



Sentence Appeals in Victoria

Statistical Research Report

Sentencing Advisory Council
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Chapter 1

Introduction

Purpose and scope

- 1.1 The Court of Appeal plays a crucial role in sentencing in Victoria. It reviews sentences imposed by judges of the County Court and the Trial Division of the Supreme Court and determines whether an error has been made in the sentencing process.¹ In giving its reasons for judgment, the Court of Appeal may also provide guidance to sentencing judges about the correct approach to sentencing.²
- 1.2 Despite the importance of sentence appeals, there is little published research in Victoria on the broader operation of sentence appeals and patterns of decision-making in sentence appeal cases heard by the Court of Appeal.
- 1.3 A number of concerns have been expressed in recent years in relation to sentence appeals in Victoria. In 2009 the President of the Court of Appeal and in 2010 the Chief Justice of the Supreme Court (which includes the Court of Appeal) respectively expressed concerns about what was then a large and growing backlog of criminal appeals in the Court of Appeal.³ Questions have also been raised about the number of Crown appeals against sentence as well as the principles that apply to such appeals.⁴ Other concerns raised relate to more substantive issues in sentence appeals, including errors found by the Court of Appeal to have been made in the sentencing process⁵ and resentencing outcomes in successful sentence appeals.⁶

¹ The Court of Appeal also hears appeals arising out of civil matters in the County and Supreme Courts and some appeals from proceedings before the Victorian Civil and Administrative Tribunal (VCAT) and other tribunals.

² The Court of Appeal also hears 'fresh evidence' appeals.

³ Chris Maxwell, 'A New Approach to Criminal Appeals' (Address to the Victorian Bar, Melbourne, 7 October 2009) 11; Supreme Court of Victoria, *2009–10 Annual Report* (2010) 1.

⁴ See for example, Richard Edney, 'Crown Appeals against Sentence in Victoria: Results and Implications of an Empirical Study' (2005) 79 *Australian Law Journal* 513. See also Geoff Wilkinson, 'It's an Injustice to Society if the Punishment Doesn't Fit the Crime', *Herald Sun* (Melbourne), 5 August 2010, 32.

⁵ See for examples, Geoff Wilkinson, 'Judges on Trial. Revealed: Mistakes Lead to Record Number of Appeals', *Herald Sun* (Melbourne), 13 January 2009, 1; Wilkinson (2010), above n 4, 32.

⁶ See for example, Wilkinson (2010), above n 4, 32.

- 1.4 At the same time a number of reforms have also been made to the laws governing sentence appeals and to the practices and procedures that apply to sentence appeals. One such reform has been the introduction of the *Criminal Procedure Act 2009* (Vic), which has changed the law in relation to Crown and offender appeals. Another significant reform has been the introduction by the Supreme Court of an 'intensive management' model of criminal appeal cases based on the Criminal Division of the Court of Appeal of England and Wales. The purpose of this reform is to reduce the backlog of criminal appeals and reduce delay in the hearing and determination of criminal appeals.⁷ Other changes to practice and procedure include the adoption of two-judge sentence appeal hearings (rather than a bench of three), the delivery of judgments on the same day as hearings where possible and more stringent monitoring of compliance with procedural timetables. The creation of a new Judge of Appeal position in 2009 has taken the number of Judges of Appeal from 11 to 12 (including the Chief Justice of the Supreme Court and the President of the Court of Appeal). An increase in the number of judges sitting as Judges of Appeal has also been facilitated by the constant sitting of at least two trial judges as acting Judges of Appeal.
- 1.5 Pursuant to its statutory functions of providing statistical information on sentencing and conducting research and disseminating information on sentencing matters,⁸ the Sentencing Advisory Council ('the Council') has undertaken this project, which aims to describe and analyse data⁹ on sentence appeals in Victoria in the context of Victorian sentencing law and practice.
- 1.6 The purpose of this report is to address the absence of data available on the operation of sentence appeals and to provide analysis to assist in continued discussions of the concerns that have been raised.

⁷ Supreme Court of Victoria, *2010–11 Annual Report* (2011) 5.

⁸ *Sentencing Act 1991* (Vic) ss 108C(1)(b)–(c).

⁹ These data have been made available to the Council by a number of sources. For information about the sources of data used in this report, a glossary of data sources and the Council's methodology, see Appendix I.

Limitations

- 1.7 There is no one source of data on the operation of sentence appeals. The report draws from a range of data sources, which are particularly complex as much of the data available on criminal appeals are not sufficiently disaggregated to show the breakdown of sentence appeals, conviction appeals and conviction and sentence appeals. Further, the data in this report cover a range of different time periods, data collection methods and data sources.
- 1.8 Over the period examined, there have been changes to the sentencing environment, and various changes have been made to the law and procedure on sentence appeals. Chapter 2 of the report outlines the sentencing framework in Victoria. Chapter 3 describes the role of appeals within that framework and notes the recent reforms to the legislation governing sentence appeals and the practices and processes that are intended to address delay.
- 1.9 Chapter 4 presents data on the number of criminal appeals lodged, finalised and pending in the Court of Appeal. Trend data presented on criminal lodgements are drawn from various sources over four periods. Comparisons between these four datasets should be made with caution, as there are slight differences in the counting rules used in each source:
- The first dataset is for the period 1996 to 1999 using data from a study on appeals in 2000 by Phillip Priest QC and Paul Holdenson QC.
 - The second dataset is for the period 2003–04 to 2009–10 using data from the Productivity Commission. This also includes Productivity Commission data on the criminal appeal backlog in each Australian state as at 2009–10 and on criminal appeal lodgements in Victoria and New South Wales from 2003–04 to 2009–10.¹⁰ Caution should also be exercised in comparing these data due to the different sentencing frameworks and appeal processes, and differences in the constitution of appellate courts in different jurisdictions.
 - The third dataset is for the period 2009–10 to 2010–11 using data from the Court of Appeal's new CourtView database.
 - The fourth dataset is for the period 2008 to 2010 using data from the Court of Appeal's new CourtView database. This comprises a breakdown of criminal appeal lodgements into types of appeal matter.
- 1.10 Chapter 4 also presents data on the factors that may be impacting on trends in criminal appeal lodgements, including trends in criminal case lodgements in the higher courts, the effect of sexual assault reforms on higher court cases, criminal appeal and sentence appeal lodgement rates, trends in criminal cases sentenced in the higher courts and trends in sentencing practices. These data are primarily sourced from the Productivity Commission, the higher courts sentencing database owned and maintained by the Department of Justice and sentence appeal cases published on the Australasian Legal Information Institute (AustLII) website.
- 1.11 Chapter 5 presents trend data on the number of applications for leave to appeal against sentence and the number of appeals against sentence listed, heard and finalised, and their success rates. Data have been provided by the Victorian Office of Public Prosecutions on sentence appeals brought against sentences imposed for Victorian offences only. The bulk of these data relates to the period 2003 to 2010 (calendar and financial years). Added to this is an analysis of data provided by the Office of the Commonwealth Director of Public Prosecutions on sentence appeals for Commonwealth offences. Data for 2009 and 2010 from the Court of Appeal's CourtView database are also referred to in the commentary on these data. This chapter also presents data on the timing of sentence appeals. It examines the time between hearing and determination of sentence appeals determined in 2007–08

¹⁰ At the time of the finalisation of this report (31 December 2011), comparative data on criminal appeals in Australian states were not available for 2010–11.

and 2008–09 using an analysis of sentence appeal cases published on the AustLII website and data provided by the Court of Appeal for the period 2009–10 and 2010–11. It also examines the timing of sentence appeal outcomes using data from the higher courts sentencing database and sentence appeal cases determined in 2007–08 and 2008–09 published on the AustLII website.

- I.12 Chapter 6 examines data for two discrete time periods on the grounds of appeal that are raised, the rate at which different grounds succeed and the patterns in the sentencing errors that are corrected by the Court of Appeal. The Council collected data on grounds of appeal in sentence appeal cases determined in 2008 and published on the AustLII website. Data on grounds of appeal in sentence appeal cases determined in 2010 were collected by the Court of Appeal using a methodology adapted and modified from that used by the Council for the 2008 data.
- I.13 Finally, Chapter 7 presents sentencing outcomes that followed successful sentence appeals in 2007–08 and 2008–09. It uses data collected by the Council on sentence appeals determined in the period 1 July 2007 to 30 June 2009 and published on the AustLII website. Data from the higher courts sentencing database on the original sentences imposed are also included. These data are used to examine the effect that resentencing in successful offender and Crown sentence appeals has on total effective sentences and non-parole periods.
- I.14 The bulk of the data in this report relates to the period prior to the implementation of many of the recent reforms to criminal appeals. The data confirm the need for many of the measures that have been introduced. The report also contains more recent data that provide an early indication of the possible effects of these measures. The data also function as a useful basis on which the impact of such reforms may be determined and may inform further refinement.
- I.15 The concerns that have been expressed about sentence appeals raise questions about the complex array of factors that impacts on the operation of sentence appeals. There are a number of possible hypotheses as to whether and how these factors underlie trends in sentence appeals. These hypotheses have been extensively explored using the data available to the Council; however, comprehensive trend data that focus specifically on sentence appeals have not been available to directly test these hypotheses. Ultimately, although these data shed light on some aspects of the operation of sentence appeals, it has not been possible to provide conclusive answers to the concerns that have been raised.

Summary of key issues

Backlog in criminal appeals

- I.16 Data from the Productivity Commission show that, in recent years, there has been a large backlog of pending criminal appeals in the Court of Appeal. Since 2003–04, the backlog of criminal appeals has grown, although data from the Court of Appeal's CourtView database show that the number of pending criminal appeals has substantially reduced in 2010–11.
- I.17 At the peak of the backlog, in 2009–10, the number of pending criminal appeals was 548. Based on the number of criminal appeals finalised in that year (506), even if no new criminal appeals were lodged, it would have taken over one year to clear this backlog. In 2009–10, Victoria had the largest criminal appeal backlog compared with all other Australian states and territories.
- I.18 The immediate cause of the backlog, as it stood in Victoria in 2009–10, is that, until very recently, increases in the number of criminal appeals lodged have outnumbered the criminal appeals finalised each year. There have been strong increases in the number of criminal appeals lodged in Victoria, in particular from 2005–06 to 2009–10. Although interstate comparisons must be made with caution, criminal lodgements fell in New South Wales between 2005–06 and 2009–10, while the opposite trend is evident in Victoria. Although finalisations of criminal appeals have also increased in Victoria over the same period, these have not been sufficient to allow the Court of Appeal to cope with the appeals that were lodged.
- I.19 The most recent data available from the Court of Appeal's CourtView database show that the backlog of criminal appeals in Victoria has dropped substantially. The number of pending criminal appeals reduced from 548 in 2009–10 to 404 in 2010–11, as criminal appeal lodgements dropped from 518 in 2009–10 to 397 in 2010–11 and criminal appeal finalisations substantially increased from 506 in 2009–10 to 623 in 2010–11. While there is still a backlog of pending criminal appeals of 404 as at 2010–11, CourtView data on criminal appeals for the first half of 2011–12 show further reductions in the number of pending criminal appeals. The number of pending criminal appeals as at 31 December 2011 was 259, a reduction of 145 criminal appeals from the 404 appeals that were pending as at the end of 2010–11.
- I.20 These data suggest an early positive sign of a change to the previously increasing trends in criminal appeal lodgements and pending criminal appeals, although further trend data are required before fixed conclusions may be drawn. Although the backlog has been substantially reduced in 2010–11, it is unclear what other factors caused this backlog, which, up to 2009–10, had been large and increasing. This report examines a number of possible reasons for the observed increases in criminal appeal lodgements and the criminal appeal backlog.
- I.21 One possible reason is that the increase in criminal appeals lodged between 2005–06 and 2009–10 may reflect an increase in the number of cases dealt with in the trial courts. Although the data suggest some relationship between trends in criminal case lodgements in the higher courts and criminal appeal lodgements, the increase in the number of criminal appeal lodgements cannot simply be attributed to any significant increase in the number of criminal cases.
- I.22 Another possible reason is that there has been a change in the rate at which criminal cases are appealed. The data indicate that since 2005–06, in Victoria there has been an increase in the rate at which criminal cases are appealed. This can be compared with New South Wales, where the rate at which criminal cases are appealed has decreased. Similarly, while there is no discernable trend in the number of cases sentenced in the higher courts since 2001–02, the data also show an increase in the rate at which sentenced cases are appealed in Victoria between 2005–06 and 2009–10.

- I.23 There may have also been changes to sentencing practices that may have led to more appeals against sentence by offenders. There is some evidence of an increase in sentence severity in the period from 2003–04 to 2008–09; however, investigation of the relationship between sentencing practices and the rate at which sentences are appealed has been inconclusive.
- I.24 Further, it is possible that reforms to sexual assault laws since 2006–07 have contributed to the increase in criminal appeal lodgements from 2005–06 to 2009–10. This report finds that in 2007–08 and 2008–09, sexual offences comprised a substantial proportion of the Court of Appeal's workload. In particular, rape is over-represented in both offender and Crown sentence appeals, compared with all cases sentenced in the higher courts. However, although there has been an increase in the proportion of criminal appeals that involve sexual offences, it is unclear whether these reforms have directly contributed to the increase in criminal appeal lodgements.
- I.25 The data and analysis in this report shed light on these factors. The report does not seek to determine conclusively the precise roles of these factors and the complex interrelationships between them in contributing to trends in criminal appeal lodgements. The Council recognises that other factors may also have contributed to the increases in criminal appeal lodgements between 2005–06 and 2009–10.
- I.26 It has not been possible to separate the criminal appeal trend data into sentence appeals; however, there is some indication of increases in sentence appeal lodgements, given the substantial proportion of criminal appeals that are referable to sentencing matters. Since 2008, the number of applications for leave to appeal against sentence and substantive offender sentence appeals listed and heard by the Court of Appeal has increased. These data could also be indicative of the effect that recent reforms introduced to target delay may be having on the Court of Appeal's increased capacity to hear and determine more applications for leave to appeal and sentence appeals. The data also show that, until recently, success rates of applications for leave to appeal and substantive offender sentence appeals have increased over time, although there has been a downward trend in the number of applications for leave to appeal against sentence allowed since 2007. The success rates for substantive offender sentence appeals fluctuated between 2008 and 2010. The number of Crown sentence appeals listed and heard and their success rates have also fluctuated.
- I.27 Data on the timing of sentence appeals in sentence appeal cases prior to the implementation of recent measures introduced by the Supreme Court and the Court of Appeal to address delay confirm the need for such measures. In 2007–08 and 2008–09, almost 60% of sentence appeals took more than 12 months to reach an outcome after the date of sentence. Analysis comparing the time taken to reach sentence appeal outcomes with sentence lengths shows that in almost one-third of cases offenders had served more than half of the non-parole period when the sentence appeal was determined.
- I.28 Since 2007–08, the Court of Appeal has continued to increase the substantial proportion of sentence appeal judgments delivered on the same day as, or close to the day of, hearing the appeal. This, together with the most recent data available on criminal appeal lodgements and sentence appeals, provides further early indications of the effect that recent reforms may be having on addressing delay and reducing the criminal appeals backlog. Continued changes to these trends and reductions in delay may be expected in future under the significant legislative and procedural reforms to criminal appeals in Victoria, although it is too early to conclusively determine exactly what impact these reforms and changes will continue to have in further reducing the backlog of criminal appeals.

Crown appeals against sentence

- 1.29 Crown appeals against sentence in Victoria have traditionally been considered to be rare and exceptional. The data show that, in the past decade to 2009–10, the number of Crown appeals against sentence has increased. While Crown sentence appeals are far from common when compared with offender sentence appeals, they can no longer be described as a 'rarity'.
- 1.30 Data on success rates of Crown sentence appeals show that they have fluctuated between 2000–01 and 2009–10; thus, it is unclear whether success rates of Crown appeals have had a role in the increasing number of Crown appeals against sentence.
- 1.31 Although there have been a number of recent changes to the laws governing Crown sentence appeals, in particular the removal of the double jeopardy principle, recent consideration of these principles by the Court of Appeal¹¹ suggests that these should not affect the frequency with which sentence appeals are brought by the Director of Public Prosecutions.

Substantive issues in sentence appeals

- 1.32 The instinctive synthesis approach to sentencing in Victoria means that the scope for appellate intervention is narrowly confined. Gaining an accurate knowledge of the nature of the errors being argued and found by the Court of Appeal and of the changes made to sentences in resentencing can lead to a better understanding and informed debate about the concerns surrounding the broader operation of substantive issues in sentence appeals.
- 1.33 Data on the grounds of appeal argued and found to be successful in sentence appeals show consistent trends in the types of sentencing errors being argued and found to be successful on appeal. The data comprise two datasets collected over two discrete time periods using slightly different methodologies and thus the two datasets are not directly comparable. However, the data in each dataset indicate that the most prevalent grounds of appeal found to have been successful by the Court of Appeal relate to manifest excess or manifest inadequacy of sentence and errors relating to the weight given to sentencing factors and principles.
- 1.34 In resentencing, the Court of Appeal may make changes to the individual sentences imposed, orders for cumulation and/or concurrency and the non-parole period. In some cases, substantial changes may be made to individual sentences, but the overall effect on the total effective sentence may be minimal. In other cases, significant changes may be made to the non-parole period, but the individual sentences and thus the total effective sentence may remain unchanged. The implications of the minimal impact that resentencing can have on the total effective sentence have recently been considered by the Court of Appeal.¹²
- 1.35 The data show that in 19.5% of successful offender sentence appeals, resentencing resulted in no change being made to the original total effective sentence. In 13.1% of successful offender sentence appeals, resentencing resulted in no change being made to the original non-parole period. In relation to Crown sentence appeals, the data show that where such appeals were successful, resentencing resulted in substantial changes being made to the total effective sentence and non-parole period. The data show that in the vast majority (74.1%) of successful Crown sentence appeals between 2007–08 and 2008–09, the increase in total effective sentence in resentencing was over 30.0%. In 44.4% of successful Crown sentence appeals, resentencing resulted in increases of more than 50.0% in the non-parole period.

¹¹ *Director of Public Prosecutions v Karazisis; Director of Public Prosecutions v Bogtstra; Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14.

¹² *Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010).

Chapter 2

Sentencing in Victoria

Introduction

- 2.1 Sentencing is a complex exercise that involves the consideration of different purposes and factors. It has been described as a 'synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money'.¹³
- 2.2 This chapter considers the legal context for the determination of sentences in Victoria. Prior to examining the role of sentence appeals in Chapter 3, this chapter briefly describes how sentences are determined in this state.

The sentencing framework

- 2.3 In Victoria, sentencing is governed by a combination of statute and common law. The *Sentencing Act 1991* (Vic) sets out the purposes of sentencing, the relevant considerations to which a court must have regard when imposing a sentence and the sentencing hierarchy.
- 2.4 The sentencing purposes listed in section 5(1) of the *Sentencing Act 1991* (Vic), namely just punishment, deterrence, rehabilitation, denunciation and community protection, are the only purposes for which a sentence can be imposed. The *Sentencing Act 1991* (Vic) provides that a judicial officer can impose a sentence for a combination of more than one of these purposes.¹⁴ There is no further guidance in the legislation as to how to balance these purposes, even though '[a]ll these purposes cannot, in logic, co-exist'.¹⁵

¹³ *Weininger v The Queen* (2003) 212 CLR 629, 638, cited in John Goldring, 'Facts and Statistics in the Sentencing Process' (2009) 32 *Australian Bar Review* 281, 287.

¹⁴ *Sentencing Act 1991* (Vic) s 5(1)(f).

¹⁵ Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed., 1999) 203.

- 2.5 There may be cases in which the purposes of sentencing will point in different directions. For example, a person may commit a very serious offence that calls for punishment and denunciation, but the person may also have strong prospects of rehabilitation. A significant term of imprisonment would satisfy the first two purposes but may hinder the offender's rehabilitation. Judges are frequently required to balance competing purposes in this way.
- 2.6 The *Sentencing Act 1991 (Vic)* also includes a number of considerations that the sentencer must take into account when sentencing an offender, including the maximum penalty for the offence, current sentencing practices, the nature and gravity of the offence, the offender's culpability and degree of responsibility for the offence and the impact of the offence on any victim.¹⁶
- 2.7 The considerations listed in the *Sentencing Act 1991 (Vic)* are not intended to be exhaustive, and there is no legislative guidance as to the weight that should be given to each factor. This weight largely depends on the individual circumstances of the case and is left to the discretion of the sentencing judge or magistrate.
- 2.8 When imposing a sentence on an offender, the court must also have regard to the sentencing hierarchy in the *Sentencing Act 1991 (Vic)*. The hierarchy is the legislative expression of the principle of parsimony at common law.¹⁷ The principle provides that 'a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.¹⁸
- 2.9 Sections 5(4)–(7) of the *Sentencing Act 1991 (Vic)* give practical significance to this rule by requiring the sentencer to consider the efficacy of each sanction in fulfilling the relevant sentencing purposes, before moving up to the next, more serious sanction available. For example, section 5(7) states that 'a court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a dismissal, discharge or adjournment'.
- 2.10 The common law supplements these legislative provisions. A number of fundamental principles established at common law guide and limit the type or severity of sentence that should be imposed. Among these are the principles of proportionality, parity and totality and the avoidance of double punishment.¹⁹
- 2.11 Although courts have some guidance as to what they are required to take into account, how these principles and factors are to be balanced against one another is largely a matter for judges in each particular case before them. The common law in Australia, however, prescribes an approach to be followed in formulating a sentence, known as instinctive synthesis.

¹⁶ *Sentencing Act 1991 (Vic)* s 5(2).

¹⁷ Judicial College of Victoria, *Victorian Sentencing Manual* (2005–) <www.justice.vic.gov.au/emanuals/VSM/default.htm> at 30 November 2011, [6.3.1.2] ('Sentencing Act 1991 s 5'); Fox and Freiberg (1999), above n 15, 186.

¹⁸ *Sentencing Act 1991 (Vic)* s 5(3).

¹⁹ *Muldrock v The Queen* (2011) 281 ALR 652, 658. See also Sentencing Advisory Council, *Sentencing, Parole Revocation and Confiscation Orders*, Discussion and Options Paper (2009) 4–7.

The doctrine of instinctive synthesis

- 2.12 In *Markarian v The Queen*²⁰ the High Court affirmed the instinctive synthesis approach to sentencing followed in Victoria, namely that a judge must identify all the factors that are relevant to the sentence, discuss the significance of each factor and then make a decision as to the appropriate sentence given all the facts of the case. Only at the end of the process does the judge determine the sentence.²¹
- 2.13 The High Court stressed that sentencing should not ordinarily be treated as an arithmetical equation. It is neither possible nor desirable for the judge to establish a starting point and then add and subtract the relevant aggravating and mitigating factors to arrive at the final sentence. The doctrine permits, and indeed encourages, the judge to state the factors that he or she has taken into account in determining the sentence but discourages the judge from quantifying the weight that is given to any single factor.²²
- 2.14 The High Court's objection to a two-step approach is that such an approach reduces sentencing to a mathematical exercise. The High Court has consistently held that sentencing is more than merely the sum of the value given to each of the various factors that are taken into account. However, the High Court has also noted that 'the law favours transparency' and 'accessible reasoning'; thus there may be some occasions, for example, in simple cases, when 'some indulgence in an arithmetical process will better serve these ends'.²³
- 2.15 The instinctive synthesis approach to sentencing has recently been endorsed by the High Court in *Hili v The Queen; Jones v The Queen*,²⁴ in which the court emphasised that the prescribed method of achieving consistency in federal sentencing is to apply the relevant legal principles consistently, and that this approach 'is not capable of mathematical expression'.²⁵
- 2.16 While the High Court was careful in the case to note that its comments were limited to the sentencing of federal offenders, these observations have been referred to in recent statements made by the Victorian Court of Appeal concerning general sentencing principles. In *Hudson v The Queen; Director of Public Prosecutions v Hudson*,²⁶ the Court of Appeal rejected the applicant's submission that the non-parole period was manifestly excessive, having had regard to a number of 'worst' category cases of murder. The Court of Appeal said:

The selection of a sentence involves the exercise of a judicial discretion which is informed by the circumstances in which the offence was committed and the character, antecedents and conditions of the offender. It is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty. The method of instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ.²⁷

²⁰ *Markarian v The Queen* (2005) 228 CLR 357.

²¹ *Ibid* 375 (Gleeson CJ, Gummow, Hayne and Callinan JJ); *ibid* 378 (McHugh J).

²² Possible exceptions are the value of the guilty plea and the discount for assisting the authorities. For a discussion of the value of the guilty plea in sentencing, see Sentencing Advisory Council, *Sentence Indication and Specified Sentencing Discounts*, Final Report (2007).

²³ *Markarian v The Queen* (2005) 228 CLR 357, 375 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

²⁴ *Hili v The Queen; Jones v The Queen* (2010) 272 ALR 465, 477.

²⁵ *Ibid* 478.

²⁶ *Hudson v The Queen; Director of Public Prosecutions v Hudson* [2010] VSCA 332 (9 December 2010).

²⁷ *Ibid* [27].

- 2.17 The Court of Appeal went on to say that, while sentences imposed in 'like' cases can provide some indication as to the appropriate range, attempts to identify a 'like' case through a comparative analysis of sentencing cases, whether at first instance or on appeal, are 'calculated to introduce a level of mathematical precision inimical to the instinctive synthesis'.²⁸
- 2.18 The instinctive synthesis approach allows for a high level of individual discretion for judges.²⁹ This reflects confidence in the ability of individual judges to bring to bear their knowledge and experience in considering all the relevant factors and arriving at an appropriate sentence in each of the cases before them.
- 2.19 The Court of Appeal observed in *R v MacNeil-Brown; R v Piggott*:³⁰
- There is ... an ambit of reasonable disagreement in the exercise of the sentencing discretion. It is a fundamental precept of sentencing law that there is no single correct sentence in a particular case, no particular opinion being uniquely right, and that there will be differences of opinion which, within a given range, are legitimate and reasonable.³¹
- 2.20 It is therefore recognised that a degree of 'reasonable' disagreement as to the appropriate sentence in any given case is unavoidable and that this fact is intrinsic to the acceptance of the instinctive synthesis approach.

²⁸ Ibid [32].

²⁹ Fox and Freiberg (1999), above n 15, 28.

³⁰ *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677.

³¹ Ibid 680 (citations omitted).

Consistency in sentencing

The importance of consistency

- 2.21 The *Sentencing Act 1991* (Vic) has as one of its purposes the promotion of ‘consistency of approach in the sentencing of offenders’³² and requires a sentencing court to have regard to ‘current sentencing practices’.³³
- 2.22 Chief Justice Gleeson in *Wong v The Queen*³⁴ recognised and accepted ‘some degree of inconsistency’ as unavoidable in a system that allows for discretionary decision-making.³⁵ However, he also said that there are ‘limits beyond which such an inconsistency itself constitutes a form of injustice’.³⁶
- 2.23 There is a public interest in consistency in sentencing, which may be undermined by the belief that sentencing is dependent on the particular judge who hears the matter.³⁷ The Court of Appeal in *R v MacNeil-Brown; R v Piggott*³⁸ observed:
- Consistency in sentencing is of fundamental importance to public confidence in the criminal justice system and to the maintenance of the rule of law. Not surprisingly, the first of the stated objects of the Sentencing Act is ‘to promote consistency of approach in the sentencing of offenders’.³⁹
- 2.24 The goal is not absolute consistency of outcome, as this is both unachievable and undesirable. The New South Wales Sentencing Council has drawn a distinction between consistency of approach and consistency of outcome in relation to sentencing. The New South Wales Sentencing Council has defined consistency in sentencing as ‘account [being] taken of the same factors and ... similar weight [being] given to those factors’.⁴⁰
- 2.25 The High Court has also said, ‘[c]onsistency is not demonstrated by, and does not require, numerical equivalence ... [t]he consistency that is sought is consistency in the application of the relevant legal principles’.⁴¹ In other words, there is no right sentence, but there is a right way to sentence.
- 2.26 Under the instinctive synthesis approach to sentencing, it is not possible, and indeed it is forbidden, to identify or prescribe the weight that is given to any individual factor in the determination of sentence.⁴² As has been said by the Court of Appeal, ‘quantitative significance is not to be assigned

³² *Sentencing Act 1991* (Vic) s 1(a).

³³ *Sentencing Act 1991* (Vic) s 5(2)(b).

³⁴ *Wong v The Queen* (2001) 207 CLR 584.

³⁵ *Ibid* 591.

³⁶ *Ibid*.

³⁷ James Spigelman, ‘Consistency and Sentencing’ (Paper presented at the Sentencing Conference, Canberra, 8 February 2008) 5.

³⁸ *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677.

³⁹ *Ibid* 690.

⁴⁰ New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Courts* (2004) 10.

⁴¹ *Hili v The Queen; Jones v The Queen* (2010) 272 ALR 465, 466. See also *R v Wyley* [2009] VSCA 17 (19 February 2009) [22].

⁴² As mentioned, the only limited exceptions to this relate to discounts for undertakings to assist the authorities and the Crown in the prosecution of co-offenders and discounts for guilty pleas. However, even in these cases, Victorian courts have been reluctant to quantify the effect on sentence of such discounts. In cases of assistance to the authorities, the question of whether or not to state the discount depends on the circumstances of the particular case: *R v Johnston* [2008] VSCA 133 (29 July 2008) [16]. In relation to discounts for guilty pleas, there is now legislation in Victoria that requires a sentencing judge to state the sentence that would have been imposed but for the plea of guilty: *Sentencing Act 1991* (Vic) s 6AAA.

to individual considerations'.⁴³ However, the Court of Appeal has provided guidance to courts at first instance as to which purpose of sentencing should take precedence in particular circumstances (such as in cases involving youthful⁴⁴ or mentally ill⁴⁵ offenders), but the differing factual circumstances of each case mean that this guidance may be limited in its application.

The sentencing 'range'

- 2.27 Allowing for differing sentences based on particular factual circumstances is where 'reasonable disagreement' becomes relevant. As Justice Batt said in *R v Monardo*,⁴⁶ there is a 'range of sentences open to a sentencing judge in the exercise of sound discretionary judgment'.⁴⁷ The range refers to the limits within which reasonable minds can differ on the appropriate sentence for a particular case. Variations within the range do not constitute a relevant inconsistency or impermissible disparity. However, it is an error of law to impose a sentence that is outside the range applicable to the particular case, an error that requires the Court of Appeal to intervene.
- 2.28 Identifying the range for a particular type of offence in particular circumstances is a difficult exercise. The Court of Appeal has said, 'there is no precise upper limit beyond which a sentence would inevitably be held to be manifestly excessive nor, conversely, a precise lower limit below which a sentence would inevitably be held to be manifestly inadequate'.⁴⁸
- 2.29 Traditionally, guidance on the range for sentencing courts comes from current sentencing practices (previous sentencing decisions in like cases) and relevant authoritative decisions of the Court of Appeal. The decision of *R v MacNeil-Brown; R v Piggott*⁴⁹ also requires the Director of Public Prosecutions to make submissions on the applicable range if requested by the sentencing judge, to ensure the judge does not fall into appellable error.
- 2.30 One way that courts have sought to determine the sentencing range for particular offences in recent years is by using sentencing statistics.⁵⁰ Sentencing statistics are also now commonly referred to in submissions on the plea in courts at first instance and on appeal in the Court of Appeal.⁵¹ The Court of Appeal, while referring to the limited guidance that sentencing statistics can provide within the instinctive synthesis approach, has cautioned against over-reliance on them.⁵²

⁴³ *Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart* (2009) 24 VR 457, 459.

⁴⁴ See *R v Mills* [1998] 4 VR 235.

⁴⁵ See *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269.

⁴⁶ *R v Monardo* [2005] VSCA 115 (13 May 2005).

⁴⁷ *Ibid* [28].

⁴⁸ *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677, 698.

⁴⁹ *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677.

⁵⁰ Goldring (2009), above n 13, 291.

⁵¹ See for example, *R v Thanh Phong Tran* [2009] VSCA 252 (12 October 2009) [46].

⁵² *Hudson v The Queen; Director of Public Prosecutions v Hudson* [2010] VSCA 332 (9 December 2010); *Director of Public Prosecutions v Maynard* [2009] VSCA (11 June 2009) [35]. See also *R v Giordano* [1998] 1 VR 544, 549; *R v Bangard* (2005) 13 VR 146, 148–149; *R v AB (No 2)* (2008) 18 VR 391, 404. The High Court has also warned against the reliance on statistical analyses of sentences and has made observations about the limited role such analyses play in the instinctive process of imposing and reviewing sentence: *Wong v The Queen* (2001) 207 CLR 584; *Hili v The Queen; Jones v The Queen* (2010) 272 ALR 465.

2.31 More recently, the Court of Appeal has said that, while a general overview of sentences imposed in other cases is an indicator of current sentencing practices, such an overview does not function as a determinant of the 'correct' sentence to be imposed. Like cases can provide a general guide to the appropriate sentencing range⁵³ and therefore 'will play a part in informing the "instinctive reaction" when a court is asked to consider whether a sentence is manifestly inadequate or excessive'.⁵⁴ However, taking up the observations made by the High Court with reference to the sentencing of federal offenders, the Court of Appeal has held:

A detailed examination of 'like' cases to implicitly suggest that a particular sentence is the correct one or that the sentence should fall within a very narrow band, is not permissible. Sentences imposed in other cases are not precedents which must be applied unless they can be distinguished. Where principles of parity do not apply, they are not to be regarded as some sort of 'benchmark' which is determinative of the sentence to be imposed.⁵⁵

2.32 Despite these limitations, the increased use of sentencing statistics, together with more information being made available on sentence appeal decisions in reported judgments of the Court of Appeal, has contributed to a change in the sentencing environment.

⁵³ *Hudson v The Queen; Director of Public Prosecutions v Hudson* [2010] VSCA 332 (9 December 2010) [29].

⁵⁴ *Ibid* [28].

⁵⁵ *Ibid* [31] (citations omitted).

Chapter 3

Sentence appeals in Victoria

The appeal framework

The origin of the right to appeal

- 3.1 The current right of a convicted and sentenced person to have his or her sentence reviewed by a higher court can be traced back to the establishment of the English Court of Criminal Appeal in 1907.⁵⁶ One of the main reasons for its establishment was concern about inconsistency in sentencing.⁵⁷
- 3.2 Prior to this, 'appeals against sentence were unknown at common law'.⁵⁸ The modifications to appellate procedures in England represented a major change in the way errors in the judicial process could be rectified, and these modifications were followed in Victoria in 1914.⁵⁹ The Crown's right to appeal against sentence in Victoria was introduced in 1971.⁶⁰
- 3.3 Prior to 1994, offender and Crown appeals in Victoria were conducted using the 'full court' model, whereby civil and criminal appeals were heard and determined by Supreme Court trial judges who were appointed to sit on an ad hoc basis. A separate Court of Appeal in Victoria was established in 1994.⁶¹ The need for a dedicated appellate court was, in large part, driven by concerns about inconsistency in sentencing but was also related to the perceived need to improve the efficiency of the appellate process.⁶²

⁵⁶ *Criminal Appeal Act 1907* (UK).

⁵⁷ Arie Freiberg and Peter Sallman, 'Courts of Appeal and Sentencing: Principles, Policy and Politics', (2008) 26(1) *Law in Context (Criminal Appeals 1907–2007: Issues and Perspectives)* 43, 43.

⁵⁸ Fox and Freiberg (1999), above n 15, 1052.

⁵⁹ *Criminal Appeals Act 1914* (Vic); see now *Crimes Act 1958* (Vic) and *Criminal Procedure Act 2009* (Vic).

⁶⁰ *Criminal Appeals Act 1970* (Vic) s 2.

⁶¹ The Court of Appeal was created by the introduction of the *Constitution (Court of Appeal) Act 1994* (Vic). It commenced operation in June 1995: Supreme Court of Victoria, *2007–08 Annual Report* (2008) 4.

⁶² See further [4.13]–[4.18].

Current framework

- 3.4 Prior to the introduction of the *Criminal Procedure Act 2009* (Vic), all appeals against sentence were governed by the *Crimes Act 1958* (Vic) and common law.
- 3.5 Appeals against sentences imposed before 1 January 2010 are governed by provisions in the *Crimes Act 1958* (Vic). Appeals against sentences imposed on or after 1 January 2010 are governed by the *Criminal Procedure Act 2009* (Vic), which enshrines many common law principles.⁶³
- 3.6 The *Justice Legislation Amendment Act 2010* (Vic) amended the *Criminal Procedure Act 2009* (Vic) to enable all pending applications for leave to appeal against sentence that have been commenced but have not been determined as at 26 June 2010 to be heard under the new legislative regime, irrespective of the date of sentence.⁶⁴
- 3.7 Most data examined in this report relate to appeals governed by the *Crimes Act 1958* (Vic). Due to the current overlap with both legislative regimes, the analysis includes the relevant provisions in both the *Crimes Act 1958* (Vic) and the *Criminal Procedure Act 2009* (Vic).

Offender appeals

- 3.8 An appeal against sentence imposed on an indictment in the higher courts is not available to an offender as of right. An offender may only appeal to the Court of Appeal if he or she has been granted leave to appeal by the Court of Appeal.⁶⁵ The application for leave is normally heard by a single Judge of Appeal.⁶⁶
- 3.9 In an application for leave to appeal made under the *Crimes Act 1958* (Vic), the Court of Appeal was required to grant leave if it considered that one or more of the grounds of appeal were 'reasonably arguable'.⁶⁷ Under the *Criminal Procedure Act 2009* (Vic), an application for leave may be refused by the Court of Appeal in relation to any ground of appeal if there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than first imposed. This is the case even if the Court of Appeal considers the ground of appeal to be reasonably arguable.⁶⁸
- 3.10 If the application for leave to appeal against sentence is granted, the Court of Appeal will hear the appeal, normally constituted by three, or more recently two, Judges of Appeal.⁶⁹ If an offender is not granted leave to appeal by a single Judge of Appeal, the offender is entitled to have the application for leave heard by the Court of Appeal.⁷⁰
- 3.11 The general premise that governs the success of an offender appeal against sentence is whether the 'superior court can find or infer error in the exercise of the original sentencing discretion'.⁷¹

⁶³ *Criminal Procedure Act 2009* (Vic) sch 4, s 10 states that divisions 1, 2 and 3 of part 6.3 of the *Criminal Procedure Act 2009* (Vic) 'apply to an appeal where the sentence is imposed on or after the commencement day'. The commencement day was 1 January 2010: *Criminal Procedure Act 2009* (Vic) Endnotes, page 370.

⁶⁴ *Justice Legislation Amendment Act 2010* (Vic) s 76; *Criminal Procedure Act 2009* (Vic) Endnotes, page 371; Lieutenant-Governor, 'Justice Legislation Amendment Act 2010—Proclamation of Commencement', in Victoria, *Victoria Government Gazette*, No. G 25, 24 June 2010, 1274.

⁶⁵ *Crimes Act 1958* (Vic) s 567(d); *Criminal Procedure Act 2009* (Vic) s 278.

⁶⁶ *Crimes Act 1958* (Vic) s 582; *Criminal Procedure Act 2009* (Vic) s 315.

⁶⁷ *R v Blick* (1999) 108 A Crim R 525; *R v Raad* (2006) 15 VR 338.

⁶⁸ *Criminal Procedure Act 2009* (Vic) ss 280(2)–(3).

⁶⁹ *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r. 2.03.1.

⁷⁰ *Crimes Act 1958* (Vic) s 582; *Criminal Procedure Act 2009* (Vic) s 315(2). See *R v Raad* (2006) 15 VR 338, 348 (Buchanan JA, dissenting).

⁷¹ *House v The King* (1936) 55 CLR 499; Fox and Freiberg (1999), above n 15, 1057.

- 3.12 Under the *Crimes Act 1958* (Vic), the Court of Appeal was required to allow the appeal against sentence if 'a different sentence should have been passed or a different order made'.⁷² The provision did not specify that the Court of Appeal needed to find error before it could intervene on appeal. However, the argument that the provision provided a general discretion to revise sentences was rejected by the Court of Appeal, and it was the 'long recognised practice' of the Court of Appeal not to interfere unless error could first be found in the exercise of the original sentencing discretion⁷³ or, in certain circumstances, there was fresh evidence.⁷⁴
- 3.13 This test for the determination of a sentence appeal is retained and clarified under the *Criminal Procedure Act 2009* (Vic) by expressly adopting the 'error' principle.⁷⁵
- 3.14 If the Court of Appeal allows a sentence appeal, it may set aside the original sentence and impose the sentence and any other order it thinks ought to have been passed, either more or less severe.⁷⁶ Alternatively, it may remit the matter to the original sentencing judge, with directions in relation to the matter and the scope of further hearing by the court.⁷⁷

Crown appeals

- 3.15 The Director of Public Prosecutions has the right to appeal on behalf of the Crown against a sentence passed on a person convicted in the higher courts⁷⁸ if the Director of Public Prosecutions considers that a different sentence should have been passed and is 'satisfied that an appeal should be brought in the public interest'.⁷⁹ There is no requirement for the Director of Public Prosecutions to apply for leave to appeal against sentence.
- 3.16 Under the *Crimes Act 1958* (Vic), if the Court of Appeal considered that a different sentence should have been passed, it was required to allow the appeal and quash the sentence and pass the sentence (more or less severe) it thought should have been passed.⁸⁰ In doing so, the Court of Appeal was bound by the common law principle of sentencing double jeopardy, which refers to the 'putting in jeopardy for the second time the freedom [of the convicted person] beyond the sentence imposed'.⁸¹
- 3.17 Under the *Criminal Procedure Act 2009* (Vic), the Crown can appeal a sentence only if the Director of Public Prosecutions also considers that there has been an error in the sentence imposed.⁸² The *Criminal Procedure Act 2009* (Vic) also changes Crown appeals by removing the common law principle of double jeopardy.⁸³

⁷² *Crimes Act 1958* (Vic) s 568(4).

⁷³ *R v Taylor and O'Meally* [1958] VR 285, 289 (Lowe and Gavan Duffy JJ). See also *R v Johansen (No 2)* [1917] VLR 677, 680 (Cussen J).

⁷⁴ See Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (13th ed., 2010) 495, 501.

⁷⁵ Department of Justice, *Criminal Procedure Act 2009: Legislative Guide* (2010) 261.

⁷⁶ *Crimes Act 1958* (Vic) s 568(4); *Criminal Procedure Act 2009* (Vic) ss 282(1)(a)–(2).

⁷⁷ *Crimes Act 1958* (Vic) ss 568(5)–(6); *Criminal Procedure Act 2009* (Vic) ss 282(1)(b), (3).

⁷⁸ *Crimes Act 1958* (Vic) s 567A.

⁷⁹ *Crimes Act 1958* (Vic) s 567A; *Criminal Procedure Act 2009* (Vic) s 287.

⁸⁰ *Crimes Act 1958* (Vic) s 567A(4).

⁸¹ *Everett and Phillips v The Queen* (1994) 181 CLR 295, 299 (Brennan, Deane, Dawson and Gaudron JJ).

⁸² The *Criminal Procedure Act 2009* (Vic) also retains the Crown's right of appeal if the original court has imposed a less severe sentence because the offender has given an undertaking to assist law enforcement authorities, and the Director of Public Prosecutions considers that the offender has failed to fulfil that undertaking: *Criminal Procedure Act 2009* (Vic) s 291.

⁸³ See discussion at [3.46]–[3.51].

What is the ‘sentence’ appealed?

- 3.18 In many cases coming before the courts, an offender is sentenced for a number of offences. In such cases, ordinarily, individual sentences of imprisonment are imposed in relation to each offence, and orders are made for cumulation or concurrency to arrive at a total effective sentence.⁸⁴ The total effective sentence is the total length of imprisonment that the offender is required to serve for the offending behaviour. Depending on the length of the total effective sentence, a non-parole period may or must be set.⁸⁵ This is the minimum period of imprisonment the offender is required to serve before being considered for release on parole.
- 3.19 This raises the issue of the nature of sentence appeals and what parts of a ‘sentence’ can be appealed. The issue relates to whether an appeal can be lodged against individual sentences only, including orders for cumulation or concurrency and the non-parole period, or whether the right to appeal extends to the total effective sentence.
- 3.20 The Court of Appeal has considered this issue under the new regime for sentence appeals in the *Criminal Procedure Act 2009* (Vic) in *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen*.⁸⁶ A five-member bench held that in the ordinary case the right to appeal under the *Criminal Procedure Act 2009* (Vic) applies to the individual sentences imposed for each offence, including any orders for cumulation or concurrency on those individual sentences and the non-parole period. Where the complaint relates to orders for cumulation or concurrency, these orders comprise components of the individual sentence, and thus a ground of appeal may be lodged on this basis.
- 3.21 The Court of Appeal, however, held that ordinarily an appeal may not be made against the total effective sentence, as the total effective sentence does not come within the definition of a ‘sentence’ in the legislative framework governing appeals.⁸⁷ Similarly, an appeal may not, in the ordinary case, be lodged against the total effective sentence on the basis that there has been an error in cumulation or concurrency. Therefore, in a case involving multiple offences:
- leave should ordinarily only be granted in respect of an individual sentence which is arguably erroneous, but should be refused in respect of other individual sentence(s). Leave will extend, in such a case, to any consequential order for cumulation/concurrency made in respect of the impugned sentence and to any non-parole period which has been fixed.⁸⁸

⁸⁴ Section 9 of the *Sentencing Act 1991* (Vic) empowers a court to impose an aggregate sentence of imprisonment if an offender is convicted of two or more offences that are founded on the same facts or that form, or are part of, a series of offences of the same or a similar character in place of a separate sentence of imprisonment in respect of all or any two or more of the offences.

