹⁶ In another two cases, the total effective sentence was reduced but the non-parole period was unchanged.⁹⁷

Figure 9 (page 21) illustrates the proportional changes to total effective sentences and non-parole periods in the 42 successful offender sentence appeals involving imprisonment sentences. The court reduced the total effective sentence by less than 20% in 22 cases and by 20% or more in 20 cases.⁹⁸ In contrast, the court reduced the non-parole period by less than 20% in 16 cases and by 20% or more in 21 cases. The average proportional reduction in the total effective sentence was 20%, and the average proportional reduction in the non-parole period was 25%.⁹⁹ This suggests that non-parole periods were reduced at a slightly higher proportional rate than total effective sentences. This could perhaps be due to the weighting of certain factors when determining the length of the total effective sentence and non-parole period.

94. Six cases were excluded from Figure 8 because proceedings ended before the appeal could be determined. Four of these cases involved an appeal that was abandoned partway through the process. In the remaining two cases, the offenders' applications for extensions of time to apply for leave to appeal were refused. Further, some cases categorised as *not appealed* may have been the subject of conviction appeals, and would therefore not be displayed in Figure 8.

95. See for example, *Saleem v The Queen* [2014] VSCA 190 (26 August 2014).

96. *Hasmi v The Queen* [2014] VSCA 291 (19 November 2014); *Altun v The Queen* [2014] VSCA 46 (25 March 2014); *Suri v Director of Public Prosecutions (Cth)* [2014] VSCA 260 (24 October 2014); *Chan & Another v The Queen* [2014] VSCA 301 (27 November 2014).

97. *Nguyen v The Queen* [2014] VSCA 53 (31 March 2014); *Wagner v The Queen* [2014] VSCA 157 (21 July 2014).

98. This suggests a slightly higher rate of change to total effective sentences than in the Council's 2012 report. Adjusting calculations to ensure compatibility, the present report finds that 54.8% of reductions were 20% or less, while in the 2012 report 64% of successfully appealed total effective sentences were reduced by 20% or less: Sentencing Advisory Council (2012), above n 2, 116.

99. This includes cases in which the total effective sentence or non-parole period did not change.

For instance, non-parole periods are more heavily influenced by the offender's individual characteristics (such as their prospects of rehabilitation and the risk they pose to the community), while the total effective sentence is more heavily influenced by the harm and culpability of the offending.¹⁰⁰

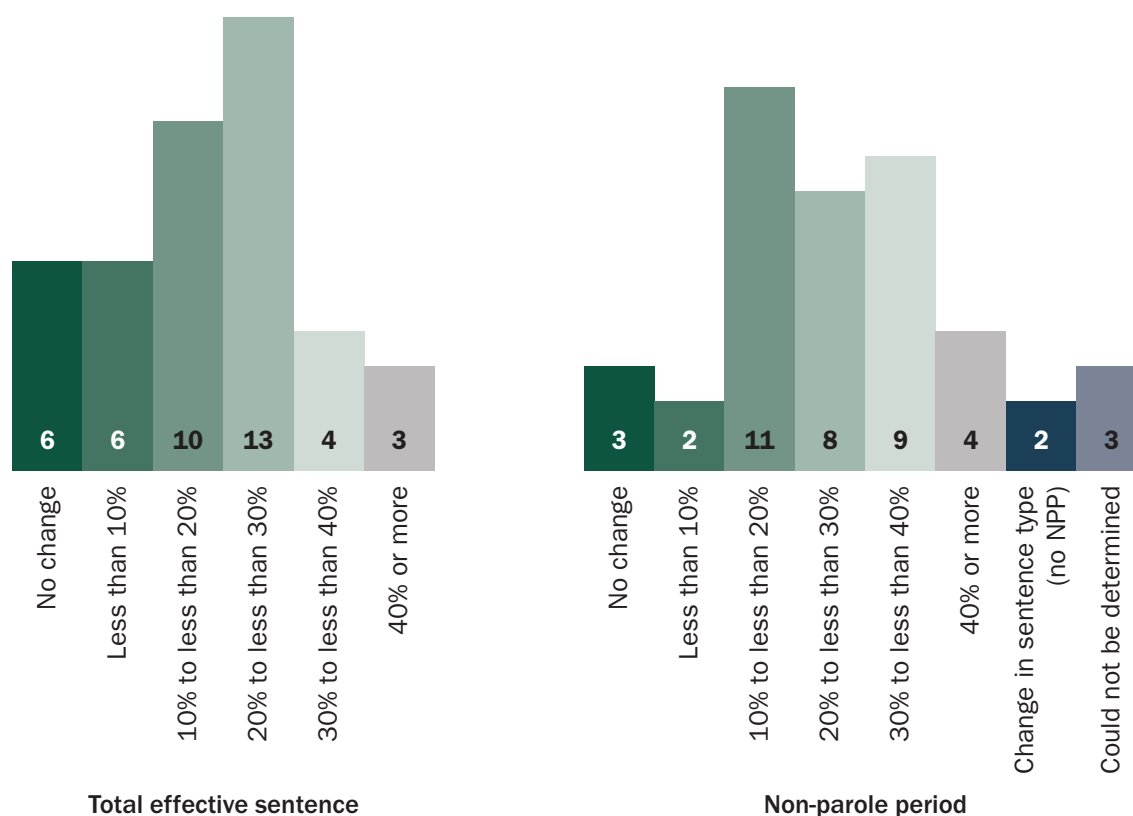
In some cases, a reduction in the imprisonment term after a successful sentence appeal resulted in no non-parole period. For instance, in one case a two-and-a-half-year imprisonment term was reduced to a combined sentence of three months' imprisonment and a two-year community correction order.¹⁰¹