⁸⁵ *Sentencing Act 1991* (Vic) ss 11(1)–(2).

⁸⁶ *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen* [2010] VSCA 333 (10 December 2010).

⁸⁷ *Ibid* [55]. The definition of ‘total effective sentence’ in *R v Boucher* [1995] 1 VR 110 was referred to and approved.

⁸⁸ *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen* [2010] VSCA 333 (10 December 2010) [55]. For a statement of the same principle on this issue under the *Crimes Act 1958* (Vic), see *R v Gill* [2010] VSCA 67 (31 March 2010) [40], citing *R v Boucher* [1995] 1 VR 110, 116. In *R v Gill*, the Court of Appeal considered the question of whether, once it has determined that an individual sentence is manifestly excessive, this opens up all aspects of the sentencing process. The Court of Appeal held that, due to this and two other reasons, the correct position is that once it is determined that an individual sentence is manifestly excessive and that a lesser sentence should be imposed, the sentence on that count, any order for cumulation or concurrency, the sentence(s) on any other count(s) and the order fixing a non-parole period are opened for fresh determination: *R v Gill* [2010] VSCA 67 (31 March 2010) [36]–[42]. Further, in *R v Burke* (2009) 21 VR 471, 477, the Court of Appeal determined that an appeal under the *Crimes Act 1958* (Vic) does not extend to the ‘notional sentence’ announced in accordance with section 6AAA of the *Sentencing Act 1991* (Vic).

- 3.22 In its interpretation of the term 'sentence', the Court of Appeal further stated that:
- There is nothing in the new statutory regime that would suggest that Parliament intended to alter that position and leave the applicant with no remedy where error is shown with respect to an individual sentence. Unmistakeable language would be required to produce such a result.⁸⁹
- 3.23 This means that an offender is entitled to have an error corrected and to be resentenced with respect to an individual sentence, even if there has been no error with respect to the total effective sentence, irrespective of the effect that changes to individual sentences in resentencing may have on the total effective sentence.⁹⁰

The role of appeals

- 3.24 The Court of Appeal's criminal appeal work comprises the determination of applications for leave to appeal against sentence⁹¹ and the determination of substantive appeals, including appeals against conviction,⁹² against sentence and against both conviction and sentence.
- 3.25 Appeals ordinarily perform two functions:
- to correct substantial errors; and
 - to provide guidance to lower courts.
- 3.26 The first of these functions focuses on the review of a particular case so that any errors in the sentencing process may be corrected to ensure that justice is done in that case.⁹³ The second function operates at a broader, more 'public' level, in giving guidance and aiming 'to clarify and develop a body of law which provides predictability, coherence, consistency, generality, equality and certainty'.⁹⁴

Correction of errors

The 'error' principle

- 3.27 The proper approach to applying the error principle by an appellate court to a review of a sentencing judge's discretion was articulated by the Court of Appeal in *R v Taylor and O'Meally*⁹⁵ as follows:
- It will not proceed by considering at once what the individual members of the bench will consider an appropriate punishment. On the contrary it will look at the sentence imposed by the trial judge, and unless it appears that he [sic] has made a mistake as to the facts, or has acted on an erroneous principle of law, or has taken into account some matters which should not be taken into account, or has failed to take into account matters which should have been taken into account, or has clearly given insufficient weight, or excessive weight, to some matter taken into account, or unless the sentence is obviously – not merely arguably – too severe or too lenient, it will not interfere.⁹⁶

⁸⁹ *Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010) [81].

⁹⁰ *Ibid.*

⁹¹ *Crimes Act 1958* (Vic) ss 567(d), 582; *Criminal Procedure Act 2009* (Vic) ss 278, 280.

⁹² *Crimes Act 1958* (Vic) s 567(a); *Criminal Procedure Act 2009* (Vic) s 274. Under the *Criminal Procedure Act 2009* (Vic), all appeals against conviction now require leave to appeal. Previously it had been a common practice of the Court of Appeal to hear the application for leave before a bench of three (or five) judges and, if leave was granted, to treat the appeal as having been heard *instanter* (at once).

⁹³ One exception to the error principle concerns appeals made against sentence under the 'fresh evidence' rule. In limited circumstances the Court of Appeal may allow an appeal against sentence in the interests of justice or to avoid a miscarriage of justice if there is evidence that sheds light on a fact that was in existence at the time of sentence. See Fox and Freiberg (1999), above n 15, 1083.

⁹⁴ Freiberg and Sallman (2008), above n 57, 46.

⁹⁵ *R v Taylor and O'Meally* [1958] VR 285.

⁹⁶ *Ibid* 289 (Lowe and Gavan Duffy JJ). This principle was first enunciated in *R v Johansen (No 2)* [1917] VLR 677, 679.

- 3.28 This approach was later confirmed by the High Court in *Griffiths v The Queen*.⁹⁷ The primary sources of error, which have been established by the above case law, are that the sentencer has:
- acted on an erroneous principle of law;
 - made a mistake as to the facts;
 - taken into account matters that should not have been taken into account;
 - failed to take into account matters that should have been considered; or
 - clearly given excessive or insufficient weight to some matters taken into account.
- 3.29 These sources of error are not exhaustive. Other errors could also include the sentencer acting 'arbitrarily in response to predetermined policy, capriciously, or in bad faith'.⁹⁸

Manifest excess or manifest inadequacy

- 3.30 The concept of 'non-specific' error has also emerged at common law⁹⁹ whereby a flaw in the exercise of the discretion is inferred from the manifest excess or the manifest inadequacy of the sentence, even if it is not possible to identify the precise source of the error.¹⁰⁰ The grounds of manifest excess and manifest inadequacy were articulated by the High Court in *Dinsdale v The Queen*¹⁰¹ as follows:
- Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion. A Court of Criminal Appeal is not obliged to employ any particular verbal formula so long as the substance of its conclusions and its reasons is made plain. The degree of elaboration that is appropriate or possible will vary from case to case.¹⁰²
- 3.31 This concept focuses on an assessment of the end result of the sentence and whether this result is appropriate in the circumstances of the case. If it is not appropriate, by reason of either its perceived 'crushing' effect on the offender¹⁰³ or its disproportion to the offender's circumstances rendering the sentence unjust and unreasonable,¹⁰⁴ this can be evidence of an error. Therefore:
- Where specific error cannot be detected, if the manner in which the discretion is exercised is such that no reasonable tribunal could exercise the discretion in that way unless there was error ... an appeal court will conclude that some such error has occurred although none is disclosed.¹⁰⁵
- 3.32 Non-specific error can be used as the basis of an offender appeal to argue against the 'manifest excess' of a sentence and in Crown appeals to attack a sentence on the basis of its 'manifest inadequacy'.
- 3.33 The manifest excess and manifest inadequacy grounds of appeal are linked to one of the main functions of an appeal court: ensuring consistency and certainty of sentence by reducing disparities in sentencing standards while still preserving as much as possible the discretion given to sentencing judges.¹⁰⁶

⁹⁷ *Griffiths v The Queen* (1977) 137 CLR 293, 308, 309.

⁹⁸ Fox and Freiberg (1999), above n 15, 1083.

⁹⁹ See for example, *Everett and Phillips v The Queen* (1994) 181 CLR 295; *Harris v The Queen* (1954) 90 CLR 652.

¹⁰⁰ *Skinner v The King* (1913) 16 CLR 336, 339–340; *House v The King* (1936) 55 CLR 499, 505.

¹⁰¹ *Dinsdale v The Queen* (2000) 202 CLR 321.

¹⁰² *Ibid* 325–326.

¹⁰³ Fox and Freiberg (1999) above n 15, 1084.

¹⁰⁴ *R v Campbell, Godfrey and Moran* [1970] VR 120, 129.

¹⁰⁵ *Wood v McDonald* (1988) 35 A Crim R 296, 300 (von Doussa J), citing *Uznanski v Searle* (1981) 26 SASR 388, 389.

¹⁰⁶ *R v Allison* (1987) 49 NTR 38, 39.

- 3.34 For a sentence to be manifestly excessive, it is not enough for an appeal court to have itself imposed a different sentence or to think the sentence is too severe,¹⁰⁷ having regard to the permissible sentencing range. Rather the question is whether the sentence ‘falls within the range of sentences that are appropriate to the objective gravity of the offence and to the matters personal to the offender’.¹⁰⁸ Thus:

A sentence will only be held to be manifestly excessive if it is clearly outside the range of permissible sentences open to the sentencing judge.¹⁰⁹

- 3.35 Similarly, manifest inadequacy requires a significant departure from the range, as the Court of Appeal has observed in referring to the principles set out in *Director of Public Prosecutions v Bright*:¹¹⁰

An appeal should not be brought unless the inadequacy in the sentence is clear and egregious, to the extent that the sentence is so disproportionate to the seriousness of the crime as to shock the public conscience and undermine public confidence in the ability of the courts to play their part in deterring criminal activity.¹¹¹

- 3.36 Most recently, the Victorian Court of Appeal has emphasised the stringency that applies to the grounds of manifest excess and manifest inadequacy. Such grounds are difficult to make good, unless it can be shown that:

it was not reasonably open to the sentencing judge to come to the sentencing conclusion which he/she did if proper weight had been given to all the relevant circumstances of the offending and of the offender.¹¹²

- 3.37 Like the sentencing process, the sentence review process, together with any judgment made by the Court of Appeal that a sentence is manifestly excessive or manifestly inadequate, is an ‘instinctive’ one made on the face of the sentence, having regard to the relevant considerations.¹¹³ Thus:

In order to make good a submission that the sentences passed are excessive, it is essential for an applicant to show that the sentences are manifestly and not merely arguably excessive. Such a submission is not one which is capable of a great deal of elaboration ... the imposition of a sentence is in the last resort an individual sentencing judge’s instinctive synthesis of the various factors involved, and when application is made to this Court for leave to appeal on the ground that a sentence imposed in the Court below is excessive, the approach of the members of this Court must, I think, necessarily be the same. Each member of the Court instinctively synthesises the relevant considerations and, having done so, considers whether in all the circumstances he [sic] is able to say that the sentence imposed is so obviously excessive that there must have been some miscarriage in the trial Judge’s discretion.¹¹⁴

- 3.38 Thus, while sentencing statistics are generally regarded as having limited value and inherent limitations in the sentence review process,¹¹⁵ the Court of Appeal has said that:

a general overview of the sentences imposed by courts over a substantial period for offences of a similar character must inevitably play its part in provoking the instinctive reaction of any court which is asked to consider whether a particular sentence is manifestly excessive or manifestly inadequate.¹¹⁶

¹⁰⁷ *Harris v The Queen* (1954) 90 CLR 652.

¹⁰⁸ *Hudson v The Queen; Director of Public Prosecutions v Hudson* [2010] VSCA 332 (9 December 2010) [35].

¹⁰⁹ *R v Glickman* (Unreported, Victorian Court of Criminal Appeal, Young CJ, McInerney and Anderson JJ, 19 December 1979). See also *R v Wyley* [2009] VSCA 17 (19 February 2009).

¹¹⁰ *Director of Public Prosecutions v Bright* (2006) 163 A Crim R 538.

¹¹¹ *Director of Public Prosecutions v Brown* [2009] VSCA 314 (21 December 2009) [23], referring to the principles set out in *Director of Public Prosecutions v Bright* (2006) 163 A Crim R 538, 542 (Redlich JA).

¹¹² *Director of Public Prosecutions v Karazisis; Director of Public Prosecutions v Bogtstra; Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14, 44.

¹¹³ *R v Giordano* [1998] 1 VR 544, 549; *R v Bangard* (2005) 13 VR 146, 149; *R v AB (No 2)* (2008) 18 VR 391, 404.

¹¹⁴ *R v Kenny* (Unreported, Victorian Court of Criminal Appeal, Young CJ, Starke and Marks JJ, 2 October 1978) 2–3.

¹¹⁵ *R v AB (No 2)* (2008) 18 VR 391, 404.

¹¹⁶ *R v Giordano* [1998] 1 VR 544, 549.

Restraint in intervention by the Court of Appeal

- 3.39 A sentence is presumed to be correct, 'unless the Court of Appeal is satisfied that it is clearly wrong'.¹¹⁷ The original conceptualisation of the error principle was that it should operate as a 'brake' to restrain appellate intervention. First articulated in *House v The King*,¹¹⁸ the error principle was designed to restrain appellate courts from intervening in sentences and unwarranted appeals by requiring the 'necessity to identify an error that justifies and authorises appellate intervention'.¹¹⁹
- 3.40 This deference is shown to the trial judge, not only to maintain the discretion afforded in the sentencing process but also to recognise the advantages that the trial judge has over the Court of Appeal in having presided over the trial. A number of factors have been identified as being relevant to the presumption of correctness, including the trial judge's assessment of the gravity of the crime, the effect of the crime on the victim, the demeanour of witnesses and the defendant's behaviour during the trial.¹²⁰
- 3.41 The presumption of the correctness of a sentence may be legitimately weakened in cases in which the offender has pleaded guilty, as the sentencing judge would not be considered to have the advantages gained from a trial.¹²¹
- 3.42 Another relevant consideration is the recognition by an appellate court of the fact that even though a sentencing judge may not have referred to a matter in sentencing remarks, it does not follow that the matter was not taken into account in sentencing, and it does not of itself imply error. In some cases it may be:
- impossible to expect that [judges] will refer in minute detail to every feature of evidence or sentencing principle which might come into play. Before this Court imputes error because of the absence of words in the remarks on sentence, this Court should be quite satisfied that, allowing for the experience of the judge and the words he [sic] has used, and the sentence he [sic] has passed, the matter has not been present in the sentencing judge's mind and not simply that it *might* not have been.¹²²
- 3.43 Mindful of the deference given to sentencing judges and the exercise of restraint in intervening in sentences on appeal, the Court of Appeal has indicated that 'the Court normally takes a strong stance against what has been described as "tinkering"'.¹²³
- 3.44 Discussion of 'tinkering' with sentences in Victorian case law suggests that tinkering relates to minor reductions in sentences in the context of considering whether a sentence is manifestly excessive.¹²⁴

¹¹⁷ *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621, 627.

¹¹⁸ *House v The King* (1936) 55 CLR 499.

¹¹⁹ *Dinsdale v The Queen* (2000) 202 CLR 321, 339 (Kirby J).

¹²⁰ *Whittaker v The King* (1928) 41 CLR 230, 249; *Skinner v The King* (1913) 16 CLR 336.

¹²¹ *R v Holder and Johnston* [1983] 3 NSWLR 245, 255.

¹²² *R v Salameh* (1991) 55 A Crim R 384, 394 (Lee CJ dissenting), cited in *R v Majors* (1991) 54 A Crim R 334, 338.

¹²³ *R v Williamson* (2009) 21 VR 330, 336 fn 10.

¹²⁴ For a discussion of the propriety of making a minor reduction in sentence to achieve parity between co-offenders, see *R v Wilson* [2000] VSCA 202 (10 October 2000) [21]. In that case, the Court of Appeal distinguished between minor reductions for manifest excess and minor reductions to achieve parity: the question was not whether the sentence was manifestly excessive; it was whether there was manifest disparity between the sentences in question such as to warrant relevant interference by the Court of Appeal. In these circumstances, a minor reduction in the more severe sentence, if otherwise appropriate, would not amount to an impermissible 'tinkering' or 'fiddling' with it.

Error and Crown appeals

- 3.45 Crown appeals differ from offender appeals in a number of ways, some of which reflect historical concerns about the appropriateness of giving the Crown a right to appeal.¹²⁵ These concerns have, in the past, limited the Crown's ability to appeal successfully against sentences.

Double jeopardy

- 3.46 The principle of double jeopardy in sentencing, now repealed in Victoria, required the Court of Appeal, when determining whether or not to allow a Crown appeal, to take into account the fact that the offender had already faced a sentencing court. The effect of the principle was to make appellate courts more reluctant to intervene in Crown appeals.¹²⁶
- 3.47 Further, when the provision was in operation, the Court of Appeal was required to consider sentencing double jeopardy when resentencing an offender on a successful Crown appeal. In resentencing, the Court of Appeal could not impose the sentence that, in its view, should have been imposed by the original sentencing court. Instead the sentence imposed by the Court of Appeal had to be less than the sentence that should have been imposed at first instance by the sentencing judge, in order to recognise that it was the second time the offender had faced a court for sentence.¹²⁷
- 3.48 The principle of double jeopardy took on more significance in cases in which an offender had already been released from custody at the time the appeal was being determined. This can be an issue when there is a lengthy delay between the original sentence and the determination of the appeal.
- 3.49 The double jeopardy rule was abolished by the *Criminal Procedure Act 2009* (Vic).¹²⁸ Since the abolition of the sentencing double jeopardy principle in the *Criminal Procedure Act 2009* (Vic), the Court of Appeal (comprising a bench of five) has considered the effect of the removal of the principle on both the Director of Public Prosecutions' decision to lodge an appeal against sentence and the Court of Appeal's determination of Crown sentence appeals.¹²⁹
- 3.50 The Court of Appeal held that the principle was removed from all stages of its determination of Crown appeals; however, this did not interfere with the Court of Appeal's residual discretion to dismiss an appeal (see below). The Court of Appeal was divided on the issue of whether parliament intended to remove double jeopardy as a consideration for the Director of Public Prosecutions in lodging an appeal. The majority held that double jeopardy principles remain to be taken into account by the Director of Public Prosecutions in determining whether bringing an appeal against sentence is in the public interest.¹³⁰

¹²⁵ There was significant debate in parliament when the Criminal Appeals Bill 1970 (Vic) proposing Crown appeals was introduced. The view of the opposition at the time was that no one would criticise sentences on the basis of inadequacy. Concerns were also expressed that there was a lack of evidence for such a proposal, that the sentencing court was best placed to impose the correct sentence and that an appeal against the inadequacy of sentence was an attack on the ability of judges to perform this duty. See Victoria, 'Criminal Appeals Bill', *Parliamentary Debates*, Legislative Assembly, 29 October 1970, 1484 (Mr Reid, Attorney-General); Victoria, 'Criminal Appeals Bill', *Parliamentary Debates*, Legislative Assembly, 17 November 1970, 1976 (Mr Doube); Victoria, 'Criminal Appeals Bill', *Parliamentary Debates*, Legislative Assembly, 17 November 1970, 1974 (Mr Turnbull).

¹²⁶ *Director of Public Prosecutions v Bright* (2006) 163 A Crim R 538.

¹²⁷ *R v Clarke* (1996) 2 VR 520, 522.

¹²⁸ *Criminal Procedure Act 2009* (Vic) s 294(2). This change followed a recommendation by the Double Jeopardy Law Reform Working Group accepted by the Council of Australian Governments in 2007 (although Victoria reserved its position on double jeopardy). Since that time, the sentencing double jeopardy principle has been removed in the majority of Australian jurisdictions. See Kate Warner, 'Sentencing Review 2008–2009' (2010) 34 *Criminal Law Journal* 16, 24. See also *Criminal Appeals Act 2004* (WA) s 41(4)(b); *Criminal Code 1924* (Tas) s 402(4A); *Criminal Law Consolidation Act 1935* (SA) s 340; *Crimes (Appeal and Review) Act 2001* (NSW) s 68A.

¹²⁹ *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14.

¹³⁰ *Ibid* 42–43 (Ashley, Redlich and Weinberg JJA); *ibid* 17 (Warren CJ and Maxwell P dissenting).

- 3.51 The principle of double jeopardy, however, remains relevant when examining the data in this report, which primarily relate to appeals decided prior to the commencement of the *Criminal Procedure Act 2009* (Vic).

Rare and exceptional circumstances

- 3.52 When Crown appeals were first introduced, there was an apprehension of their being used as a vehicle for injustice and unfairness to an offender. Courts took the view that Crown appeals should only be brought in 'rare and exceptional circumstances to establish some point of principle'.¹³¹

The residual discretion

- 3.53 The Court of Appeal has a residual discretion to dismiss a Crown appeal even if it considers that the sentence is manifestly inadequate.¹³²
- 3.54 In the period 1 July 2007 to 30 June 2009, there were nine Crown appeals where the Court of Appeal found that the sentence imposed by the lower court was manifestly inadequate but chose not to intervene in the sentence. The most commonly stated reason for exercising this residual discretion not to intervene was the double jeopardy principle. In *Director of Public Prosecutions (Cth) v Hizhnikov*,¹³³ where the defendant received a suspended sentence at first instance, the Court of Appeal stated:
- Had we been sentencing the respondent, he would almost certainly have been required to serve a term of actual imprisonment. In that sense, we accept the Crown's submission that a wholly suspended term of imprisonment was grossly inadequate in the circumstances of this case ... the sentence imposed was extraordinarily light by comparison with other sentences imposed in similar cases in Victoria and within the Commonwealth. The position is different, however, when it comes to a Crown appeal. There is first of all the principle of double jeopardy that must be taken into account.¹³⁴
- 3.55 Although sentencing double jeopardy is no longer relevant to Crown sentence appeals determined under the *Criminal Procedure Act 2009* (Vic),¹³⁵ the residual discretion not to intervene survives insofar as it relates to factors other than sentencing double jeopardy.¹³⁶
- 3.56 The Court of Appeal has identified the factors that might be relevant to its residual discretion not to intervene, including 'delay, parity, the totality principle, rehabilitation, and fault on the part of the Crown'.¹³⁷ The residual discretion can, for example, be relevant if the offender is already serving a sentence in the community, particularly if he or she has completed community work or attended programs as part of the sentence.¹³⁸

¹³¹ *Griffiths v The Queen* 137 CLR 293, 310; *R v Clarke* (1996) 2 VR 520.

¹³² *Director of Public Prosecutions v Brown* [2009] VSCA 314 (21 December 2009) [23]. See also Judicial Commission of New South Wales, *Crown Appeals against Sentence* (2005) 16; Nicholas Cowdery, 'Prosecution Appeals in New South Wales: New Rights, Roles and Challenges for the Court of Criminal Appeal and the DPP' (2008) 26(1) *Law in Context (Criminal Appeals 1907–2007: Issues and Perspectives)* 75, 99.

¹³³ *Director of Public Prosecutions (Cth) v Hizhnikov* (2008) 192 A Crim R 69.

¹³⁴ *Ibid* 74.

¹³⁵ *Criminal Procedure Act 2009* (Vic) ss 289(2), 290(2).

¹³⁶ Department of Justice (2010), above n 75, 267.

¹³⁷ *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14, 40; see generally 39–41.

¹³⁸ *Director of Public Prosecutions (Cth) v Hizhnikov* (2008) 192 A Crim R 69, 74. See also *Director of Public Prosecutions v Daniel* [2008] VSCA 76 (16 May 2008) [48]; *Director of Public Prosecutions v Anderson* [2005] VSCA 68 (6 April 2005) [59]; *Director of Public Prosecutions v BW* [2007] VSCA 171 (31 August 2007); *Director of Public Prosecutions v Leach* (2003) 139 A Crim R 64, 75.

- 3.57 Delay is another relevant issue in the determination of Crown appeals, particularly if the offender is close to the end of his or her sentence. In *Director of Public Prosecutions v Dalley*,¹³⁹ the Court of Appeal found that the sentence was manifestly inadequate but did not resentence the offender because of the effect of double jeopardy and the fact that the offender had only a few days left of his sentence to serve.¹⁴⁰
- 3.58 Another relevant consideration is the position of the Crown on the sentence at first instance. Historically there was a view that the Crown did not have any part in sentencing an offender other than putting forward the facts on which an offender was to be sentenced. However, ever since the Crown has had the right to appeal, it has been 'universally accepted' that a corollary to this right is the responsibility to assist the sentencing court to avoid appellable error.¹⁴¹
- 3.59 The fact that the Crown takes a different position on appeal from that taken in the sentencing court does not necessarily mean that the Court of Appeal will decline to intervene in the sentence.¹⁴² In *Director of Public Prosecutions v Waack*,¹⁴³ the Court of Appeal confirmed that an alternative submission to that made on sentence is not fatal to a Crown appeal; however, it is something that the Court of Appeal will take into account:
- ultimately [it is] a matter for the court's discretion what weight to accord to the position taken by the Crown at first instance, if different, and such weight will vary from case to case according to the facts. The degree of the departure must be a relevant consideration, as also the seriousness of the criminal conduct being punished and the magnitude of the sentencing error identified on the appeal – that is, the degree to which the appellate court thinks that the sentencing judge fell into error.¹⁴⁴
- 3.60 The Court of Appeal has also indicated that Crown appeals should not interfere with the proper application of mercy, which in particular circumstances may lead to a more lenient sentence than would otherwise be appropriate. This is the case even for 'offenders with bad records, when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform'.¹⁴⁵
- 3.61 Finally, in determining whether to resentence an offender, the Court of Appeal is constrained by the fact that 'it would be inappropriate to intervene unless the sentence of imprisonment to be substituted was significantly greater than that imposed below'.¹⁴⁶

¹³⁹ *Director of Public Prosecutions v Dalley* [2008] VSCA 173 (11 September 2008).

¹⁴⁰ *Ibid.* It should be noted, however, that the passage of time will not always preclude the Court of Appeal from resentencing an offender. In *Director of Public Prosecutions v S (No 2)* [2009] VSCA 127 (5 June 2009) the Crown was successful in appealing against a sentence of six years' imprisonment with a non-parole period of three years for cultivation of a commercial quantity of a narcotic plant even though the non-parole period had expired by the time the appeal was heard. The issue in that case was not manifest inadequacy, but rather that the offender had reneged on an agreement to give evidence against the co-accused in the case.

¹⁴¹ *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677, 682, 678. The Court of Appeal held that the making of submissions on sentencing range is part of the duty of the prosecutor to assist the court.

¹⁴² However, see *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677, 684, in which the duty of the Crown to make submissions on sentencing can be linked to the Crown right of appeal in that '[a]n appellate court may well decline to intervene on an appeal against sentence to correct an alleged error if the Crown did not do what was reasonably required to assist the sentencing judge to avoid the error'.

¹⁴³ *Director of Public Prosecutions v Waack* (2010) 3 VR 194.

¹⁴⁴ *Ibid.* 207.

¹⁴⁵ *R v Osenkowski* (1982) 30 SASR 212, 212–213, cited in *R v Shahi* [2008] VSCA 281 (19 December 2008).

¹⁴⁶ *Director of Public Prosecutions (Cth) v Hizhnikov* (2008) 192 A Crim R 69.

Provision of guidance

3.62 In addition to the correction of error, the Court of Appeal has a wider role in developing principles of broad application to be followed by lower courts. As suggested by Freiberg and Sallmann:

Moving from the particular case or cases before it, an appellate court may state broadly the underlying principle that provides coherence to conflicting contentions or rules and which will settle not only the instant conflict, but provide future decision-makers with a framework within which to make a decision in a similar case.¹⁴⁷

3.63 In giving its reasons for judgment, the Court of Appeal frequently makes statements to provide some guidance on aspects of sentencing.

3.64 For example, in *R v Mills*¹⁴⁸ the Court of Appeal made a series of propositions relevant to the sentencing of youthful offenders, and in *R v Verdins*; *R v Buckley*; *R v Vo*¹⁴⁹ ('Verdins') the Court of Appeal set out a series of principles relating to the sentencing of offenders suffering from mental disorders, mental abnormalities or mental impairments. In another example, *R v AB (No 2)*,¹⁵⁰ the Court of Appeal considered the weight given to an increase in the maximum penalty for the offence of manslaughter. It discussed the impact that the increase in maximum penalty had on the sentencing discretion and the future sentencing of manslaughter offences subject to the increased maximum penalty. In doing so, it gave guidance on resolving the conflict between the guidance provided by current sentencing practices and the guidance provided by the maximum penalty for an offence when there has been an increase in the maximum penalty by parliament.¹⁵¹

3.65 The *Sentencing Act 1991* (Vic) also allows for the promulgation of a formal guideline judgment.¹⁵² A guideline judgment can be given in a case even where it is not necessary for the purposes of determining the appeal.¹⁵³ In considering the giving of, or in reviewing, a guideline judgment, the Court of Appeal must have regard to the need to promote:

- consistency of approach in sentencing offenders; and
- public confidence in the criminal justice system.¹⁵⁴

¹⁴⁷ Freiberg and Sallman (2008), above n 57, 53.

¹⁴⁸ *R v Mills* [1998] 4 VR 235.

¹⁴⁹ *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269.

¹⁵⁰ *R v AB (No 2)* (2008) 18 VR 391.

¹⁵¹ For other examples of cases in which guidance has been given by the Court of Appeal, see *R v Miceli* [1998] 4 VR 588; *R v Arundell* [2003] VSCA 69 (4 June 2003); *R v Flaherty* (2008) 19 VR 305; *Winch v The Queen* [2010] VSCA 141 (17 June 2010); *R v Gill* [2010] VSCA 67 (31 March 2010); *R v Ashdown* [2011] VSCA 408 (7 December 2011).

¹⁵² *Sentencing Act 1991* (Vic) s 6AB(1).

¹⁵³ *Sentencing Act 1991* (Vic) s 6AB(3).

¹⁵⁴ In considering the giving of, or in reviewing, a guideline judgment, the Court of Appeal is also required to take into account any views stated by the Sentencing Advisory Council and any submissions made by the Director of Public Prosecutions (or a lawyer representing the Director of Public Prosecutions) and a lawyer representing (or arranged by) Victoria Legal Aid: *Sentencing Act 1991* (Vic) s 6AE(c).

- 3.66 Under the *Sentencing Act 1991* (Vic):
- A guideline judgment may set out—
- (a) criteria to be applied in selecting among various sentencing alternatives;
 - (b) the weight to be given to the various purposes specified in section 5(1) for which a sentence may be imposed;
 - (c) the criteria by which a sentencing court is to determine the gravity of an offence;
 - (d) the criteria which a sentencing court may use to reduce the sentence for an offence;
 - (e) the weighting to be given to relevant criteria;
 - (f) any other matter consistent with the principles contained in this Act.¹⁵⁵
- 3.67 The Court of Appeal may give a guideline judgment of its own initiative on hearing and considering an appeal or on an application made by a party to the appeal. To date, the provisions have not been exercised by the Court of Appeal, nor has an application been made to the Court of Appeal to consider giving a guideline judgment.
- 3.68 A range of approaches to the provision of guidance in sentencing has been adopted in other Australian and international jurisdictions.
- 3.69 A number of guideline judgments have been delivered by the New South Wales Court of Criminal Appeal under legislation providing for such judgments.¹⁵⁶ One such guideline judgment was subject to criticism by the High Court; in a judgment that cast doubt on the use of numerical guidelines generally, the High Court suggested that such guidelines restricted the proper exercise of the sentencing discretion.¹⁵⁷ The High Court has also said that 'no universal rules can be stated' as to the sentencing process to be adopted by the courts.¹⁵⁸
- 3.70 While guideline sentencing judgments have not been adopted as a matter of policy by the New Zealand Court of Appeal, and 'there is yet to emerge a consistent approach to the structure and place of guideline judgments within the appellate system',¹⁵⁹ the Court of Appeal in that jurisdiction has issued six judgments that have been characterised as guideline judgments.¹⁶⁰
- 3.71 In England, the responsibility for the provision of guidance, first exercised by the English Court of Appeal, is now shared between the courts and the Sentencing Council for England and Wales, a statutory body that has as one its functions the preparation of sentencing guidelines.¹⁶¹

¹⁵⁵ *Sentencing Act 1991* (Vic) s 6AC. The provisions do not allow the Court of Appeal to set out an appropriate level for, or range of, sentences for a particular offence or class of offences.

¹⁵⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) div 4 pt 3. For a detailed discussion of guideline judgments in New South Wales and a list of guideline judgments that have been delivered, see Judicial Commission of New South Wales, *Sentencing Bench Book* (2007–) <www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html#p13-600> at 30 November 2011, [13-600]–[13-640] ('Sentencing Procedures Generally – Sentencing Guidelines').

¹⁵⁷ *Wong v The Queen* (2001) 207 CLR 584. The validity of guideline judgments under the scheme in New South Wales has since been confirmed by a five-judge bench of the New South Wales Court of Criminal Appeal in *R v Whyte* (2002) 55 NSWLR 252.

¹⁵⁸ *Markarian v The Queen* (2005) 228 CLR 357, 373.

¹⁵⁹ Saul Holt, 'Appellate Sentencing Guidance in New Zealand' (2006) 3 *The New Zealand Postgraduate Law E-Journal* <www.nzpostgraduatelawejournal.auckland.ac.nz/Home.htm> at 25 October 2011, 2.

¹⁶⁰ *Ibid* 11–17.

¹⁶¹ For information on sentencing guidelines and a list of definitive sentencing guidelines delivered by the Council, see Sentencing Council for England and Wales, *Sentencing Guidelines* (Sentencing Council, 2011) <<http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>> at 30 November 2011. For a discussion of the history of appellate guidance in England, see Holt (2006), above n 159, 17–25.

Chapter 4

Trends in criminal appeals

Introduction

- 4.1 This chapter presents and describes trend data on criminal appeal lodgements in the Court of Appeal. This chapter then presents data on trends in criminal lodgements and sentencing cases in the higher courts.
- 4.2 Since 2009, concerns have been expressed about what was then a growing backlog in criminal appeals in the Court of Appeal.¹⁶² Statistics published by the Supreme Court in its annual reports indicate that there were substantial increases in the number of pending criminal appeals during the period from 2005–06 to 2009–10, resulting in a large backlog of criminal appeals by 2009–10. For example, the annual reports of the Supreme Court show that the number of pending applications for leave and criminal appeals increased from 466 in 2007–08¹⁶³ to 548 pending criminal appeals in 2009–10. Given the number of appeals finalised in that year,¹⁶⁴ as at 31 July 2010, it would have taken over one year to clear this backlog, even if no new appeals (or applications for leave to appeal) were lodged in the Court of Appeal.
- 4.3 This backlog of criminal appeals has been substantially reduced in 2010–11, although a backlog of criminal appeals still remains. While there are early positive signs that the backlog is reducing, it is unclear what caused this backlog, which, up to 2009–10, had been large and increasing. The increases in the backlog may have been caused by increases in the overall number of criminal appeal lodgements (conviction and sentence appeals). Alternatively, the increases in the backlog may have been solely referable to increases in sentence appeal lodgements. Other causes of the backlog may have been changes in the higher courts in the number of criminal cases lodged, the number of cases sentenced or the severity of sentences imposed.

¹⁶² Maxwell (2009), above n 3; Supreme Court of Victoria (2010), above n 3.

¹⁶³ Supreme Court of Victoria, *2008–09 Annual Report* (2009) 10.

¹⁶⁴ Supreme Court of Victoria (2010), above n 3, 16.

- 4.4 Data available to the Council show that there have been increases in the number of criminal appeal lodgements in Victoria. This has occurred, in particular since 2005–06, for a number of years, whereupon in 2010–11 there was a substantial decrease in the number of criminal appeal lodgements.
- 4.5 The Council does not, however, have access to equivalent trend data on sentence appeal lodgements. Consequently, there is no direct evidence indicating whether the number of sentence appeals lodged in the Court of Appeal has increased or decreased over the same period.
- 4.6 There are some data available on the number of sentence appeal lodgements from 2008 to 2010. These data have been provided to the Council by the Court of Appeal, from its new CourtView database. Due to the short reference period, it is difficult to discern a trend in sentence appeal lodgements from the data. However, the data show that over 50% of criminal appeal lodgements are sentence-only matters, and the proportion of criminal lodgements referable to sentence-only appeals increased in the period from 2008 to 2010.
- 4.7 Further, there is some indirect evidence of an increase in sentence appeal lodgements. The majority of appeals brought before the Court of Appeal are sentence appeals; therefore, it is likely that the increases in the overall number of criminal appeal lodgements up to 2009–10 reflect a corresponding increase in sentence appeal lodgements. Further, the data examined in this chapter show that the rate at which sentenced cases are appealed increased between 2005–06 and 2009–10.

Trends in criminal appeal lodgements

- 4.8 The Court of Appeal hears appeals from criminal and civil matters in the Supreme Court and the County Court. It also hears some appeals from matters in the Victorian Civil and Administrative Tribunal (VCAT) and other tribunals. The majority of the Court of Appeal's appellate workload consists of criminal appeals. This has been the case since the Court of Appeal commenced operation in 1995.¹⁶⁵ Between 1996 and 1998, criminal appeals comprised approximately 70.0% of all appeals.¹⁶⁶ The most recent annual report of the Supreme Court of Victoria show that 68.3% of appeals filed in 2010–11 were criminal appeals.¹⁶⁷
- 4.9 One factor that has been identified as underlying the previous growth in the backlog of cases in the Court of Appeal is an increase in the number of criminal appeals filed between 2006 and 2008, which outpaced the number of finalisations in 2008–09.¹⁶⁸ In the 2009–10 annual report of the Supreme Court, the Chief Justice of the Supreme Court, Marilyn Warren, discussed the issue of delay caused by increases in the number of criminal appeals:
- Whilst the criminal appeals finalised have steadily but modestly improved, the overall delays are growing because of the increased numbers of criminal appeals being lodged. The Court of Appeal is unable to control the influx of appeals, most of which come from the County Court.¹⁶⁹
- 4.10 This section presents data on trends in criminal appeals. It describes changes in appellate practice, such as the change from a 'full court' model to the establishment of a separate Court of Appeal, and changes in the law and practice relating to the lodgement and determination of criminal appeals. It also describes the recent reforms to the management of criminal appeals initiated in the Court of Appeal to address delay in criminal appeals.
- 4.11 Trend data presented on criminal lodgements are drawn from various sources over three periods. The data on criminal appeal lodgements in the Court of Appeal relate to criminal appeals overall and include appeals against conviction and appeals against sentence. The data relate to the number of lodged, finalised and pending criminal appeals¹⁷⁰ in four datasets covering four discrete time periods: 1996 to 1999,¹⁷¹ 2003–04 to 2009–10,¹⁷² 2009–10 to 2010–11¹⁷³ and 2008 to 2010.¹⁷⁴ Comparisons between these four datasets should be made with caution, as there are slight differences in the counting rules used in each of the four sources.

¹⁶⁵ Stephen Charles, 'The First Decade of the Victorian Court of Appeal' (2008) 26(1) *Law in Context (Criminal Appeals 1907–2007: Issues and Perspectives)* 21, 29–30.

¹⁶⁶ Calculated from data presented by Phillip Priest and Paul Holdenson in 'The Court of Appeal Five Years On: Some Reflections' (Summer 2000) 115 *Victorian Bar News* 16.

¹⁶⁷ Supreme Court of Victoria (2011), above n 7, 9.

¹⁶⁸ Maxwell (2009), above n 3, 11.

¹⁶⁹ Supreme Court of Victoria (2010), above n 3, 1.

¹⁷⁰ Data were not available on the breakdown between conviction and sentence appeals. As the majority of appeals brought before the Court of Appeal tend to be sentence appeals, changes in the overall numbers of lodgements are also a good reflection of the number of sentence appeal lodgements and thus the increasing demand brought about by sentence appeals.

¹⁷¹ Priest and Holdenson (2000), above n 166, 17 (Table 3).

¹⁷² Steering Committee for the Review of Government Services Provision, *Report on Government Services 2011*, vol. 1 (2011) [7.1]–[7.8].

¹⁷³ Data provided to the Sentencing Advisory Council from CourtView, Court of Appeal, Supreme Court of Victoria.

¹⁷⁴ Data provided to the Sentencing Advisory Council from CourtView, Court of Appeal, Supreme Court of Victoria.

- The first dataset is for the period 1996 to 1999 using data from a study on appeals in 2000 by Phillip Priest QC and Paul Holdenson QC. This dataset counts criminal appeals to the Court of Appeal by calendar year.
 - The second dataset is for the period 2003–04 to 2009–10 using data from the Productivity Commission. This also includes Productivity Commission data on the criminal appeal backlog in each Australian state as at 2009–10 and on criminal appeal lodgements in Victoria and New South Wales from 2003–04 to 2009–10.¹⁷⁵ Caution should also be exercised in comparing these data due to the different sentencing frameworks and appeal processes, and differences in the constitution of appellate courts in different jurisdictions. This dataset counts criminal appeals by financial year and includes criminal appeals to the Court of Appeal and criminal appeals from the Magistrates' Court to the Trial Division of the Supreme Court on a question of law.¹⁷⁶
 - The third dataset is for the period 2009–10 to 2010–11 using data from the Court of Appeal's CourtView database. This dataset counts criminal appeals by financial year and only includes criminal appeals in the Court of Appeal. It excludes criminal appeals from the Magistrates' Court to the Trial Division of the Supreme Court on a question of law.¹⁷⁷
 - The fourth dataset is for the period 2008 to 2010 using data from the Court of Appeal's CourtView database. This dataset counts criminal appeals by calendar year and only includes criminal appeals in the Court of Appeal. It excludes criminal appeals from the Magistrates' Court to the Trial Division of the Supreme Court on a question of law.¹⁷⁸ It contains a breakdown of criminal appeal lodgements into types of appeal matter.
- 4.12 Filings or lodgements of criminal appeals can indicate the demand on the Court of Appeal in terms of its workload.¹⁷⁹ Lodgement of an appeal in Victoria refers to the initiation of a matter by filing a notice of appeal (or application for leave to appeal). Finalisations refer to dispositions of appeals, either by judicial determination¹⁸⁰ or by non-judicial determination.¹⁸¹ A matter is not necessarily finalised by way of a substantive appeal and may not result in a reported judgment.¹⁸² The number of pending appeals refers to the number of appeal matters (either applications for leave or substantive appeals) not finalised at any particular time. This is calculated by comparing the number of criminal appeal finalisations with the number of criminal appeal lodgements.

¹⁷⁵ At the time of the finalisation of this report (31 December 2011), comparative data on criminal appeals in Australian states were not available for 2010–11.

¹⁷⁶ *Criminal Procedure Act 2009* (Vic) s 272. Prior to the introduction of the *Criminal Procedure Act 2009* (Vic) criminal appeals from the Magistrates' Court to the Trial Division of the Supreme Court on a question of law were made pursuant to the *Magistrates' Court Act 1989* (Vic) s 92.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ If an application for leave is granted and proceeds to be heard as a substantive appeal, it is counted as one lodgement.

¹⁸⁰ For example, a refusal of leave to appeal, a refusal of appeal or a grant of appeal.

¹⁸¹ For example, abandonment of an appeal or dismissal for failure to comply with the applicable rules.

¹⁸² Supreme Court of Victoria (2010), above n 3, 16. A matter can be 'finalised' a number of times; for example, the Court of Appeal may refuse leave to appeal and the applicant may elect to proceed to the Court of Appeal whereupon leave is granted and the appeal is allowed, but the matter will only be counted as one finalisation.

Trends in criminal appeals from 1996 to 1999

- 4.13 Support for the establishment of a separate Court of Appeal within the Supreme Court began to emerge in Victoria in 1987.¹⁸³ Writing about the comments that were expressed publicly on this matter in 1987, Stephen Charles QC stated:
- In Victoria, complaint was also made of the delay in hearing appeals being a matter of despair to practitioners and that the number of pending appeals was then increasing dramatically ... [It was suggested] that the profession believed the Full Court, already overburdened with work, did not respond adequately to the demands of urgent litigation.¹⁸⁴
- 4.14 The Supreme Court responded to such complaints by establishing an Appeal Division in the late 1980s as part of an internal reorganisation.¹⁸⁵
- 4.15 In 1994 a separate Court of Appeal was established within the Supreme Court with the expectation that a separate court would not only make the appeal process more efficient and expeditious, but it would also lead to the development of a more consistent approach by the judiciary in determining appeals.¹⁸⁶
- 4.16 A separate Court of Appeal was proposed as a way of removing the inefficiencies that arose from difficulties in balancing appellate work with first instance trial work as the appellate workload increased:
- Permanent appellate membership will also place the Court of Appeal in a sound position to achieve significantly superior case flow management to that of an appellate court of varying composition by, for example, enabling the implementation of more efficient procedures for allocating appeals among its members.¹⁸⁷
- 4.17 When it was first established, the Court of Appeal comprised nine Judges of Appeal, including the Chief Justice, the President and seven Judges of Appeal as well as any additional appointed or acting Judges of Appeal. Two trial judges were also permanently appointed as additional Judges of Appeal who sat on the Court of Appeal permanently until their respective retirements.
- 4.18 After one year of operation in 1995, the Court of Appeal introduced a number of measures to address the already growing workload, particularly in sentence appeals. These measures included the introduction of two practice statements in 1995 to improve the management of the Court of Appeal's civil and criminal appeal workload.¹⁸⁸

¹⁸³ Charles (2008), above n 165, 21.

¹⁸⁴ Charles (2008), above n 165, 25. These debates also arose out of the previous establishment of separate appellate courts in New South Wales and Queensland and comments made by Justice Kirby, the then President of the New South Wales Court of Appeal, in an article published in August 1987 and in an address to the Law Institute of Victoria in October 1987.

¹⁸⁵ Charles (2008), above n 165, 26.

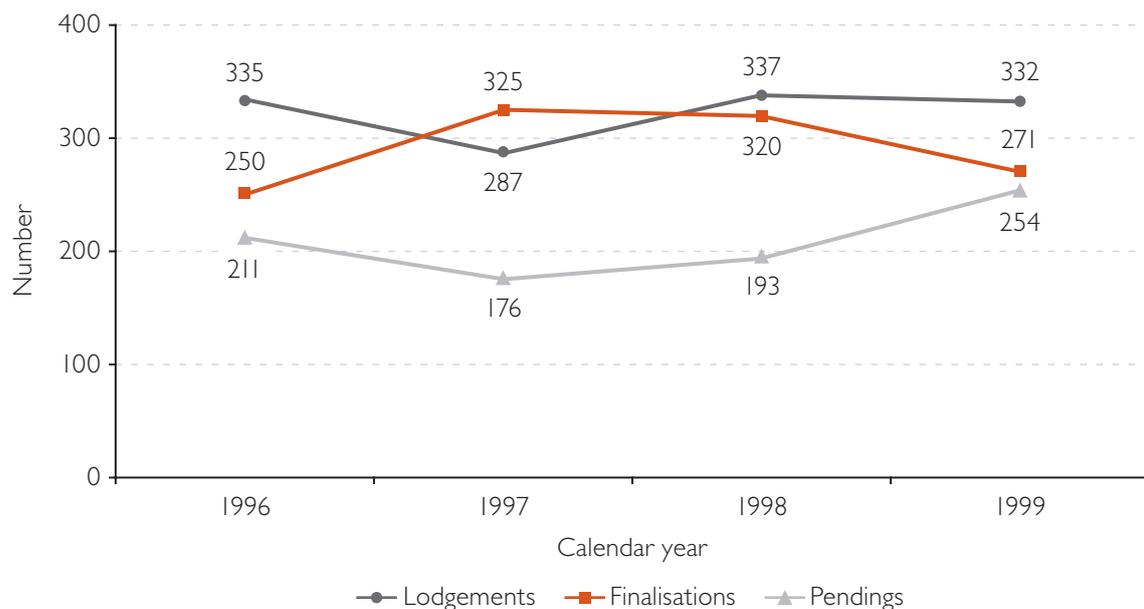
¹⁸⁶ Jan Wade, 'Inaugural Dean's Lecture on Law Reform' (Law School, University of Melbourne, 1994), cited in Charles (2008), above n 165, 26–27. See also Victoria, 'Constitution (Court of Appeal) Bill', *Parliamentary Debates*, Legislative Assembly, 10 November 1994, 1693–5 (Mrs Jan Wade, Attorney-General).

¹⁸⁷ Victoria, 'Constitution (Court of Appeal) Bill', *Parliamentary Debates*, Legislative Assembly, 10 November 1994, 1694 (Mrs Jan Wade, Attorney-General).

¹⁸⁸ The first practice statement relates to the production of outlines of submissions and chronologies by parties to an appeal: Supreme Court of Victoria, *Court of Appeal Practice Statement No. 1 of 1995* [1996] 1 VR 249. The second, to assist the Court of Appeal in the preparation of judgments, covers the contents of a summary of proceedings and issues and a summary of facts that were to be provided by the parties in appeals: Supreme Court of Victoria, *Court of Appeal Practice Statement No. 2 of 1995* [1996] 1 VR 251. See Charles (2008), above n 165, 29–30.

- 4.19 A study of appeals by Phillip Priest QC and Paul Holdenson QC published in 2000 shows the number of criminal appeals the Court of Appeal had before it on 1 January of each year between 1996 and 1999 and new appeals filed, appeals finalised and resultant appeals the Court of Appeal had not dealt with by 31 December of each year between 1996 and 1999. The number of lodgements, finalisations and pending appeals from their study are presented in Figure 1.
- 4.20 In 1996, the Court of Appeal started the year with 126 criminal appeals on hand. In that year, there were 335 new criminal appeals filed, and the Court of Appeal disposed of 250 criminal appeals. Therefore, the Court of Appeal was left with 211 appeals pending at the end of 1996.
- 4.21 In 1997, in response to its increasing workload, the capacity of the Court of Appeal was increased through the appointment of the two trial judges as additional Judges of Appeal. Figure 1 shows that, in that year, the Court of Appeal increased the number of appeals finalised (325), which allowed it to reduce the number of criminal appeals pending at the end of 1997 to 176.
- 4.22 In 1998, although the number of new appeals increased again to 337, the Court of Appeal maintained a high level of finalisation (320) and was able to keep the number of pending appeals to 193 as at 1 December 1998.
- 4.23 In 1999, however, an equally high number of new appeals (332) was filed, and the Court of Appeal disposed of 271 appeals. This resulted in an increase in the number of matters pending from 193 at the end of 1998 to 254 at the end of 1999.
- 4.24 Using the data presented by Priest and Holdenson, a 'clearance rate' for each year was calculated. The clearance rate is the number of finalisations as a proportion of the number of lodgements in a given year and is a standard measure used by the Productivity Commission. Over the four-year period from 1996 to 1999, the clearance rate was initially 74.6%, indicating finalisations were well below lodgements. After rising to 113.2% in 1997, the clearance rate dropped to 95.0% in 1998, then to 81.6% in 1999.

Figure 1: Number of criminal appeal lodgements, finalisations and pendings, by calendar year, 1996 to 1999



Source: Priest and Holdenson (2000).

- 4.25 After the first five years of its operation, the Court of Appeal was generally considered to have achieved one of its aims of addressing delay in the appeal process. The Court of Appeal was described as a success in terms of its ability to deal more expeditiously with the appellate workload. In 2000, Priest and Holdenson observed:
- It has been our experience that urgent applications – in both the criminal and civil divisions – can generally be accommodated without great difficulty ... Our distinct impression is that the Court of Appeal is far more efficient in dealing with applications than was its predecessor. This impression seems to be supported by the figures.¹⁸⁹
- 4.26 The data presented show that by 1999, however, there were early signs of a growing backlog of pending criminal appeals.
- 4.27 A significant measure that was adopted in response to the increasing demands on the Court of Appeal was the change in practice in November 1999 when the Court of Appeal began to use section 582 of the *Crimes Act 1958* (Vic) to manage the growing workload in sentence appeals. The provision allowed applications for leave to appeal to be heard and determined by a single Judge of Appeal, rather than a full bench of three or two Judges of Appeal.¹⁹⁰
- 4.28 Although the power for a single judge to hear applications for leave had been available from the commencement of the Court of Appeal,¹⁹¹ it had not previously been used. The adoption of the practice was largely in response to the realisation that the greatest volume of the Court of Appeal's work was in sentence appeals and that substantial numbers of sentence appeals were being abandoned before or at the commencement of the hearing.¹⁹² The continued use of this provision led to the current practice of applications for leave to appeal being made to a single Judge of Appeal.¹⁹³ In the 2001 annual report of the Supreme Court, it was reported that this 'screening process employed by the Court pursuant to s.582 of the *Crimes Act* has proved to be successful in reducing the number of frivolous applications for leave to appeal against sentence'.¹⁹⁴

¹⁸⁹ Priest and Holdenson (2000), above n 166, cited by Charles (2008), above n 165, 32.

¹⁹⁰ Supreme Court of Victoria, *Annual Report 1999* (2000) 10; Supreme Court of Victoria, *Annual Report 1998* (1999) 21. The *Constitution (Court of Appeal) Act 1994* (Vic) s 11 provided that any three or more judges may constitute the Court of Appeal; however, the President of the Court of Appeal is empowered to determine that, in a particular case, only two Judges of Appeal can constitute the Court of Appeal: Victoria, 'Constitution (Court of Appeal) Bill', *Parliamentary Debates*, Legislative Assembly, 10 November 1994, 1694 (Mrs Jan Wade, Attorney-General). The Supreme Court rules now provide that two Judges of Appeal may hear and determine a sentence appeal: *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r. 2.03.1.

¹⁹¹ *Constitution (Court of Appeal) Act 1994* (Vic) ss 26(b), 28(h)(i). The Court of Appeal commenced operation on 8 June 1995.

¹⁹² Charles (2008), above n 165, 30.

¹⁹³ *Ibid.* See *R v Raad* (2006) 15 VR 338, 338.

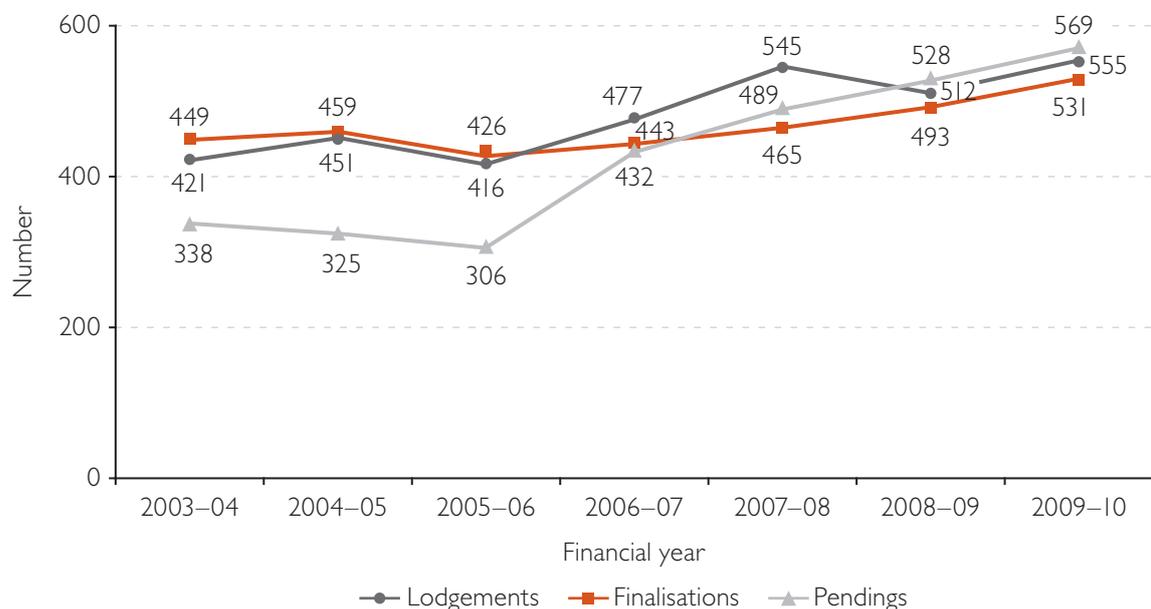
¹⁹⁴ Supreme Court of Victoria, *Annual Report 2001* (2002) 12.

Trends in criminal appeals from 2003–04 to 2009–10

Victoria

- 4.29 Concerns about delays, identified as early as 1999, continued to be expressed in relation to the Court of Appeal's increasing workload and the growing backlog in criminal appeals in the period between 2003–04 and 2009–10.
- 4.30 The delays in the Court of Appeal were noted as a troubling issue in the 2007–08 annual report of the Supreme Court.¹⁹⁵ The need to 'set about attacking delays in criminal appeals' was identified in its 2009–10 annual report as a continued issue of priority for the Supreme Court.¹⁹⁶ In an address to the Victorian Bar in 2009, the President of the Court of Appeal, Justice Maxwell, said:
- Even though we keep increasing the rate of disposal of criminal appeals, we cannot keep pace with the increasing inflow, and the backlog therefore grows.¹⁹⁷
- 4.31 Data published by the Productivity Commission on criminal appeals¹⁹⁸ suggest that, compared with earlier years of the Court of Appeal's operation, the number of criminal appeals has increased. This, combined with growing numbers of pending criminal appeals each year, is likely to have been a contributing factor to the backlog of criminal appeals in the Court of Appeal as it was in 2009–10.
- 4.32 Figure 2 shows the number of criminal appeals lodged, finalised and pending in the Court of Appeal between 2003–04 and 2009–10.

Figure 2: Number of criminal appeal lodgements, finalisations and pendings, by financial year, 2003–04 to 2009–10



Source: Productivity Commission (2011).

¹⁹⁵ Supreme Court of Victoria (2008), above n 61, 2.

¹⁹⁶ Supreme Court of Victoria (2010), above n 3, 1–2.

¹⁹⁷ Maxwell (2009), above n 3, 11.

¹⁹⁸ Steering Committee for the Review of Government Services Provision (2011), above n 172. Published data were unavailable on the number of sentence appeal lodgements specifically. The closest data available were the number of all lodgements, which includes conviction as well as sentence appeals.

- 4.33 Between 2003–04 and 2009–10, the Court of Appeal was required to deal with consistently higher numbers of criminal appeal lodgements compared with the numbers dealt with in the earlier years of its operation (although the two different datasets compare calendar with financial year). In 1999, there were 332 criminal appeals lodged. By 2003–04, the number of appeals lodged annually had increased by almost 100 to reach 421, and by 2007–08, the number had exceeded 500 lodgements, with 545 criminal appeals lodged.
- 4.34 As is evident from Figure 2, the number of criminal appeals lodged has remained above 500 since that time, up to and including 2009–10. In 2008–09, the number of criminal appeals lodged fell slightly to 512. In 2009–10, the number of criminal appeals increased to 555.
- 4.35 Figure 2 also shows that, initially from 2003–04 to 2005–06, the Court of Appeal finalised slightly more criminal appeal matters than were lodged. This resulted in a correspondingly slight reduction in the number of matters that were pending (from 338 to 306).
- 4.36 From 2005–06 to 2007–08, however, the number of criminal appeal lodgements increased by 31.0% (from 416 to 545). Although the Court of Appeal steadily increased the number of criminal appeals finalised each year in the same period, the number of criminal appeal lodgements continued to exceed the number of finalisations. In 2007–08, for example, there were 80 more lodgements than finalisations.
- 4.37 The effect of this was an increase of 126 in the number of pending appeals from 306 in 2005–06 to 432 in 2006–07. The backlog of pending cases continued to increase, reaching 528 cases in 2008–09 and 569 cases in 2009–10. This occurred despite a small reduction in the number of criminal appeal lodgements from 2007–08 to 2008–09.
- 4.38 Therefore, it appears that a primary factor contributing to the increases observed in the number of pending criminal appeals between 2005–06 and 2009–10 was an overall increase in the number of criminal appeals that were lodged but were not finalised. The increase in criminal appeal lodgements was particularly evident over the period from 2005–06 to 2007–08. In each of the following two years, the number of criminal appeal lodgements remained above 500.
- 4.39 The most recent data on criminal appeal lodgements from the Court of Appeal's CourtView database, discussed at [4.52]–[4.61], suggest a change in these trends in the lodgement and backlog of criminal appeals. These data show an increase in finalised criminal appeals and decreases in criminal appeal lodgements and pending criminal appeals in 2010–11.

Interstate comparisons

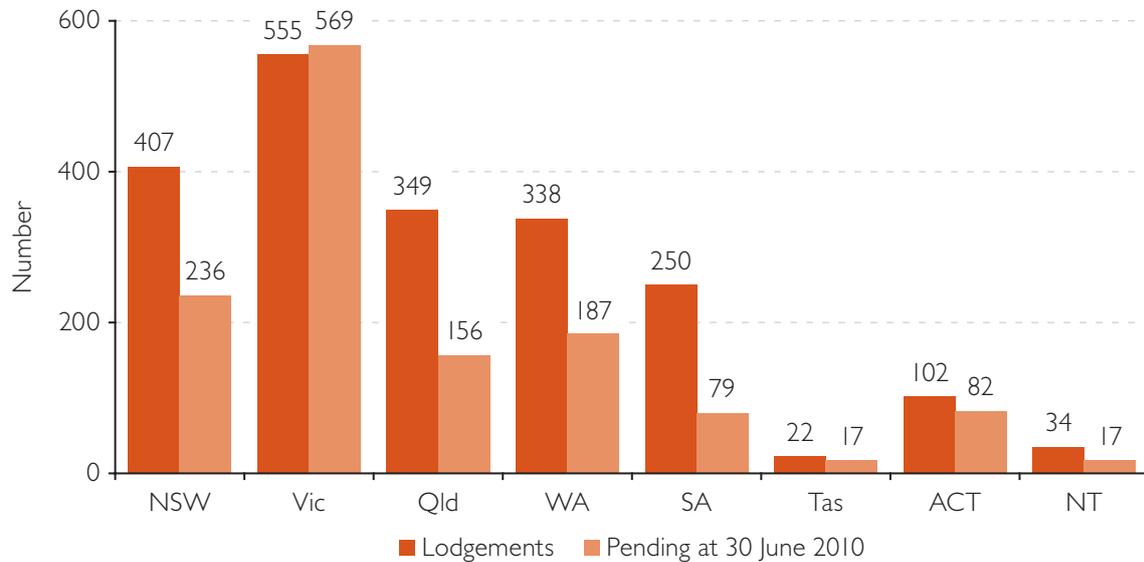
- 4.40 To further examine the possible causes of the backlog of criminal appeals in Victoria that had been increasing in the period 2003–04 to 2009–10, the Council analysed comparative national data on criminal appeals published by the Productivity Commission over the same period.
- 4.41 When making comparisons between different jurisdictions, it should be noted that there are differences in the constitution of appellate courts between jurisdictions, and there are different numbers of appeal judges in each jurisdiction and therefore differences in the proportion of appeal judges per capita.
- 4.42 In New South Wales, as in Victoria, the Supreme Court is divided into appellate and trial jurisdictions. However, the appellate jurisdiction in New South Wales is split into two courts: the Court of Appeal, which hears appeals from civil proceedings, and the Court of Criminal Appeal, which hears appeals from criminal proceedings. The judges who make up the New South Wales Court of Appeal are the Chief Justice, the President of the Court of Appeal and nine Judges of Appeal. Sittings of the Court of Criminal Appeal are organised on a roster basis, subject to judges' regular judicial duties in either civil appellate matters or civil and criminal trial matters. Judges are selected to hear criminal appeal cases from a pool of judges that includes the Chief Justice, the President of the Court of Appeal, the nine Judges of Appeal in the (civil) Court of Appeal, the Chief Judge of the Common Law Trial Jurisdiction and judges of the Common Law Trial Jurisdiction. The 2009 annual review of the Supreme Court of New South Wales reported that in that year, the Court of Criminal Appeal comprised at least two judges of the Common Law Trial Jurisdiction.¹⁹⁹ Therefore, there is a pool of judges that may be rostered solely to hear criminal appeals.
- 4.43 New South Wales differs from Victoria, which has one Court of Appeal that hears appeals in both civil and criminal matters. In Victoria, any trial judge may be appointed as an acting Judge of Appeal. Therefore, the pool comprises Judges of Appeal and acting Judges of Appeal who are required to balance both their civil and their criminal appeal workloads.
- 4.44 Further, caution should always be exercised when making comparisons between different jurisdictions, as there is a danger that such comparisons will not take into account local variations in practice and procedure.²⁰⁰
- 4.45 National data on criminal appeal lodgements published by the Productivity Commission indicate that, in 2009–10, Victoria had the largest number of pending appeals in Australia.
- 4.46 Figure 3 shows that the number of appeals pending in Victoria at the end of the 2009–10 financial year was 569, which exceeded the number of lodgements for the same year (555).²⁰¹ All other jurisdictions had fewer pending cases than Victoria (for example, New South Wales had 236 pending cases), and all jurisdictions except Victoria had fewer pending cases than lodgements in the same year. Some, but not all, disparities can be accounted for by the different sizes of the jurisdictions.

¹⁹⁹ Supreme Court of New South Wales, *Annual Review 2009* (2010) 5.

²⁰⁰ For example, there may be differences in counting rules between jurisdictions as to when a criminal appeal may be recorded as 'lodged' due to different procedural requirements for filing a notice of appeal. In New South Wales, an applicant must first file a notice of intention to appeal and then file all relevant documents before filing a notice of appeal, whereupon which the matter is recorded as lodged. In Victoria, an applicant must file a notice of appeal, whereupon the matter is recorded as lodged, and then file the necessary documents before the matter can be heard. These procedural differences could manifest as longer periods between the appeal lodgement and hearing in Victoria compared with New South Wales.

²⁰¹ This number includes 37 criminal appeals lodged in the Trial Division of the Supreme Court of Victoria.

Figure 3: Number of criminal appeal lodgements and pendings at the end of financial year, by jurisdiction, 2009–10

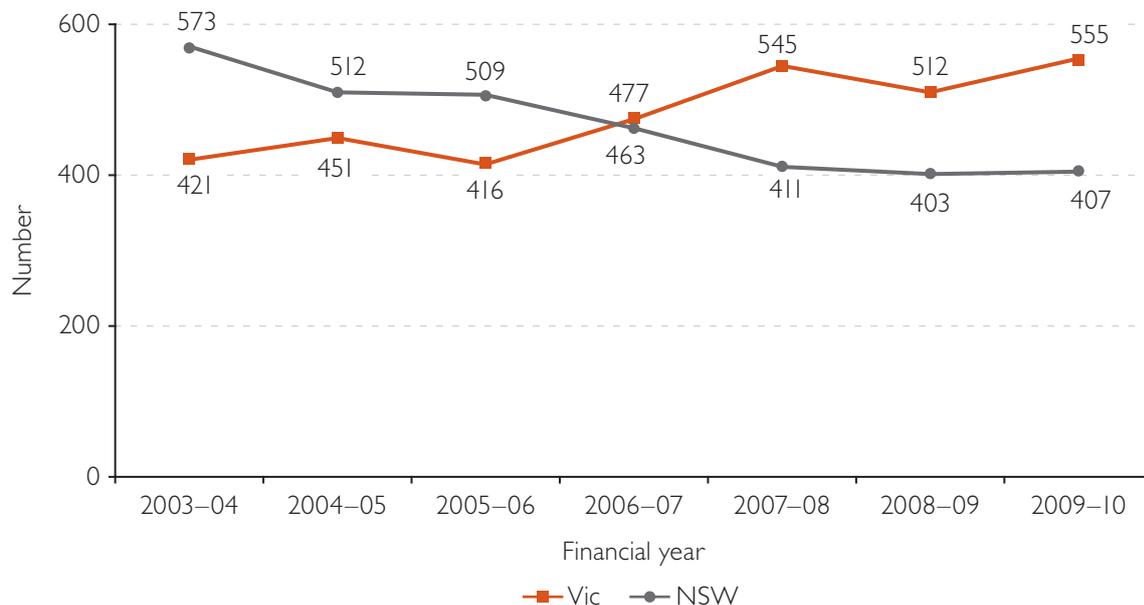


Source: Productivity Commission (2011).

4.47 Victoria had the highest number of criminal appeal lodgements (555). This represents 36.4% more criminal appeal lodgements than New South Wales (407). However, there were 333 more pending appeals in Victoria than in New South Wales.

4.48 In part, the high numbers in Victoria can be explained by the increase in demand experienced by the Victorian Court of Appeal. As Figure 4 shows, although in 2003–04 demand was high in the New South Wales Court of Appeal, since 2005–06 demand has steadily decreased and remained constant from 2007–08 to 2009–10. The opposite trend is evident in Victoria, where there has been an increase in demand since 2005–06, remaining at a high level from 2007–08 to 2009–10.

Figure 4: Number of criminal appeal lodgements for Victoria and New South Wales, by financial year, 2003–04 to 2009–10



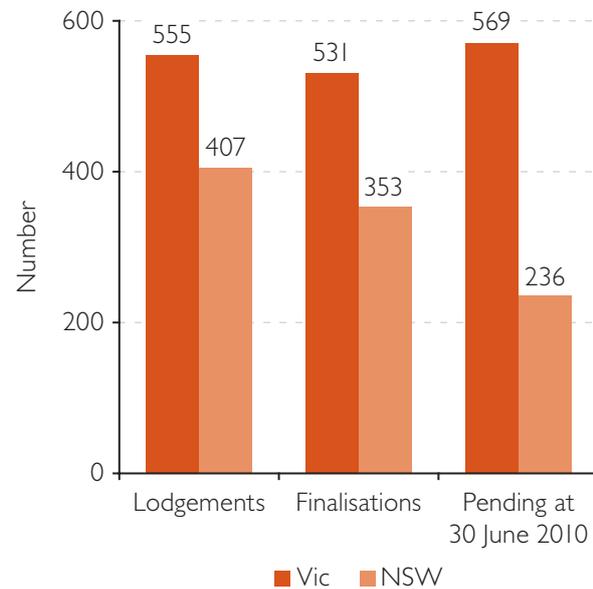
Source: Productivity Commission (2011).

4.49 The decrease in lodgements in New South Wales provides only part of the picture. Another reason for the disparity between jurisdictions may be the appeal disposal rate in each court. Figure 5 shows that the Victorian Court of Appeal disposed of more cases in 2009–10 than its New South Wales counterpart. In both jurisdictions the number of criminal appeal finalisations fell short of the number of criminal appeals lodged.

4.50 In Victoria, there were 24 fewer finalisations compared with lodgements in 2009–10, while in New South Wales, the number of finalisations fell short of the number of criminal appeals lodged by 54. However, although in 2009–10 the Victorian Court of Appeal disposed of criminal appeals at a high rate, the number of pending appeals remained markedly higher in Victoria (569) than in New South Wales (236).

4.51 This can be compared with the previous year, 2008–09, during which the Victorian Court of Appeal also disposed of more criminal appeals than did its New South Wales counterpart. However, in Victoria the number of finalisations fell short of the number of lodgements by 19, whereas in New South Wales the number of finalisations exceeded the number of lodgements by 46.

Figure 5: Number of criminal appeals lodged, finalised and pending for Victoria and New South Wales, 2009–10



Source: Productivity Commission (2011).

Trends in criminal appeals from 2009–10 to 2010–11

4.52 The Court of Appeal has provided the Council with data on criminal lodgements in 2009–10 and 2010–11 from its new CourtView database. These data show that there has been a substantial reduction in the backlog of criminal appeals in the Court of Appeal. This suggests early positive signs of a move away from the trends observed up to 2009–10, although further data beyond 2010–11 are required before conclusions about trends may be drawn.

4.53 There are slight differences between the counting rules in the Productivity Commission data discussed at [4.29]–[4.51] and the CourtView data analysed in this section, meaning that the datasets are not directly comparable.

4.54 The differences in the counting rules are a result of the kind of criminal appeals counted in the two datasets. The Productivity Commission data include appeals to the Court of Appeal from criminal matters in the higher courts, as well as appeals to the Trial Division of the Supreme Court from criminal proceedings in the Magistrates' Court on a question of law.²⁰² The CourtView data exclude these criminal appeals to the Trial Division of the Supreme Court on a question of law and contain only appeals to the Court of Appeal from criminal matters in the higher courts. Analysis of the 2009–10 data (shown in Figure 2) on the breakdown between these two appeal types shows that appeals to the Trial Division of the Supreme Court comprise only a small proportion of the

²⁰² *Criminal Procedure Act 2009 (Vic)* s 272. Prior to the introduction of the *Criminal Procedure Act 2009 (Vic)* criminal appeals from the Magistrates' Court to the Trial Division of the Supreme Court on a question of law were made pursuant to the *Magistrates' Court Act 1989 (Vic)* s 92.

criminal appeals counted in the Productivity Commission data. Of the 555 criminal appeals lodged in 2009–10 (shown in Figure 2), 6.7% (37) were made to the Trial Division of the Supreme Court, leaving 518 criminal appeals lodged in the Court of Appeal. Of the 531 total criminal appeals finalised in 2009–10, 4.7% (25) were finalised in the Trial Division of the Supreme Court, leaving 506 appeals finalised in the Court of Appeal. However, it is important to note these small differences in the number of matters included in the Productivity Commission data, but not the CourtView data.

- 4.55 The CourtView data show a similar picture to that shown by the Productivity Commission data of the number of lodged, finalised and pending appeals in 2009–10 (shown in Figure 2). The CourtView data show that, in 2009–10, the number of criminal appeals lodged was 518. The number of criminal appeals finalised was 506, and the number of pending criminal appeals was 548.
- 4.56 The CourtView data for 2010–11 suggest that the observed trend of increasing criminal lodgements and increasing pending criminal appeals may be changing. In 2010–11, compared with 2009–10, the number of criminal appeals lodged and pending substantially decreased, while the Court of Appeal increased the number of criminal appeals finalised.
- 4.57 There was a decrease in criminal appeal lodgements, from 518 in 2009–10 to 397 in 2010–11. The number of criminal appeal finalisations increased from 506 to 623, and the number of pending criminal appeals decreased from 548 to 404. Thus, in 2010–11, there was a substantial drop in the number of criminal appeals pending. This drop corresponds with fewer criminal appeals being lodged and more criminal appeals being finalised and gives the first possible signs that the backlog in criminal appeals may be reducing.
- 4.58 While there is still a backlog of 404 pending criminal appeals as at 2010–11, CourtView data on criminal appeals for the first half of 2011–12 show further reductions in the number of pending criminal appeals. The number of pending criminal appeals as at 31 December 2011 was 259, a reduction of 145 criminal appeals from the 404 pending appeals as at the end of 2010–11.
- 4.59 The reductions in the criminal appeal backlog, which prior to 2010–11 had been substantially larger and steadily increasing, suggest early positive signs of the effect of the significant reforms recently initiated in the Court of Appeal to the management of criminal appeals. The reforms introduced an 'intensive management' model of criminal appeal cases, based on the system used by the Criminal Division of the Court of Appeal of England and Wales. The model includes active case management of appeals by specialist personnel within the Court of Appeal Registry. The procedure under the new case management model applies to all applications for leave to appeal against sentence and/or conviction filed on or after 28 February 2011.²⁰³
- 4.60 In the Supreme Court's most recent annual report (2010–11), the Chief Justice, Marilyn Warren, has reported that the reforms have increased finalisations of criminal appeals by 29.5%.²⁰⁴ In remarking on the figures for criminal appeals in 2010–11, the Chief Executive Officer of the Supreme Court has said:
- the implementation [of the reforms] has shown early positive signs, evident in the decline in the number of initiations and in the significant increase in the clearance rate of criminal appeals. In the long term, it is anticipated that the reforms will further reduce delays in the listing and hearing of appeals and reduce Court costs.²⁰⁵
- 4.61 The criminal appeal reforms and other measures recently introduced to address delay in criminal, and specifically sentence, appeals are discussed further at [5.124]–[5.132].

²⁰³ Supreme Court of Victoria (2010), above n 3, 2; Supreme Court of Victoria, 'Reform of Criminal Appeals Will Slash Court Delays' (Media Release, 15 October 2010); Supreme Court of Victoria, *Practice Direction No. 2 of 2011 – Court of Appeal: Applications for Leave to Appeal against Conviction and Sentence* (28 February 2011).

²⁰⁴ Supreme Court of Victoria (2011), above n 7, 2.

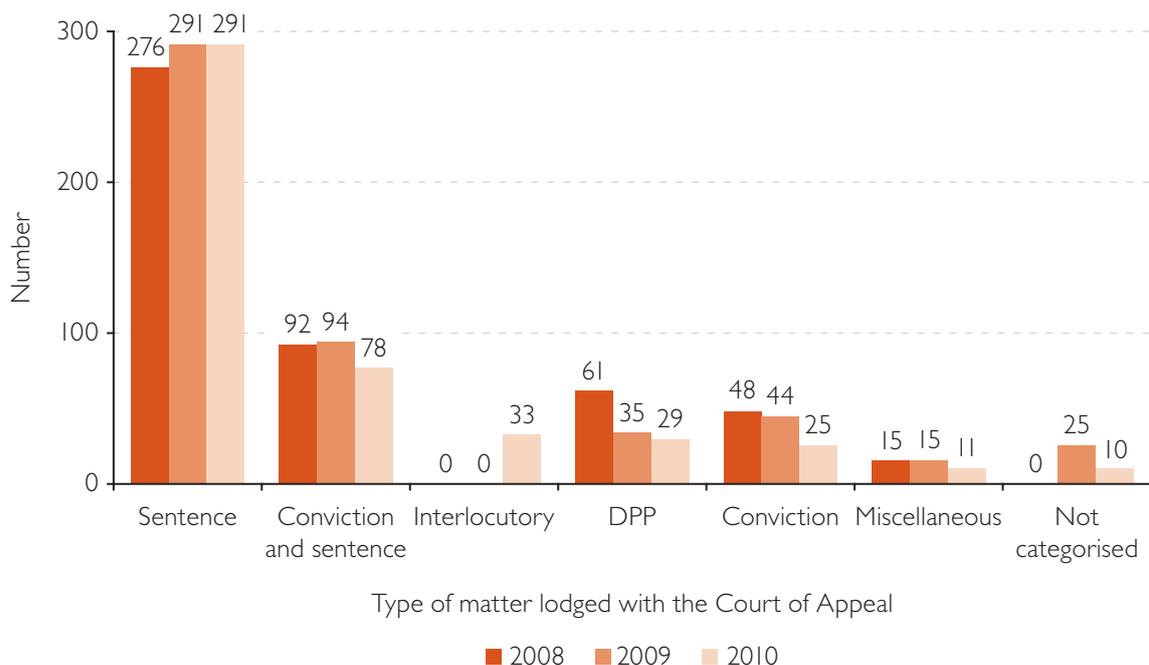
²⁰⁵ *Ibid* 5.

Breakdown of criminal appeal lodgements

Sentence appeal lodgements from 2008 to 2010

- 4.62 As discussed, the lack of data on the number of sentence appeal lodgements means that trends for sentence appeal lodgements, equivalent to those shown in Figure 2 for criminal appeal lodgements, are not available. Thus, it has not been possible to examine whether there have been similar increases in the number of sentence appeal lodgements and whether the increases in criminal appeal lodgements have been a direct result of more sentences being appealed.
- 4.63 Due to its recently implemented CourtView database, however, the Court of Appeal has been able to provide the Council with a breakdown of criminal lodgements into types of appeals for the calendar years 2008 to 2010.
- 4.64 It is difficult to ascertain any trends from these data, due to the short reference period. However, the data confirm that the majority of criminal appeal lodgements relate to sentence appeal matters only and that there has been a consistently high number of sentence appeal lodgements in recent years.
- 4.65 Figure 6 shows the breakdown of criminal lodgements in the Court of Appeal over a three-year period to 2010. It shows an increase in sentence appeal lodgements from 276 in 2008 to 291 in 2009. The number remained at an equally high level in 2010.
- 4.66 Overall more than half of the criminal appeal lodgements relate to appeals against sentence only. Of the 492 criminal appeal lodgements in 2008, 56.1% were sentence appeal lodgements. In 2009, sentence appeal lodgements comprised 57.7% of the total number of criminal appeal lodgements (504). This increased in 2010, with 61.0% of criminal appeal lodgements referable to sentence-only matters.

Figure 6: Criminal appeal lodgements in the Court of Appeal, by type of appeal matter, by calendar year, 2008–10



Source: CourtView (Court of Appeal, Supreme Court of Victoria).

- 4.67 The most recent CourtView data on the breakdown of criminal appeals lodged as at 30 September 2011 suggest a similar pattern, showing a high proportion of sentence-only appeals among criminal appeal lodgements. These data show that from 1 January 2011 to 30 September 2011, 53.8% (128) of all criminal appeal lodgements related to sentence-only appeals. This was followed by conviction and sentence appeals, which comprised 15.1% (36) of criminal appeal lodgements. Conviction-only appeals comprised 13.0% of criminal appeal lodgements (31 lodgements). There have been 28 interlocutory criminal appeals lodged up to 30 September 2011, comprising 11.8% of total lodgements and only 12 Crown appeals.
- 4.68 These data are not comparable to the trend data on criminal appeal lodgements that relate to financial year. Further, as the data relate to two different time periods, they do not shed light on the factors that may be underlying the observed increases in criminal appeal lodgements from 2005–06 to 2007–08 (see Figure 2). Therefore, these data do not provide direct evidence that these previous increases in criminal appeal lodgements are attributable solely to an increase in the number of sentence appeals being lodged. There may be other factors underlying these trends.

Interlocutory criminal appeal lodgements in 2010

- 4.69 Figure 6 shows that in 2010, there were 33 appeal lodgements that related to interlocutory appeals, comprising 6.9% of all lodgements in that year. As at 30 September 2011, 28 interlocutory appeals had been lodged, comprising 11.8% of criminal appeals lodged in the first nine months of 2011.
- 4.70 Interlocutory appeals in criminal proceedings were introduced by the *Criminal Procedure Act 2009* (Vic).²⁰⁶ The provisions allow a party to a criminal proceeding in the County Court or the Trial Division of the Supreme Court to appeal to the Court of Appeal against a decision made during the proceedings. This relates to any decision made before or during a trial and includes a decision to grant, or refuse to grant, a permanent stay of proceedings. Leave to appeal is required from the Court of Appeal.²⁰⁷
- 4.71 The provisions concern decisions that are made before or during a trial and that are important enough to have an impact on the continuation of the trial. The provisions are designed to enable appeals against such decisions to be determined at the time or soon after the decisions are made. The provisions aim not only to reduce delay in the finalisation of matters by avoiding the need to wait for the completion of the criminal proceedings before an appeal can be lodged, but also to 'avoid the fragmentation of trials without good reason'.²⁰⁸
- 4.72 The addition of interlocutory appeals is designed ultimately to reduce the burden on the Court of Appeal (in terms of conviction appeals), by dealing with points that could potentially 'knock-out' a trial at the beginning, rather than at the end, of a trial. However, as acknowledged by President Maxwell, 'these new procedures will impose an additional workload on the Court of Appeal'.²⁰⁹

²⁰⁶ *Criminal Procedure Act 2009* (Vic) pt 6.3 div 4. The introduction of these provisions was recommended by the Ad Hoc Criminal Law Reform Working Group convened by the Chief Justice and the President of the Court of Appeal. The provisions aim to assist the management of criminal appeals. See Supreme Court of Victoria (2008), above n 61, 7.

²⁰⁷ *Criminal Procedure Act 2009* (Vic) ss 3, 295, 297.

²⁰⁸ Explanatory Memorandum, Criminal Procedure Bill 2008 (Vic) 108–109.

²⁰⁹ Maxwell (2009), above n 3, 2.

Trends in criminal matters in the higher courts

- 4.73 One factor that could be underlying the observed trends in criminal appeal lodgements is the trends in criminal cases and sentencing in the higher courts. All criminal appeals to the Court of Appeal are direct responses to decisions made in criminal cases by either the Supreme Court or the County Court.
- 4.74 Thus, there may be a relationship between trends in the number of higher court criminal cases tried and sentenced and the number of criminal appeal lodgements.
- 4.75 An increase in the number of appeals lodged in the Court of Appeal and the resultant backlog observed up to 2009–10 could have been a product of an overall increase in the number of criminal matters being heard in the higher courts at first instance.
- 4.76 Other factors that may affect the number of criminal appeals lodged include changes over time in the severity of sentences being imposed in the higher courts and changes in the prevalence of particular types of offences.
- 4.77 In its 2007–08 annual report, the Supreme Court attributed the delays in the determination of criminal appeals in the Court of Appeal to 'significantly increased criminal trials in the County Court with a commensurate increase in criminal appeals'.²¹⁰ This was also suggested in comments made by the Supreme Court in the 2009 *Report on Government Services*:
- The increase in delays in criminal appeals principally arises from the increased listing of criminal trials in the County Court followed by appeals ... A number of reforms are being introduced to reduce delays.²¹¹
- 4.78 In the 2009–10 annual report of the Supreme Court, the Chief Justice, in discussing the issue of delay in the finalisation of criminal appeals, also referred to the effect that specific regimes have had on increasing the caseload of the higher courts and consequently the Court of Appeal. For example, '[r]eforms of sexual offences laws have significantly increased the workload of the County Court with a flow-on of appeals'.²¹²

Trends in criminal case lodgements

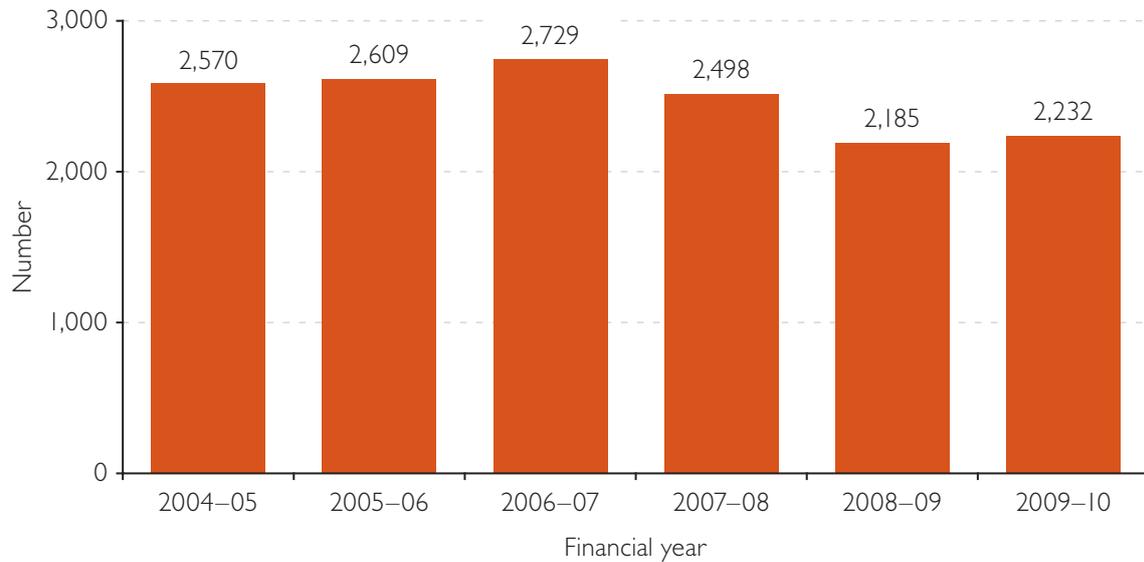
- 4.79 Figure 7 shows the number of criminal matters lodged in the County Court from 2004–05 to 2009–10. It shows that, while there have been some fluctuations in the number of criminal matters lodged, overall there is no significant increase in the number of matters over time.
- 4.80 There may be a time lag, however, between when criminal cases are lodged in the higher courts and when criminal cases reach the Court of Appeal as sentence and/or conviction appeals. The large increase in criminal appeal lodgements in Figure 2 was in 2007–08, one year after the increase in the number of County Court lodgements shown in Figure 7. This may suggest a relationship between the increase in criminal appeal lodgements and the increase in County Court lodgements, although without specific matching of cases, such comparisons may be misleading. In 2007–08 and 2008–09, the number of criminal cases lodged in the County Court decreased. There was a slight increase in the number of criminal case lodgements in the County Court in 2009–10 (2,232 cases).
- 4.81 When the number of appeals in Victoria and New South Wales is considered as a percentage of the matters finalised in the higher courts in each jurisdiction, there remains a noticeable difference between the two jurisdictions.

²¹⁰ Supreme Court of Victoria (2008), above n 61, 2.

²¹¹ Steering Committee for the Review of Government Services Provision, *Report on Government Services 2009*, vol. 1 (2009) [7.52].

²¹² Supreme Court of Victoria (2010), above n 3, 1.

Figure 7: Number of non-appeal criminal case lodgements in the County Court, by financial year, 2004–05 to 2009–10

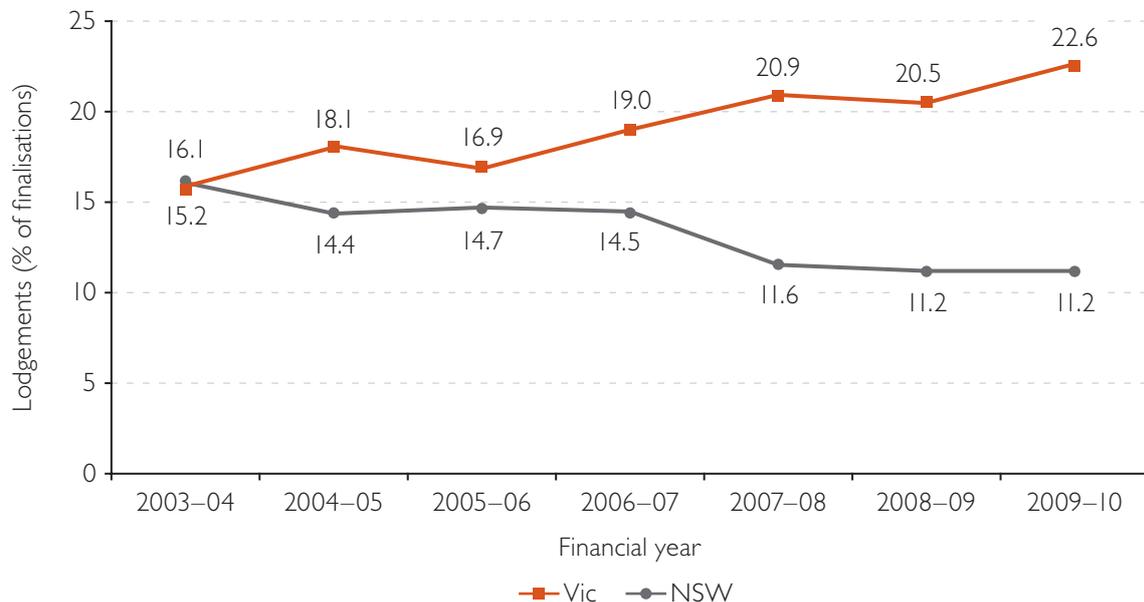


Source: Productivity Commission (2011).