In raw numbers, the average reduction of total effective sentences on appeal was 16 months, and the average reduction in the non-parole period was 17 months.

Reductions in total effective sentence lengths on appeal ranged from one month to five years and six months (for cases in which the duration changed). In just over half of cases (24 of 42 cases), there was a reduction of less than two years from the original total effective sentence. This includes 13 cases in which there was a reduction of less than one year, and 11 cases in which there was a reduction of one to less than two years. The largest change, which occurred in two cases, was a reduction of between five and less than six years.

Reductions in non-parole periods on appeal ranged from one month to five years (for cases in which the duration changed). The largest group of cases (16 of 42 cases) received reductions to non-parole periods of less than one year, and 8 of 42 cases received reductions of between one and less than two years. The largest change to a non-parole period was a reduction of between five and less than six years (one case).

Figure 9: Imprisonment sentences imposed in the higher courts in 2013–14 and involved in offender sentence appeals finalised by 31 December 2016, by reductions in total effective sentences and non-parole periods as a proportion of the original sentence



100. See for example, *Bugmy v The Queen* [1990] HCA 18 (24 May 1990) [20]–[21].

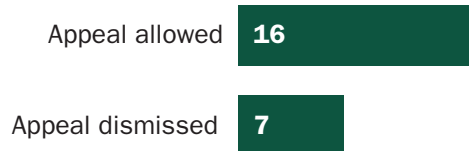
101. *Tran v The Queen* [2014] VSCA 85 (29 April 2014).

Crown appeals

During the reference period, the Crown appealed 23 sentences originally imposed in 2013–14. Of these 23 appeals, 16 (70%) were allowed¹⁰² and 7 (30%) were dismissed (see Figure 10). This represents a substantial increase in the proportion of successful Crown appeals since the 2012 report, up from 52%.¹⁰³

In 15 of the 16 cases in which the Crown appeal was allowed, the Court of Appeal increased the total effective sentence.¹⁰⁴ In the remaining case, the Court of Appeal increased the non-parole period only. In that case the Crown had exclusively appealed the non-parole period, and not the total effective sentence, on the basis that a non-parole period that was 47% of the total effective sentence in a serious case was manifestly inadequate.¹⁰⁵

Figure 10: Sentences imposed in the higher courts in 2013–14 and appealed by the Crown and finalised by 31 December 2016, by result of Crown appeal



Offence types in Crown appeals

Presented below is a brief analysis of the type of charges that offenders were sentenced for in cases that were appealed by the Crown during the reference period. Caution should be exercised in extrapolating conclusions from this data given that the sample size (23 cases and 59 charges) is quite small. Of the 59 charges, the most prevalent offence types were:

- sexual offences (20%);
- drug offences (17%);
- abduction/harassment offences (15%); and
- acts intended to cause injury (14%).

The Crown also appealed 3 of the 85 homicide offences (3.5%) sentenced in 2013–14.

As mentioned above (see page 18), however, it is arguably more useful to identify the *principal proven offence* type in Crown appeals, rather than all offences, in order to better identify the types of cases most frequently appealed. For instance, although sexual offences were the most common offence type in Crown appeals during the reference period, eight of the 12 charges were sentenced in a single case.¹⁰⁶ The most frequent principal proven offences in Crown appeals were drug offences (30% or 7 of 23 cases), burglary offences (17% or 4 of 23 cases) and acts intended to cause injury (17% or 4 of 23 cases).

In 10 of the 23 Crown appeals, the offender was originally sentenced for a single offence. Most of these cases were either serious drug offences (5 cases) or homicide offences (3 cases). In the remaining 13 cases, the offender was originally sentenced for multiple charges.

Sentence types in Crown appeals

As with offender sentence appeals, the sentence type most often appealed by the Crown was an immediate sentence of imprisonment (18 of 23 cases or 78%). The remaining five Crown appeals

102. A number of these appeals were part of the same proceedings. Estrada, Yuan and Byun were all sentenced in the same case: *Director of Public Prosecutions (Cth) v Estrada; Director of Public Prosecutions (Cth) v Yuan & Byun* [2015] VSCA 22 (20 February 2015). Ray and Vella were sentenced in the same case: *Director of Public Prosecutions v Vella & Ray* [2014] VSA 140 (26 June 2014). So too were Fucile and Tran: *Director of Public Prosecutions v Fucile & Tran* [2013] VSCA 312 (11 November 2013).

103. Sentencing Advisory Council (2012), above n 2, 67.

104. This includes one offender who received a custodial sentence in place of a community correction order on resentencing: *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29 (3 March 2014).

105. *Director of Public Prosecutions v Costa* [2014] VSCA 116 (20 June 2014).

106. *Director of Public Prosecutions (Vic) v Chatterton; Director of Public Prosecutions (Cth) v Chatterton* [2014] VSCA 1 (4 February 2014).

involved two cases in which a fine was imposed (both successful),¹⁰⁷ two cases in which a community correction order was imposed (both successful)¹⁰⁸ and one case in which the original court's refusal to make a sex offender registration order was appealed (not successful).¹⁰⁹

Table 3: Sentences imposed in the higher courts in 2013–14 and appealed by the Crown and finalised by 31 December 2016, by sentence type

Sentence type	Number appealed	As a proportion of all sentences imposed
Imprisonment	18	18 of 1,140 (1.6%)
Community correction order	2	2 of 295 (0.68%)
Fine	2	2 of 59 (3.4%)

Imprisonment sentences in Crown appeals

Of the 1,264 cases in which an offender was sentenced to a term of immediate imprisonment in the higher courts in 2013–14,¹¹⁰ the Crown appealed the sentence in 18 cases (1.4%) and was successful in 12 cases (0.95%).

As with offender sentence appeals, the likelihood of the Crown appealing an imprisonment sentence increased as the length of the total effective sentence increased. The Crown appealed less than 1% of imprisonment terms that were under five years (6 of 890 cases), 3% of imprisonment terms that were between five and less than 10 years (8 of 310 cases) and 6% of imprisonment terms that were 10 years or more (4 of 64 cases).

Table 4: Imprisonment sentences imposed in the higher courts in 2013–14 and appealed by the Crown and finalised by 31 December 2016, by length of total effective sentence

Length of original sentence	Cases sentenced to imprisonment	As a proportion of all imprisonment sentences of this length	
		Successful Crown appeals	Unsuccessful Crown appeals
Less than 5 years' imprisonment	890	4 (0.4%)	2 (0.2%)
Between 5 and less than 10 years' imprisonment	310	5 (1.6%)	3 (1.0%)
10 years' imprisonment or more	64	3 (4.7%)	1 (1.6%)

The Crown successfully appealed 12 of 18 imprisonment sentences (67%). The Crown *successfully* appealed, as a proportion of all imprisonment sentences imposed in the higher courts in 2013–14, 0.4% of all imprisonment terms that were less than five years (4 cases), 1.6% of imprisonment terms that were between five and less than 10 years (5 cases) and 4.7% of imprisonment terms that were 10 years or more (3 cases). Given the small numbers involved, however, this analysis is not necessarily illustrative of any particular trends regarding Crown appeals.