4.82 Figure 8 shows criminal case lodgements in Victoria and New South Wales as a proportion of criminal case finalisations in the higher courts in each jurisdiction. It shows that in 2003–04 both jurisdictions had similar criminal appeal lodgement rates. The criminal appeal lodgement rate in Victoria was 15.2%. The criminal appeal lodgement rate in New South Wales was 16.1%.

4.83 Since then the proportion of criminal cases appealed in New South Wales has dropped to 11.2% (2008–09 and 2009–10), while in Victoria the opposite trend is evident. Since 2003–04, there has been a steady increase in Victoria in the proportion of criminal cases appealed, from 16.1% in 2003–04 to 22.6% in 2009–10. In 2009–10, a criminal matter was twice as likely to be appealed in Victoria than in New South Wales.

Figure 8: Criminal appeal lodgements as a proportion of criminal case finalisations in the higher courts in Victoria and New South Wales, by financial year, 2003–04 to 2009–10



Source: Productivity Commission (2011).

- 4.84 Such comparisons must be made carefully due to the different sentencing frameworks and appeal processes operating in each jurisdiction. The data show that criminal appeal rates have been rising in Victoria, while in New South Wales criminal appeal rates have been dropping. However, it is unclear which factors might be contributing to the increase in the rate of criminal appeal lodgements in Victoria.

Reforms to sexual assault laws

- 4.85 Another factor that may be connected to the number of criminal appeals lodged in the Court of Appeal is specific reforms or changes to the law. One such reform, which has been raised as having a possible impact on trends in higher court cases and consequently trends in criminal appeal lodgements, concerns sexual offence laws in Victoria.
- 4.86 The Sexual Assault Reform Strategy was implemented in 2006–07 by the Department of Justice in response to the Victorian Law Reform Commission's 2004 final report on sexual offences.²¹³ It resulted in various legislative changes and the introduction of a number of programs and initiatives related to the law and procedure in sexual assault cases.²¹⁴
- 4.87 The Department of Justice commissioned an evaluation of the Sexual Assault Reform Strategy in 2008. The final evaluation report, published in 2011, examined, among other matters, the impact of the reforms on the criminal caseload in the County Court and on appeals, if any, involving sexual offences.
- 4.88 The evaluation found that over the reform period the percentage of criminal cases involving sexual offences had increased in the County Court. The number of sexual assault cases initiated generally increased between 2001–02 and 2009–10. During the reform period, there were increases in the number of matters initiated, from 440 in 2005–06 to 497 in 2006–07. This was followed by smaller increases, to 512 in 2007–08 and 529 in 2008–09, and a drop in initiations to 502 in 2009–10.²¹⁵
- 4.89 There were noticeable increases in the number of sexual assault matters finalised after 2006–07, with finalisations increasing from 395 in 2006–07 to 521 in 2007–08 and 548 in 2008–09. The number decreased slightly to 494 in 2009–10.²¹⁶ The increase in finalisations was attributed to:
- [t]he capacity of the County Court to finalise a greatly increased number of cases over the past three years ... due to the prioritisation of sexual assault matters within the County Court ... as well as the 'freeing up' of County Court resources following the expansion in the jurisdiction of the Magistrates' Court.²¹⁷
- 4.90 The final evaluation report also examined the extent to which rates of appeals and retrials in sexual assault cases had been reduced. The proportion of appeal decisions relating to sexual offences in the period 1 January 2008 to 31 October 2008 was compared with the proportion in the period 1 January 2010 to 31 July 2010.
- 4.91 It was reported that in the ten-month period in 2008, there were 213 criminal appeals determined, 13.0% of which related to sexual offences. Of these 28 appeals that related to sexual offences, 11 were dismissed in full and two were dismissed in part. This compares with 192 appeals in the seven-month period in 2010, of which 19.0% related to sexual offences. Of these 37 appeals, 11 were dismissed in full. Six of these were interlocutory matters, of which one was dismissed and two were refused.²¹⁸

²¹³ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004).

²¹⁴ These included changes to procedures for sexual assault cases, the amendment of existing sexual offences, the addition of a number of offences and changes to evidentiary provisions. For details of these legislative changes and the programs and initiatives introduced under the reform, see Success Works Pty Ltd, *Sexual Assault Reform Strategy*, Final Evaluation Report (2011) 9–13.

²¹⁵ Success Works Pty Ltd (2011), above n 214, 130.

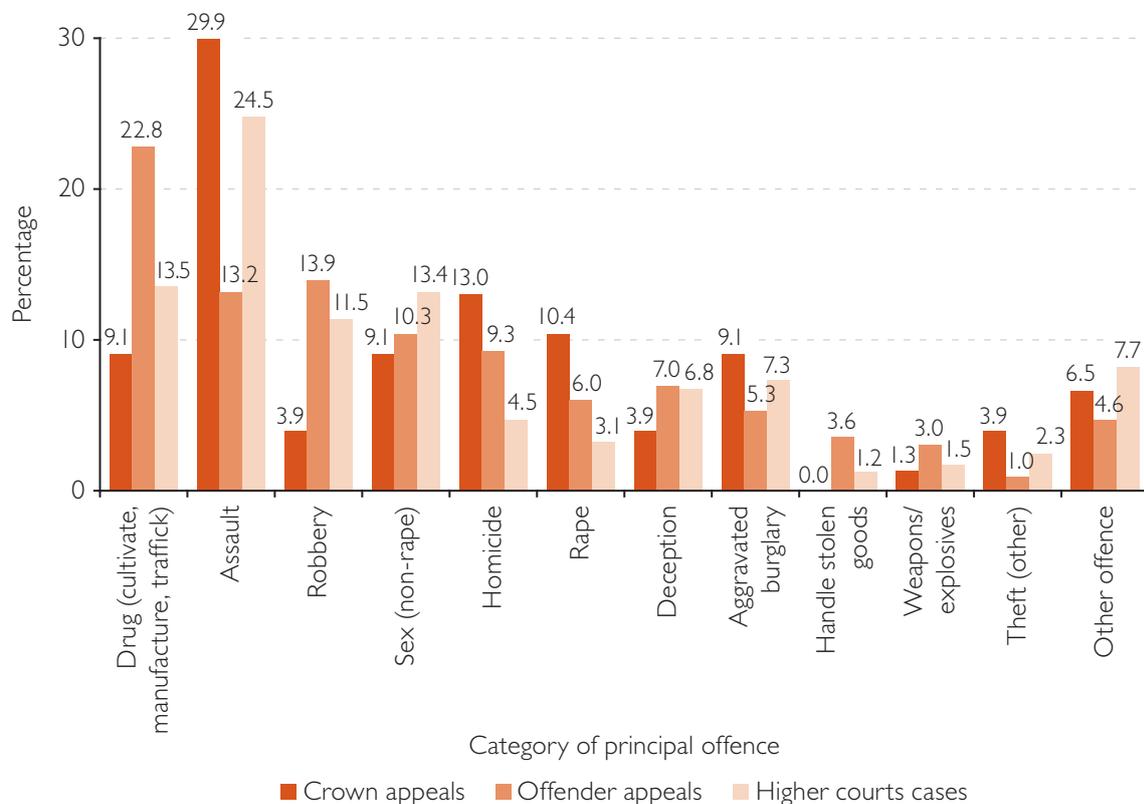
²¹⁶ Ibid.

²¹⁷ Ibid 130–131.

²¹⁸ Ibid 183.

- 4.92 The comparison of unequal time periods (10 months versus seven months) in the analysis means that caution should be exercised in generalising from these findings. However, the analysis shows an increase in the proportion of criminal appeal decisions relating to sexual offences after implementation of the reforms. The evaluation also notes that several stakeholders discussed the complexity of the law surrounding sexual offences and the likelihood of matters involving sexual offences continuing to be 'referred to the Court of Appeal for decision'.²¹⁹
- 4.93 In order to gain an understanding of how sexual offence cases affect the number of sentence appeals, the Council has examined the proportion of sentence appeal cases in which the principal offence is a sexual offence.
- 4.94 In 2007–08 and 2008–09, a sexual offence (rape or a non-rape sexual offence) was the principal offence in 16.3% of sentences appealed by offenders and 19.5% of sentences appealed by the Crown.
- 4.95 As such, sexual offences represent the second most common offence category for both offender appeals (behind drug trafficking offences at 22.8%) and Crown appeals (behind assault offences at 29.9%). Thus, sexual offences comprise a substantial proportion of the Court of Appeal's sentence appeal workload.
- 4.96 The Council has also examined the likelihood of a sentence appeal for sexual offence cases and has compared this with the likelihood of a sentence appeal for other offence types.
- 4.97 Figure 9 compares the offence distribution for sentence appeals determined by the Court of Appeal between 1 July 2007 and 30 June 2009 with the offence distribution for all cases sentenced in the higher courts over the same period.

Figure 9: Percentage of cases by principal offence category, Crown sentence appeals, offender sentence appeals and cases sentenced in the higher courts, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

²¹⁹ Ibid 184.

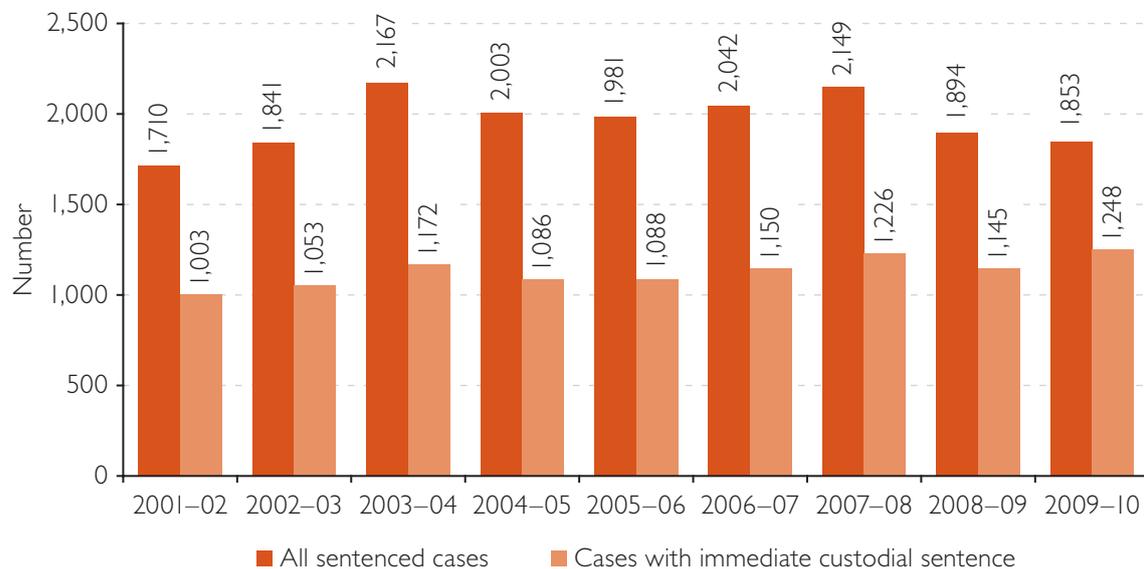
4.98 Cases in which a non-rape sexual offence was the principal offence were slightly under-represented in appeals (9.1% of Crown appeals and 10.3% of offender appeals) in comparison with all sentenced cases (13.4%). However, cases in which rape was the principal offence comprised a substantially higher proportion of both Crown appeals (10.4%) and offender appeals (6.0%) than all cases sentenced in the higher courts (3.1%). In terms of appeal rates, rape cases were the most likely type of case to be appealed by the Crown (followed by homicide cases) and by offenders (followed by drug trafficking cases).

Trends in criminal cases sentenced

4.99 A large proportion of the Court of Appeal's appellate workload comprises appeals lodged against sentence. In 2008, 82.5% of a total 372 criminal appeal hearings were connected to appeals against sentence only.²²⁰ Therefore, sentence appeals may be a primary contributor to the increase in the number of criminal appeals being lodged.

4.100 The sentences most likely to be appealed are immediate custodial sentences. Figure 10 shows the number of cases sentenced and the number of cases receiving an immediate custodial sentence in the higher courts from 2001–02 to 2009–10. It shows that over the nine-year period, the number of cases sentenced in the higher courts and the number of cases with an immediate custodial sentence have fluctuated. While there have been increases in some years, these are not significant, and there is no discernable upward trend in the number of cases sentenced in the higher courts and the number of cases with an immediate custodial sentence.

Figure 10: Number of sentenced cases and number of cases with an immediate custodial sentence in the higher courts, by financial year, 2001–02 to 2009–10



Source: Higher courts sentencing database.

²²⁰ This is based on analysis of appeal cases determined in 2008 and published on the AustLII website: Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/au/cases/vic/VSCA/> at 31 December 2009. The remaining 65 criminal appeals were appeals against conviction and appeals against conviction and sentence.

- 4.101 In terms of general trends, there is some correlation between the number of criminal appeal lodgements and the number of higher court cases sentenced from 2003–04 to 2009–10, when these numbers are compared. This suggests that the increase in appeals to some extent might be attributable to the volume of cases in the higher courts. However, proportionally the increases in appeals are far greater than the increases in cases sentenced in the higher courts.
- 4.102 Increases in the numbers of cases sentenced in the higher courts have resulted in an increase in the appeal lodgement rate, as indicated in Figure 11.²²¹ Figure 11 shows that, in 2003–04, the rate of criminal appeal lodgements for all cases sentenced was 19.4%. After staying steady for a number of years to 2005–06, the appeal lodgement rate increased each year, to 30.0% in 2009–10.

Figure 11: Criminal appeal lodgements as a percentage of all cases sentenced in the higher courts, by financial year, 2003–04 to 2009–10



Source: Higher courts sentencing database and Productivity Commission (2011).

²²¹ The appeal lodgement rate is the number of criminal appeal lodgements expressed as a proportion of the number of cases sentenced in the higher courts. It provides a reasonable estimate at least of the change in appeal rate over time. Appeal lodgement normally occurs within two weeks of the imposition of a sentence, so there should be very little lag between the original sentence date and the lodgement date. It should be noted, however, that the lodgement rate is an overestimation of the actual sentence appeal rate for two reasons: first, some lodgements do not become substantive appeals, and second, lodgements include conviction as well as sentence appeals. This appeal rate is an overestimation of the true sentence appeal rate.

Trends in sentence severity

- 4.103 A general increase in the severity of sentences may result in an increase in the number of offender appeals against the severity of sentences. Conversely, a decrease in the severity of sentences may result in more Crown appeals against the leniency of sentences.
- 4.104 The Council has investigated the links between the appeal lodgement rate and a number of factors, including increases in the severity of sentences. However, overall these investigations have proved inconclusive.²²² Figure 10 shows that the *number* of cases with an immediate custodial sentence varied from year to year. It is difficult to discern an overall increasing trend from this.
- 4.105 Analysis of the *percentage* of all higher court cases receiving an immediate custodial sentence, however, suggests that there may have been increases in the severity of sentencing practices. Overall, the percentage of cases receiving an immediate custodial sentence has risen from 54.1% in 2003–04 to 60.5% in 2008–09. As the most common sentence type in both offender and Crown appeals is imprisonment (for example, 93.3% for offender appeals and 68.4% for Crown appeals in 2007–08 and 2008–09), this may be evidence of a link between increases in sentence severity and increases in sentence appeal rates.
- 4.106 Analysis of imprisonment lengths also provides evidence of increased severity in sentences imposed over the past decade. In 2007, the Council reported that the mean imprisonment term in the higher courts increased from 4.0 to 4.5 years between 2000–01 and 2005–06.²²³ However, the mean imprisonment term then declined over the next two years, to 4.2 years in 2007–08, before increasing to 4.6 years in 2008–09.
- 4.107 Thus, this suggests that there has been a general trend towards an increased severity in sentencing practices in the higher courts. However, it is difficult to assess whether, and to what extent, this trend has influenced the rate at which appeals against sentence are lodged.

²²² Offences types with a relatively high appeal rate (30 or more cases) for offenders sentenced between July 2007 and December 2007 were examined. The analysis only considered principal offences. Some changes were identified in the prevalence of commonly appealed offence categories from 2003–04 to 2008–09, and these could be relevant to the appeal lodgement rate. However, it was difficult to draw any conclusions about the correlation between these two factors.

²²³ Sentencing Advisory Council, *Victoria's Prison Population: 2001 to 2006* (2007).

Summary

- 4.108 This chapter has examined data on the lodgement of criminal appeals. It has also examined data on the trends in criminal cases in the higher courts and the rates at which criminal cases and sentenced matters are appealed.
- 4.109 Productivity Commission data on the number of criminal appeal lodgements indicate that the criminal appeal workload of the Court of Appeal has increased. In recent years, between 2003–04 and 2009–10, the number of criminal appeals (including appeals against conviction and applications for leave to appeal against sentence) lodged in the Court of Appeal was markedly higher than in earlier years, specifically between 1996 and 1999. In particular, from 2005–06 to 2009–10 this trend accelerated.
- 4.110 Although the Court of Appeal steadily increased the number of criminal appeals finalised in the period from 2003–04 to 2009–10, this number did not match the increases in criminal appeal lodgements. The increases in the number of criminal appeal lodgements from 2005–06 to 2009–10 have resulted in corresponding increases in the number of criminal appeals pending over the same period. Thus, as at 2009–10, there was a large backlog of criminal appeals in the Court of Appeal.
- 4.111 In the same year (2009–10), Victoria had the highest number of criminal appeal lodgements and the highest number of pending criminal appeals in Australia.
- 4.112 Care must be exercised when comparing jurisdictions, because they have different sentencing and appeal frameworks. For example, in New South Wales standard non-parole periods have applied to sentencing since 2002,²²⁴ and guideline judgments have been given in relation to a number of offences since 1998,²²⁵ although these reforms do not appear to have had a significant effect on sentence appeal outcomes.²²⁶
- 4.113 The data, however, show that between 2003–04 and 2009–10, while the number of criminal appeals being lodged in Victoria has been increasing, the corresponding number in New South Wales has been declining since 2005–06.
- 4.114 In 2008–09, the Victorian Court of Appeal disposed of more criminal appeals than did its New South Wales counterpart. However, in Victoria the number of finalisations fell short of the number of lodgements by 19, whereas in New South Wales the number of finalisations exceeded lodge-

²²⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A. Section 54B provides that when determining sentence for the relevant offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a longer or shorter non-parole period. The only bases on which the court can depart from the standard non-parole period are the aggravating and mitigating factors found in section 21 of the Act, and the court must identify the relevant reasons for such a departure.

²²⁵ The New South Wales Court of Appeal has delivered several guideline judgments. See Judicial Commission of New South Wales (2007–), above n 156 [13-620] ('Sentencing Procedures Generally – Sentencing Guidelines').

²²⁶ See Judicial Commission of New South Wales, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) 141, where it is reported that there has been no significant difference in the success rates for offender and Crown appeals since promulgation of the Henry guideline judgment. See Judicial Commission of New South Wales, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 49–54, 60. The Judicial Commission reports an increase in Crown appeals and a decrease in severity (offender) appeals under the scheme. While Crown appeals were more likely to be successful, regardless of the period, there was an increase in the success rate of severity appeals, possibly suggesting that 'at least initially the statutory scheme was not easy to apply in the absence of appellate guidance'. See also Judicial Commission of New South Wales (2007–), above n 156 <www.judcom.nsw.gov.au/publications/benchbks/sentencing/appeals.html> at 30 November 2011, [70-010] ('Appeals') Table 2, which shows that, although the numbers are small, success rates for severity appeals for standard non-parole period offences have decreased over time from 57.5% in 2005 to 31.7% in 2009.

ments by 46. In 2009–10, the number of finalisations in Victoria fell short of the number of lodgements by 24. In New South Wales, the number of lodgements also fell short of the number of finalisations (by 54). This highlights the significance of the 'clearance rate' for appeals and suggests that over time even a small shortfall between the number of finalisations and the number of lodgements can result in a substantial backlog of pending appeals.

- 4.115 The most recent data on criminal appeal lodgements (2009–10 and 2010–11) from the Court of Appeal's CourtView database show that there has been a substantial reduction in the backlog of criminal appeals in the Court of Appeal. There are small differences between the counting rules used in the CourtView data and the Productivity Commission data in the type of criminal appeals counted.²²⁷ Nevertheless, the CourtView data suggest early positive signs of a move away from the trends observed up to 2009–10, although further data beyond 2010–11 are required before conclusions about trends may be drawn.
- 4.116 The CourtView data show that there has been an increase in the number of finalised criminal appeals, from 506 in 2009–10 to 623 in 2010–11. This is combined with a decline in the lodgement of criminal appeals, from 518 in 2009–10 to 397 in 2010–11. The backlog of pending appeals has reduced from 548 in 2009–10 to 404 in 2010–11.
- 4.117 CourtView data on criminal appeals for the first half of 2011–12 show further reductions in the number of pending criminal appeals. The number of pending criminal appeals as at 31 December 2011 was 259, a reduction of 145 criminal appeals from the 404 appeals that were pending as at the end of 2010–11.
- 4.118 Thus, the backlog of criminal appeals evident in 2009–10 has been substantially reduced in 2010–11, although a backlog of criminal appeals still remains. While there are early positive signs that it is reducing, it is unclear what caused this backlog, which, up to 2009–10, had been large and increasing. There are a number of possible explanations for the increases in criminal appeal lodgements and subsequent pending criminal appeals that have been observed between 2003–04 and 2009–10. The increases may be attributable to a greater number of criminal cases being heard in the County Court and Supreme Court. Alternatively, or in addition, there may have been an increase in the rate at which criminal cases (and particularly sentences) are being appealed.
- 4.119 Although there may be a relationship between the number of criminal cases and the number of criminal appeal lodgements, the data suggest that the increase in the number of criminal appeal lodgements up to 2009–10 cannot simply be attributed to any significant increase in the number of criminal cases. Reforms to sexual assault laws and the expedition of cases involving sexual offences have resulted in increases in the number of sexual offence cases being finalised in the County Court. There is some evidence of a subsequent increase in the proportion of criminal appeals to the Court of Appeal involving sexual offences. However, without equivalent analysis of the trends in offence types in criminal appeal lodgements, it is unclear whether these reforms have directly contributed to the observed increases in criminal appeal lodgements that occurred between 2003–04 and 2009–10.
- 4.120 The data show that in this period, there has been an increase in the rate at which criminal cases are appealed. Again, the situation in Victoria can be compared with the situation in New South Wales.

²²⁷ The Productivity Commission data include a small number of criminal appeals to the Trial Division of the Supreme Court from Magistrates' Court on a question of law. These appeals are excluded from the CourtView data, thus the Productivity Commission data may include a slightly higher number of criminal appeals not included in the CourtView data. For example, in 2009–10, there were 37 appeals of this type lodged in the Trial Division of the Supreme Court, comprising 6.7% of the total lodged criminal appeals counted in the Productivity Commission data. In that same year, there were 25 finalised appeals of this type in the Trial Division, comprising 4.7% of total finalised criminal appeals counted in the Productivity Commission data.

- In 2003–04, both states had a similar criminal appeal rate. Victoria had an appeal lodgement rate of 15.2% and New South Wales had an appeal lodgement rate of 16.1%. In New South Wales, this had decreased to 11.2% by 2009–10, while in Victoria it had increased to 22.6% over the same period.
- 4.121 A comparison between the number of criminal appeal lodgements and the number of cases sentenced in the higher courts shows that, while there are increases in the trend data for both, proportionally the increases in appeals are far greater than the increases in cases sentenced. Using these data, the appeal rate for sentenced cases increased from 19.4% in 2003–04 to 30.0% in 2009–10.
- 4.122 A lack of data makes it difficult to examine directly the proportion of these criminal appeals that are against sentence. However, there is some evidence that sentence appeal lodgements have increased.
- 4.123 Data on the breakdown of criminal appeal lodgements over a three-year period from 2008 to 2010 show that over this three-year period, sentence-only appeals consistently comprise between approximately 50% and 60% of all criminal appeal lodgements. Overall, there has been a slight increase (from 56.1% to 61.0%) in the proportion of lodgements for sentence-only appeals. However, due to the short reference period, it is difficult to discern a trend from these data. The most recent data available from the Court of Appeal's CourtView database to 30 September 2011 suggest that sentence-only appeals continue to comprise over half of criminal appeal lodgements. However, firm conclusions cannot be drawn until the complete data for 2011–12 are available for analysis.
- 4.124 Further, the majority of appeals brought before the Court of Appeal are sentence appeals; therefore, it is likely that the increases in the overall numbers of criminal appeal lodgements between 2003–04 and 2009–10 reflect corresponding increases in sentence appeal lodgements in the same period.
- 4.125 A number of factors can be related to increases in criminal appeal and sentence appeal rates. One factor is changes in sentencing practices. For instance, if the higher courts impose sentences of imprisonment more frequently and impose longer sentences of imprisonment, this may lead to more appeals by offenders. The Council has examined this and has found some evidence of increased severity in sentencing practices in the higher courts in recent years. This could be a minor contributor to the increased appeal rate; however, investigation of the relationship has been inconclusive.
- 4.126 Increases in the numbers of finalised sexual offence cases in the County Court and corresponding increases in the numbers of sentenced cases involving sexual offences could also impact on the sentence appeal rate. In 2007–08 and 2008–09, sexual offence cases were the second most prevalent offence type appealed by both offenders and the Crown, comprising between 16.3% and 19.5% of sentences appealed. Such cases are similarly represented in the cases sentenced in the higher courts (16.5%).
- 4.127 A breakdown of these cases into rape and non-rape sexual offences, however, shows that rape cases are over-represented in sentence appeals. In 2007–08 and 2008–09, rape was the principal proven offence in only 3.1% of cases sentenced in the higher courts, whereas rape was the principal proven offence in 10.4% of Crown sentence appeals and 6.0% of offender sentence appeals over the same period.
- 4.128 Thus, the combination of the comparatively high prevalence of sexual offence cases among sentence appeals and the relatively high likelihood of appeal among rape cases suggests that the prioritisation of sexual offence cases in first instance courts has put additional pressure on the Court of Appeal's sentence appeal workload.
- 4.129 To assist in examining which other factors may have contributed to trends in the rate of criminal appeals, the following chapter examines data on the listing and hearing trends for applications for leave to appeal against sentence. It also examines the rate at which those applications for leave and substantive sentence appeals succeed and trends in the timing of sentence appeals.

Chapter 5

Trends in sentence appeals

Introduction

- 5.1 It has been suggested that the increases in the Court of Appeal's criminal appeal workload have primarily been a result of increases in the rate or numbers of sentence appeals being made to the Court of Appeal. In an address to the Victorian Criminal Bar in 2009, the President of the Court of Appeal, Chris Maxwell, attributed the increased demand on the Court of Appeal to the 'growth in the number of sentence applications'.²²⁸
- 5.2 Sentence appeals are the primary contributor to the Court of Appeal's criminal appellate workload. For example, in 2008, 82.5% of a total 372 criminal appeal hearings were connected to appeals against sentence only.²²⁹ Of these 307 sentence appeal hearings, 56.7% were hearings for applications for leave to appeal, 31.9% were hearings of substantive offender appeals and 11.4% were hearings of Crown sentence appeals.²³⁰
- 5.3 Data examined in the previous chapter provide some evidence of increases over time in the number and rate of criminal appeal lodgements and the rate of sentence appeal lodgements between 2003–04 and 2009–10. In 2010–11, there has been a decrease in the number of criminal appeals lodged.
- 5.4 While the Council does not have equivalent data on the number of sentence appeal lodgements, available data on the treatment of sentence appeals shed further light on the factors underlying criminal appeal trends.
- 5.5 This chapter presents and describes available trend data on the hearings and on the success rates of applications for leave to appeal against sentence and substantive sentence appeals in Victoria as well as the time taken to determine sentence appeals and deliver sentence appeal judgments.

²²⁸ Maxwell (2009), above n 3, 12.

²²⁹ The remaining 65 criminal appeals were appeals against conviction and appeals against conviction and sentence.

²³⁰ This is based on an analysis of sentence appeal cases published on the AustLII website: Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/au/cases/vic/VSCA/> at 31 December 2009.

- 5.6 The Victorian Office of Public Prosecutions has provided trend data on offender and Crown sentence appeals relating to Victorian offences. The Office of the Commonwealth Director of Public Prosecutions has provided data on offender and Crown sentence appeals in Commonwealth matters. Due to the small numbers of appeals in Commonwealth matters, the Commonwealth data are noted under graphs containing data from the Victorian Office of Public Prosecutions.
- 5.7 Following the establishment of its new CourtView database, the Court of Appeal has been able to provide recent data on sentence appeals. The Court of Appeal has also provided recent data on applications for leave to appeal against sentence and sentence appeals. There are differences in the counting rules between the Court of Appeal data and the Victorian Office of Public Prosecutions data; the Court of Appeal data and any disparities between the two datasets are referred to in the commentary on the graphs.
- 5.8 The data presented in this chapter show that there have been increases in the success rates of applications for leave to appeal against sentence and substantive sentence appeals. Recently, these trends appear to have subsided. However, it is not clear what kind of influence, if any, these increases have had on sentence appeal lodgements. Delay in the determination of sentence appeals is also a factor that requires consideration in examining these issues. To explore this, data on the timing of sentence appeals are also presented.

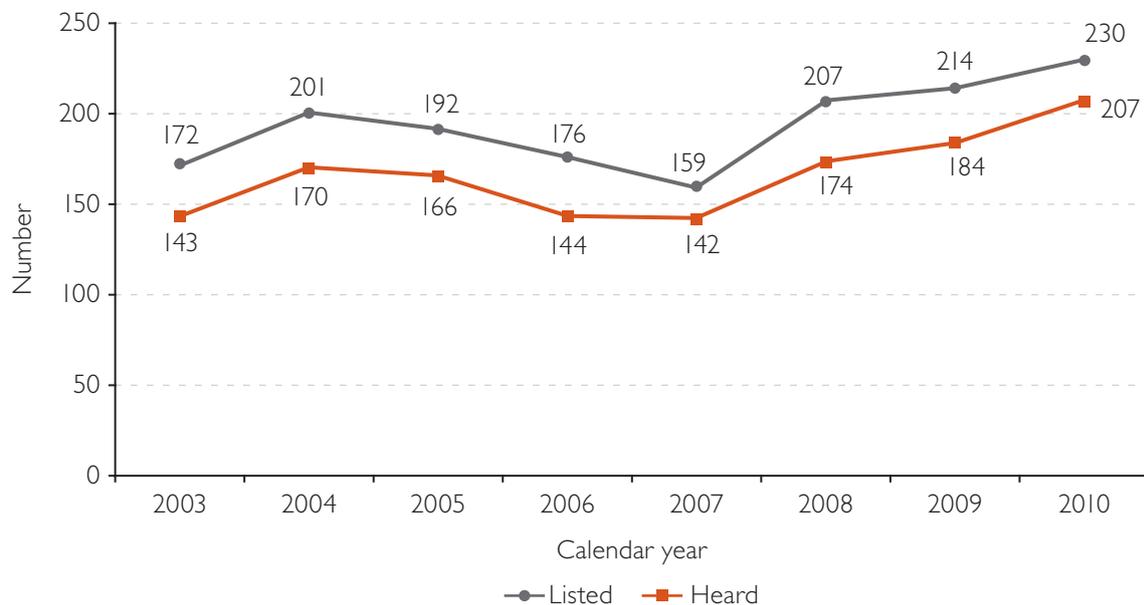
Applications for leave to appeal against sentence

- 5.9 In Victoria, if an offender wishes to appeal against sentence, he or she must first make an application to the Court of Appeal, comprising a single Judge of Appeal,²³¹ for leave to appeal against sentence.
- 5.10 The application for leave process is the first stage in every sentence appeal. Therefore, if the numbers of these applications increase, these numbers may be reflected in an increase in the number of applications that are listed and heard by the Court of Appeal.
- 5.11 The application for leave process is designed to function as a 'filter of unmeritorious' sentence appeals. The number of applications for leave to appeal allowed by a single Judge of Appeal therefore determines how many substantive sentence appeals are required to be determined by the Court of Appeal.

Numbers of applications for leave listed and heard

- 5.12 Figure 12 shows the number of applications listed and heard by the Court of Appeal for leave to appeal against sentences imposed for Victorian offences between 2003 and 2010. In addition to these applications, the Court of Appeal also heard a small number of applications for leave to appeal relating to sentences imposed for Commonwealth offences. These data are noted below.
- 5.13 Figure 12 shows that the number of listed applications for leave to appeal against sentence increased between 2003 and 2004 but then decreased between 2004 and 2007.²³² Over this time, there was

Figure 12: Number of applications for leave to appeal against sentence listed and heard in the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard applications for leave to appeal against sentence by offenders sentenced for Commonwealth offences. Between 2003 and 2010, the average number (per calendar year) of determinations for applications for leave to appeal against sentence in Commonwealth matters was 14.8 and ranged from 12 in 2005 to 23 in 2010.

²³¹ *Crimes Act 1958 (Vic) s 582; Criminal Procedure Act 2009 (Vic) s 315.*

²³² Listings are used as an indicator of demand in applications for leave to appeal against sentence. However, this does not take into account applications that do not proceed from lodgement to the listing of the application.

a parallel trend in the number of applications listed and heard, from 170 in 2004 to 142 in 2007. A substantial increase in applications for leave to appeal then occurred in 2008 (30.2%), followed by more gradual increases to 2010. In 2010, there were 207 applications for leave to appeal heard in the Court of Appeal.

- 5.14 The substantial increase (from 142 to 174) in the number of applications heard in 2008 constituted half (46.8%) of the Court of Appeal's criminal appeal hearing workload in that year, although such applications would have been heard by only one Judge of Appeal (rather than by a bench of three or more Judges of Appeal, as is the usual practice in substantive appeal hearings). As will be discussed, in some cases, as authorised by the *Supreme Court (Criminal Procedure) Rules 2008 (Vic)*, sentence appeals can be determined by a bench of two Judges of Appeal rather than three or more.²³³
- 5.15 The Court of Appeal also provided the Council with data on the number of heard and listed applications for leave to appeal against sentence. These data were only available for the calendar year 2010. They show that the number of applications for leave to appeal against sentence listed was 242 and the number heard was 212. The slight disparity in numbers compared with the data for 2010 (in Figure 12) is a result of different counting rules between the two datasets.

Success rates of applications for leave

- 5.16 The application for leave to appeal process in sentence appeals was designed:
to operate as a filter, enabling unmeritorious applications for leave to be disposed of by a single judge without the need for a hearing before a bench of three, with all the additional time and expense which such a hearing involves for all concerned.²³⁴
- 5.17 If an application to a single Judge of Appeal for leave to appeal against sentence is granted, the appeal may proceed to a substantive appeal hearing, unless the appeal is abandoned. If an application is not granted, the offender still has the option of seeking leave before the Court of Appeal (comprising three or more, or in some cases two, Judges of Appeal), but generally, this option is not pursued. For example, over the six-year period from 2003 to 2008, offenders sought leave from the Court of Appeal in 8.0% of refused applications for leave to appeal.
- 5.18 The common law test applied in determining applications for leave to appeal against sentence under the *Crimes Act 1958 (Vic)* was that a single judge should grant leave to appeal if one or more of the grounds of appeal were 'reasonably arguable'. This was so, notwithstanding the fact that there may have been no prospect that the Court of Appeal would impose a less severe sentence.²³⁵
- 5.19 This threshold for the filtering of unmeritorious sentence appeals, which revolves around the validity of the grounds of appeal rather than the appeal grounds' ultimate chances of success, is relatively low in order to give offenders the opportunity to have 'a reasonably arguable' appeal heard.²³⁶ However, the effective operation of the application for leave process, as a filter of unmeritorious appeals, is also crucial to the Court of Appeal's ability to manage the demand in both the lodgement of sentence appeals and the consequent substantive sentence appeals the Court of Appeal determines each year.
- 5.20 Observations on the first decade of the application for leave process suggest that it was effective as a filter in the sentence appeal process. Approximately two-thirds of leave to appeal applications were refused, resulting in a 'very substantial reduction in the number of sentencing appeals required to be disposed of by a court of three judges'.²³⁷

²³³ *Supreme Court (Criminal Procedure) Rules 2008 (Vic)* r. 2.03.1.

²³⁴ *R v Raad* (2006) 15 VR 338, 339.

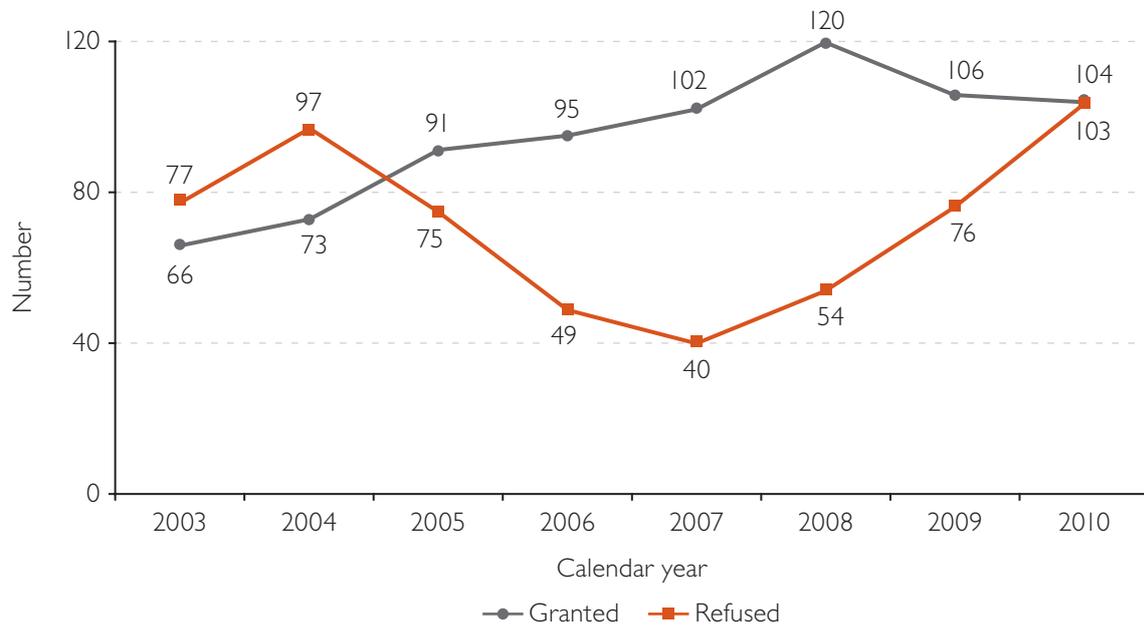
²³⁵ *R v Blick* (1999) 108 A Crim R 525; *R v Raad* (2006) 15 VR 338.

²³⁶ *Ibid.*

²³⁷ Charles (2008), above n 165, 30.

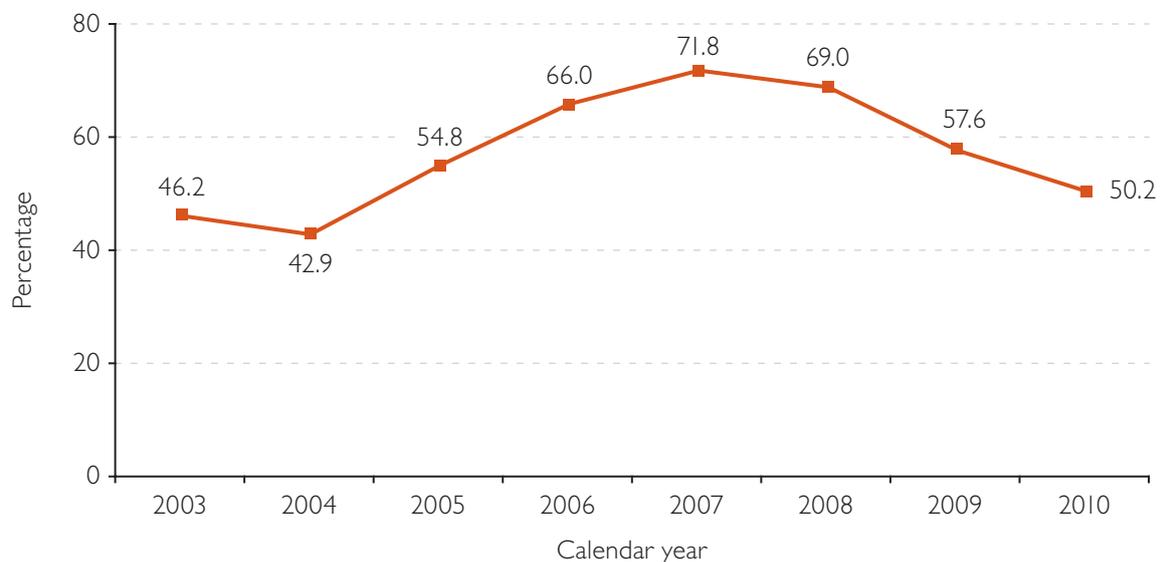
- 5.21 Figures 13 and 14 show the number and percentage of successful applications for leave to appeal against sentences imposed for Victorian offences between 2003 and 2010. Data were not available on the success rates of applications for leave to appeal against sentences imposed for Commonwealth offences.
- 5.22 From 2004 to 2007, there was an increasing trend in the success rates of applications for leave to appeal against sentence. This trend halted in 2008, after which success rates declined.
- 5.23 Figure 13 shows that the number of granted applications for leave increased steadily, from 73 in 2004 to 120 in 2008, an increase of 64.0%. The number of refused applications gradually declined, from 97 in 2004 to 40 in 2007. Between 2007 and 2010 the number of refused applications increased

Figure 13: Number of applications for leave to appeal against sentence granted and refused by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Figure 14: Percentage of applications for leave to appeal against sentence granted by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

substantially, from 40 to 103. Although initially the number of allowed applications continued to increase as the number of refused applications increased, from 2008 the number of allowed applications decreased (to 104 in 2010).

- 5.24 Accordingly, as Figure 14 shows, the rate at which applications were granted gradually increased, from 42.9% in 2004 to 71.8% in 2007. This rate dropped slightly, to 69.0% in 2008, and then rapidly in the following two years, to 50.2% in 2010.
- 5.25 Data for the calendar years 2009 and 2010, collected manually by the Court of Appeal and provided to the Council, show a similar increasing trend in the number of dismissed applications for leave. This dataset shows that the number of allowed applications remained stable at 110 in 2009 and 107 in 2010. The number of dismissed applications increased from 76 in 2009 to 105 in 2010.
- 5.26 These data show that there has been a change in the trend in success rates of applications for leave to appeal against sentence. After having increased between 2004 and 2007, the success rates declined between 2008 and 2010.
- 5.27 The data, however, do not shed light on the factors that may be underlying these changing trends. The changing success rates may reflect the frequency with which errors in the sentencing process are being made, thus having an impact on the number of lodged sentence appeals with reasonably arguable grounds. Alternatively, or in addition, these fluctuations may suggest that there have been changes in the application of the test.
- 5.28 The *Criminal Procedure Act 2009* (Vic) introduced a narrower test than the test used previously for the determination of applications for leave to appeal against sentence. The new test is based on the prospects of a less severe sentence being imposed, rather than only the merits of the grounds of appeal being argued. The *Justice Legislation Amendment Act 2010* (Vic) enables all pending applications for leave commenced but not yet determined as at 26 June 2010 to be determined under this new provision.
- 5.29 The new test adopts the minority decision of Justice Buchanan in *R v Raad*²³⁸ and realigns the aim of the test for applications for leave to appeal against sentence in order to identify and filter out those applications that have no reasonable prospect of success:
- [This is done] in the hope that the applicants will be dissuaded from requiring the diversion of the court's resources by electing to have the applications heard by courts consisting of three judges. I see the mischief at which [the current test] is aimed as the dissipation of the resources of this court by the proliferation of unmeritorious appeals.²³⁹
- 5.30 The test applies to the determination of applications for leave to appeal against sentence after 26 June 2010. Therefore, it is a relevant factor in the reduced success rate of applications in 2010 (50.2%). However, the success rates began to decline prior to the implementation of the test. Therefore, there may be other factors that underlie the change from an increasing to a decreasing trend in success rates of applications for leave to appeal against sentence.
- 5.31 The long-term effects of the narrower test have therefore yet to be measured. However, these data provide a useful basis on which to compare the future trends in success rates of applications for leave to appeal against sentence.
- 5.32 Other procedural reforms to the application for leave process in sentence appeals have recently been adopted by the Supreme Court. These include intensified listing of leave to appeal sentence hearings, 'fine-tuning' of application for leave to appeal procedures and seeking to determine applications for leave to appeal on the papers.²⁴⁰

²³⁸ *R v Raad* (2006) 15 VR 338.