107. Both appeals were heard in the same proceedings: *Director of Public Prosecutions v Fucile & Tran* [2013] VSCA 312 (11 November 2013).

108. *Director of Public Prosecutions v Maxfield* [2015] VSCA 95 (12 May 2015); *Director of Public Prosecutions (Cth) v Guest* [2014] VSCA 29 (3 March 2014).

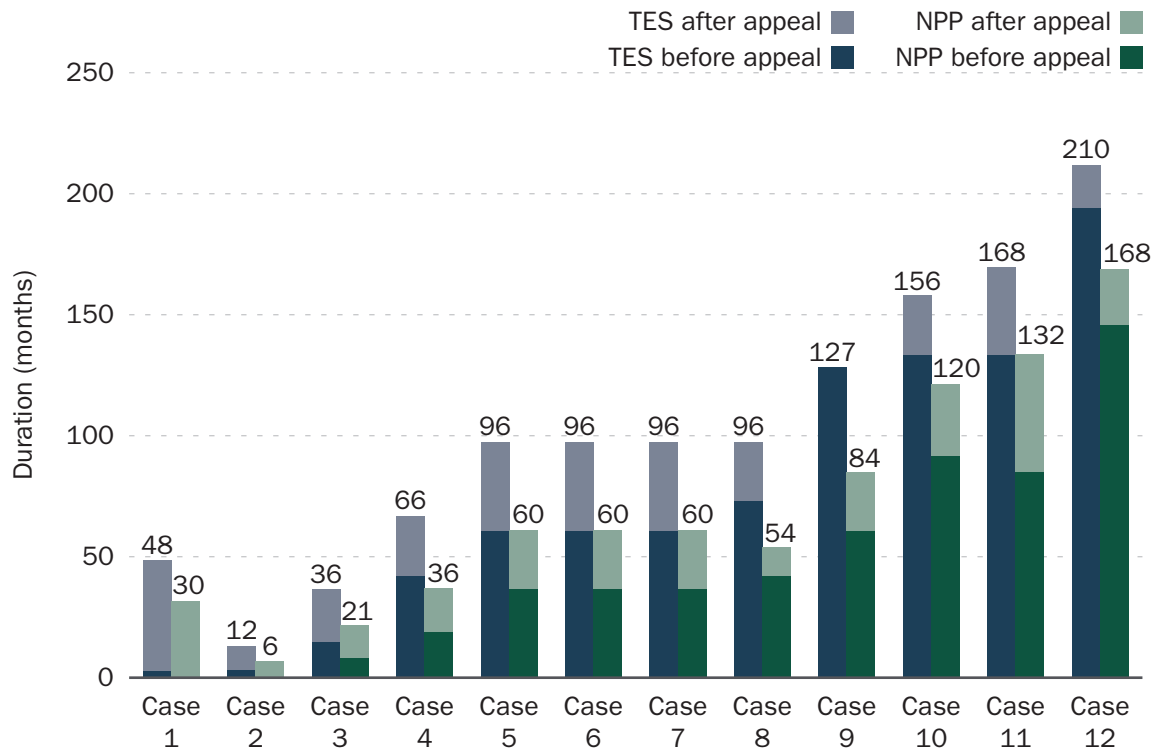
109. *Director of Public Prosecutions v Cartwright* [2015] VSCA 11 (11 February 2015). Although this offender was sentenced to a term of imprisonment, the case is not included in Table 3 because the appeal related exclusively to the sex offender registration order. A sex offender registration order is, however, defined as a sentence: *Criminal Procedure Act 2009* (Vic) s 3.

110. As per above n 93, the total number of cases with an immediate custodial component (1,264) comprises 124 partially suspended sentences and 1,140 immediate terms of imprisonment.

Changes to imprisonment sentences after successful Crown appeals

Figure 11 shows the changes made to both total effective sentences and non-parole periods in the 12 successful Crown appeals involving imprisonment sentences.

Figure 11: Imprisonment sentences imposed in the higher courts in 2013–14 and appealed by the Crown and finalised by 31 December 2016, by changes to total effective sentences and non-parole periods (in months)¹¹¹



The average increase to the **total effective sentence** resulting from successful Crown appeals was an additional 70% of the original sentence.¹¹² In raw numbers, the average increase was 24 months (or 26 months if Case 1 is included). The smallest increase was nine months (Case 2),¹¹³ and the largest increases were 45 months (Case 1) and 36 months (Cases 5, 6, 7 and 11).

The average proportional increase in **non-parole periods** was 64%.¹¹⁴ In raw numbers, the average increase in non-parole periods was 23 months (including Cases 1 and 2). The smallest increase was six months (Case 2), and the largest increase was 48 months (Case 11). In the majority of cases (7 of 12 cases), the non-parole period was increased by between two and less than three years. It was to be expected that the average proportional increase to the non-parole period (64%) would be slightly lower than the average proportional increase to the total effective sentence (70%). Excepting cases in which no non-parole period is imposed,¹¹⁵ non-parole periods are ordinarily between two-thirds and three-quarters of the total effective sentence of imprisonment.¹¹⁶ As a result, any increase in the total effective sentence is usually accompanied by a slightly lower increase in the corresponding non-parole period.

111. In Case 12, the total effective sentence and non-parole period reflect the combination of two original sentences; however, the Director of Public Prosecutions only appealed one of the two sentences: *Murrell v The Queen; Director of Public Prosecutions v Murrell* [2014] VSCA 337 (18 December 2014).

112. Case 1 is excluded as it is an outlier case in which the total effective sentence was 16 times higher than the original sentence.

113. Case 9 is excluded as the Crown appeal did not result in a change to the total effective sentence.

114. Cases 1 and 2 are excluded as there were no non-parole periods in the original sentences.

115. *Sentencing Act 1991* (Vic) s 11, which provides that courts have discretion to impose a non-parole period for imprisonment terms of between one and two years, but they cannot impose a non-parole period for imprisonment terms of less than one year.

116. Judicial College of Victoria, '7.12 – Non-Parole Period', *Victorian Sentencing Manual* (2017).

Concluding remarks

This report has examined sentence appeals for all cases sentenced in the higher courts in 2013–14 that were appealed and finalised by 31 December 2016.

In total, 1,910 cases were sentenced in the higher courts in 2013–14. Of these, 230 (12%) were appealed. The majority of appeals (91%) were offender appeals, and 10% were Crown appeals.¹¹⁷ The Crown was successful in 16 of 23 cases, and offenders were successful in 44 of 153 sentence appeals (offender conviction appeals are excluded from the analysis).

In total, then, 3.1% of all sentences imposed in the higher courts in 2013–14 were successfully appealed: 2.3% were offender sentence appeals and the remaining 0.8% were Crown appeals. This finding corresponds with a recent statement made by the Chief Judge of the County Court in response to media criticism of sentences that were later appealed,¹¹⁸ such that of the 1,600 cases sentenced in the County Court in 2017, the original sentence was only increased on appeal in 13 cases (also less than 1%).¹¹⁹

Offender sentence appeals

The 153 offender sentence appeals analysed in this report involved 804 discrete charges. The most common *principal proven offence* types in these appeals were drug offences (28%), acts intended to cause injury (18%) and sexual offences (14%). The most common sentence type appealed was imprisonment (150 of 153 cases).¹²⁰

The likelihood of an offender both appealing a sentence and being *successful* in that appeal increased as the length of the imprisonment term increased. Offenders successfully appealed 2% of the 890 cases with imprisonment terms of less than five years. They successfully appealed 5% of the 310 cases with imprisonment terms of between five years and less than 10 years. Finally, they successfully appealed 19% of the 64 cases with imprisonment terms of 10 years or more.

Of the successful offender sentence appeals involving imprisonment sentences, the average proportional reduction in the total effective sentence was 20% (or 16 months in raw numbers), and the average proportional reduction in the non-parole period was 25% (or 17 months in raw numbers).

Crown appeals

The 23 Crown appeals analysed in this report involved 59 discrete charges. The most common *principal proven offence* types in these appeals were drug offences (7 cases), burglary offences (4 cases) and acts intended to cause injury (also 4 cases). The most common sentence type appealed was imprisonment (in 18 cases).

117. The overlap is a result of two cases that were appealed by both the offender and the Crown.

118. Aleks Devic, 'Victorian Criminals Hit with Extra Time as Soft Sentences Thrown Out', *Herald Sun* (Melbourne) 17 May 2018 <<http://www.heraldsun.com.au/news/law-order/victorian-criminals-hit-with-extra-time-as-soft-sentences-thrown-out/news-story/aa5b064f003fbefa53a5a3bc8825116c>> at 1 June 2018.