²³⁹ *Ibid* 348 (Buchanan JA dissenting), citing *Samuels v Western Australia* (2005) 30 WAR 473, 482 (Steytler, Wheeler and Roberts-Smith JJA).

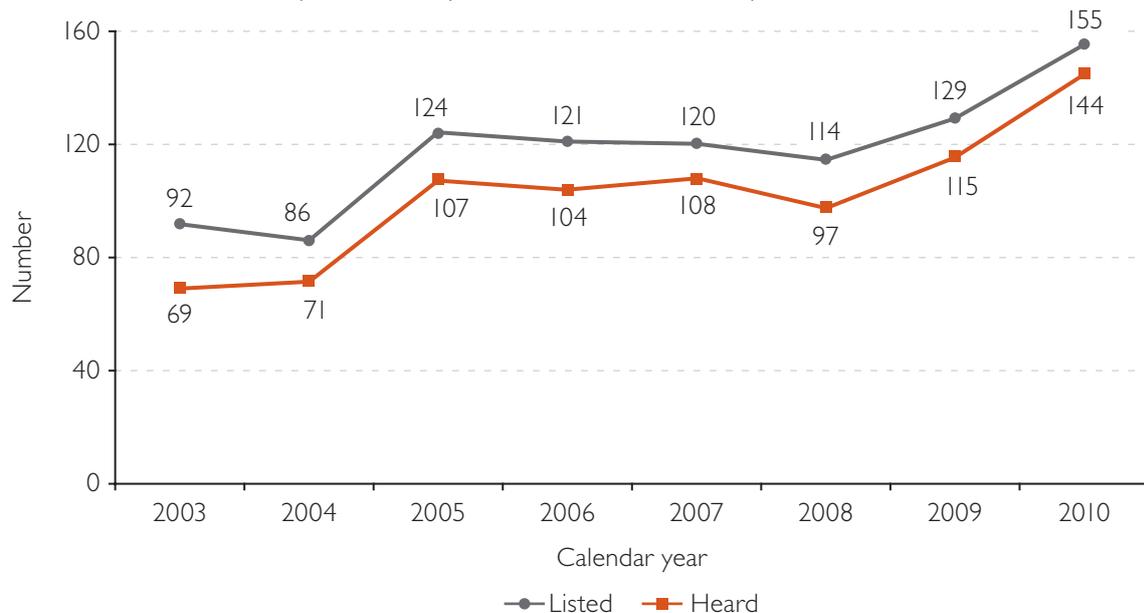
²⁴⁰ Supreme Court of Victoria (2010), above n 3, 14.

Substantive sentence appeals

Number of offender sentence appeals listed and heard

- 5.33 The success rates of applications for leave to appeal against sentence have been declining in recent years (from 2008 to 2010); however, prior to this there had been an upward trend in success rates. One effect of the increases in the success rates of applications for leave to appeal against sentence observed between 2004 and 2007 may be increases in the number of substantive offender sentence appeals awaiting determination by the Court of Appeal. Such an effect of the increases in the number and percentage of sentence applications granted by the Court of Appeal (shown in Figures 13 and 14) is, at least in part, evident in the number of substantive sentence appeals heard by the Court of Appeal.
- 5.34 Figure 15 shows the number of substantive offender sentence appeals listed and heard by the Court of Appeal between 2003 and 2010. It only shows appeals against sentences imposed for Victorian offences. The Court of Appeal also heard a small number of sentence appeals in Commonwealth matters. These are noted below.
- 5.35 As Figure 15 shows, there was a substantial increase in the number of substantive sentence appeals listed and heard by the Court of Appeal between 2004 and 2005 (from 71 to 107). This correlates with the increase from 42.9% in 2004 to 54.8% in 2005 in the success rates of applications for leave to appeal.
- 5.36 Contrary to what might be expected, there is little evidence of continued increases between 2005 and 2008 in the number of substantive offender sentence appeals heard by the Court of Appeal. The number of offender sentence appeals listed and heard by the Court of Appeal remained stable over this four-year period, even declining somewhat in 2008. However, since 2008, the number of substantive offender sentence appeals heard has increased substantially, from 97 in 2008 to 144 in 2010.

Figure 15: Number of offender sentence appeals listed and heard by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by offenders sentenced for Commonwealth offences. Between 2003 and 2010, the average number (per calendar year) of determinations for offender sentence appeals in Commonwealth matters was 10.8 and ranged from seven in both 2007 and 2008 to 17 in 2010.

- 5.37 Data from the Court of Appeal's new CourtView database on substantive offender sentence appeals listed and heard by the Court of Appeal in 2010 reflect this increased trend. The numbers are slightly lower (134 heard, 123 listed) due to small differences in counting rules.
- 5.38 One possible explanation for the levelling off in the number of substantive offender appeals between 2005 and 2008 may be that the capacity of the Court of Appeal to hear sentence appeals had been reached. If this is the case, the increasing number of substantive sentence appeals unable to be listed and heard by the Court of Appeal would likely have been collecting as pending appeals and thus contributing to the criminal appeal backlog as it was in 2009–10 (see Figures 2 and 3).
- 5.39 The recent increases in the number of applications listed and heard are indicative of the Court of Appeal's increased capacity to list and hear more sentence appeals after 2008. The recent reduction in the criminal backlog in 2010–11 may also be reflective of the Court of Appeal's capacity to list and hear more sentence appeals.
- 5.40 One of the factors that previously may have hampered the Court of Appeal's ability to increase the number of substantive sentence appeal determinations and meet the growing demand between 2005 and 2008 is that three Judges of Appeal were required for substantive appeal hearings.
- 5.41 This factor has been recognised by the Court of Appeal, with the introduction of the practice in September 2008 allowing 'straightforward' sentence appeals to be determined by a bench of two Judges of Appeal rather than three or more.²⁴¹ This measure was formalised in the *Supreme Court (Criminal Procedure) Rules 2008 (Vic)*.²⁴²
- 5.42 The importance accorded to sentence appeals has traditionally required a bench of three judges; however, in 2009 the President of the Court of Appeal, Justice Maxwell, said, '[i]n the face of the growing backlog . . . [the Court of Appeal] came to the conclusion – precisely because of the importance of sentence appeals – that it was preferable to have the appeal heard earlier by two judges rather than later by three'.²⁴³
- 5.43 In data examined by the Council, the practice of two-judge sentence appeals was initially used infrequently. Between 2007–08 and 2008–09, there were 33 cases (all of which were appeals by offenders) heard by two Judges of Appeal (11.1%). In the overwhelming majority of cases (87.8%), the appeal was heard by three Judges of Appeal.²⁴⁴ Thus, the practice of two-judge sentence appeals is unlikely to have made a significant difference to the speed with which sentence appeals were dealt in that period.
- 5.44 The Supreme Court has recently indicated that this practice has increased, as part of continued action to reduce waiting periods in criminal appeals.²⁴⁵
- 5.45 The continued increases in the number of substantive sentence appeals listed and heard in 2009 and 2010 may reflect an increase in the practice of two-judge sentence appeals. Other factors, such as the number of presiding Judges of Appeal and other recent changes to practice and procedure aimed at increasing the number of sentence appeals heard per day, may also have contributed to this increased capacity to hear sentence appeals. Recent changes to practice and measures introduced to address delay are discussed at [5.124]–[5.132].

²⁴¹ Maxwell (2009), above n 3, 12.

²⁴² *Supreme Court (Criminal Procedure) Rules 2008 (Vic)* r. 2.03.1.

²⁴³ Maxwell (2009), above n 3, 12.

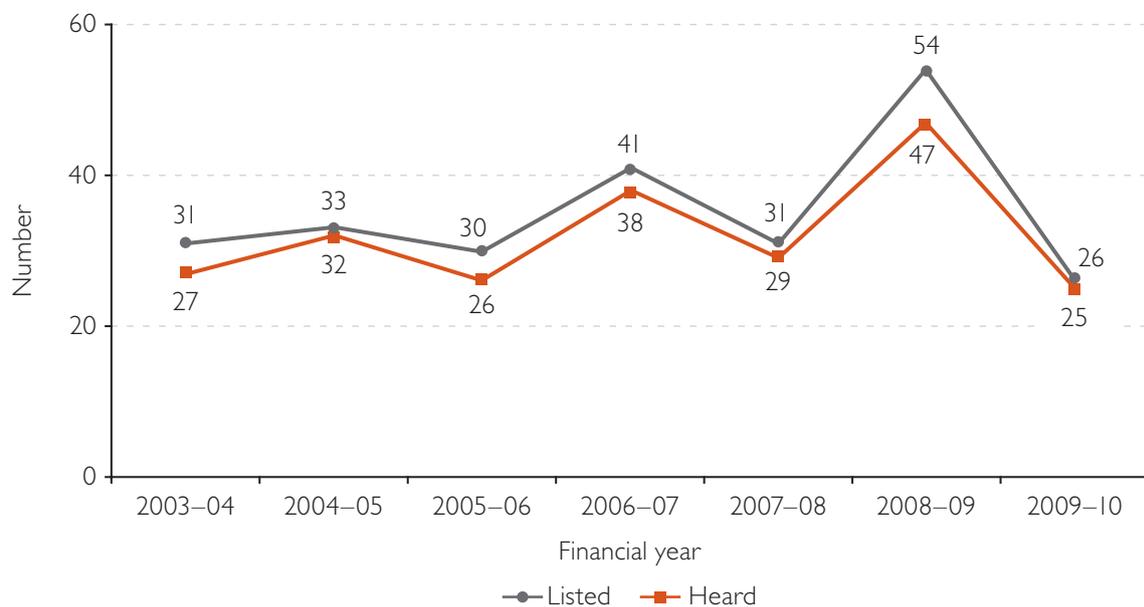
²⁴⁴ There were three cases that were heard by five Judges of Appeal.

²⁴⁵ Supreme Court of Victoria (2010), above n 3, 14.

Number of Crown sentence appeals listed and heard

- 5.46 The number of offender sentence appeals listed and heard by the Court of Appeal may be contrasted with the number of Crown sentence appeals listed and heard by the Court of Appeal. Figure 16 shows appeals brought by the Victorian Director of Public Prosecutions against sentences imposed for Victorian offences. The Court of Appeal also heard a small number of sentence appeals brought by the Commonwealth Director of Public Prosecutions in relation to Commonwealth matters. These are noted below.
- 5.47 The number of Crown appeals listed and heard fluctuated between 2003–04 and 2007–08. The number increased substantially in 2008–09 and then dropped sharply in 2009–10. The number of Crown appeals heard increased by 46.9% from 29 in 2007–08 to 47 in 2008–09.²⁴⁶

Figure 16: Number of Crown sentence appeals listed and heard by the Court of Appeal, by financial year, 2003–04 to 2009–10 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

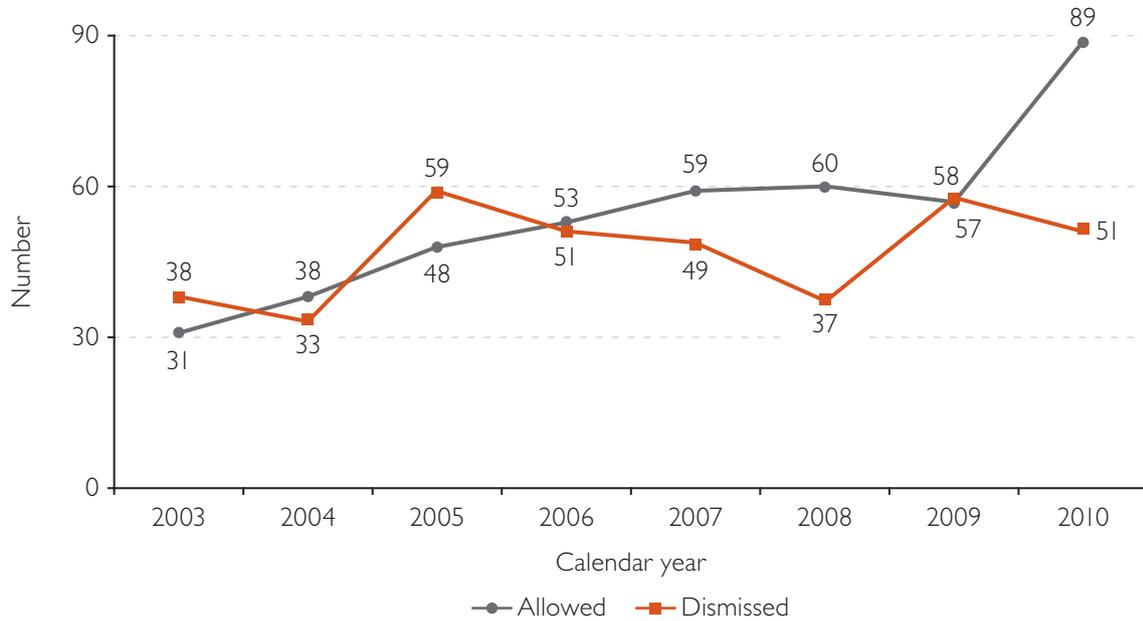
Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by the Commonwealth Director of Public Prosecutions in relation to sentences imposed for Commonwealth offences. Between 2003–04 and 2009–10, the average number (per financial year) of determinations for sentence appeals brought by the Crown in Commonwealth matters was 3.1 and ranged from zero in 2006–07 to seven in 2005–06.

²⁴⁶ There may also be differences in listing practices for Crown and offender appeals.

Success rates of offender sentence appeals

- 5.48 Analysis of the success rates of substantive sentence appeals shows that overall these rates have also been increasing. Figure 17 shows the number of allowed and dismissed offender sentence appeals, by calendar year, from 2003 to 2010. The data relate to appeals against sentences imposed for Victorian offences. The success rates of offender appeals in Commonwealth matters are noted below.
- 5.49 While the number of heard offender sentence appeals fluctuated, Figure 17 shows that there was a steady increase in the numbers of offender appeals allowed each year. Between 2003 and 2007, the number of allowed substantive offender appeals increased from 31 to 59. The number remained steady in 2009 before increasing substantially in 2010, from 58 to 89.
- 5.50 To some extent, this increase in allowed offender sentence appeals may be related to the increase in the total number of heard offender sentence appeals, shown in Figure 15 to have occurred in 2005, 2009 and 2010. However, Figure 17 indicates that the increase in the number of offender sentence appeals heard is largely reflected in the substantial increase in the number of offender sentence appeals dismissed in that year, increasing from 33 in 2004 to 59 in 2005. After 2005, the number of dismissed offender sentence appeals then started to decline, from 59 in 2005 to 37 in 2008, while the number of allowed offender sentence appeals steadily increased over that period, from 48 in 2005 to 60 in 2008.
- 5.51 In 2009, the number of allowed offender sentence appeals remained stable at 58, before increasing dramatically to 89 in 2010. The number of dismissed offender sentence appeals increased substantially from 37 in 2008 to 57 in 2009 and remained stable at 51 in 2010.
- 5.52 This increase in the number of offender sentence appeals allowed by the Court of Appeal is reflected in the analysis, shown in Figure 18, of the percentage of offender sentence appeals allowed, by calendar year, from 2003 to 2010. The data relate to appeals against sentences imposed for Victorian offences. The success rates of offender sentence appeals in Commonwealth matters are noted below.
- 5.53 In 2003, only 44.9% of offender sentence appeals were allowed by the Court of Appeal, increasing to 53.5% in 2004. The significant increase in 2005 in the number of offender sentence appeals heard (Figure 15) and dismissed (Figure 17) is reflected in a drop in the percentage of successful offender sentence appeals (Figure 18), to 44.9%.
- 5.54 After 2005, however, the proportion of successful offender sentence appeals gradually increased, from 44.9% in 2005 to 61.9% in 2008. This corresponds with increases in the number of appeals allowed and decreases in the number of appeals dismissed over the same period, as shown in Figure 17. In 2009, the percentage of allowed offender sentence appeals declined once more to 49.6%, which is largely a reflection of the significant increase in the number of appeals dismissed in that year.
- 5.55 The increase in the number of offender sentence appeals allowed in 2010 (shown in Figure 17) resulted in another increase, to 61.8%, in the proportion of offender sentence appeals allowed (shown in Figure 18).
- 5.56 The Court of Appeal also provided the Council with CourtView data on the success rates of substantive offender sentence appeals for the year 2010 only. Due to the different data sources and counting rules, care should be taken in comparing the CourtView data with the data in Figures 17 and 18.
- 5.57 The increase in the number of allowed offender sentence appeals and the resultant increased success rate in 2010 were also evident in the Court of Appeal data. These data show that 73 offender sentence appeals were allowed and 50 were dismissed by the Court of Appeal in that year, producing a success rate of 59.5%.

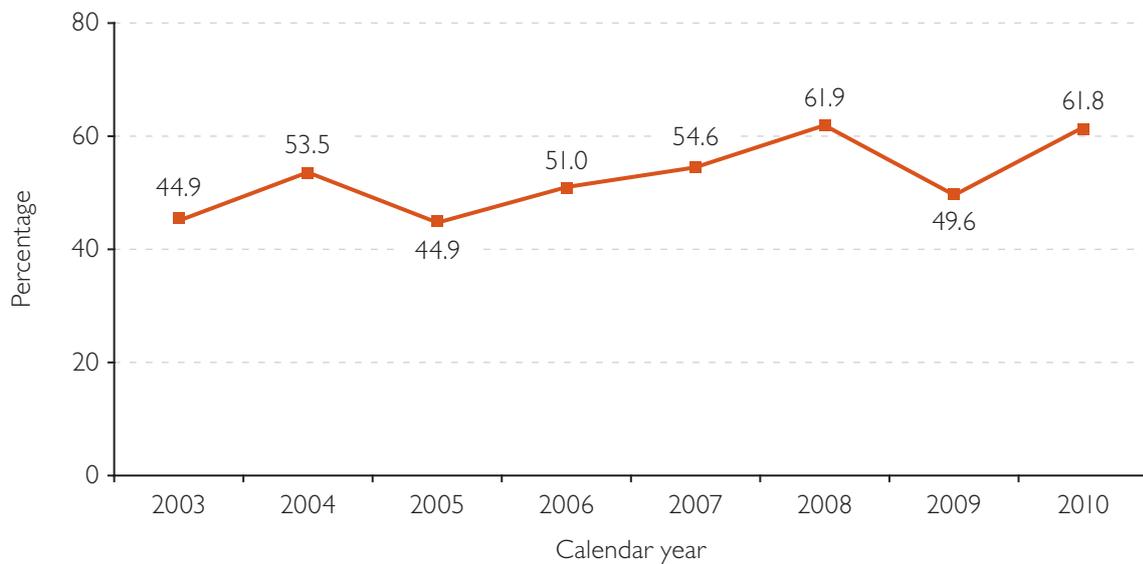
Figure 17: Number of offender sentence appeals allowed and dismissed by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by offenders sentenced for Commonwealth offences. Between 2003–04 and 2009–10, 44 out of a total of 86 offender sentence appeals in Commonwealth matters were allowed.

Figure 18: Percentage of offender sentence appeals allowed by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by offenders sentenced for Commonwealth offences. Between 2003–04 and 2009–10, the percentage of allowed offender sentence appeals in Commonwealth matters was 51.1% (44 out of 86).

- 5.58 The data show that until recently there was an upward trend in the success rates of both applications for leave to appeal against sentence and substantive sentence appeals. There may be a connection between the success rates of applications for leave to appeal against sentence, the hearing rates of substantive sentence appeals and the success rates of substantive sentence appeals. However, the existence of a correlation between the three does not necessarily mean that there is a causal relationship.
- 5.59 Recent changes to the law on the determination of applications for leave to appeal against sentence may be a factor explaining the downward trend in success rates of applications for leave to appeal against sentence. Reforms to the practice of hearing substantive sentence appeals by two, rather than three, Judges of Appeal may also have boosted the capacity of the Court of Appeal and may underlie the recent increases in hearing rates of substantive sentence appeals. However, it is unclear which factors may be underlying the trends in success rates of substantive sentence appeals, which, prior to the recent fluctuations in 2009 and 2010, had been increasing.

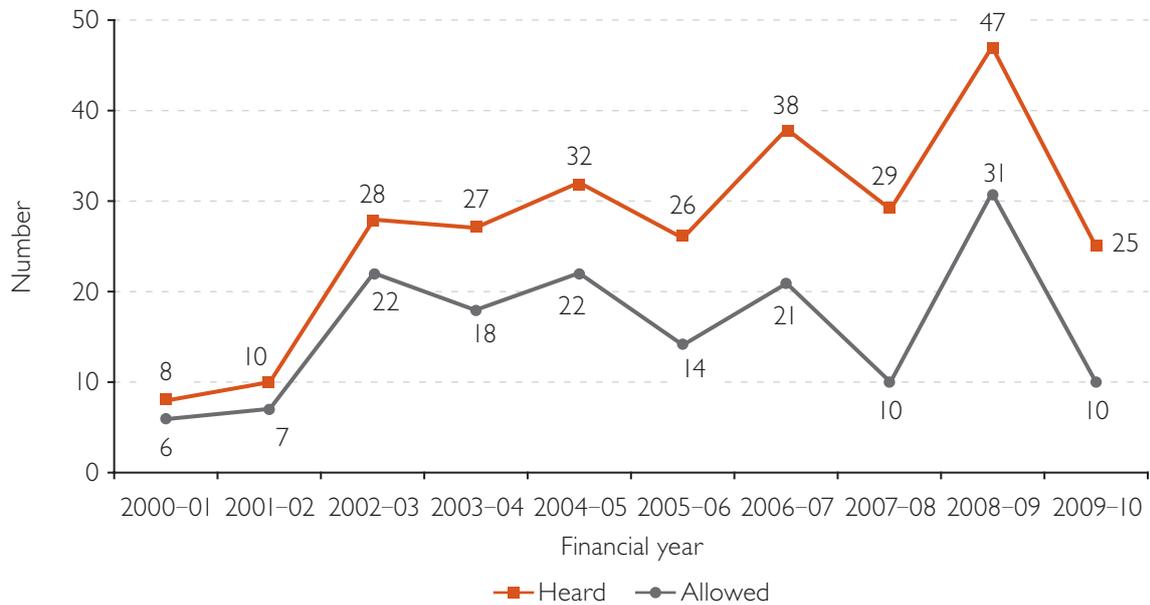
Success rates of Crown sentence appeals

- 5.60 As discussed, the common law position in relation to Crown appeals, unlike offender appeals, has been that Crown appeals should be a rarity, as expressed by the Court of Appeal in *R v Clarke*.²⁴⁷
- 5.61 One way of examining the question of whether Crown appeals are a 'rarity' is to look at the number of Crown appeals over a given period. In 2007–08 and 2008–09, the Court of Appeal heard 76 Crown appeals against sentence. Over the same two-year period some 300 offender sentence appeals or sentence and conviction appeals were determined. Thus, when compared with offender sentence appeals, Crown appeals comprised only 20.2% of the total sentence appeals heard over that period. There were almost four times as many offender sentence appeals as there were Crown sentence appeals.
- 5.62 Another way to consider whether Crown appeals are a rarity is to examine the number of cases appealed by the Crown in relation to the overall number of cases sentenced in the higher courts, that is, the potential pool of cases sentenced that the Crown may appeal. There were 4,147 cases sentenced in the higher courts in 2007–08 and 2008–09. Thus, the 'crude' rate of appeal was 1.8%. A more thorough analysis of Crown appeal rates, in which lag between sentence and appeal has been taken into account, found that 2.5% of cases sentenced from July 2007 to December 2007 had an appeal determination in the 24 to 36 months following sentence.
- 5.63 A further way of exploring the question of rarity is to examine trends in the number of Crown sentence appeals over time. Figure 19 shows the number of Crown appeals heard and allowed by the Court of Appeal between 2000–01 and 2009–10. The data relate to Crown appeals against sentences imposed for Victorian offences. The success rates of Crown sentence appeals in Commonwealth matters are noted below.
- 5.64 Figure 19 shows that over time the numbers of Crown sentence appeals have fluctuated considerably; however, until 2009–10 the overall trend was upwards. In 2000–01 and 2001–02, there were 10 or fewer Crown appeals in each year. In 2002–03, the number of Crown appeals almost tripled to 28. From 2002–03 to 2007–08, the number of Crown appeals fluctuated between 26 and 38, followed by another substantial increase, to 47 in 2008–09. The number decreased again in 2009–10, when 25 Crown sentence appeals were heard.
- 5.65 The overall rise in the number of Crown sentence appeals evident in Figure 19 raises the questions of whether Crown appeals can still be considered an uncommon occurrence²⁴⁸ and what factors can explain the rise in Crown appeals.

²⁴⁷ *R v Clarke* (1996) 2 VR 520.

²⁴⁸ Richard Edney, 'The Rise and Rise of Crown Appeals in Victoria' (2004) 28 *Criminal Law Journal* 351.

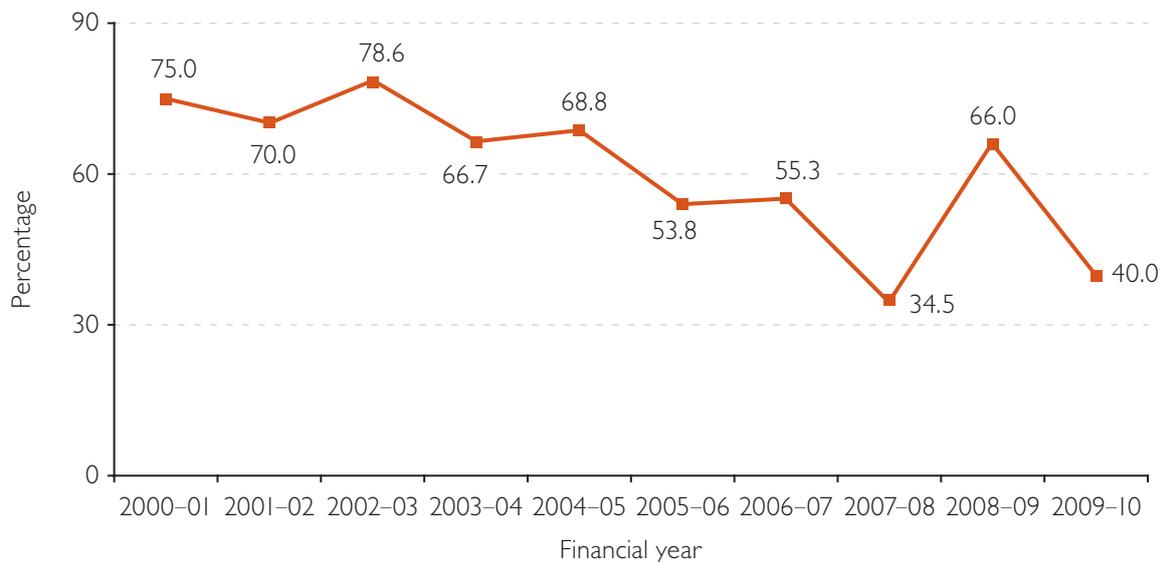
Figure 19: Number of Crown sentence appeals heard and allowed by the Court of Appeal, by financial year, 2000–01 to 2009–10 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by the Commonwealth Director of Public Prosecutions in relation to sentences imposed for Commonwealth offences. Between 2003–04 and 2009–10, seven out of a total of 25 Crown sentence appeals in Commonwealth matters were allowed.

Figure 20: Percentage of heard Crown sentence appeals allowed by the Court of Appeal, by financial year, 2000–01 to 2009–10 (sentences imposed for Victorian offences)



Source: Victorian Office of Public Prosecutions.

Note: In addition to appeals shown in this figure, the Victorian Court of Appeal heard sentence appeals by the Commonwealth Director of Public Prosecutions in relation to sentences imposed for Commonwealth offences. Between 2003–04 and 2009–10, the percentage of allowed sentence appeals brought by the Crown in Commonwealth matters was 28.0% (seven out of 25).

- 5.66 Edney has suggested that the increases in the number of Crown appeals may be explained by increases in the success rates of Crown appeals, as successful appeals may in turn encourage the Director of Public Prosecutions to lodge more appeals. Thus Crown appeals may become a 'self-fulfilling prophecy'.²⁴⁹
- 5.67 An analysis of the success rates of Crown appeals over time found little evidence of this. Figure 19 shows that the number of allowed Crown sentence appeals has fluctuated along with the number of heard Crown appeals.
- 5.68 Figure 20 (page 69) shows a fluctuating, although overall downward, trend in the success rates of Crown appeals against sentences imposed for Victorian offences. The increasing number of Crown appeals has occurred when the success rate of appeals has declined. In 2002–03, 78.6% of Crown appeals were successful, while in 2007–08 the proportion had declined to 34.5%. There was, however, a sharp increase in the number of successful Crown appeals in 2008–09 (although it is not clear why there was such a substantial change in the success rate) followed by a substantial decline to 40.0% in 2009–10.
- 5.69 One reason for the observed increases in Crown sentence appeals may be a change in the Director of Public Prosecutions' policy on the identification of appellable sentences. Historically, the Crown's right of appeal was used sparingly.²⁵⁰ For some time after the creation of an independent Director of Public Prosecutions in 1994, Crown appeals were relatively uncommon.²⁵¹
- 5.70 Paul Coghlan QC (now Justice Coghlan) became the Director of Public Prosecutions in 2001 and introduced the practice of reviewing every sentence handed down in the higher courts in order to identify cases in which the Crown might have considered exercising its right of appeal. This practice was continued under Jeremy Rapke QC, the Director of Public Prosecutions from 2007 to 28 June 2011, who said in 2008:
- [there is] no other mechanism for correcting what [the Director] think[s] are inadequate sentences ... no other mechanism for sending a message to the courts that we do keep an eye on them, that we do take sentencing very seriously and that if it's wrong we will do something about it. We have no other mechanism for conveying to the public that we share their concerns about the level of some sentences for some offences.²⁵²
- 5.71 One of the aims of Crown sentence appeals has been described as 'encouraging the courts to give sufficient regard to the maximum penalties set by the Victorian parliament in matters such as drug trafficking, homicide, serious sex crimes and major fraud'.²⁵³ This is done by maintaining a high level of scrutiny of individual sentences.
- 5.72 This approach to Crown sentence appeals, which uses the appeal process as a corrective measure in individual sentences, can be viewed as a departure from the principles set down in *R v Clarke*.²⁵⁴ However, one of the principles articulated in that case is to 'enable the courts to establish and maintain adequate standards of punishment for crime'.²⁵⁵ Justice Maxwell, President of the Court of Appeal, has said that the Director of Public Prosecutions, by reason of the position's statutory functions, is, with the Court of Appeal, the 'custodian of sentencing standards in this State'.²⁵⁶ In light of

²⁴⁹ Ibid 362.

²⁵⁰ The right to appeal sentences was conferred on the Crown in 1971. See *Criminal Appeals Act 1970* (Vic).

²⁵¹ Director of Public Prosecutions, *The Pursuit of Justice: 25 Years of the DPP in Victoria* (2008) 14.

²⁵² Ibid 15.

²⁵³ Office of Public Prosecutions, *Annual Report 2007–08* (2008) 8.

²⁵⁴ *R v Clarke* (1996) 2 VR 520.

²⁵⁵ Ibid 522.

²⁵⁶ *Director of Public Prosecutions v Avci* (2008) 21 VR 310, 318.

recent remarks made by the Court of Appeal on the inadequacy of current sentencing practices for a range of offences and observations that part of the Director of Public Prosecutions' role is to assist the courts in setting appropriate sentencing standards, in 2010 the then Director of Public Prosecutions, Jeremy Rapke QC, adopted a policy regarding challenging current sentencing practices.²⁵⁷

- 5.73 Further, the Director of Public Prosecutions' policy on appeals makes specific reference to *R v Clarke*²⁵⁸ and reiterates that Crown sentence appeals are not to be brought in every case in which the Director of Public Prosecutions is of the view that the sentence is inadequate.²⁵⁹ The policy clearly states that the decision to appeal a sentence by the Director of Public Prosecutions depends 'upon a consideration of the relevant statutory criteria, in combination with the principles discussed in the relevant case law as to the circumstances in which a Crown appeal against sentence may be justified'.²⁶⁰
- 5.74 There are a number of relevant considerations with respect to the statutory criteria that apply. The Director of Public Prosecutions will first consider whether the sentence imposed discloses technical sentencing error, in terms of:
- a clear failure to follow a prescribed procedure, a failure to invoke a mandatory provision, or the making of an erroneous finding of fact, although these types of error are comparatively rare.²⁶¹
- 5.75 Secondly, and more commonly, the Director of Public Prosecutions will make an assessment of whether, despite the fact that there has been no technical sentencing error, the sentence imposed is manifestly inadequate. This is an assessment that:
- depends on the whole of the circumstances of the case including the material led upon the plea, and an assessment of the matter comparatively with other similar cases and relevant sentencing practices.²⁶²
- 5.76 In addition, the Director of Public Prosecutions will consider whether it is in the public interest to appeal a particular sentence. The policy contemplates that any of the above factors may be present, but the Director of Public Prosecutions may decide that it is against the public interest to institute an appeal.²⁶³ Prior to the abolition of the double jeopardy principle by the *Criminal Procedure Act 2009* (Vic), the Director of Public Prosecutions was also required to take into account whether any increase in sentence, discounted for double jeopardy,²⁶⁴ would be adequate to justify pursuing the appeal. The Director of Public Prosecutions will also take into account the delay since the imposition of the original sentence, any sentences imposed on co-offenders and any submissions by the prosecutor on sentence on the plea.²⁶⁵

²⁵⁷ Office of Public Prosecutions, *Annual Report 2009–10* (2010) 5. See Office of Public Prosecutions, *Director's Policy Regarding Challenging Current Sentencing Practices*, Policy 32 (Office of Public Prosecutions, 2010–) <www.opp.vic.gov.au/home/opp+-+prosecution+policies+and+guidelines+%28pdf%29> at 30 November 2011.

²⁵⁸ *R v Clarke* (1996) 2 VR 520.

²⁵⁹ Office of Public Prosecutions, *Director's Policy in Relation to Director's Appeals Pursuant to s.287 and s.291 of the Criminal Procedure Act 2009*, Policy 11 (Office of Public Prosecutions, 2010–) <www.opp.vic.gov.au/home/opp+-+prosecution+policies+and+guidelines+%28pdf%29> at 30 November 2011, [11.18.12], [11.19.2].

²⁶⁰ *Ibid* [11.18.12].

²⁶¹ *Ibid* [11.18.3].

²⁶² *Ibid* [11.18.3].

²⁶³ *Ibid* [11.18.4].

²⁶⁴ Since the introduction of the *Criminal Procedure Act 2009* (Vic) abolishing the sentencing double jeopardy principle, the Director of Public Prosecutions' policy on appeals has been amended: Office of Public Prosecutions (2010–), above n 259 [11.18.5]–[11.18.6].

²⁶⁵ Office of Public Prosecutions (2010–), above n 259.

5.77 The Court of Appeal has considered the question of whether the provisions in the *Criminal Procedure Act 2009* (Vic) that remove the double jeopardy principle also remove the principle as a factor that must be considered by the Director of Public Prosecutions in lodging an appeal against sentence. The majority of the bench of five considered that it did not, stating:

the principles which lie at the heart of the double jeopardy rule continue to have operative force. Those principles are to be taken into account by the Director in determining whether it is truly in the public interest for an appeal to be brought. The filter has shifted from the Court, to the Director, who must, in accordance with the Act, turn his [sic] mind to the considerations which lie at the heart of double jeopardy as part of the requirement that he [sic] have regard, when deciding whether to institute an appeal, to whether it is really in the public interest to do so.²⁶⁶

5.78 The final consideration as to whether or not the Crown will appeal a sentence is whether there are reasonable prospects for success. The Director of Public Prosecutions' policy on appeals notes, '[i]t would be contrary to the purpose and rationale of Crown appeals against sentence to institute such appeals in matters of borderline merit or in matters in which it was recognised that there was little or no prospect of the appeal succeeding'.²⁶⁷

Likelihood of a sentence being successfully appealed

5.79 Success rates can also be analysed according to the likelihood of a sentence being successfully appealed. Overall, the actual numbers of sentence appeals lodged and appeal cases resentenced are relatively low compared with the number of sentences imposed in the higher courts. Of all cases sentenced between July 2007 and December 2007, the appeal rate was 8.2% and the resentence rate was 3.2%.²⁶⁸

Figure 21: Appeal and resentence rates by original imprisonment sentence lengths for cases sentenced between July 2007 and December 2007



Source: AustLII and higher courts sentencing database.

²⁶⁶ *Director of Public Prosecutions v Karazisis; Director of Public Prosecutions v Bogtstra; Director of Public Prosecutions v Kontoklatsis* (2010) 206 A Crim R 14, 42–43.

²⁶⁷ Office of Public Prosecutions (2010–), above n 259 [11.19.2].

²⁶⁸ Appeal and resentence rates have been calculated by examining the proportion of cases sentenced in the six months between July 2007 and December 2007 in which a sentence appeal was determined within 24 to 36 months.

- 5.80 Sentences other than imprisonment are rarely appealed. Compared with all sentence types, both the appeal rate and the success rate of the appeal increase where the appealed sentence is one of imprisonment. When imprisonment cases were isolated from all cases sentenced between July 2007 and December 2007, the appeal rate increased to 17.1% and the resentence rate increased to 6.7%.
- 5.81 Figure 21 shows that both appeal rates and resentence rates continued to increase as the length of sentences appealed increased. The time taken to process an appeal means that few short sentences of imprisonment are appealed (as shown in Figure 21). For cases involving sentences of between three and five years, the appeal rate increased to 22.0% and the resentence rate increased to 12.6%. This pattern is consistent for sentences of between five years and 10 years. In cases involving sentences of more than 10 years, the appeal rate increased to 38.7% and the resentence rate increased to 12.9%. Therefore, in cases between July 2007 and December 2007 involving sentences of imprisonment of more than three years, the chance of the sentence being successfully appealed was 11.6%.

The timing of sentence appeals

- 5.82 There may be factors in addition to trends in criminal appeal lodgements and the success rates of sentence appeals that may have contributed to the increases in the criminal appeal backlog, observed to have occurred particularly between 2003–04 and 2009–10. Factors such as the time taken for sentence appeals to be listed, heard and determined may have contributed to overall delays in criminal appeals. Such factors may also interact in complex ways with other underlying factors within the appellate process, for example, observed increases in criminal appeal lodgements (from 2005–06 to 2009–10) and observed increases in success rates of sentence applications (from 2004 to 2007) and substantive sentence appeals (from 2005 to 2008).
- 5.83 This section presents data on trends in the time taken to deliver sentence appeal judgments and determine sentence appeals.

Time between hearing and determination of sentence appeals

- 5.84 One factor that is relevant to delay in the resolution of criminal appeal cases is the time in which appeal judgments are delivered.
- 5.85 The practice of a court delivering a decision at the time of, or soon after, the hearing and determination of a case is known as an *ex tempore* judgment.
- 5.86 Reserved judgments tend to be used in appeal cases that raise particularly complex issues or require the consideration of a particular legal principle. In such cases, the Court of Appeal hears the appeal and then reserves its decision in order to give it time to consider its decision, prepare its reasons and deliver its judgment after hearing the appeal. Reserved judgments tend to be relied on for statements of principle more commonly than *ex tempore* judgments, as reserved judgments often contain more detailed reasons than *ex tempore* ones.
- 5.87 The use of *ex tempore* judgments raises a number of issues relating to the pressure of increased workloads on judges and the resources and training available to judges 'to assist in the more efficient disposition of their case load as well as developing the skill of *ex tempore* judgments'.²⁶⁹ Changes to, or increases in, the complexity of sentencing and criminal law can also have an impact on the

²⁶⁹ International Commission of Jurists, Victoria, *Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice: Written Submission of the International Commission of Jurists – Victoria*, Sub No. j2 (Parliament of Australia, Senate, 2009) <www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/submissions/sublist.htm> at 31 November 2011, 7.

frequency with which sentence appeals are able to be determined by *ex tempore* judgments, if more time is required to consider complex issues or prepare detailed reasons for successful appeals.

- 5.88 Another factor to note is that the Court of Appeal also deals with civil appeals and thus Judges of Appeal must balance these with their criminal appeal workload. Although civil appeals have consistently comprised a lower proportion of the Court of Appeal's appellate workload,²⁷⁰ the civil appeal workload of individual Judges of Appeal can also have an impact on sitting and judgment writing time for criminal appeals.
- 5.89 The use of *ex tempore* judgments where possible and appropriate can have an impact on delay in the resolution of criminal appeals, not only because *ex tempore* judgments reduce the time taken for the Court of Appeal to deliver its decision, but also because they reduce workload in terms of judgment writing if judgment has been reserved. The use of *ex tempore* judgments has long been recognised by the Court of Appeal as a measure that can help minimise delay in the finalisation of criminal appeals.
- 5.90 Priest and Holdenson have observed that, in the first five years of its operation, the Court of Appeal 'attempted to deliver as many judgments *ex tempore* as was humanly possible' during circuit work carried out twice a year.²⁷¹
- 5.91 The Supreme Court has continued to identify this practice as an area of priority for reducing waiting periods in criminal matters. The Supreme Court has recently indicated that action taken to reduce waiting periods in criminal matters includes the 'delivery of *ex tempore* judgments (i.e. orally immediately, rather than in delayed written form) where possible'.²⁷²
- 5.92 The Council has analysed data on the timing between sentence appeal hearings and delivery of judgments to establish how frequently the Court of Appeal delivers *ex tempore* judgments. Two sets of data have been examined. As over half of the Court of Appeal's criminal appeal workload comprises sentence-only appeals, appeals against conviction and sentence have been excluded. Both datasets include offender and Crown sentence-only appeals.²⁷³ Applications for leave to appeal against sentence have also been excluded as, since 1999, the Court of Appeal has adopted the practice of having applications heard by a single Judge of Appeal. Applications for leave to appeal against sentence are almost always delivered *ex tempore* on the same day as the hearing.
- 5.93 Firstly, the Council examined judgments published on the AustLII website²⁷⁴ for substantive sentence-only appeals heard and delivered in the period between 2007–08 and 2008–09.
- 5.94 Figure 22 shows that in the period from 2007–08 to 2008–09, three in 10 (32.8%) sentence appeal judgments were delivered on the same day as the hearing of the appeal. In the remainder of cases, judgment was reserved.
- 5.95 In a third (33.4%) of sentence appeal cases, judgment was reserved but delivered within one to 29 days of the hearing of the appeal. In the remaining third of sentence appeal cases, judgment was reserved and delivered more than one month after the hearing date; however, in the majority of these cases, judgment was delivered between one and two months (12.5%) and between two and four months (10.3%) after the hearing.

²⁷⁰ For example, in 2009–10, civil appeals comprised 28.7% of the Court of Appeal's appellate workload.

²⁷¹ Charles (2008), above n 165, 33.

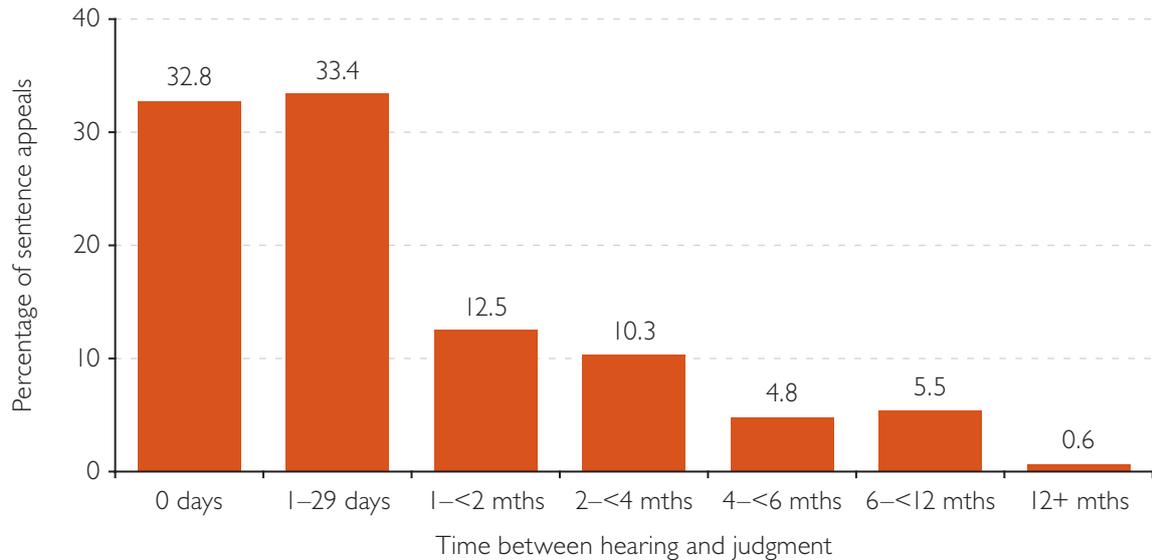
²⁷² Supreme Court of Victoria (2010), above n 3, 14.