119. Chief Judge Peter Kidd, 'Message from the Chief Judge – Response to Recent Media on Sentencing' (countycourt.vic.gov.au, 2018) County Court of Victoria <<https://www.countycourt.vic.gov.au/news-media/news/message-chief-judge-response-recent-media-sentencing>> at 1 June 2018 (published 23 May 2018).

120. Nine of the 150 imprisonment sentences were partially suspended sentences that included an immediate custodial component.

Of the 18 Crown appeals involving imprisonment, 12 were successful. The average proportional increase in the total effective sentence was 70% (excluding an outlier case in which the total effective sentence was substantially increased), and the average increase in the non-parole period was 64%. In raw numbers, including the outlier case, the average increase to the total effective sentence was 26 months, and the average increase to the non-parole period was 23 months.

Comparison with findings in the 2012 report

With the caveat that the data set in this report is relatively small, there are some comparisons that can be made between this report and the 2012 report (see Table 5, page 27). Overall, the characteristics of sentence appeals in Victoria have changed relatively little. For example, the proportion of offender sentence appeals involving original sentences of imprisonment (including partially suspended sentences) remained very high at 98%, and the proportion of offender sentence appeals that were allowed (after leave to appeal was granted) increased slightly from 55% to 57%.

There are, however, three noteworthy changes:

- first, the proportion of appeals initiated by offenders increased from 80% to 91% (in comparison with appeals initiated by the Crown);
- second, and perhaps relatedly, the success rate of Crown appeals increased from 52% to 70%; and
- third, the proportion of offender appeals for which leave to appeal was granted decreased from 60% to 50%. It is likely that new processes in the Court of Appeal designed to drive improvements in court efficiency contributed to this change.

Future research

As mentioned at the beginning of this report (see page 2), a significant change to sentence appeals in Victoria occurred in October 2017 when the High Court delivered its decision in *Dalgliesh*, which substantially reduced the weight that Victorian courts are required to give to *current sentencing practices*. Some time will need to pass before research can be conducted on the effect of *Dalgliesh* (and other recent reforms, such as the introduction of standard sentences); however, the findings in this report should offer a useful point of comparison for that future research.

Table 5: Comparison of key findings between the present report and the 2012 report

Feature of sentence appeals	2012 report	Present report
Offender appeals	80%	91%
Offender sentence appeal of case with imprisonment sentence	98%	98%
Crown appeal of case with imprisonment sentence	68%	78%
Leave to appeal sentence granted to offender	60%	50%
Offender appeal allowed (where leave granted)	55%	57%
Average reduction to total effective sentence of imprisonment following successful offender sentence appeal ^a	17%	19%
Average reduction to non-parole period following successful offender sentence appeal	20%	25%
Crown appeal allowed	52%	70%
Average increase to total effective sentence of imprisonment following successful Crown appeal ^b	39%	36%
Average increase to non-parole period following successful Crown appeal	54%	64%
Most common offence in offender sentence appeals – principal proven offence only	Drug offences (23%)	Drug offences (28%)
	Sexual offences (16%)	Acts intended to cause injury (18%)
	Acts intended to cause injury (13%)	Sexual offences (14%)
Most common offences in Crown appeals – principal proven offence only	Acts intended to cause injury (30%)	Drug offences (30%)
	Sexual offences (20%)	Burglary offences (17%)
	Homicide offences (13%)	Acts intended to cause injury (17%)

a. In order to ensure comparability of findings between the 2012 report and the present report, this is limited only to sentences of immediate imprisonment, and does not include partially suspended sentences of imprisonment. This is why some percentages in Table 5 are different from the percentages discussed elsewhere in the report.

b. In order to ensure comparability of findings between the 2012 report and the present report, this does not include cases in which the increase to the total effective sentence was greater than 100%. This is why some percentages in Table 5 are different from the percentages discussed elsewhere in the report.

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Sentencing Advisory Council

Level 3

333 Queen Street

Melbourne VIC 3000

Telephone 1300 363 196

Facsimile 03 9908 8777

contact@sentencingcouncil.vic.gov.au

www.sentencingcouncil.vic.gov.au

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