²⁷³ Sentence appeals that also involve a conviction appeal may increase the time the Court of Appeal requires to determine and prepare its decision, as such appeals involve consideration of significant additional factors, including evidence in the trial or jury directions given by the judge. Only a small proportion (3.4%) of the 58 conviction and sentence appeals in 2007–08 and 2008–09 was delivered *ex tempore*. The proportion of conviction and sentence appeals finalised within a month of the hearing date in the same period was 44.8%.

²⁷⁴ Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/au/cases/vic/VSCA/> at 31 December 2009.

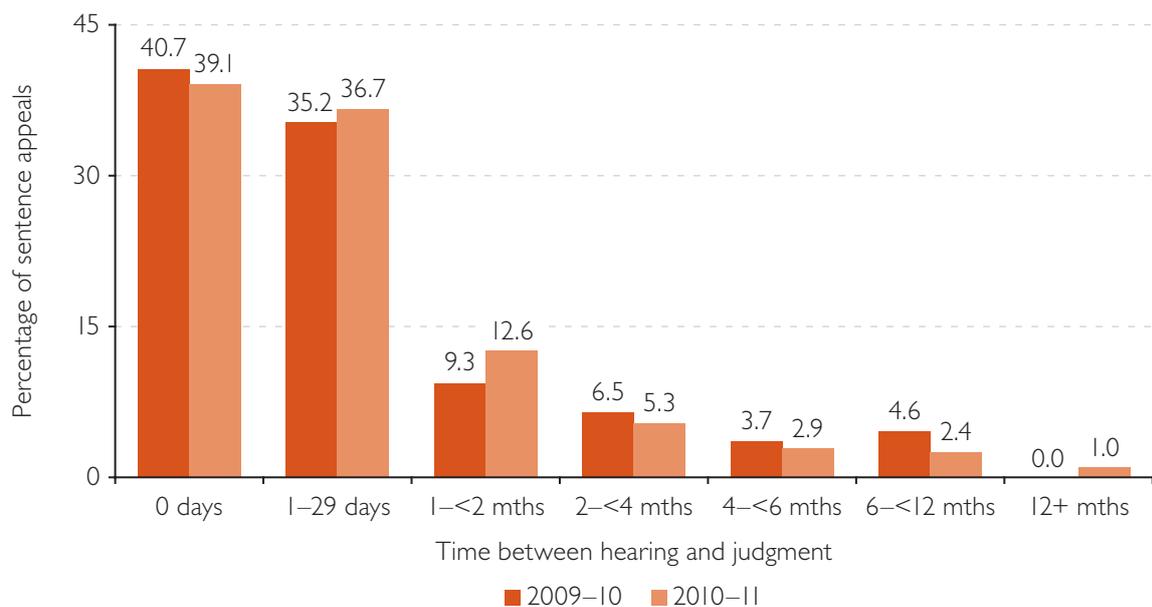
- 5.96 Secondly, the Council examined CourtView data provided by the Court of Appeal. These data comprise substantive sentence-only appeals heard and delivered in 2009–10 and 2010–11, shown in Figure 23 according to the time between hearing date and judgment date.
- 5.97 Figure 23 shows that, in both 2009–10 and 2010–11, approximately four in 10 substantive sentence appeals were delivered *ex tempore* on the same day as the hearing. In the remaining sentence appeals, judgment was reserved.

Figure 22: Percentage of sentence-only appeals determined by time, grouped by months, between hearing and judgment date, 2007–08 and 2008–09



Source: AustLII.

Figure 23: Percentage of sentence-only appeals determined by time, grouped by months, between hearing and judgment, by financial year, 2009–10 and 2010–11



Source: CourtView (Court of Appeal, Supreme Court of Victoria).

- 5.98 A similar proportion of sentence appeals in both 2009–10 and 2010–11 was reserved and judgment was delivered within one day to 29 days of the appeal hearing. In 2009–10, these cases comprised 35.2% of appeals heard in that financial year, and in 2010–11, such cases comprised 36.7%.
- 5.99 A slightly lower proportion of sentence appeal decisions was delivered between one month and two months of the hearing date in 2009–10 (9.3%), compared with the proportion in 2010–11 (12.6%).
- 5.100 Smaller proportions of sentence appeal decisions were delivered between two and 12 months after the hearing date in both 2009–10 and 2010–11.
- 5.101 Caution should be exercised in comparing the two datasets, as they are from two different sources and may use different counting rules. Further, the data provided by the Court of Appeal rely in part on data from the CourtView database and in part on data collected prior to the implementation of the CourtView database.
- 5.102 Despite these limitations, a comparison of the two datasets shows that the Court of Appeal has continued to deliver *ex tempore* judgments in substantive sentence appeals. In the last two years (2009–10 and 2010–11), a higher proportion of substantive sentence appeals was determined and delivered *ex tempore* by the Court of Appeal compared with the earlier period (from 2007–08 to 2008–09).
- 5.103 The higher proportion of sentence appeal decisions delivered on the same day as the hearing date in 2009–10 and 2010–11 is consistent with recent action taken by the Court of Appeal to deliver *ex tempore* judgments where possible.

Timing of sentence appeal outcomes

- 5.104 Delays in the determination of sentence appeals can have a broad impact on both individuals and organisations involved in criminal proceedings, including offenders, victims and their families, courts, the Office of Public Prosecutions and Victoria Legal Aid. Delays in the resolution of sentence appeals can also affect the actual outcome of the appeal.
- 5.105 Another issue relevant to the consideration of delay in hearing and determining criminal appeals is the effect that delay may have on the time taken to reach outcomes in sentence appeal cases in which offenders are serving sentences of imprisonment.
- 5.106 One way of assessing delay in the determination of sentence appeals is to examine the time between the original sentence date and the appeal judgment date. Figure 24 shows the time taken to resolve sentence appeal cases from the original sentence date to the appeal judgment date between 2007–08 and 2008–09. It includes offender and Crown appeals lodged against sentence and offender appeals lodged against conviction and sentence.
- 5.107 These data do not take into account the time lag created by the procedural requirements under the *Crimes Act 1958* (Vic)²⁷⁵ specifying the time within which sentence appeals may be made to the Court of Appeal.²⁷⁶ These requirements create a lag between the date the sentence is imposed and the date an appeal is lodged in the Court of Appeal. A further lag can be created if there is a backlog

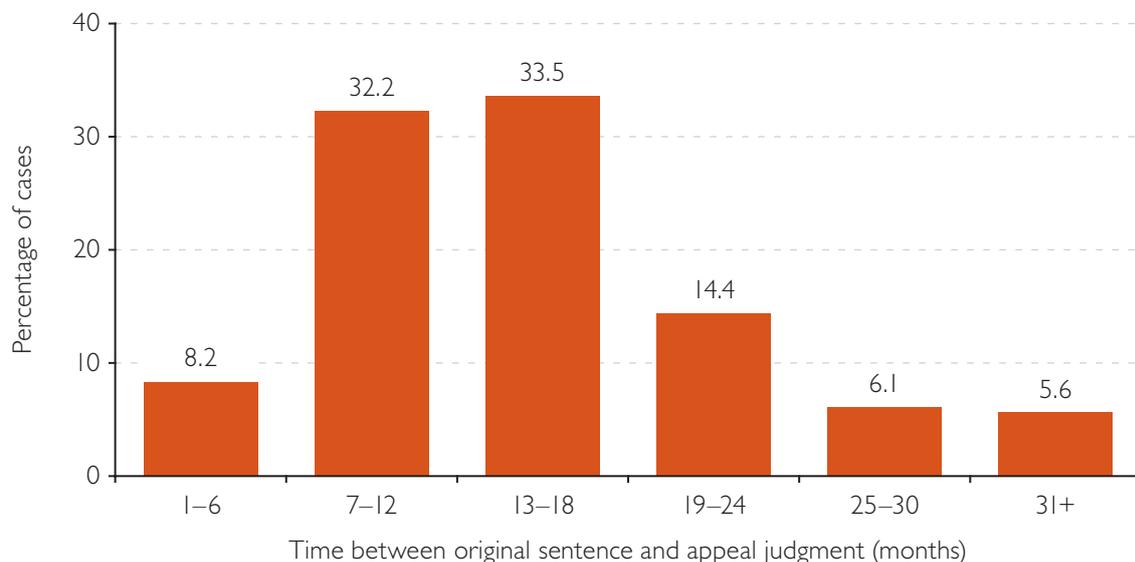
²⁷⁵ For appeals against sentences imposed before 1 January 2010, an offender was required to give notice of the appeal or the application for leave to appeal no later than 14 days after he or she had been convicted and sentenced: *Crimes Act 1958* (Vic) s 572. The Court of Appeal was able to extend this time. The Director of Public Prosecutions was required to give notice of the intention to appeal to the Court of Appeal within one month of the passing of the sentence: *Crimes Act 1958* (Vic) s 567(1). Leave of the Court of Appeal was required for notice of appeal against sentence more than one month after the imposition of sentence: *Crimes Act 1958* (Vic) ss 567(2)–(3).

²⁷⁶ The *Criminal Procedure Act 2009* (Vic) changes the time to appeal for both offender and Crown appeals against sentence to within 28 days of the day on which the sentence is imposed: *Criminal Procedure Act 2009* (Vic) ss 279(1), 288(1). In both cases, the time to appeal may be extended under section 313 by the Court of Appeal or the Registrar of Criminal Appeals of the Supreme Court.

of pending criminal appeal cases that may cause delays in the listing of applications for leave to appeal and delays in the listing of consequent substantive sentence appeal hearings. In the period examined in Figure 24, the backlog of criminal appeals increased from 489 in 2007–08 to 528 in 2008–09 (see Figure 2), although, as discussed at [4.52]–[4.61], this has since reduced in 2010–11.

- 5.108 Taking this time lag into account, the data show that 40.4% of sentence appeal cases from 2007–08 to 2008–09 were resolved within 12 months of the sentence being imposed. However, in the remaining 59.6% of cases, it took more than one year from the date of sentence for an appeal outcome to be reached; in some cases it took over two years (11.7%).
- 5.109 Figure 24 also shows that 8.2% of cases were heard between one month and six months of the date of sentence. This suggests that in many cases over the period, the Court of Appeal has been able to hear urgent sentence appeals and determine them within a relatively short period from the date of sentence.
- 5.110 Thus, consistent with comments made by Priest and Holdenson in 2000,²⁷⁷ the Court of Appeal has continued to be able to hear urgent applications relating to sentence appeals.²⁷⁸
- 5.111 While not relevant to sentence appeals, the system of interlocutory appeals in criminal proceedings (introduced by the *Criminal Procedure Act 2009* (Vic), which commenced in 2010) will also further enable the Court of Appeal to hear urgent applications for leave to appeal against decisions made before or during criminal proceedings. The Court of Appeal also hears urgent civil applications for stays of execution and leave to appeal.²⁷⁹

Figure 24: Percentage of sentence appeals by time, grouped by months, between original sentence date and appeal judgment date, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

²⁷⁷ Priest and Holdenson (2000), above n 166, cited by Charles (2008), above n 165, 32.

²⁷⁸ A recent example of an urgent conviction appeal is *Arafan v The Queen* [2010] VSCA 356 (30 November 2010). In this case, the applicant had made an application for bail pending an appeal against conviction that had been converted into a hearing and determination of a substantive conviction appeal. Due to these exceptional circumstances, the conviction appeal was heard and determined by two Judges of Appeal, instead of the usual three Judges of Appeal.

²⁷⁹ See for example, *Holihan v Amcor* [2011] VSCA 225 (5 August 2011), in which an urgent application for leave to appeal against interlocutory orders during a civil trial was heard by the Court of Appeal two days after the interlocutory orders were made. The Court of Appeal determined the applications for leave to appeal on the same day as the hearing, pronouncing orders at the end of the hearing refusing leave to appeal, with costs, and indicated that its reasons would be published as soon as practicable. The Court of Appeal published its reasons on 5 August 2011, seven days after hearing the application for leave to appeal.

Timing of sentence appeal outcomes and sentence lengths

- 5.112 The problem of delay has implications for both Crown and offender sentence appeals.
- 5.113 One effect of delay in the determination of sentence appeal cases is that an offender may have served all or the majority of his or her sentence in custody while awaiting the outcome of the sentence appeal. The resolution of a sentence appeal when only a very short period remains before an offender is eligible for release may have significant consequences for an offender and his or her rehabilitation efforts or may cause difficulties in the management of an offender serving a sentence of imprisonment.
- 5.114 An offender who is serving a sentence being appealed by the Crown faces a possible extension of his or her sentence after having already served much of the original minimum period before release. Conversely, it may be difficult for the Court of Appeal to make meaningful reductions in resentencing if there is only a short period remaining on the sentence at the time the appeal is determined.
- 5.115 In some cases, delay may be unavoidable or may be the result of particular circumstances, such as a very short non-parole period (discussed below). The Court of Appeal will give priority to listing appeals against sentences with a very short non-parole period.
- 5.116 In cases in which the offender has been granted bail pending the outcome of the appeal, the Court of Appeal may be reluctant to impose a sentence of imprisonment on appeal. (This was particularly so in cases determined when the double jeopardy principle applied.) Generally, an applicant must show exceptional circumstances before bail is granted pending an appeal. The proportion of the sentence that the applicant has served before the appeal is heard does not constitute exceptional circumstances. Although the Court of Appeal will also look to the chances of success of the sentence appeal, this of itself will generally not warrant the granting of bail pending appeal.²⁸⁰
- 5.117 To examine the possible effects of delay in sentence appeal cases from 2007–08 to 2008–09, the Council has analysed the time taken to reach a sentence appeal outcome according to the earliest release date in sentence appeal cases with a non-parole period.
- 5.118 Figure 25 shows the number of sentence appeal cases with a non-parole period by the length of the non-parole period according to the timing of the appeal decision after sentence. The spread of bubbles above the dashed line indicates that, in the majority of cases, the appeal was determined before the expiry of the non-parole period.
- 5.119 There are 10 bubbles in Figure 25 that appear below the dashed line, indicating that the appeal was determined after the non-parole period had expired. These appeals comprised 3.1% of cases.²⁸¹ While this initially appears concerning, analysis of the 10 cases indicates unavoidable delay²⁸²

²⁸⁰ *Director of Public Prosecutions v Theodorellos* [2010] VSCA 21 (12 January 2010) [6], [7], [9]. See *Re Zoudi* (2006) 14 VR 580 for an authoritative statement by a five-judge bench of the Court of Appeal on the principles on which bail will be granted to a person serving a sentence.

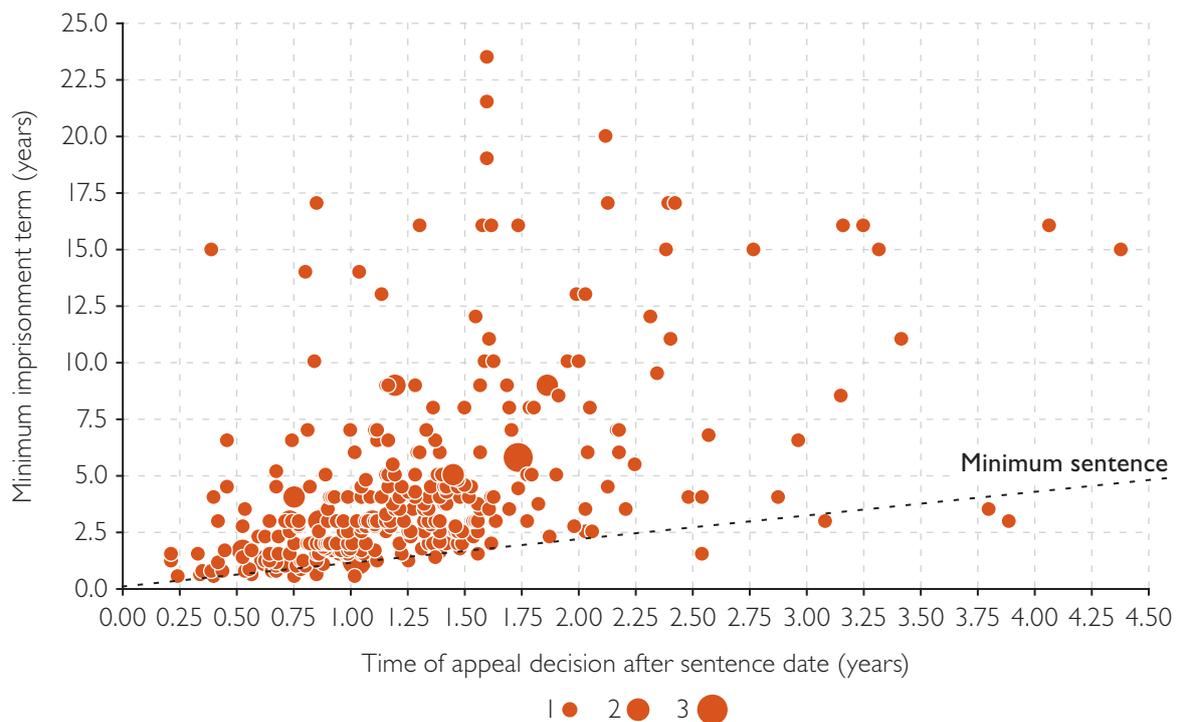
²⁸¹ One case was a Crown appeal and the remaining nine were offender appeals.

²⁸² See, for example, the one Crown appeal, *Director of Public Prosecutions v S (No 2)* [2009] VSCA 127 (5 June 2009), where, after the sentence was imposed, the offender reneged on an undertaking to give evidence against a co-accused. The sentence imposed for cultivation of a large commercial quantity of cannabis was increased from six years' imprisonment with a non-parole period of three years and six months to eight years' imprisonment with a non-parole period of six years.

and particular circumstances²⁸³ for the determination of the appeal after the expiration of the non-parole period.

- 5.120 Figure 25 also shows that there is a large number of cases just above the line, which indicates that, in many cases, offenders were close to serving a large proportion, or almost all, of the non-parole period of their sentences before the appeal was determined.
- 5.121 While a large proportion of offenders (57.9%) had only served up to 40.0% of the original minimum sentence, almost a third of offenders (30.8%) had served more than half of the non-parole period by the time the appeal was determined. This equates to 98 sentence appeal cases. In 6.3% of cases, offenders had only 20% or less of the term remaining on their non-parole period.
- 5.122 When viewed as the amount of time offenders had left to serve of their non-parole periods, one quarter (24.5%) of cases had less than one year remaining at the time the appeal was determined. There were 37 cases (11.6%) in which the appeal was determined within six months of the offenders' earliest release date. In some cases (4.7%), the appeal was determined with only three months or less of the non-parole period remaining.

Figure 25: Number of sentence appeal cases with a non-parole period, by length of non-parole period and the timing of the appeal decision, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases.

²⁸³ In other cases, the determination of the appeal after the expiry of the non-parole period may be the result of a very short non-parole period. In two offender appeal cases, the non-parole period of the appealed sentence was short, and the offender had been granted bail pending the outcome of the appeal and was therefore not in custody at the time the appeal was determined. In both cases, the appeal was allowed, the original sentence of imprisonment was set aside and a non-custodial sentence was imposed: *R v Scott* (2009) 22 VR 41; *R v McIntosh* (2008) 191 A Crim R 370. Two offender appeal cases involved multiple and complex appeals by two offenders against sentences in multiple trials, which had taken a significant amount of time to determine: *R v Henderson and Warwick* [2009] VSCA 136 (16 June 2009).

5.123 Therefore, while the data show that it is uncommon for offenders to have served all of their minimum sentences before the appeal outcome has been determined, there were many cases in 2007–08 and 2008–09 in which offenders had served substantial proportions of their sentences of imprisonment by the time the appeal against sentence was determined. One effect of the increases in the backlog of pending criminal appeals, observed to have occurred from 2005–06 to 2009–10 (see Figure 2), may have been further increases in the number of such cases. As discussed at [4.52]–[4.61], the backlog of pending criminal appeals has since reduced significantly in 2010–11.

Recent measures to address delay

5.124 In recognition of the delays in criminal matters, and specifically sentence appeals, the Supreme Court has introduced a number of measures to 'reduce the waiting periods for the determination of criminal appeals, which are unacceptably long'.²⁸⁴

5.125 In the Supreme Court's 2009–10 annual report, Chief Justice Marilyn Warren referred extensively to the delays in criminal appeals and set out the Supreme Court's strategy for addressing these delays:

Demonstrative of our pursuit of innovation and excellence the Court has set about attacking delays in criminal appeals with a strong creative approach . . . In response to delays in criminal appeals the Court has initiated reforms that are the most significant since the establishment of the Court of Appeal in 1995. The reforms are the highest reform priority of the Supreme Court.²⁸⁵

5.126 An additional Judge of Appeal position was funded and allocated to the Court of Appeal from 1 July 2009 because of concerns over delay and backlog. This took the number of Judge of Appeal positions from 11 to 12;²⁸⁶ however, the number of presiding Judges of Appeal remained at 11 until November 2009, due to the vacancy of another position. In that year, four judges from the Trial Division of the Supreme Court were also made available to be rostered on to the Court of Appeal (in addition to the permanent Judges of Appeal), to assist with the Court of Appeal's workload.²⁸⁷ President Maxwell noted:

I wish to record publicly the court's appreciation of this increase in the size of the Appeal Court. This is the first such increase in more than a decade, and it will certainly make a difference to our ability to deal with our workload. But it will only take us so far. At best, the additional position will help us to meet the increased demand. As Government appreciates, we are working to capacity and, if we are to make any major inroads into delay and backlog, we will need additional judicial resources.²⁸⁸

5.127 On 30 June 2010, the Court of Appeal thus comprised the Chief Justice of the Supreme Court, the President of the Court of Appeal and 10 Judges of Appeal.²⁸⁹ However, due to a vacancy of one position, there were 11 presiding permanent Judges of Appeal (including the Chief Justice of the

²⁸⁴ Supreme Court of Victoria (2010), above n 3, 14.

²⁸⁵ *Ibid* 1–2.

²⁸⁶ When a separate Court of Appeal was first created in 1994, there were nine Judges of Appeal, including the Chief Justice of the Supreme Court and the President of the Court of Appeal, plus any additional appointed or acting Judges of Appeal. This was increased to 11 Judges of Appeal in 1997 in response to the growing workload.

²⁸⁷ Maxwell (2009), above n 3, 12–13. For a list of presiding Judges of Appeal and judicial retirements and appointments in 2009–10 respectively, see Supreme Court of Victoria (2010), above n 3, 6, 13.

²⁸⁸ Maxwell (2009), above n 3, 13.

²⁸⁹ Supreme Court of Victoria (2010), above n 3, 8.

Supreme Court and the President of the Court of Appeal).²⁹⁰ One month later, in July 2010, there was a further appointment to the Court of Appeal,²⁹¹ taking the number of permanent presiding Judges of Appeal to 12, plus any additional acting or appointed Judges of Appeal.

- 5.128 It should also be noted that on some occasions the time taken to fill vacant positions can result in gaps in the number of Judges of Appeal available to preside over appeals. For example, Court of Appeal data on appointment gaps in 2009 show a total of 202 lost judge days in 2009 due to the gaps between vacancy and appointment. A further 32 days were lost between the vacancy and the appointment for the most recent position in 2010.
- 5.129 In another measure to reduce delay, the Supreme Court has worked with the Victorian Government Reporting Service, and with trial judges, to develop new time standards for the provision of unrevised and revised transcripts.²⁹² The Court of Appeal has also sought to monitor more stringently compliance with procedural timetables and has developed a 'list of matters ready for hearing, which can be listed at short notice to fill vacancies in the roster'.²⁹³
- 5.130 Most significantly, an 'intensive management' model of criminal appeal cases, based on the system used by the Criminal Division of the Court of Appeal of England and Wales, has been introduced into the Victorian appeals system. This reform brings 'radical changes' to the management of criminal appeals in Victoria and is 'expected to cut hearing delays by up to 50 per cent' by doubling the number of appeals to four per sitting day. The model includes active case management of appeals by specialist personnel within the Court of Appeal Registry. The procedure under the new case management model applies to all applications for leave to appeal against sentence and/or conviction filed on or after 28 February 2011.²⁹⁴
- 5.131 Data from the first quarter of 2011–12 provide a possible early indication that this new system may be assisting the Court of Appeal to hear and determine more sentence appeals *ex tempore*. These data are indicative only, as they are limited to the first three months of 2011–12 and do not show sentence appeals that have been heard but have not had the judgment delivered. However, they show that from 1 July 2011 to 30 September 2011, 53.3% of sentence appeals heard as at 30 September 2011 had been delivered on the same day as the hearing. In a further 31.9% of cases, judgment had been reserved but delivered between one day and 29 days of hearing.
- 5.132 Further, increases in the number of criminal appeals finalised and reductions in the backlog of pending criminal appeals, shown in the 2010–11 CourtView data, also suggest possible signs of the positive impact that these reforms may be having on delay in the determination of criminal appeals.

²⁹⁰ Ibid 6.

²⁹¹ Selma Milovanovic, 'Judge Promoted to Court of Appeal', *The Age* (Melbourne), 14 July 2010, 5.

²⁹² Supreme Court of Victoria (2009), above n 163, 7.

²⁹³ Ibid 9.

²⁹⁴ Supreme Court of Victoria (2010), above n 3, 2; Supreme Court of Victoria, 'Reform of Criminal Appeals Will Slash Court Delays' (Media Release, 15 October 2010); Supreme Court of Victoria, *Practice Direction No. 2 of 2011 – Court of Appeal: Applications for Leave to Appeal against Conviction and Sentence* (28 February 2011).

Summary

5.133 This chapter has examined data on the trends in listings, hearings and success rates of applications for leave to appeal against sentence and substantive offender sentence appeals. It has also examined data on the numbers and success rates of Crown appeals. Finally, it has presented data on the timing of sentence appeals.

Applications for leave and offender appeals against sentence

5.134 There is no clear trend in the number of applications by offenders for leave to appeal against sentence listed and heard during the period from 2003 to 2008. The number of applications listed and heard had in fact been declining prior to 2008. However, in 2009 and 2010, the number of applications for leave to appeal listed and heard increased.

5.135 Until recently, there had been a clear increase in the rate at which such applications succeeded. The success rates of applications for leave to appeal against sentence increased from 42.9% in 2004 to 71.8% in 2007. However, since then, this trend appears to have been changing, with success rates steadily declining to 50.2% in 2010.

5.136 The decline in success rates of applications for leave to appeal against sentence could be related to the recent changes to the test for determining such applications. Since 26 June 2010, all pending applications for leave to appeal, irrespective of the date of sentence, have been determined under the new legislative regime for criminal appeals in the *Criminal Procedure Act 2009* (Vic). This regime introduced a new, more restricted test for the determination of applications for leave to appeal, allowing the Court of Appeal to dismiss an application for leave to appeal if there is no reasonable prospect of a less severe sentence being imposed. This is the case even if the Court of Appeal considers that the ground of appeal may be reasonably arguable. The reduction in success rates of applications for leave to appeal may be partly a result of this new test; however, it is difficult to know exactly how many applications for leave were determined under this test prior to 26 June 2010.

5.137 Over the same period, the number of listed and heard substantive sentence appeals initially increased (particularly between 2004 and 2005) but then reached a plateau (between 2006 and 2008). During this period, the number of sentence appeals listed and heard did not match the increasing rate of successful applications for leave to appeal. This suggests that the Court of Appeal's capacity to hear these appeals had been reached and that the successful applications were contributing to the backlog of pending appeals that had been growing between 2005–06 and 2009–10.

5.138 In 2009 and 2010, the number of substantive sentence appeals heard by the Court of Appeal increased significantly to 144 in 2010, suggesting an increase in the Court of Appeal's capacity to hear sentence appeals. This was accompanied by a significant reduction in the backlog of pending criminal appeals, from 548 in 2009–10 to 404 in 2010–11.

5.139 It has not been possible to determine conclusively the nature of the connection between the changing trends in success rates of applications for leave to appeal against sentence and changing trends in success rates of substantive sentence appeals. However, the data show that success rates of applications for leave to appeal increased over the same period as did success rates for substantive sentence appeals. There was a gradual increase in the success rates of applications for leave to appeal against sentence, from 42.9% in 2004 to 71.8% in 2007. There were also concomitant increases in the success rates for substantive offender sentence appeals, from 44.9% in 2005 to 61.9% in 2008. Since 2008, there has been a downward trend in the success rates of applications for leave to appeal, reaching 50.2% in 2010, while for substantive sentence appeals, there was a dramatic drop in success rates in 2009 to 49.6%, before an increase to 61.8% in 2010.

- 5.140 A number of factors referable to the current sentencing environment may underlie or be contributing to these changing trends in success rates of sentence appeals. These factors may operate independently or in combination in complex ways. The following includes some, but not all, of these potential factors:
- the prosecution proceeding with a large number of charges on indictments in the higher courts;
 - the level of experience of defence practitioners and prosecutors and the quality of submissions on the plea;
 - changes to, or increases in the complexity of, the law on sentencing;
 - an increased rate of errors being made by judges at first instance;
 - the development of a highly specialised criminal appellate bar in arguing error in sentences;
 - an increased rate of error detection by the Court of Appeal;
 - changes in the way that sentencing discretion and error are viewed on appeal by the Court of Appeal; and
 - trends in sentencing issues, such as current sentencing practices, and trends in appeal grounds argued in sentence appeals.
- 5.141 Uncertainty also remains as to the nature of the connection, if any, between the observed increases in the success rates of sentence appeals (at both the application for leave stage and the substantive appeal stage) and the increases in criminal appeal and sentence appeal rates observed in Chapter 4.
- 5.142 Data on the time taken to finalise sentence appeals have also been analysed. However, it has not been possible to determine conclusively the nature of the relationship, if any, between success rates in sentence appeals, delay in the finalisation of sentence appeals and the backlog of criminal appeals, which up to 2009–10 had been increasing.
- 5.143 In the period from 2007–08 to 2008–09, a high proportion of sentence appeal judgments were delivered on, or close to, the day of hearing. Analysis of the timing of judgment delivery in sentence appeals indicates that almost a third of sentence appeals (32.8%) were being delivered *ex tempore* (on the same day as the hearing) and a further third (33.4%) were being delivered between one day and 29 days after the hearing. As part of recent action taken to reduce waiting periods in criminal matters, the Court of Appeal has increased the proportion of *ex tempore* judgments. In both 2009–10 and 2010–11, approximately 40% of sentence appeals were delivered on the same day as the hearing, and just over one-third were delivered between one day and 29 days after the hearing.
- 5.144 Analysis of the timing of the determination of sentence appeals with respect to the date of sentence shows that, in the period from 2007–08 to 2008–09, the Court of Appeal was able to hear and determine urgent sentence appeals. However, only 40.4% of cases in that period were determined within 12 months of the date of sentence. A large proportion (59.6%) of sentence appeal cases was determined more than 12 months after the date of sentence. Analysis comparing the time taken to reach sentence appeal outcomes with sentence lengths in sentence appeal cases in the same period shows that in some cases the offender was close to serving a large proportion of the original non-parole period. While 57.9% of offenders had served up to 40.0% of the original non-parole period, almost a third (30.8%) had served more than half of the non-parole period when the sentence appeal was determined. In a quarter of cases (24.5%), offenders had less than one year of the non-parole period to serve when the appeal was determined.
- 5.145 While these data indicate that there may be some relationship between success rates, the time taken to finalise sentence appeals and the backlog in criminal appeals that existed in 2009–10, it has not been possible to determine the precise nature of that complex relationship and the role of each factor. For example, delay may have contributed to the backlog and/or the backlog may have contributed to the delay.

- 5.146 The data do, however, support the need for the recent measures introduced by the Supreme Court and the Court of Appeal to address delay in criminal appeals. The data also provide an early indication of the effect that these measures may be having on increasing the capacity of the Court of Appeal to list and hear more sentence appeals per year, observed for 2009 and 2010.
- 5.147 This increased capacity to hear sentence appeals may be connected to the range of steps taken by the Supreme Court to address issues of delay in the Court of Appeal. However, other factors, such as the time taken to deliver judgments in sentence appeals, also continue to be relevant. Continued changes to these trends and reductions in delay may be expected in future under the significant legislative reforms introduced to the law on criminal appeals and the recent introduction of an intensive case management model for criminal appeals. However, it is too early to conclusively determine exactly how these reforms and changes to the sentence appeal process will continue to affect the broader operation of sentence appeals.

Crown appeals against sentence

- 5.148 During the past decade, the number of Crown appeals against sentence has increased significantly. However, while Crown appeals are far from common when compared with offender appeals, they can no longer be described as a 'rarity'. The majority of the Court of Appeal, in the decision of *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis*,²⁹⁵ indicated that 'the notion that Crown appeals should be "rare and exceptional" no longer applies as a sentencing principle to which this Court must have regard'.²⁹⁶
- 5.149 The success rates of Crown sentence appeals have fluctuated over the period, with no clear trend; thus the relationship between success rates and the increasing number of Crown appeals is unclear.
- 5.150 The recent removal of the double jeopardy principle, which previously operated as a limiting principle in the Director of Public Prosecutions' decision to lodge an appeal, may have a future impact on the number of Crown appeals against sentences. If double jeopardy is no longer a relevant consideration, it is possible that the Director of Public Prosecutions may appeal more sentences.
- 5.151 The Court of Appeal's interpretation of the effect of the removal of the double jeopardy principle on Crown appeals in *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis*²⁹⁷ suggests that, while it will affect the determination of Crown sentence appeals, it should not affect the frequency with which sentence appeals are brought by the Director of Public Prosecutions. In that case, the majority of the Court of Appeal held that, although double jeopardy is removed at all stages of the determination of Crown appeals, the principle should still operate and be taken into account by the Director of Public Prosecutions in determining whether the lodgement of a sentence appeal is in the public interest.²⁹⁸

²⁹⁵ *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14.

²⁹⁶ *Ibid* 42.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid* 42–43 (Ashley, Redlich and Weinberg JJA). The minority concluded that parliament intended to remove double jeopardy as a consideration for both the Court of Appeal and the Director of Public Prosecutions: *ibid* 17, 20–23 (Warren CJ and Maxwell P).

5.152 The new, more restrictive test for Crown appeals under the *Criminal Procedure Act 2009* (Vic) may be thought of as limiting the number of Crown appeals by specifying that an actual error must be identified.²⁹⁹ However, the new test will not necessarily restrict the Director of Public Prosecutions' appeal rights, because manifest inadequacy is the most common ground alleged and, according to the common law, inadequacy of sufficient magnitude will amount to an error. The explanatory memorandum for the *Criminal Procedure Act 2009* (Vic) indicates that this principle is preserved, allowing the Court of Appeal to 'presume error' where manifest inadequacy is established.³⁰⁰ Although there have been some changes to the laws governing Crown appeals, the changes do not displace the principles relating to the discretion not to intervene. These principles include maintaining adequate standards of punishment and promoting consistency in sentencing.

²⁹⁹ *Criminal Procedure Act 2009* (Vic) s 287.

³⁰⁰ Explanatory Memorandum, *Criminal Procedure Act 2009* (Vic) cl 298.

Chapter 6

Grounds in sentence appeals

Introduction

- 6.1 This chapter examines successful sentence appeals brought by offenders and by the Crown between 1 July 2007 and 30 June 2009. The Council presents general data on the prevalence and nature of the 376 offender and Crown appeals determined by the Court of Appeal in this period.
- 6.2 This chapter then examines in detail a subset of this dataset – sentence appeals heard and determined by the Court of Appeal between January 2008 and December 2008 – according to the grounds argued on appeal and the success rates of grounds in successful sentence appeals. These data include 114 offender appeals and 34 Crown appeals. These data have been collected and analysed by the Council.
- 6.3 This chapter also examines a separate dataset – sentence appeals determined and heard by the Court of Appeal between January 2010 and December 2010 – according to the grounds argued on appeal and the success rates of grounds in successful sentence appeals. These data include 153 offender appeals and 27 Crown appeals. These data have been collected by Court of Appeal staff, in consultation with the Council, and have been provided by the Court of Appeal to the Council for analysis.
- 6.4 As the methodologies for the collection of data on grounds of appeal in these two datasets differ, the data cannot be directly compared. However, the data shed light on the patterns in sentencing errors argued by offenders and the Crown and found by the Court of Appeal.

Prevalence of offender and Crown appeals

- 6.5 Offender appeals comprise the majority of appeals against sentence in the Court of Appeal. In 2007–08 and 2008–09, almost eight in 10 of the total 376 sentenced cases in which the offender or the Crown appealed were offender appeals (79.9%). Crown appeals comprised 21.1% of sentenced cases in that period (76 appeals).
- 6.6 The prevalence of offender appeals compared with Crown appeals can be explained by the different focus and principles underpinning each type of appeal.
- 6.7 Offender appeals are focused on fairness to offenders. They ensure that offenders are afforded the opportunity to have a sentence reviewed by a higher court according to the applicable sentencing law as well as current sentencing practices.
- 6.8 A sentence imposed on a person convicted of an offence, to various degrees dependent on the particular sentence type imposed, affects his or her liberty. The extent to which an offender's liberty is affected by a sentence can provide a strong incentive for an offender to lodge an appeal against sentence. The impact that a sentence can have on an offender's liberty was also recognised by the sentencing double jeopardy principle, which, prior to its abolition, applied to Crown sentence appeals. In particular, the principle required the Court of Appeal to take into account in Crown sentence appeals that the offender had already faced sentence. The Crown sentence appeals analysed in this section were determined when the principle of sentencing double jeopardy applied both to the decision of the Court of Appeal to intervene and in resentencing the offender in a successful Crown appeal.³⁰¹
- 6.9 Crown appeals have traditionally been underpinned by the common law principle that they should be a 'rarity'.³⁰² An appeal is not to be brought in every case in which the Director of Public Prosecutions is of the view that the sentence is inadequate. There are specific statutory criteria that the Director of Public Prosecutions must apply in deciding whether to lodge an appeal against sentence. There are no equivalent principles limiting the prevalence of offender appeals, aside from the statutory threshold put in place by the application for leave test.
- 6.10 An offender does not have an automatic right to appeal against a sentence imposed in the County or Supreme Court. However, the previous 'reasonably arguable' test, which applied at the time these appeals were determined, set a relatively low threshold for the 'screening' of offender appeals that did not take into account the prospects of a less severe sentence being imposed.³⁰³ This can be contrasted with Crown appeals, for which the reasonable prospect of success is a relevant factor in the Director of Public Prosecutions' decision to appeal.³⁰⁴
- 6.11 An offender's decision to appeal is an individual one, whereas Crown appeals are subject to considerations of whether the appeal is in the public interest.³⁰⁵ The Director of Public Prosecutions also has regard to other factors, such as the delay since the imposition of the original sentence, the sentences imposed on any co-offenders and the submissions made by the prosecutor on sentence at the plea.³⁰⁶

³⁰¹ See [3.46]–[3.51] for discussion of the principle and its effect on the Court of Appeal's decision to intervene in Crown appeals. The principle was abolished by the *Criminal Procedure Act 2009* (Vic) s 294(4).

³⁰² *R v Clarke* (1996) 2 VR 520.

³⁰³ Note that this has been narrowed under the *Criminal Procedure Act 2009* (Vic) and from 26 June 2010 applies to sentence appeals irrespective of when a sentence was imposed.

³⁰⁴ Office of Public Prosecutions (2010–), above n 259.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

- 6.12 An offender's decision to appeal may be informed by legal advice on whether it is possible to argue that an error has been made in the sentence imposed and/or that the sentence is outside the range of possible sentences for the particular case. It may also be informed by advice on the risks and merits of lodging an appeal against the sentence in each particular case, as well as advice on the likelihood of the appeal's success.
- 6.13 An offender's decision to appeal may also be motivated by the perception that the sentence imposed on the offender is severe compared with sentences imposed in similar cases, particularly those involving co-offenders. The decision by an offender to appeal against a sentence also depends on other factors, including the availability of funding and consideration of the risk that the Court of Appeal may decide to impose a more severe sentence.³⁰⁷
- 6.14 The low threshold for offender appeals, combined with the consequences of the imposition of a sentence on a person, provides a significant incentive for an offender to exercise the right to apply for leave to appeal against sentence.

Types of sentences appealed against

- 6.15 Imprisonment was the most common type of sentence appealed against in both Crown and offender appeal cases from 2007–08 to 2008–09. Imprisonment comprised a substantially higher proportion of cases appealed by the offender (93.4%) than by the Crown (68.4%).
- 6.16 The proportion of offender appeal cases with an imprisonment sentence is nearly double the proportion of all higher court cases with an imprisonment sentence (48.1%) in the same period, confirming that the imposition of a sentence that affects an offender's liberty is a strong motivating factor for bringing an appeal against sentence.
- 6.17 Offender appeal cases were primarily confined to imprisonment and partially suspended sentences (5.0%). The remaining small proportion of offender sentence appeals (1.6%) involved different sentence types. These comprised five cases with the following sentences: fine (two cases), intensive correction order (one case), hospital security order (one case) and youth justice centre order (one case). Crown appeal cases had a wider variety of sentence types: imprisonment, partially suspended sentences (7.9%), wholly suspended sentences (15.8%), intensive correction orders (3.9%) and youth justice centre orders (3.9%).
- 6.18 Offenders appealed a wide range of imprisonment terms in the period from 2007–08 to 2008–09, suggesting that the length of sentence is not necessarily a determinative factor in an appeal against sentence. However, the sentences appealed by offenders tended to be longer than the sentences in all higher court cases and in cases appealed by the Crown. Over half of offender appeal cases (55.6%) had sentences of greater than six years' imprisonment, compared with just over one-third of Crown appeal cases (36.5%). Offender appeals were more likely to be made against sentences of between two and six years (54.3%) or sentences of more than 10 years (17.1%), while the majority of Crown appeals were made against sentences of between two and four years (25.0%) and four and six years (36.5%).

³⁰⁷ The power of the Court of Appeal to impose a more severe sentence was originally introduced as a disincentive to offender appeals. However, '[n]otwithstanding this express power to increase a sentence, the Court of Appeal has said in *R v Boyle* (1996) 87 A Crim R 539 that ... "where a person has shown that the sentencing process was attended by error, he [sic] should, as a prima facie rule, not be required to run the risk of suffering a heavier sentence as a result of a successful appeal. The applicant is entitled to come to this Court and complain of sentencing error, and it is in the public interest that such error be identified and corrected". See Department of Justice (2010), above n 75, 262.

- 6.19 The majority of offenders from 2007–08 to 2008–09 appealed against their sentences only. Sentence-only appeals comprised 80.0% of all offender sentence appeals (240 cases), compared with appeals against both conviction and sentence, which comprised 20.0% of the 300 cases involving offender sentence appeals in that period.
- 6.20 The high rate of sentence-only appeals is related to the fact that the overwhelming majority of criminal cases in the County Court and the Supreme Court resolve by way of a guilty plea.³⁰⁸ Only a small proportion of people charged with offences tried in the higher courts proceeds to trial and thus faces being convicted by a jury. For example, in 2008–09, 71.4% of cases in the County Court resolved by a plea of guilty.³⁰⁹ Therefore, the number of cases in which an offender is convicted by a jury and is able to lodge an appeal against a conviction is small.
- 6.21 It is highly unlikely that an offender will be given leave to appeal against a conviction if that offender has pleaded guilty. This is due to the 'strong public interest in restricting appeals against convictions following deliberate pleas of guilty'.³¹⁰ The general principle is that the Court of Appeal will only allow an appeal against conviction following a plea of guilty if there has been a miscarriage of justice.³¹¹

Grounds of appeal

- 6.22 When an appeal is brought against sentence, the applicant (whether an offender or the Crown) is required to identify the grounds on which an appeal is made. *Court of Appeal Practice Statement No. 1 of 2000* requires that:
- In the case of an appeal, or an application for leave to appeal, against sentence, the appellant's or applicant's outline must identify the precise criticisms that are made of the sentence. Where a ground is that the sentence is manifestly excessive, the outline should particularize the reasons why that is said to be the case. Manifest excess is not to be used as an umbrella under which to shelter discrete contentions such as that the judge made a mistake as to the facts or that the sentence violates the principle of parity.³¹²
- 6.23 This section presents data on the grounds of appeal in sentence appeal cases analysed by the Council using two datasets.
- 6.24 The first dataset comprises data collected by the Council on sentence appeal cases in 2008. The Council analysed judgments in sentence appeals determined between January 2008 and December 2008 in 114 offender appeals and 34 Crown appeals to identify the grounds of appeal argued and the success rates of grounds of appeal.³¹³ The Council's analysis of these data is presented below.

³⁰⁸ The high guilty plea rate in the higher courts also means that the majority of sentence appeals are appeals against sentences imposed after pleas of guilty rather than convictions at trial. This may weaken the presumption of correctness of sentences applicable in the search for error on appeal, discussed at [3.39]–[3.41].

³⁰⁹ Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (2009) 23.

³¹⁰ *R v Coffey* (2003) 6 VR 543, 546, citing *R v Liberti* (1991) 55 A Crim R 120, 122.

³¹¹ *R v Holden* [2009] VSCA 254 (29 October 2009); *R v Coffey* (2003) 6 VR 543, 546; *R v Forde* [1923] 2 KB 400 (His Lordship Justice Avory).

³¹² Supreme Court of Victoria, *Court of Appeal Practice Statement No. 1 of 2000 – Appeals against Conviction; Appeals against Sentence; Applications for Leave to Appeal Against Sentence Not Heard by a Single Judge of Appeal* (27 October 2000) 2.

³¹³ Sentence appeal cases determined in 2008 published on the AustLII website: Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/au/cases/vic/VSCA/> at 31 December 2009.

- 6.25 The second dataset comprises data collected by the Court of Appeal on sentence appeal cases in 2010. The Court of Appeal provided the Council with data from an analysis of the grounds of appeal in sentence appeal cases determined and published between January 2010 and December 2010. These data comprise the grounds of appeal argued and found to be successful in 153 offender sentence appeals and 27 Crown sentence appeals.³¹⁴ The Council's analysis of these data is presented below.
- 6.26 The methodology used by the Court of Appeal for the collection of these 2010 data has been adapted, in consultation with the Council, from the methodology used by the Council in the collection of data for 2008 sentence appeals. While the methodologies are similar, the differences between the two mean that caution should be exercised in comparing the two datasets. The raw data in both datasets are contained in Appendix 2 of this report. The key difference between the methodologies used for the two separate data collection processes is the categorisation of grounds relating to the weight given to a particular factor or principle. The Court of Appeal has employed a different methodology to capture the additional data that in its view more accurately reflects the manner in which Judges of Appeal deal with matters raised in sentence appeals.
- 6.27 In each appeal case, applicants may have argued more than one ground of appeal. Some grounds, for example, grounds as to the weight given to particular factors or principles, may have been argued as separate grounds of appeal and/or as particularisations of broader grounds of appeal, most commonly manifest excess or manifest inadequacy.
- 6.28 In the methodology used by the Council for the 2008 data collection, no differentiation was made between matters that were argued by counsel and treated by the Court of Appeal as separate grounds of appeal and those treated as particularisations of manifest excess or manifest inadequacy. This was done as the analysis was designed to reflect the types of sentencing errors commonly argued and found to be successful, rather than how each matter raised formed the basis of a ground to attack a sentence.
- 6.29 In the methodology used by the Court of Appeal for the 2010 data collection, the codes for the classification of grounds of appeal were modified slightly to reflect whether matters were argued and treated as separate grounds of appeal and/or as particularisations of other separate grounds of appeal of manifest excess or manifest inadequacy. A slightly different approach to this issue was taken for offender and Crown appeals. The approach taken for the 2010 analysis is described in more detail with the presentation of the data below.

Grounds argued on appeal

- 6.30 Analysis of the grounds of appeal raised by applicants in offender and Crown appeals delivered in 2008 is shown in Table 1. In that year, there were 114 offender sentence appeals and 34 Crown appeals against sentence determined.
- 6.31 The data are presented according to the number of cases in which each ground of appeal was argued in offender and Crown appeals and the proportion of the number of each type of appeal that each ground comprised. In each of these appeals, the applicant may have argued and been successful on more than one ground of appeal.
- 6.32 As there are more offender appeals (114) compared with Crown appeals (34) in the one-year period analysed, some caution should be exercised in comparing the data in each appeal type.

³¹⁴ The analysis was limited only to those sentence appeal cases in which reasons for judgment were published on the AustLII website: Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2011) <www.austlii.edu.au/au/cases/vic/VSCA/> at 9 August 2011. Reasons that are restricted or have been removed from AustLII have been excluded.

- 6.33 Further, the grounds as to weight may have been argued as separate grounds of appeal or particularisations of the grounds of manifest excess or manifest inadequacy, that is, they may have been argued as the basis on which the sentence was argued to be manifestly excessive or manifestly inadequate. In some cases, such grounds as to weight were argued both as separate grounds of appeal and as particularisations of manifest excess or manifest inadequacy.
- 6.34 Table 1 shows the Council's analysis of the grounds of appeal argued in sentence appeals determined in 2008, using data collected by the Council. It shows that manifest excess and manifest inadequacy are the most common grounds of appeal argued respectively in offender and Crown appeal cases determined in 2008.
- 6.35 Manifest excess was argued in 81 of the 114 offender appeal cases (71.1%). Manifest inadequacy was argued in 33 of the 34 Crown appeal cases (97.1%).
- 6.36 The other common ground of appeal argued for both offender and Crown appeals relates to the failure to give sufficient weight, or excessive weight being given, to specific factors or principles in sentencing. A similar proportion of offender and Crown appeal cases includes a ground on the weight given to rehabilitation or prospects of rehabilitation (29 offender appeals, 25.4%, and seven Crown appeals, 20.6%).

Table 1: Number and percentage of grounds raised in sentence appeals, by type of appeal, offender and Crown appeals, 2008

Offender sentence appeals (n = 114)	Ground raised	
	No.	% of offender appeals
Manifest excess	81	71.1
Weight to guilty plea/assistance to authorities	37	32.5
Weight to rehabilitation/prospects of rehabilitation	29	25.4
Approach to parity	24	21.1
Approach to totality	21	18.4
Mistook facts	20	17.5
Weight to mental illness/disability	17	14.9
Weight to drug/alcohol/gambling addiction	12	10.5
Weight to delay	12	10.5
Weight to hardship of offender/family	11	9.6
Weight to offending history/prior convictions	9	7.9
Weight to youth	8	7.0
Weight to deterrence	8	7.0
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	8	7.0
Approach to/applicable maximum penalty	6	5.3
Allowed irrelevant facts	6	5.3
Approach to <i>Confiscation Act 1997</i> (Vic) ss 5(2)(A)–(B)	2	1.8
Increase in maximum penalty	2	1.8
Clerical error in sentencing	2	1.8

Table 1 cont.: Number and percentage of grounds raised in sentence appeals, by type of appeal, offender and Crown appeals, 2008

Crown sentence appeals (n = 34)	Ground raised	
	No.	% of Crown appeals
Manifest inadequacy	33	97.1
Weight to general deterrence	25	73.5
Weight to seriousness of offending behaviour	24	70.6
Weight to specific deterrence	21	61.8
Weight to effect on victim	19	55.9
Approach to denunciation	16	47.1
Weight to offence seriousness	14	41.2
Weight to offending history/prior convictions	11	32.4
Approach to/applicable maximum penalty	11	32.4
Regard to current sentencing practices	7	20.6
Weight to rehabilitation/prospects of rehabilitation	7	20.6
Other error of law	4	11.8
Weight to absence of remorse	4	11.8
Weight to youth	4	11.8
Weight to guilty plea/assistance to authorities	3	8.8

Source: AustLII.

Note: In each appeal, the applicant may have argued more than one ground of appeal. Grounds as to weight may have been argued as separate grounds of appeal and/or as particularisations of broader grounds of manifest excess or manifest inadequacy. In this analysis, no differentiation has been made on this basis. The total number of offender appeals is 114 and the total number of Crown appeals is 34. The percentage breakdown for the treatment of grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

- 6.37 Overall, however, different grounds of appeal tended to be argued in each type of appeal. For example, weight given to a guilty plea was a common ground in offender appeals (argued in 37 cases, 32.5%), while this did not feature in Crown appeals (argued in three cases, 8.8%).
- 6.38 The most common other grounds argued in offender appeals relate to parity with co-offenders (21.1%) and weight given to the following particular factors or principles, including:
- totality (18.4%);
 - mental illness or disability (14.9%); and
 - drug, alcohol or gambling addiction (10.5%).
- 6.39 A number of the appeal grounds argued relate to 'technical' errors, such as the sentencing judge making a mistake as to the facts (17.5%), allowing irrelevant facts to be taken into account (5.3%) or making a clerical error in sentencing (1.8%). A small number of appeals include grounds arguing error as to the applicable maximum penalty (5.3%) or error arising from an increase in the maximum penalty (1.8%).

- 6.40 In Crown appeals, other commonly argued grounds of appeal include insufficient weight given to general deterrence (25 cases, 73.5%), insufficient weight given to seriousness of offending (24 cases, 70.6%), insufficient weight given to specific deterrence (21 cases, 61.8%) and insufficient weight given to effect on the victim (19 cases, 55.9%).
- 6.41 Table 2 shows the Council's analysis of the grounds of appeal argued in sentence appeals determined in 2010, using data collected by the Court of Appeal. In that year, 153 offender sentence appeals and 27 Crown sentence appeals were determined.
- 6.42 As discussed, these data were collected using a slightly different methodology from that used for the collection of the data for 2008 sentence appeals. Thus, care should be taken in comparing the two datasets.
- 6.43 In relation to the coding of grounds of appeal argued, compared with the Council's 2008 methodology, a different approach has been taken where an argument has been raised under the heading of another ground. Most commonly this is an argument about weight given to a particular factor or principle that in practice is argued as part of a manifest excess ground or a manifest inadequacy ground or as a separate ground of appeal or both.
- 6.44 In offender appeals, a ground of appeal has been counted once as having been raised where:
- the matter was argued as a separate ground of appeal; or
 - the matter was argued as a separate ground of appeal *and* raised as part of another ground of appeal, such as manifest excess.
- 6.45 Where a matter was *only* raised under another ground of appeal, namely manifest excess, and not as a separate ground of appeal, it has not been coded as having been raised. Arguments have only been coded separately as having been raised if they were argued as a stand-alone ground.³¹⁵
- 6.46 In relation to Crown appeals, if a matter was *only* raised in support of a manifest inadequacy ground but was given particular attention by the Crown in argument, it has been coded as being raised and considered as part of manifest inadequacy.³¹⁶
- 6.47 Table 2 shows that manifest excess or inadequacy is also the most common ground of appeal argued in both offender and Crown appeal cases determined in 2010. For offender appeals, Table 2 only shows those grounds argued in two or more cases. There are 47 instances of error in offender appeals that appears only once in cases, and these are coded and described in Table 2 as 'other error'. These errors and their success rates are listed in Table E in Appendix 2.
- 6.48 Manifest excess was argued in 126 of the 153 offender sentence appeals (82.4%) and manifest inadequacy in 25 of the 27 Crown sentence appeals (92.6%).
- 6.49 The other common grounds of appeal argued in both offender and Crown appeals relate to the failure to give sufficient weight, or excessive weight being given, to specific factors or principles in sentencing. Similar to the 2008 analysis, the 2010 analysis shows that different grounds of appeal tended to be argued in each type of appeal.

³¹⁵ The reasoning for this is that matters argued in support of a larger ground are presented in a range of different ways, for example, they may be stated in the ground, argued as particulars of the ground or referred to by counsel in argument. There is uncertainty about what level of reliance is required to justify a matter being coded. There is also variation in the amount of detail provided by judges in their reasons, which makes the data unreliable.

³¹⁶ This is usually apparent from the judge's reasons. The rationale for this is that, if such an approach were not taken, there would be no useful data obtained regarding Crown appeals, as the grounds would be invariably limited to manifest inadequacy (with particulars) with a small number of specific error grounds occasionally added in.

Table 2: Number and percentage of grounds raised in sentence appeals, by type of appeal, offender and Crown appeals, 2010

Offender sentence appeals (n = 153)	Ground raised	
	No.	% of offender appeals
Manifest excess	126	82.4
Error of fact	31	20.3
Approach to parity	28	18.3
Weight to guilty plea/assistance to authorities	27	17.6
Approach to totality	21	13.7
Allowed irrelevant facts	19	12.4
Weight to mental illness/disability and approach to <i>Verdins</i> framework ^a	17	11.1
Error as to, or excessive, cumulation	15	9.8
Other error of law	15	9.8
Fresh evidence	13	8.5
Weight to delay	12	7.8
Natural justice/procedural fairness	9	5.9
Weight to deterrence	7	4.6
Error in characterisation or assessment of offence seriousness	6	3.9
Weight to hardship of offender/family	6	3.9
Weight to rehabilitation/prospects of rehabilitation	6	3.9
Clerical error in sentencing	6	3.9
Error in approach to, insufficient discount for or failure to take into account, 'dead' or ' <i>Renzella</i> ' ^b time	5	3.3
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	4	2.6
Applicable maximum penalty	4	2.6
Weight to youth	3	2.0
Weight to offending history/prior convictions	3	2.0
Failure to take into account delay	2	1.3
'Other error' ^c	47	30.7

^a This includes both errors of weight and errors made within the framework required by the decision of *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269. For example, it includes alleged errors in the assessment of an offender's moral culpability based on mental illness and failure to take into account the hardship of prison.

^b *R v Renzella* [1997] 2 VR 88. This refers to pre-sentence detention that section 18 of the *Sentencing Act 1991* (Vic) does not apply to, that is, pre-sentence detention in respect of an offence carrying a sentence of imprisonment or a period of detention that is not deducted from the sentence imposed.

^c For offender appeals, this table only shows grounds argued in two or more cases. There are 47 instances of error in offender appeals that appears only once in cases and thus these are coded and described as 'other error'. These errors and their success rates are listed in Table E in Appendix 2.

Table 2 cont.: Number and percentage of grounds raised in sentence appeals, by type of appeal, offender and Crown appeals, 2010

Crown sentence appeals (n = 27)	Ground raised	
	No.	% of Crown appeals
Manifest inadequacy	25	92.6
Weight to general deterrence	11	40.7
Weight to seriousness of offending behaviour	11	40.7
Approach to cumulation	7	25.9
Weight to specific deterrence	6	22.2
Other error of law	5	18.5
Weight to offending history/prior convictions	4	14.8
Other error	4	14.8
Weight to denunciation	3	11.1
Weight to guilty plea/assistance to authorities	3	11.1
Weight to maximum penalty	3	11.1
Weight to community protection	2	7.4
Weight to effect on victim	2	7.4
Weight to youth	2	7.4
Weight to rehabilitation/prospects of rehabilitation	2	7.4
Regard to current sentencing practices	1	3.7

Source: Court of Appeal, Supreme Court of Victoria.

Note: The data in Table 2 have been collected using a different methodology from that used to collect the 2008 data on grounds of appeal. In each appeal, the applicant may have argued more than one ground of appeal. Grounds as to weight may have been argued as separate grounds of appeal and/or as particularisations of broader grounds of manifest excess or manifest inadequacy. In offender appeals, where grounds as to weight were advanced either as separate grounds of appeal or as separate grounds of appeal and as part of manifest excess, they have been coded as raised. Where grounds as to weight were advanced as part of manifest excess only, they have not been coded as raised. In Crown appeals, where grounds as to weight were advanced and given particular attention in argument as part of manifest inadequacy, they have been coded as raised. The total number of offender appeals is 153 and the total number of Crown appeals is 27. The percentage breakdown for the treatment of grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

- 6.50 In offender sentence appeals, a ground of appeal commonly argued was error of fact (20.3%). This refers to errors relating to the judge's assessment of the facts of the case, including mistakes of fact, findings of fact made without sufficient evidence and errors asserted in the sentencing judge's assessment of certain facts, such as the offender's rehabilitation prospects.³¹⁷ In a further 12.4% of offender appeals, it was argued that the sentencing judge allowed irrelevant facts.
- 6.51 Following this, the most common grounds for offender sentence appeals are parity with co-offenders (18.3%) and weight given to the following factors or principles, including:
- guilty plea/assistance to authorities (17.6%);
 - totality (13.7%); and
 - mental illness/disability and approach to *Verdins* framework (11.1%).³¹⁸
- 6.52 A number of the appeal grounds argued relate to specific or 'technical' errors, such as natural justice or procedural fairness (5.9%)³¹⁹ and other errors of law (9.8%). In 9.8% of cases, it was argued that there had been an error as to, or excessive, cumulation. In a smaller proportion of cases, it was argued that there had been an error in the characterisation or assessment of the seriousness of the offence (3.9%).
- 6.53 In 8.5% of cases, the ground of appeal relates to fresh evidence. The fresh evidence rule operates as an exception to the error principle concerning appeals against sentence. In limited circumstances, the Court of Appeal may allow an appeal against sentence, in the interests of justice or to avoid a miscarriage of justice, if there is evidence that sheds light on a fact that was in existence at the time of sentence.
- 6.54 In Crown appeals, other commonly argued grounds of appeal include insufficient weight given to general deterrence (11 cases, 40.7%), insufficient weight given to seriousness of offending behaviour (11 cases, 40.7%), insufficient weight given to specific deterrence (six cases, 22.2%) and insufficient weight given to offending history/prior convictions (four cases, 14.8%). Other grounds relate to errors such as approach to cumulation (seven cases, 25.9%) and other errors of law (four cases, 14.8%).

Successful grounds on appeal

- 6.55 The frequency of grounds being argued on appeal is only an indication of which grounds appellate counsel include in sentence appeals lodged in the Court of Appeal. The prevalence of the favourable consideration of grounds in successful sentence appeals is arguably more important, as this prevalence indicates which errors are found to have been made in the sentencing process and corrected in the appeal process.
- 6.56 In cases in which matters are argued both as separate grounds of appeal arguing specific error and as particularisations of broader grounds of appeal arguing non-specific error (manifest excess or manifest inadequacy), it can be a complex task to identify the precise basis on which the Court of Appeal has modified a sentence. This can be particularly so when there are multiple grounds on which the Court of Appeal has looked favourably. More often than not, the appeal will be due to a combination of reasons rather than any single consideration.

³¹⁷ Grounds that involve the 'characterisation' of the facts of the case, for example, the offender's level of remorse, have been treated as 'other error'.

³¹⁸ This includes both errors of weight and errors made within the framework required by the decision of *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269. For example, it includes alleged errors in the assessment of an offender's moral culpability based on mental illness and failure to take into account the hardship of prison.

³¹⁹ This includes allegations of bias in the sentencing judge.

- 6.57 The proper approach to the inquiry as to error on an appeal against a discretionary judgment of sentence was identified by the High Court in *House v The King*³²⁰ and reiterated in *Markarian v The Queen*.³²¹ In this approach, also articulated by the Victorian Court of Appeal, it is not for an appellate court to look at which sentence it considers to be appropriate, but to look at the sentence imposed and only interfere if an error has been made or the sentence is 'obviously – not merely arguably – too severe or too lenient'.³²²
- 6.58 Although the Court of Appeal does refer to sentencing remarks, the absence of a reference to a particular factor in remarks does not necessarily mean that the sentencer did not have regard to a matter. Therefore, in many cases the Court of Appeal is required to infer what the judge had in mind as part of the instinctive synthesis.
- 6.59 Manifest excess or manifest inadequacy may be easily identified or immediately apparent from the sentence itself.³²³ Under the instinctive synthesis approach to sentencing in Victoria, it is not possible, and indeed it is forbidden, to identify or prescribe the precise weight given to any individual sentencing factor in the sentencing process. The Court of Appeal has said, 'quantitative significance is not to be assigned to individual considerations';³²⁴ therefore, the Court of Appeal does not and cannot seek to identify the weight given to particular factors in the review of sentences on appeal. Ordinarily, questions of weight can thus only be determined by looking at the sentence ultimately arrived at, rendering questions of weight as particulars of manifest excess or manifest inadequacy.³²⁵
- 6.60 The New South Wales Court of Criminal Appeal has also considered the question of whether failure to attribute sufficient weight to an issue at sentence amounts to a 'material error'. In *R v Baker*,³²⁶ Chief Justice Spigelman observed:
- Questions of weight in the exercise of a discretion are matters for the first instance judge. The circumstances in which matters of 'weight' will justify intervention by an appellate court are narrowly confined.³²⁷
- 6.61 The Victorian Court of Appeal has made similar statements in relation to the discretion afforded to sentencing judges in assessing the weight given to sentencing factors. For example, in relation to the weight given to a plea of guilty,³²⁸ the Court of Appeal has said:
- The factors that a sentencing judge might take into account with respect to a plea of guilty are very broad and the discretion in assessing the weight to be attached to a plea of guilty is a wide one that will not be readily interfered with.³²⁹
- 6.62 There are, however, case examples where the Court of Appeal has allowed a sentence appeal on the basis that, in its view, an error has been made as to weight given to a particular sentencing factor. For example, in *R v Howard*,³³⁰ an appeal against sentence by the offender was allowed on the ground that the sentencing judge had erred in failing to give sufficient discount for the appellant's early plea of guilty. The Court of Appeal concluded that the differences between the discount

³²⁰ *House v The King* (1936) 55 CLR 499, 504–505.

³²¹ *Markarian v The Queen* (2005) 228 CLR 357, 370.

³²² *R v Taylor and O'Meally* [1958] VR 285, 289 (Lowe and Gavan Duffy JJ).

³²³ *Fox and Freiberg* (1999), above n 15, 1084.

³²⁴ *Director of Public Prosecutions v Terrick*; *Director of Public Prosecutions v Marks*; *Director of Public Prosecutions v Stewart* (2009) 24 VR 457, 459.

³²⁵ *R v Burke* (2009) 21 VR 471, 477; *Scerri v The Queen* [2010] VSCA 287 (28 October 2010) [30]; *Nguyen v The Queen* [2011] VSCA 32 (16 February 2011) [51]–[52].

³²⁶ *R v Baker* [2000] NSWCCA 85 (17 March 2000).

³²⁷ *Ibid* [11] (Spigelman CJ).

³²⁸ Sentencing judges in Victoria are required to state the sentence that would have been imposed but for the plea of guilty: *Sentencing Act 1991* (Vic) s 6AAA.

³²⁹ *R v El-Ahmad* [2004] VSCA 93 (26 May 2004) [31] (Eames JA).

³³⁰ *R v Howard* [2009] VSCA 281 (30 November 2009).

given to the appellant and the discount given to the appellant's co-offenders were 'an aspect of the sentencing judge's failure to accord sufficient weight to the appellant's plea of guilty'.³³¹ In allowing the appeal, the Court of Appeal said:

For a judge to give too much weight or too little weight to a sentencing consideration is not necessarily sentencing error but where it is manifest, as it is here, that a sentencing judge has grossly undervalued the importance of the discount for pleading guilty, it may be viewed as sentencing error and the sentencing discretion is re-opened.³³²

- 6.63 There are also examples of cases in which matters as to weight have been successful as separate grounds of appeal, presented below in the analysis of successful grounds of appeal in sentence appeals determined in 2008 and 2010 (see Tables 3 and 4).³³³
- 6.64 In a more recent decision that states the current law in Victoria, *Scerri v The Queen*,³³⁴ the Court of Appeal reiterated that a 'complaint about the discount for the plea of guilty can only ever be a particular of a ground contending that the sentence was manifestly excessive, that is, outside the range reasonably open to the sentencing judge in the circumstances of the case'.³³⁵ In this case, the Court of Appeal confirmed the approach to be taken to considering a complaint about the weight given to the discount for the plea of guilty (or to any other factor) as that set out in *R v Burke*³³⁶ as follows:
- A complaint about the sentence discount or the notional sentence identified in the s6AAA statement is a complaint about the weight attributed to one particular sentencing consideration. As with any argument about weight, the question for the appeal court is whether, taking into account all the relevant sentencing considerations, the sentence imposed was within range.³³⁷
- 6.65 The current state of the law in Victoria is that stated in *Scerri v The Queen*.³³⁸ It has been referred to and applied in subsequent sentence appeal cases in which the Court of Appeal has rejected the submission that the discount for the plea of guilty can constitute an error and grounds for a successful appeal.³³⁹
- 6.66 Table 3 (page 100) shows the Council's analysis of the successful grounds of appeal in sentence appeals determined in 2008, using data collected by the Council. It shows successful grounds of appeal in offender and Crown sentence appeals from January 2008 to December 2008, according to the number and percentage of cases in which each ground was successful. In that year, 114 offender sentence appeals and 34 Crown sentence appeals were determined.

³³¹ Ibid [12].

³³² Ibid [15].

³³³ See for example, *Key v The Queen* [2010] VSCA 242 (16 September 2010) [24] in which the Court of Appeal allowed the appeal on the ground, among other grounds, that the sentencing judge had erred in failing to have sufficient regard to the appellant's guilty plea, concluding that 'the discount allowed here was altogether too little and thus indicative of sentencing error'. See also *R v RGG* [2008] VSCA 94 (6 June 2008) [41] in which the Court of Appeal allowed the appeal on the ground, among other grounds, that the sentencing judge had given inadequate weight to the appellant's age and ill-health, concluding that the extracted principles did not support the conclusion of the sentencing judge that the weight to be given was 'only very modest'. The Court of Appeal said that this ground was made out; however, these considerations were also relevant as a particular of another ground of manifest excess. See also *R v Taric; R v Sindik* [2008] VSCA 166 (28 August 2008) [22] in which the Court of Appeal allowed the appeal on the ground, among other grounds, that the sentencing judge had failed to give sufficient weight to a number of sentencing factors, concluding that the sentencing judge's 'failure to mention them, taken in conjunction with the sentence actually passed, does show that at least inadequate weight was accorded to them'.

³³⁴ *Scerri v The Queen* [2010] VSCA 287 (28 October 2010).

³³⁵ Ibid [24].

³³⁶ *R v Burke* (2009) 21 VR 471.

³³⁷ Ibid 477.

³³⁸ *Scerri v The Queen* [2010] VSCA 287 (28 October 2010).

³³⁹ See for example, *Lunt v The Queen; Viet Huynh v The Queen; Szadov v The Queen; LK v The Queen* [2011] VSCA 56 (9 March 2011) [15]; *Yang v The Queen* [2011] 161 (7 June 2011) [30]–[31].

Sentence appeals in Victoria

- 6.67 In addition to being the most common grounds of appeal argued, manifest excess and manifest inadequacy were the most successful grounds of appeal in offender sentence appeals and Crown sentence appeals respectively. Manifest excess was successful in 24.5% of offender sentence appeals determined in 2008 (28 cases). Manifest inadequacy was found in 55.9% of Crown sentence appeals determined in 2008 (19 cases).
- 6.68 A number of grounds relating to weight given to a particular factor or principle feature as errors in both offender and Crown appeals, although there are different patterns in the frequency with which such errors were found in the two types of appeal. Weight given to a guilty plea or assisting authorities is the second most successful ground of appeal in offender appeals. Such an error was found in 14.9% of the 114 offender appeals determined in 2008 (17 cases). This contrasts with the one Crown appeal case in which such an error was found.
- 6.69 Another error that features as successful in both offender and Crown appeals relates to the weight given to rehabilitation/prospects of rehabilitation. Such an error was found in 11 offender appeal cases (9.6% of offender appeals) and in six Crown appeal cases (17.6% of Crown appeals).
- 6.70 The majority of other errors relating to weight given to a particular factor or principle feature in one appeal type (offender or Crown) only.

Table 3: Number and percentage of successful grounds in sentence appeals, by type of appeal, offender and Crown appeals, 2008

Offender sentence appeals (n = 114)	Successful/Considered favourably	
	No.	% of offender appeals
Manifest excess	28	24.5
Weight to guilty plea/assistance to police	17	14.9
Weight to rehabilitation/prospects of rehabilitation	11	9.6
Approach to totality	9	7.9
Mistook facts	8	7.0
Approach to parity	6	5.3
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	6	5.3
Approach to/applicable maximum penalty	6	5.3
Weight to mental illness/disability	4	3.5
Weight to drug/alcohol/gambling addiction	4	3.5
Weight to delay	3	2.6
Weight to offending history/prior convictions	2	1.8
Weight to youth	2	1.8
Weight to deterrence	2	1.8
Clerical error in sentencing	2	1.8
Allowed irrelevant facts	2	1.8
Approach to <i>Confiscation Act 1997</i> (Vic) ss 5(2)(A)–(B)	2	1.8
Weight to hardship of offender/family	1	0.9
Increase in maximum penalty	0	0.0

Table 3: cont.: Number and percentage of successful grounds in sentence appeals, by type of appeal, offender and Crown appeals, 2008

Crown sentence appeals (n = 34)	Successful/Considered favourably	
	No.	% of Crown appeals
Manifestly inadequate	19	55.9
Weight to seriousness of offending behaviour	12	35.3
Weight to general deterrence	11	32.4
Weight to effect on victim	8	23.5
Weight to specific deterrence	7	20.6
Weight to denunciation	7	20.6
Weight to offence seriousness	6	17.6
Weight to rehabilitation/prospects of rehabilitation	6	17.6
Weight to offending history/prior convictions	2	5.9
Approach to/applicable maximum penalty	4	11.8
Weight to youth	3	8.8
Regard to current sentencing practices	2	5.9
Other error of law	2	5.9
Weight to absence of remorse	1	2.9
Weight to guilty plea/assistance to authorities	1	2.9

Source: AustLII.

Note: In each appeal, the applicant may have argued more than one ground of appeal. Grounds as to weight may have been considered by the Court of Appeal as separate grounds of appeal and/or as particularisations of broader grounds of manifest excess or manifest inadequacy. In this analysis, no differentiation has been made on this basis. The total number of offender appeals is 114 and the total number of Crown appeals is 34. The percentage breakdown for the treatment of grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

- 6.71 In offender appeals, other errors as to weight were found in relation to totality (nine cases, 7.9%) and mental illness/disability (four cases, 3.5%). An error in the approach taken to parity was found in six cases (5.3%).
- 6.72 In Crown appeals, errors were made as to the weight given to other factors or principles, such as seriousness of the offending behaviour (12 cases, 35.3%), general deterrence (11 cases, 32.4%), effect on the victim (eight cases, 23.5%) and specific deterrence (seven cases, 20.6%).
- 6.73 A technical or other error was more commonly found in offender appeals. For example, in 10 cases the error relates to the facts of the case, such as the sentencing judge making a mistake as to the facts (eight cases) or allowing irrelevant facts (two cases). Other such errors found by the Court of Appeal concern errors made in relation to particular legislative provisions, such as part 2A (serious offenders) or part 2B (continuing criminal enterprise offenders) of the *Sentencing Act 1991* (Vic) (six cases) or the applicable maximum penalty (six cases). This contrasts with Crown appeals, in which a technical or other error was found by the Court of Appeal in only four cases, relating to current sentencing practices (two cases) and 'other error of law' (two cases).

- 6.74 Table 4 (page 104) shows the Council's analysis of the successful grounds of appeal in sentence appeals determined in 2010, using data collected by the Court of Appeal. It shows successful grounds of appeal in offender and Crown sentence appeals from January 2010 to December 2010, according to the number and percentage of cases in which each ground was successful. In that year, 153 offender sentence appeals and 27 Crown sentence appeals were determined.
- 6.75 As discussed, these data were collected using a slightly different methodology from that used for the collection of the data for 2008 sentence appeals. Thus, care should be taken in comparing the two datasets.
- 6.76 As discussed, in offender appeals, a ground of appeal has been counted once as having been raised where:
- the matter was argued as a separate ground of appeal; or
 - the matter was argued as a separate ground of appeal *and* raised as part of another ground of appeal, such as manifest excess.
- 6.77 Where a matter was *only* raised under another ground of appeal, namely manifest excess, and not as a separate ground of appeal, it has not been coded as having been raised. Arguments have only been coded separately as having been raised if they were argued as a stand-alone ground.³⁴⁰
- 6.78 For the classification of the success of grounds of appeal, a matter has been coded as successful if it was successful as a separate ground of appeal. If the matter was argued as a separate ground of appeal *and* as part of another ground of appeal, such as manifest excess, separate codes have been used to denote whether the matter was:
- successful as a separate ground of appeal and considered as part of a manifest excess ground; or
 - not successful as a separate ground of appeal but considered as part of a manifest excess ground.
- 6.79 A slightly different approach has been taken to coding grounds of appeal raised in Crown sentence appeals. Where a matter was *only* raised in support of a manifest inadequacy ground but was given particular attention by the Crown in argument, it has been coded as having been raised and considered as part of manifest inadequacy.³⁴¹
- 6.80 Where matters have been coded as having been raised as part of a manifest inadequacy ground, separate codes have been used to denote whether the matter was:
- successful as a separate ground of appeal and considered as part of a manifest inadequacy ground; or
 - not successful as a separate ground of appeal but considered as part of a manifest inadequacy ground.
- 6.81 Table 4 shows the successful grounds of appeal in offender and Crown sentence appeals from January 2010 to December 2010. It shows the number and percentage of cases in which each ground was successful. It also indicates the number of cases in which grounds of appeal were successful and considered as part of a manifest excess ground or a manifest inadequacy ground and the number of cases in which grounds were not successful but considered under a broader manifest excess ground or manifest inadequacy ground. The grounds of appeal in offender appeals collected under 'other' and their success rates are contained in Table E in Appendix 2.

³⁴⁰ The reasoning for this is that matters argued in support of a larger ground are presented in a range of different ways, for example, they may be stated in the ground, argued as particulars of the ground or referred to by counsel in argument. There is uncertainty about what level of reliance is required to justify a matter being coded. There is also variation in the amount of detail provided by judges in their reasons, which makes the data unreliable.

³⁴¹ This is usually apparent from the judge's reasons. The rationale for this is that, if such an approach were not taken, there would be no useful data obtained regarding Crown appeals, as the grounds would be invariably limited to manifest inadequacy (with particulars) with a small number of specific error grounds occasionally added in.

- 6.82 Similar to the 2008 analysis, the 2010 analysis in Table 4 shows that manifest excess and manifest inadequacy again feature as the most successful grounds of appeal (in addition to being the most commonly argued appeal grounds for offender and Crown appeals respectively). Manifest excess was successful in 28.1% of offender appeals determined in 2010 (43 cases). Manifest inadequacy was found in 40.7% of Crown appeals (11 cases).
- 6.83 The matters that feature in successful grounds of appeal differ between offender and Crown appeals.
- 6.84 A number of grounds argued as separate grounds of appeal feature as successful for offender appeals. These included parity with co-offenders, which was successful in 11 offender appeals (7.2%),³⁴² and error of fact, which was successful in 10 cases (6.5%). This refers to errors relating to the judge's assessment of the facts of the case, including mistakes of fact, findings of fact made without sufficient evidence and errors asserted in the sentencing judge's assessment of certain facts, such as the offender's rehabilitation prospects.³⁴³ Error as to, or excessive, cumulation was successful in four cases (2.6%).
- 6.85 Other successful grounds of appeal argued as separate grounds of appeal in a small number of offender appeals are 'other errors of law' (six cases, 3.9%) and fresh evidence (five cases, 3.3%). A number of other successful grounds relate to the weight given to a particular factor, such as:
- weight given to guilty plea/assistance to police (six cases, 3.9% of offender appeals); and
 - weight given to mental illness/disability and approach to *Verdins* framework (five cases, 3.3%).³⁴⁴
- 6.86 The most common unsuccessful grounds of appeal when argued as separate grounds of appeal but considered by the Court of Appeal under the most commonly occurring broader ground of manifest excess are:
- weight given to guilty plea/assistance to police (12 cases, 7.8%);
 - weight given to delay (five cases, 3.3%);
 - weight given to mental illness/disability and approach to *Verdins* framework (four cases, 2.6%);³⁴⁵ and
 - approach to totality (four cases, 2.6%).
- 6.87 In 19.5% of offender appeals (25 cases), the Crown had made a concession as to the error argued.
- 6.88 For Crown appeals in 2010, manifest inadequacy is the primary successful ground argued as a separate ground of appeal. However, a number of matters raised as particularisations of the broader ground of manifest inadequacy were considered as part of this broader ground. The most commonly considered matters relate to the weight given to a particular factor or principle and include:
- weight given to general deterrence (11 cases, 40.7%);
 - weight given to seriousness of offending (11 cases, 40.7%);
 - weight given to specific deterrence (six cases, 22.2%);
 - weight given to offending behaviour/prior convictions (four cases, 14.8%);
 - weight given to denunciation (three cases, 11.1%);
 - weight given to maximum penalty (three cases, 11.1%); and
 - weight given to guilty plea/assistance to police (three cases, 11.1%).
- 6.89 In seven cases (25.9%), the Court of Appeal found that there had been an error but exercised its residual discretion not to intervene.

³⁴² Parity was also considered as part of manifest excess in relation to one appeal.

³⁴³ Grounds that involve the 'characterisation' of the facts of the case, for example, the offender's level of remorse, have been treated as 'other error'.

³⁴⁴ This includes both errors of weight and errors made within the framework required by the decision of *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269. For example, it includes alleged errors in the assessment of an offender's moral culpability based on mental illness and failure to take into account the hardship of prison.

³⁴⁵ *Ibid.*

Table 4: Number and percentage of successful grounds in sentence appeals, by type of appeal, offender and Crown appeals, 2010

Offender sentence appeals (n = 153)	Successful/ considered favourably		Not successful but considered under manifest excess	
	No.	% of offender appeals	No.	% of offender appeals
Manifest excess	43	28.1	0	–
Approach to parity	11	7.2	1	0.7
Error of fact	10	6.5	0	–
Weight to guilty plea/assistance to police	6	3.9	12	7.8
Other error of law	6	3.9	1	0.7
Fresh evidence	5	3.3	0	–
Weight to mental illness/disability and approach to <i>Verdins</i> framework ^a	5*	3.3	4	2.6
Error as to, or excessive, cumulation	4	2.6	0	–
Approach to totality	3	2.0	4	2.6
Natural justice/procedural fairness	3	2.0	0	–
Allowed irrelevant facts	3	2.0	0	–
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	2	1.3	1	0.7
Applicable maximum penalty	2	1.3	0	–
Error as to assessment or characterisation of offence seriousness	2	1.3	1	0.7
Weight to deterrence	2*	1.3	1	0.7
Failure to take into account delay	2	1.3	0	–
Weight to rehabilitation/prospects of rehabilitation	1*	0.7	2	1.3
Weight to youth	0	–	2	1.3
Clerical error in sentencing	2	1.3	0	–
Weight to offending history/prior convictions	0	–	3	2.0
Error in approach to, insufficient discount for or failure to take into account, 'dead' or ' <i>Renzella</i> ' ^b time	1	0.7	0	–
Weight to hardship of offender/family	0	–	3	2.0
Weight to delay	0	–	5	3.3
Crown concessions on grounds argued	No.	%	–	–
	25	19.5	–	–

* Denotes where a ground was successful as a separate ground of appeal and considered as part of manifest excess. For each of the grounds so labelled in offender appeals, there was one instance where the ground was successful as a separate ground and considered as part of manifest excess.

Table 4 cont.: Number and percentage of successful grounds in sentence appeals, by type of appeal, offender and Crown appeals, 2010

Crown sentence appeals (n = 27)	Successful/ considered favourably		Not successful but considered under manifest inadequacy	
	No.	% of Crown appeals	No.	% of Crown appeals
Manifest inadequacy	11	40.7	0	0.0
Other error of law	1	3.7	3	11.1
Weight to general deterrence	0	0.0	11	40.7
Weight to seriousness of offending	0	0.0	11	40.7
Weight to specific deterrence	0	0.0	6	22.2
Weight to offending history/prior convictions	0	0.0	4	14.8
Weight to denunciation	0	0.0	3	11.1
Weight to maximum penalty	0	0.0	3	11.1
Weight to guilty plea/assistance to police	0	0.0	3	11.1
Weight to youth	0	0.0	2	7.4
Weight to rehabilitation/prospects of rehabilitation	0	0.0	2	7.4
Weight to community protection	0	0.0	2	7.4
Weight to effect on victim	0	0.0	2	7.4
Approach to cumulation	0	0.0	1	3.7
Regard to current sentencing practices	0	0.0	1	3.7
Court exercised residual discretion not to intervene	No.	%	–	–
	7	25.9	–	–

^a This includes both errors of weight and errors made within the framework required by the decision of *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269. For example, it includes alleged errors in the assessment of an offender's moral culpability based on mental illness and failure to take into account the hardship of prison.

^b *R v Renzella* [1997] 2 VR 88. This refers to pre-sentence detention that section 18 of the *Sentencing Act 1991* (Vic) does not apply to, that is, pre-sentence detention in respect of an offence carrying a sentence of imprisonment or a period of detention that is not deducted from the sentence imposed.

Source: Court of Appeal, Supreme Court of Victoria.

Note: The data in Table 4 have been collected using a different methodology from that used to collect the 2008 data on grounds of appeal. In each appeal, the applicant may have argued more than one ground of appeal. Grounds as to weight may have been argued as separate grounds of appeal and/or as particularisations of broader grounds of manifest excess or manifest inadequacy. In offender appeals, where grounds as to weight were advanced either as separate grounds of appeal or as separate grounds of appeal and as part of manifest excess, they have been coded as raised. Where grounds as to weight were advanced as part of manifest excess only, they have not been coded as raised. In Crown appeals, where grounds as to weight were advanced and given particular attention in argument as part of manifest inadequacy, they have been coded as raised. Grounds have been coded as: successful (as a separate ground of appeal), successful (as a separate ground of appeal) and considered as part of manifest excess/manifest inadequacy, or not successful (as a separate ground of appeal) but considered as part of manifest excess/manifest inadequacy. The total number of offender appeals is 153 and the total number of Crown appeals is 27. The percentage breakdown for the treatment of grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

Summary

- 6.90 This chapter has examined data on the nature of offender and Crown appeals from 1 July 2007 to 30 June 2009. The data indicate that, consistent with general trends in the breakdown of offender and Crown appeals, offender appeals are markedly more prevalent than Crown appeals. This can be explained primarily by the different focus and principles underlying the two different appeal types.
- 6.91 This chapter has examined the grounds of appeal in two sets of data:
- 114 offender sentence appeals and 34 Crown sentence appeals determined by the Court of Appeal between January 2008 and December 2008; and
 - 153 offender sentence appeals and 27 Crown sentence appeals determined by the Court of Appeal between January 2010 and December 2010.
- 6.92 Identifying and classifying grounds of appeal are complex exercises that can involve a degree of interpretation. In most cases, the appeal is made on the basis of multiple grounds. These tasks are particularly complex in cases in which a matter is argued as a ground of appeal in its own right or argued as a particular of broad grounds of appeal, such as manifest excess or manifest inadequacy. In some cases, matters are argued in both ways.
- 6.93 The overlap between separate grounds of appeal and particularisations of separate grounds of appeal can be common where the matters raised refer to the weight given to a particular sentencing factor or principle. In both datasets, there are sentence appeal cases in which matters of weight have been argued as grounds of appeal to establish an error in the sentencing process. There are also examples of sentence appeal cases in both datasets where, alternatively, or in addition to being argued as separate grounds of appeal, matters of weight have been raised in support of the contention that the sentence is manifestly excessive or manifestly inadequate.
- 6.94 In cases in which matters are argued both as separate grounds of appeal arguing specific error and as particularisations of broader grounds of appeal arguing non-specific error (manifest excess or manifest inadequacy), it can be a complex task to identify the precise basis on which the Court of Appeal has modified a sentence. This can be particularly so when there are multiple grounds on which the Court of Appeal has looked favourably. More often than not, the success of the appeal will be based on a combination of matters rather than any single consideration.
- 6.95 Nevertheless, gaining an accurate understanding of the nature of errors being found by the Court of Appeal can lead to a better understanding of which steps could be taken to reduce the number of errors being made in sentencing.
- 6.96 The Council coded the 2008 data using a methodology where no differentiation is made between matters argued by counsel and treated by the Court as separate grounds of appeal and those treated as particularisations of manifest excess or manifest inadequacy. This method was developed with the aim of collecting data that broadly captured the nature of errors alleged to have been made in the sentencing process and upheld by the Court of Appeal.
- 6.97 The 2010 data coded by Court of Appeal staff used a slightly modified methodology to reflect whether matters were argued and treated as separate grounds of appeal and/or as particularisations of the broader grounds of appeal of manifest excess or manifest inadequacy. The Court of Appeal has employed a different methodology to capture the additional data that in its view more accurately reflects the manner in which Judges of Appeal deal with matters raised in sentence appeals.
- 6.98 Due to the differences between the methodologies used for the collection of these data, the two datasets are not directly comparable and thus caution should be exercised in comparing the analysis from the two datasets. However, the data show similar patterns in the nature of issues arising in sentencing on appeal, in particular, the prevalence of manifest excess and inadequacy and matters as to weight given to sentencing factors or principles.

- 6.99 In both datasets, the most common errors argued by counsel and found to be successful by the Court of Appeal are manifest excess and manifest inadequacy.
- 6.100 In the 2008 data, manifest excess was argued in 71.1% of the 114 offender sentence appeals, and manifest inadequacy was argued in 97.1% of the 34 Crown sentence appeals. The other common grounds of appeal argued in both offender and Crown appeals relate to the weight given to specific factors or principles in sentencing. Errors as to the weight given to rehabilitation or prospects of rehabilitation feature in grounds argued in both offender and Crown appeals, but overall, different grounds of appeal tended to be argued in each type of appeal.
- 6.101 In the 2010 data, manifest excess was argued in 82.4% of the 153 offender sentence appeals. Manifest inadequacy was argued in 92.6% of the 27 Crown sentence appeals. Similar to the 2008 analysis, the 2010 analysis indicates that the other grounds of appeal argued are different for each type of appeal, although these commonly also relate to the weight given to particular sentencing factors or principles. Offender appeals in 2010 also commonly include the argument that factual errors have been made in the sentencing process, including mistakes and findings of fact by the sentencing judge. Fresh evidence was argued in 8.5% of offender appeals.
- 6.102 In both the 2008 and the 2010 data, manifest excess and manifest inadequacy are the most frequent errors found by the Court of Appeal.
- 6.103 In the 2008 data, manifest excess was found in 24.5% of the 114 offender sentence appeals. Manifest inadequacy was found in 55.9% of the 34 Crown sentence appeals.
- 6.104 In the 2010 data, manifest excess was found in 28.1% of the 153 offender sentence appeals. Manifest inadequacy was found in 40.7% of the 27 Crown sentence appeals.
- 6.105 In both datasets, there are differences between offender and Crown sentence appeals in terms of the sentencing considerations reflected in successful appeal grounds. Although captured in different ways, errors relating to the weight given to particular factors or principles are common in both datasets.
- 6.106 In the 2008 analysis, matters as to weight are coded as errors found to have been made in the sentencing process, and no distinction is made between their success as separate grounds of appeal and as particularisations of manifest excess.
- 6.107 In offender sentence appeals in 2008, the most common factors found by the Court of Appeal to have been given insufficient weight are the offender's guilty plea/assistance to police (made in 17 instances, comprising 14.9% of offender appeals) and rehabilitation/prospects of rehabilitation (made in 11 instances, comprising 9.6% of offender appeals). This is followed by errors found in the approach to totality (7.9%) and approach to parity (5.3%).
- 6.108 Offender appeals can be compared with Crown appeals in the same period; errors were found in the weight given to factors and principles such as the seriousness of offending behaviour (12 cases, 35.3%), general deterrence (11 cases, 32.4%), effect on the victim (eight cases, 23.5%) and specific deterrence (seven cases, 20.6%).
- 6.109 Error that may be described as technical is relatively uncommon in the 2008 data. Such errors are more common in offender appeals in relation to the facts of the case (eight cases), particular provisions in the *Sentencing Act 1991 (Vic)* (six cases) or the applicable maximum penalty (six cases).
- 6.110 In the 2010 analysis, matters as to weight are coded as errors found to have been made in the sentencing process only when found to be successful by the Court of Appeal as separate grounds of appeal. A distinction has been made between such matters as specific errors and matters considered by the Court of Appeal as part of the broader non-specific errors of manifest excess and manifest inadequacy.
- 6.111 In offender appeals in 2010, a number of errors other than manifest excess were found to be successful as separate grounds of appeal, including parity with co-offenders (7.2%), error of fact

(6.5%), weight to guilty plea/assistance to police (3.9%), other error of law (3.9%) and weight to mental illness/disability and approach to *Verdins* framework (3.3%). Fresh evidence was a successful ground of appeal in 3.3% of the 153 offender appeals. In 19.5% of offender sentence appeals, the Crown had made a concession on at least one ground of appeal.

- 6.112 A number of other matters were not successful as separate grounds of appeal but were frequently considered by the Court of Appeal under the broader grounds of manifest excess or manifest inadequacy. These tended to differ between offender and Crown appeals.
- 6.113 For offender appeals, the common issues considered under manifest excess grounds relate to weight to guilty plea/assistance to police (7.8%), weight to mental illness/disability and approach to *Verdins* framework (2.6%) and totality (2.6%).
- 6.114 For Crown appeals in 2010, the common issues considered under manifest inadequacy relate to weight to general deterrence (40.7%), weight to the seriousness of the offending (40.7%), weight to specific deterrence (22.2%) and weight to offending history/prior convictions (14.8%).
- 6.115 Similar to the 2008 analysis, the 2010 analysis shows that technical errors in both offender and Crown appeals were relatively uncommon in sentence appeals determined in 2010.
- 6.116 Manifest excess and manifest inadequacy focus on the assessment of the sentence and its appropriateness in the circumstances of the case. The Court of Appeal has said that in order to make good such a submission, the sentence must be 'manifestly' excessive or 'manifestly' inadequate and not merely 'arguably' so. This suggests that manifest excess or manifest inadequacy may be easily identified or immediately apparent from the sentence itself. A common theme in the nature of the errors being found in sentencing by the Court of Appeal is that the majority are non-specific errors of manifest excess and manifest inadequacy. Thus, this analysis contributes to the continued debate about what constitutes reasonable disagreement within the sentencing discretion and the role of the Court of Appeal in correcting errors while still allowing for reasonable disagreement about sentences and ensuring consistency in the approach to sentencing.
- 6.117 In the 2008 analysis, many errors as to weight may have been identified as particularisations of the grounds of manifest excess or manifest inadequacy, that is, these errors may have operated as the basis on which the sentence was found by the Court of Appeal to be manifestly excessive or manifestly inadequate. The 2010 analysis on grounds of appeal shows that this is often the case, although in some offender appeals, grounds as to weight are also successful as separate grounds of appeal.
- 6.118 Overall, the data from 2008 and 2010 show that a substantial number of errors being found in the sentencing process, either as successful grounds in their own right or as particularisations of manifest excess or manifest inadequacy, relate to the weight given to sentencing principles and factors.
- 6.119 Where matters as to the weight given to particular factors or principles feature as separate grounds of appeal or as matters considered under the broader grounds of manifest excess or manifest inadequacy, the nature of these matters differs between Crown and offender sentence appeals.
- 6.120 Issues as to the weight given to the offender's guilty plea, assistance to police, rehabilitation or prospects of rehabilitation and the weight given to mental illness/disability and the *Verdins* framework commonly arose in offender appeals in both 2008 and 2010, as did specific errors relating to the approach to parity or assessment of fact.
- 6.121 In Crown appeals, issues as to weight tend to relate to factors such as deterrence (general and specific), the seriousness of the offending and offending history/prior convictions.
- 6.122 These data must be interpreted in the context of the instinctive synthesis approach to sentencing in Victoria, which discourages sentencing judges from quantifying the weight given to any single factor in the sentencing process. Exceptions to this may be the value of the guilty plea and the

discount given for assistance to authorities.³⁴⁶ However, given that questions of weight are ordinarily considered as matters that fall within the sentencing judge's broad discretion, the Court of Appeal's task does not ordinarily involve seeking to identify how much weight has been given to the relevant factors and principles. The scope for appellate intervention in the exercise of that discretion is narrowly confined. The data indicate how errors as to the weight given to particular sentencing factors and principles are dealt with in the appellate process.

- 6.123 The trends in success rates of particular sentencing errors provide previously unavailable data that may assist in the identification of areas of sentencing law where more guidance from the Court of Appeal may be beneficial. However, the appropriate approach to providing further guidance in the Victorian appellate system is unclear in the context of the current instinctive synthesis approach and sentencing environment in Victoria.
- 6.124 Appellate courts in other Australian and international jurisdictions have taken different approaches to providing guidance on sentencing, with varying degrees of success.³⁴⁷ There is legislation in Victoria providing for the promulgation of guideline judgments. However, the High Court of Australia has cast doubts on the legitimacy of numerical guidelines generally.³⁴⁸ The High Court has also said that no 'universal rules'³⁴⁹ can be stated to apply in the sentencing process as they may restrict the proper exercise of the sentencing discretion in which 'a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is one that should be imposed'.³⁵⁰

³⁴⁶ See Sentencing Advisory Council (2007), above n 22.

³⁴⁷ See discussion at [3.68]–[3.71].

³⁴⁸ *Wong v The Queen* (2001) 207 CLR 584.

³⁴⁹ *Markarian v The Queen* (2005) 228 CLR 357, 373.

³⁵⁰ *Ibid.*

Chapter 7

Resentencing in sentence appeals

Introduction

- 7.1 In this chapter, the Council examines successful offender and Crown appeals in the period from 1 July 2007 to 30 June 2009. The Council also examines the changes made to sentences in successful appeals according to the effect of reductions in the resentencing process on both the total effective sentence and the non-parole period.
- 7.2 Leave to appeal extends to individual sentences, including any orders for cumulation or concurrency on individual sentences and the non-parole period. The total effective sentence is not a sentencing order and cannot ordinarily be directly appealed against.³⁵¹
- 7.3 Therefore, in a successful sentence appeal one or all of the components of a 'sentence' may change in resentencing. Resentencing can include:
- the imposition of a different sentence type, for example, a wholly suspended sentence of imprisonment instead of an immediately serveable imprisonment term;
 - the imposition of new individual sentences, combined with orders for cumulation or concurrency;
 - the confirmation of original individual sentences of imprisonment with new orders for cumulation or concurrency; and
 - the imposition of a new non-parole period.
- 7.4 Such changes made to sentences on appeal may result in the calculation of a new total effective sentence. However, there may be cases in which an appeal against sentence succeeds but resentencing on individual sentences results in minimal or no change to the total effective sentence.

³⁵¹ *Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010) [55].

- 7.5 The Court of Appeal may allow a sentence appeal only if it thinks there has been an error in the sentence first imposed *and* a different sentence should have been passed.³⁵²
- 7.6 If there is an error in one of the sentences and the Court of Appeal is of the view that a different sentence ought to be imposed, the Court of Appeal is obliged to intervene and resentence the offender. This is so even if the total effective sentence is not erroneous and the changes to sentence have little effect on the total effective sentence to be served. Such outcomes may give the appearance of 'tinkering' with sentences, due to the fact that minimal changes are made to the total effective sentence, despite significant changes being made to individual sentences or the non-parole period.
- 7.7 The following data examine the changes made to sentences in resentencing in successful offender and Crown sentence appeals according to the effect of those changes on total effective sentences and non-parole periods.
- 7.8 The data on offender appeals, in particular, indicate that the issue raised by *Ludeman v The Queen; Thomas v The Queen; French v The Queen*³⁵³ relating to total effective sentences does arise in a number of cases. The data show that in 19.5% of successful sentence appeals, changes made to individual sentences in the resentencing process had no effect on the total effective sentence.
- 7.9 The presumption that Crown appeals should only occur in rare circumstances, such as in cases that 'shock the public conscience', means that, when a Crown appeal is allowed, there may be an expectation that changes made to the appealed sentence will have a marked effect on the total effective sentence. The Court of Appeal, in determining an appeal, may take into account whether the sentence 'to be substituted [is] significantly greater' than the sentence imposed at first instance.³⁵⁴ This is to avoid what the Court of Appeal refers to as 'mere tinkering'.³⁵⁵ Therefore, it may be expected that the sentences imposed by the Court of Appeal in successful Crown appeals are much higher than the appealed sentences, in order to correct such gross inadequacy. This may be the case, even taking into account the principle of double jeopardy that applied at the time the appeals analysed in this report were determined.

³⁵² *Crimes Act 1958* (Vic) s 568(4); *Criminal Procedure Act 2009* (Vic) ss 281(1)(a)–(b). The latter legislation embeds the error principle that previously applied at common law to the determination of appeals under section 568(4) of the *Crimes Act 1958* (Vic). In fresh evidence appeals, although the Court of Appeal may allow the appeal on the fresh evidence ground and admit the fresh evidence, the Court of Appeal may decline to reopen the sentencing discretion on the basis of that evidence. Therefore, in cases in which the appeal is allowed, there may be no change in sentence in light of the fresh evidence.

³⁵³ *Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010).

³⁵⁴ *Director of Public Prosecutions v Leach* (2003) 139 A Crim R 64, 74.

³⁵⁵ *Ibid.*

Offender sentence appeals

Type of changes made

- 7.10 Between 1 July 2007 and 30 June 2009, there were 143 resentenced cases resulting from successful offender sentence appeals.³⁵⁶ In 133 of the 143 cases (93.7%), there was no change in the *type* of sentence; most of these were imprisonment sentences. Of the 135 cases originally sentenced to imprisonment, 128 cases (94.8%) received an imprisonment sentence in resentencing. In eight cases, the sentence appealed was a sentence other than imprisonment.³⁵⁷
- 7.11 In cases in which there has been a change in sentence type, the new sentence type is generally less severe than the original sentence type, according to the sentencing hierarchy. This occurred in six cases.³⁵⁸
- 7.12 In most of the 128 cases in which the offender received imprisonment at first instance and in the Court of Appeal, there was a decrease in the severity of the sentence in resentencing through changes made to the lengths of individual sentences of imprisonment and/or orders for cumulation or concurrency.
- 7.13 In almost all (94.8%) successfully appealed cases in which the offender was sentenced to a term of imprisonment, the changes affected the total effective sentence and/or the non-parole period. The breakdown of the changes made to these sentence elements is as follows:
- changes to individual sentences (sentence length or orders for cumulation or concurrency) affecting both the total effective sentence and the non-parole period (88.9%);
 - changes to individual sentences (sentence length or orders for cumulation or concurrency) affecting the total effective sentence only (6.7%);
 - changes to the non-parole period only (14.8%); and
 - changes to individual sentences (sentence length or orders for cumulation or concurrency) having no effect on the total effective sentence or the non-parole period (5.2%).³⁵⁹

³⁵⁶ Excluded from the data are offender appeals against conviction and sentence where the sentence has been changed as a result of a conviction being quashed. These have been omitted because, in such cases, the sentence change is due to an error in conviction rather than in a sentence per se (the focus of this report). Also excluded is one case in which the appeal was allowed but the case was remitted to the County Court for resentencing.

³⁵⁷ These cases comprise six partially suspended sentences, one restoration of a suspended sentence and one youth justice centre order. Of the six partially suspended sentences appealed by an offender, four received partially suspended sentences on appeal and one received a wholly suspended sentence. Of the four cases that received partially suspended sentences on appeal, two received an increase in the suspended portion of the sentence (thereby reducing the time to be served immediately) while two also received a decrease in the total effective sentence. In the remaining case that involved an original partially suspended sentence of imprisonment, the new sentence was one of imprisonment. Further investigation into this case shows that the original partially suspended sentence comprised a total effective sentence of three years with 12 months suspended (therefore requiring 24 months to be served immediately), while the revised sentence comprised a total effective imprisonment term of 25 months with a non-parole period of 15 months. Therefore, despite the increased severity of the sentence type, there was, in fact, a reduction in the total effective sentence (from 36 months to 25 months) as well as the minimum time required to be served (from 24 months to 15 months). The restoration of the partially suspended sentence was successfully overturned on appeal. In the case in which the sentence appealed was a youth justice centre order, the offender received the same order on resentence but with a reduction from 36 months to 24 months.

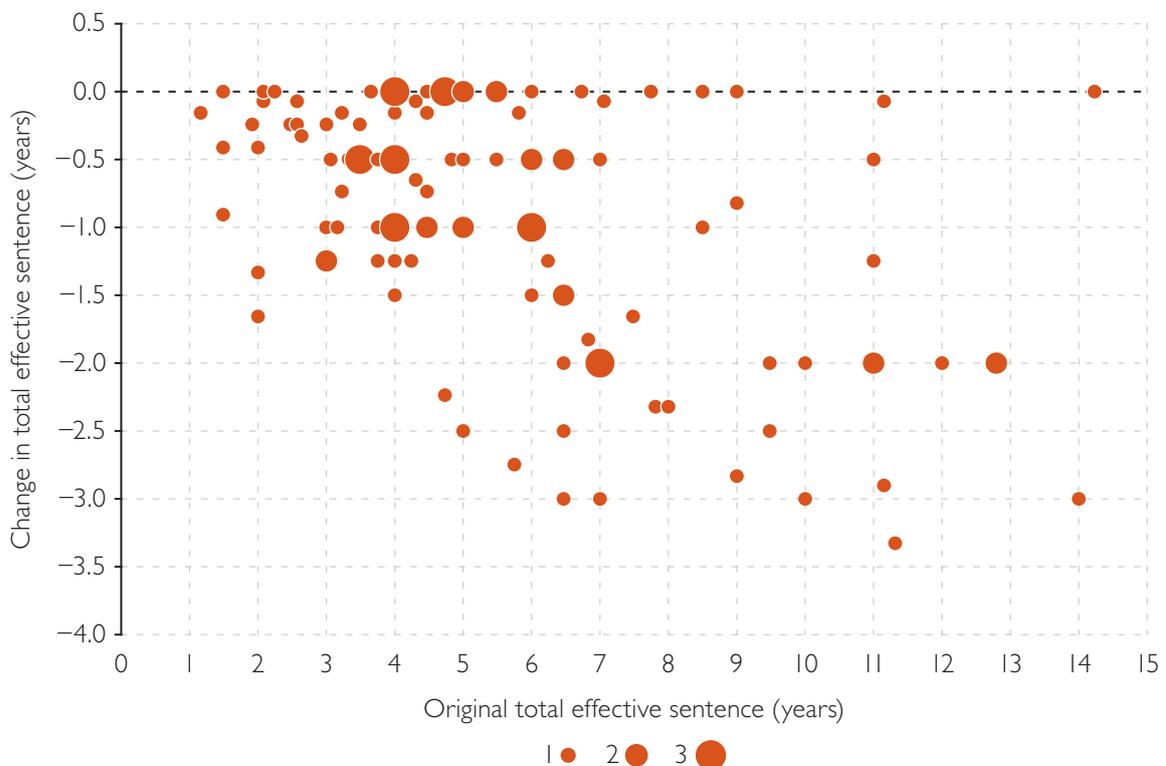
³⁵⁸ Sentences changed to a partially suspended sentence in two cases, a wholly suspended sentence in one case, an intensive correction order in one case, a youth justice centre order in one case and a community-based order in one case.

³⁵⁹ In these cases, changes were made to the individual sentences or orders for cumulation or concurrency, but these did not result in changes to overall total effective sentences.

Effect of changes on total effective sentence

- 7.14 Figures 26 and 27 show the degree of change to the total effective sentence in each of the 143 resentenced offender sentence appeal cases.
- 7.15 The size of each bubble represents the number of cases according to the original total effective sentence length and the decrease in the total effective sentence after resentencing on appeal. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence – indicated by the horizontal axis – and the degree of change to the total effective sentence – indicated by the vertical axis – by either number of years (Figure 26) or percentage (Figure 27).
- 7.16 The degree of change to the total effective sentence is first examined in Figure 26 according to the number of years by which the sentence is decreased on appeal. Figure 26 depicts reductions of less than four years and original total effective sentences of less than 15 years. Two outlying cases are not depicted. One case involved a twenty-year imprisonment sentence reduced by five years on appeal, and the other involved a twenty-three-year imprisonment sentence reduced by seven years. Overall, the average reduction in total effective imprisonment term is 12.7 months.
- 7.17 The bubbles in Figure 26 are clustered between original total effective sentences of two to seven years and decreases in the total effective sentence of zero to two years. In a number of cases, there was no reduction in the total effective sentence after resentencing.³⁶⁰

Figure 26: Number of resentenced offender sentence appeals – change in total effective sentence, by original total effective sentence, 2007–08 and 2008–09



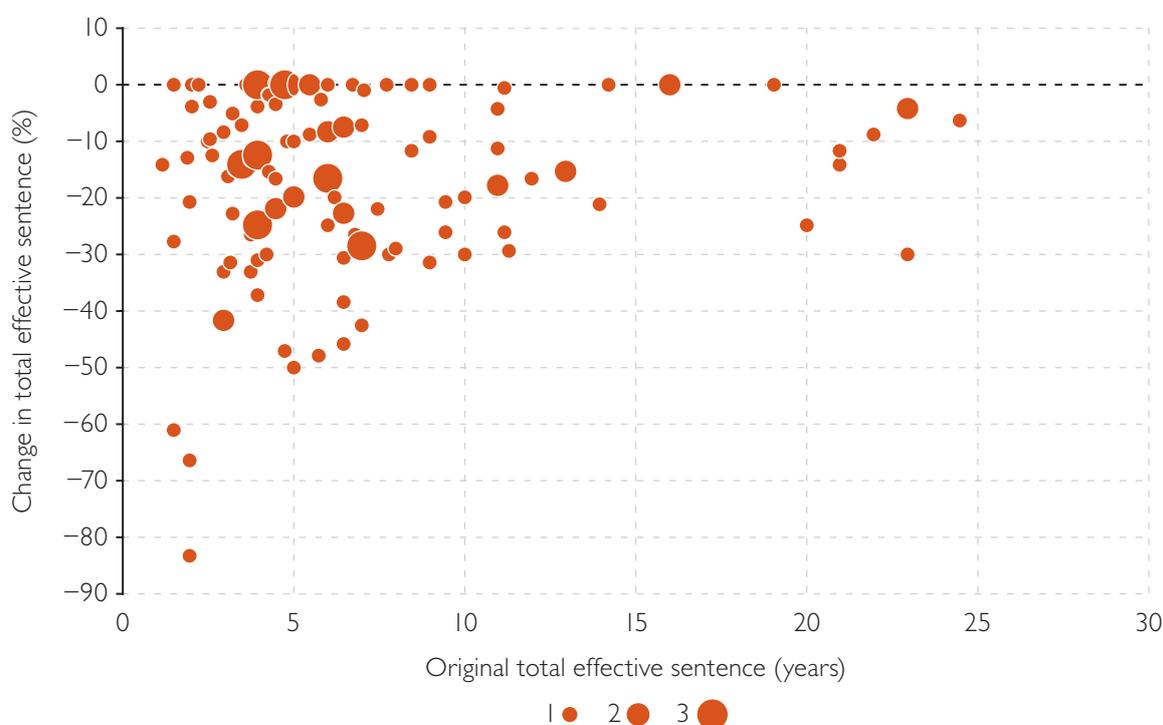
Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence, indicated by the horizontal axis, and the degree of change to the total effective sentence, indicated by the vertical axis (in years).

³⁶⁰ This also indicates that there were no offender appeal cases in which sentences increased on appeal.

- 7.18 The size of the reduction to the total effective sentence tends to be associated with the length of the original total effective sentence. All original total effective sentences of four years or less received reductions of less than two years. Although in a number of cases there were reductions of more than two years, these reductions tend to be in cases with sentences of five years or more. It was rare for a case to receive a reduction of three years or more (five cases).
- 7.19 The overall mean percentage reduction in total effective imprisonment sentence is 16.8%: predictably, the longer the original total effective sentence the smaller the percentage decrease in the total effective sentence.
- 7.20 Figure 27 shows that total effective sentences of less than 10 years tended to receive reductions of up to 50.0%, while sentences of 10 years or more received reductions of up to 30.0%. In three cases involving total effective sentences of two years or less, the reduction comprised a significant proportion of the original total effective sentence, up to 60.0% and 83.3%.³⁶¹

Figure 27: Number of resentenced offender sentence appeals – percentage change in total effective sentence, by original total effective sentence, 2007–08 and 2008–09



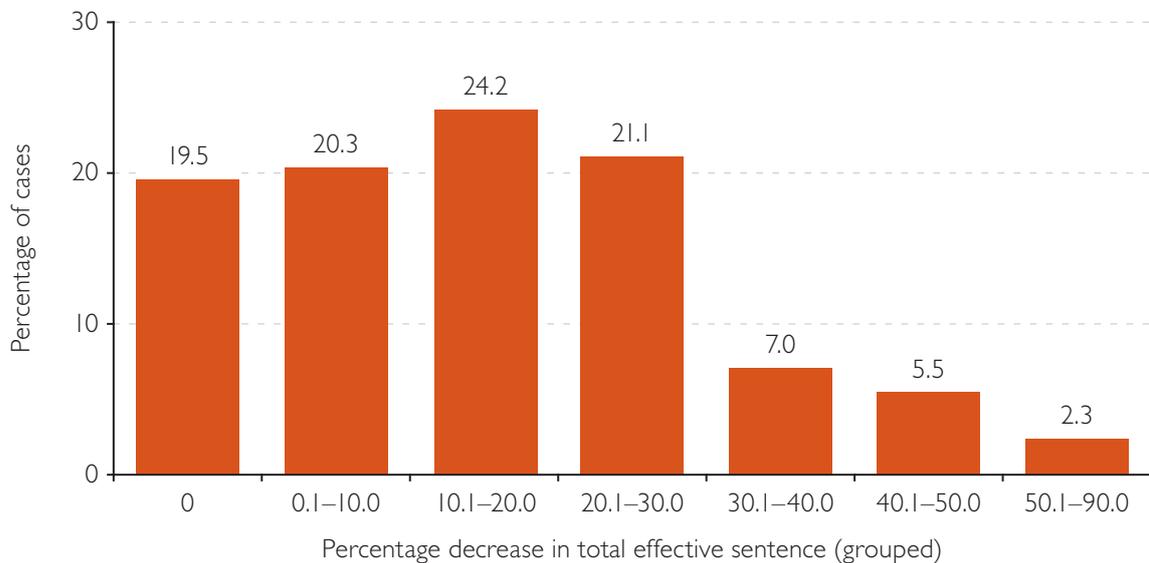
Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence, indicated by the horizontal axis, and the degree of change to the total effective sentence, indicated by the vertical axis (as a percentage of the original total effective sentence length).

³⁶¹ *R v Warwick* [2009] VSCA 163 (22 June 2009). In this case the offender had been sentenced to a total effective sentence of two years' imprisonment with a non-parole period of seven months for two counts of theft and one count of burglary. At the time of the sentence, the offender had already served a sentence for other offending and was in the process of serving a sentence for further offending referred to by the sentencing judge. The applicant was later acquitted of the previous offences. The appeal was allowed on the basis of a concession by the Crown relating to parity considerations with the applicant's co-offender and a requirement to give some weight to the term of imprisonment that the offender had served for the acquitted offences. In resentencing the offender, the Court of Appeal took into account 932 days spent by the offender in custody as pre-sentence detention.

- 7.21 The pattern that emerges from the analysis, however, is that the majority of cases received reductions of less than 30.0%. Particularly common are total effective sentences of between four and seven years (85.1%), which received reductions of up to 30.0% of the total effective sentence.
- 7.22 Figure 28 shows the grouped percentage decrease in total effective imprisonment sentence on appeal. In 19.5% of cases (22 cases), changes made to individual sentences on appeal resulted in no change to the total effective sentence. In 20.3% of cases, changes in resentencing resulted in a decrease of up to 10.0% of the original total effective sentence, and in a further 24.2% of cases, changes in resentencing resulted in a decrease of between 10.1% and 20.0% in the total effective sentence. In the remaining 35.9% of cases, changes made to individual sentences resulted in reductions of 20.1% or more in the total effective imprisonment sentence.
- 7.23 Further investigation into the 22 cases in which there was no change to the total effective sentence found that 16 cases received a reduction in the non-parole period.

Figure 28: Percentage of resentenced offender sentence appeals that received imprisonment before and after resentencing, by percentage change in total effective sentence, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

- 7.24 Therefore, in six cases there was no change to the total effective sentence or the non-parole period. Examination of these cases shows that, in some cases, significant changes were made to individual components of the sentence. A reduction in individual sentences, albeit a small reduction, may be necessary to ensure that the sentence is appropriate, having regard to the applicable range for the offence and consistency in approach to sentencing. For example, in two cases there were reductions to individual sentences, but there were orders made for cumulation, which resulted in the same total effective sentence and non-parole period.³⁶²
- 7.25 In other cases, the intervention was minor. For example, in two cases the Court of Appeal found that aggregate sentences had been imposed inappropriately and resentenced the offender separately on each charge to produce the same total effective sentence and non-parole period.³⁶³
- 7.26 An offender serving a sentence of imprisonment is unlikely to view any reduction in sentence as 'trivial'. Although such reductions to the total effective sentence may seem small as a proportional measure, it is important to note that a reduction in the maximum number of days an offender is required to serve is likely to be significant to that offender. Such reductions may also be significant to victims or family members of the victim. In over a third of cases (37.6%), the reductions equated to over 12 months, and in a further 16.4% of cases, the reduction was between seven months and 12 months.
- 7.27 In over a quarter of cases, the reduction equated to between one month and six months (28.1%). Although this is a relatively small reduction, it becomes more significant when viewed in terms of the number of days an offender is required to serve. The significance of a reduction in sentence, even when an offender is serving a long term of imprisonment, was emphasised by Justice Ashley in *R v Tran*.³⁶⁴ In that case, a sentence of 18 years' imprisonment for murder was reduced to 16 years and six months on the basis that the sentencing judge did not properly bring in the offender's pre-offence mental illness as *Verdins*³⁶⁵ authorises. In reducing the sentence, Justice Ashley said:

For anyone who might be disposed to say that there is not much difference between 16 years and 6 months' imprisonment and 18 years' imprisonment, and that the substitution of one for the other would be just 'tinkering', I think it is well to reflect upon how much is done by most people in one day, one week or one month of their lives, let alone how much in one year, or a year and a half.³⁶⁶

³⁶² *R v Propsting* [2009] VSCA 45 (5 March 2009); *R v Hyland* [2008] VSCA 220 (30 October 2008). For example, in *R v Hyland* there was a significant reduction, from 12 years' imprisonment to six years' imprisonment, for a count of aggravated burglary. However, the sentences imposed on charges of rape (12 years) and theft (nine months) were not changed and neither was the total effective sentence (14 years and three months with a non-parole period of 10 years).

³⁶³ *R v Lam*; *R v Tran* [2007] VSCA 246 (1 November 2007); *R v Bardsley* [2008] VSCA 174 (12 September 2008). In another case, *R v Do* (2007) 180 A Crim R 338, the Court of Appeal found that, due to subsequent decisions of the Court of Appeal (*R v Piacentino*; *R v Ahmed* (2007) 15 VR 501; *R v Alashkar*; *R v Tayar* (2007) 17 VR 65), the sentencing judge had erroneously made an order as to the cumulation of the sentences imposed on any period of parole that the offender might be required to serve if the Adult Parole Board cancelled parole. However, the Court of Appeal found that the original sentences were appropriate and they were reimposed. In the remaining case, *R v Novakovic* (2007) 17 VR 21, the only change made was to the period of license disqualification. This case established that an order under section 28(1)(b) of the *Road Safety Act 1986* (Vic) is a 'sentence' within the meaning of section 566 of the *Crimes Act 1958* (Vic).

³⁶⁴ *R v Tran* [2008] VSCA 80 (23 May 2008).

³⁶⁵ *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269.

³⁶⁶ *R v Tran* [2008] VSCA 80 (23 May 2008) [47].

Effect of changes on non-parole period

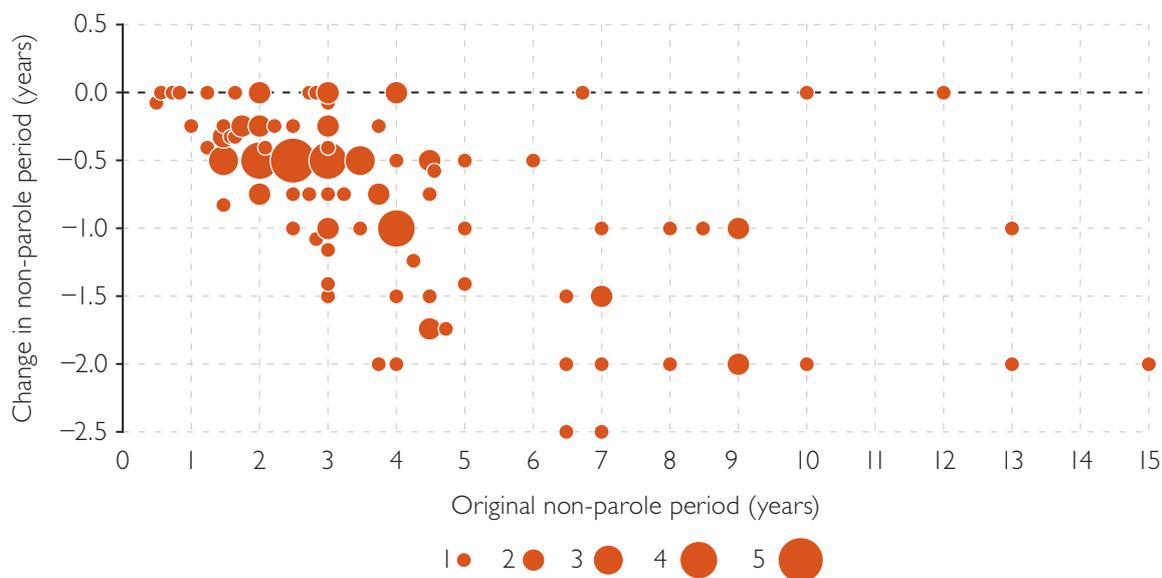
- 7.28 The non-parole period constitutes a 'sentence' for the purposes of a grant or refusal of leave to appeal.³⁶⁷ A sentence appeal may be lodged against the non-parole period only. A reduction in non-parole period can be of particular importance to an offender as it represents the earliest date on which he or she may be released from prison. Changes to the non-parole period can also have implications for the Adult Parole Board, which is responsible for making decisions relating to the release on parole of an offender who has appealed against a sentence, and for Corrections Victoria, which is responsible for the supervision of offenders on parole.
- 7.29 Figures 29 and 30 show the degree of change to the non-parole period in each of the 143 resentenced offender sentence appeal cases.
- 7.30 The size of each bubble represents the number of cases according to the original non-parole period and the decrease in the non-parole period after resentencing on appeal. The precise position of each bubble in the grid is a reflection of the original length of the non-parole period – indicated by the horizontal axis – and the degree of change to the non-parole period – indicated by the vertical axis – by either number of years (Figure 29) or percentage (Figure 30).
- 7.31 Figure 29³⁶⁸ shows that cases are clustered around much smaller reductions in the non-parole period compared with the cluster of cases according to reductions in the total effective sentence. The majority of reductions are from zero to one year in the non-parole period, compared with reductions of up to three years in the total effective sentence. There is a significant number of cases in which a non-parole period of between two and four years has been reduced by six months.
- 7.32 Although there is a large cluster of small reductions of one year or less in the non-parole period, there is a markedly broader spread across greater reductions in the length of non-parole periods compared with total effective sentences. The outlying cases show greater reductions ranging from one and a half years to four years (two cases) and are spread across a variety of non-parole period lengths. There is only a small number of cases in which the reduction in total effective sentence is more than three years.
- 7.33 Although the reductions to non-parole periods are smaller in terms of years compared with total effective sentences, non-parole periods tend to change by a greater proportion. This seems primarily due to the numeric reductions in non-parole period and total effective sentence generally being the same but the original non-parole periods being shorter than total effective sentences. The pattern is shown in Figure 30, in which the majority of cases are clustered between reductions of 10.0% and 40.0% of original non-parole periods of less than five years in length.
- 7.34 A number of outliers indicate that, in some cases, the reduction was as much as 50.0% and 60.0%.³⁶⁹ The overall distribution of percentage reductions to non-parole periods is illustrated in Figure 31 (page 120). The average decrease in months in non-parole period for offender appeal cases is 10.8 months, while the average proportional decrease is 20.2%.

³⁶⁷ *Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010) [55].

³⁶⁸ Figure 29 only shows those cases in which the reduction to the non-parole period was two and a half years or less. There are five outlying cases. For example, in one case a non-parole period of five years was reduced by two years and nine months. In one of the other outlying cases, a non-parole period of seven years was reduced by three years, and in another a non-parole period of seven and a half years was reduced by three years and nine months. Two of the five outlying cases comprised significant reductions, of four years, to non-parole periods of 15 years or more.

³⁶⁹ See, for example, *R v Kendall* [2009] VSCA 152 (18 June 2009), in which the non-parole period imposed for multiple counts of theft and obtaining financial advantage by deception was reduced from five years to two and a half years. This amounts to a 50.0% reduction in the sentence, given on the grounds of parity and on the basis of a Crown concession that the co-offender's criminality was more serious than that of the applicant.

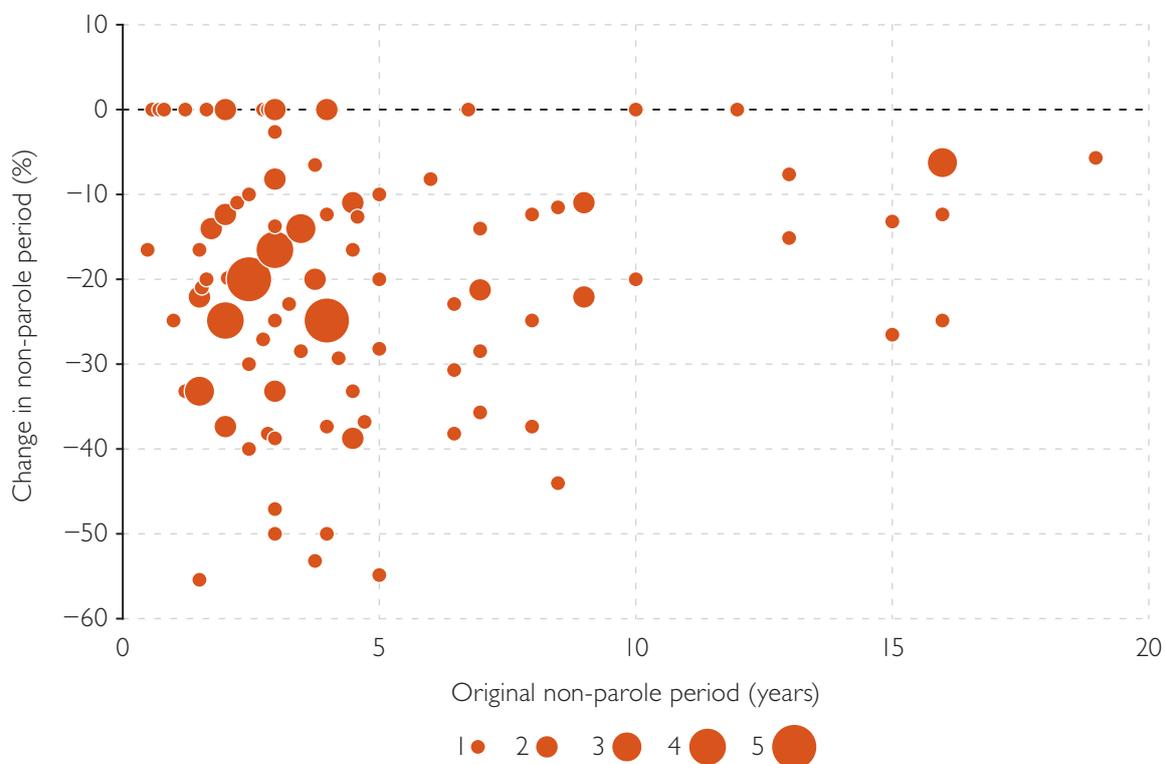
Figure 29: Number of resentenced offender sentence appeals – change in non-parole period, by original non-parole period, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the non-parole period, indicated by the horizontal axis, and the degree of change to the non-parole period, indicated by the vertical axis (in years).

Figure 30: Number of resentenced offender sentence appeals – percentage change in non-parole period, by original non-parole period, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the non-parole period, indicated by the horizontal axis, and the degree of change to the non-parole period, indicated by the vertical axis (as a percentage of the original non-parole period).

7.35 The high proportion of cases in which the reduction did not exceed 30.0% of the original non-parole period is similar to that observed in reductions to the total effective sentence. In 77.9% of cases, the reduction to the non-parole period did not exceed 30.0%. In only 13.1% of cases, there was no change to the non-parole period. By way of comparison, in 19.5% of cases, there was no change to the total effective sentence.

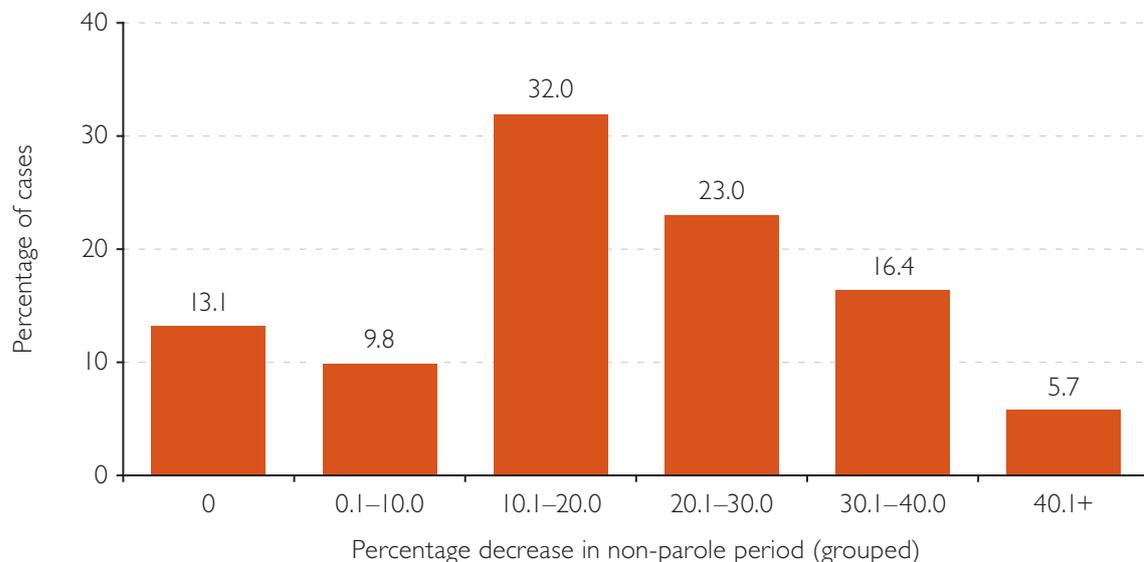
7.36 Therefore, non-parole periods tend to change by a greater proportion than do total effective sentences. There was a higher proportion of cases receiving reductions to non-parole periods in the 30.0% to 40.0% range, compared with the proportion receiving such percentage reductions in the total effective sentence. For example, 22.1% of non-parole periods, compared with 14.8% of total effective sentences, changed by 30.1% or more. In some cases, the reduction to the non-parole period was proportionately small (less than 10.0%).

7.37 Although the reductions in non-parole periods in successful sentence appeal cases are far more likely to comprise a higher proportion of the original non-parole period, the reductions tend to translate into relatively small periods of time, of six months or one year. Despite this, it is unlikely that such reductions would be viewed as insignificant to individual offenders serving time in prison.

7.38 The significance of even small reductions in non-parole periods was emphasised by Justice Neave in a successful offender appeal against a sentence of four years' imprisonment with a non-parole period of two years and six months. The appeal was allowed on the basis that the non-parole period was manifestly excessive, when regard was had to the applicant's youth and excellent prospects of rehabilitation. In resentencing the offender to a two-year non-parole period, Justice Neave said:

A reduction of six months in the non-parole period may, on its face, appear to be 'mere tinkering'. But for a youthful offender who is making considerable efforts to reform, I consider that a 6 months' reduction of his non-parole period is likely to have a significant impact on the course of his life.³⁷⁰

Figure 31: Percentage of resentenced offender sentence appeals that received imprisonment before and after resentence, by percentage change in non-parole period, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

³⁷⁰ *R v Lay* [2008] VSCA 120 (26 June 2008) [42] (Neave JA).

Crown sentence appeals

Type of changes made

- 7.39 Between 1 July 2007 and 30 June 2009, 39 cases were resentenced as a result of a successful Crown appeal. Of these, 31 (79.5%) received no change in the type of sentence. Most of these cases were imprisonment sentences (27 cases).³⁷¹
- 7.40 In eight cases, there was a change in the type of sentence in resentencing. For example, in one such case, an imprisonment sentence decreased in severity from imprisonment to a partially suspended sentence.³⁷² Despite the change in sentence type, the total effective sentence increased – from six months and two weeks to a total effective sentence of three years' imprisonment. However, the Court of Appeal ordered that all of the sentence, except for six months and two weeks already served, be suspended for a period of two years.
- 7.41 In six other cases in which the sentence type changed, all changes in resentencing represent an increase in severity according to the sentencing hierarchy.³⁷³
- 7.42 In all successful Crown appeals in which the offender has been sentenced to a term of imprisonment, there was a change to the total effective sentence and/or the non-parole period (27 cases). In the vast majority (88.9%), both the total effective sentence and the non-parole period changed.

Effect of changes on total effective sentence

- 7.43 Figures 32 and 33 show the degree of change to the total effective sentence in each of the 39 resentenced Crown sentence appeal cases.
- 7.44 The size of each bubble represents the number of cases according to the original total effective sentence length and increase in the total effective sentence after resentencing on appeal. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence – indicated by the horizontal axis – and the degree of change to the total effective sentence – indicated by the vertical axis – by either number of years (Figure 32) or percentage (Figure 33).
- 7.45 Figure 32 illustrates that most of the imprisonment sentences appealed by the Crown between 2007–08 and 2008–09 are between three and six years. On resentencing after a successful Crown appeal, most commonly the total effective sentence is increased by between one year and three years.

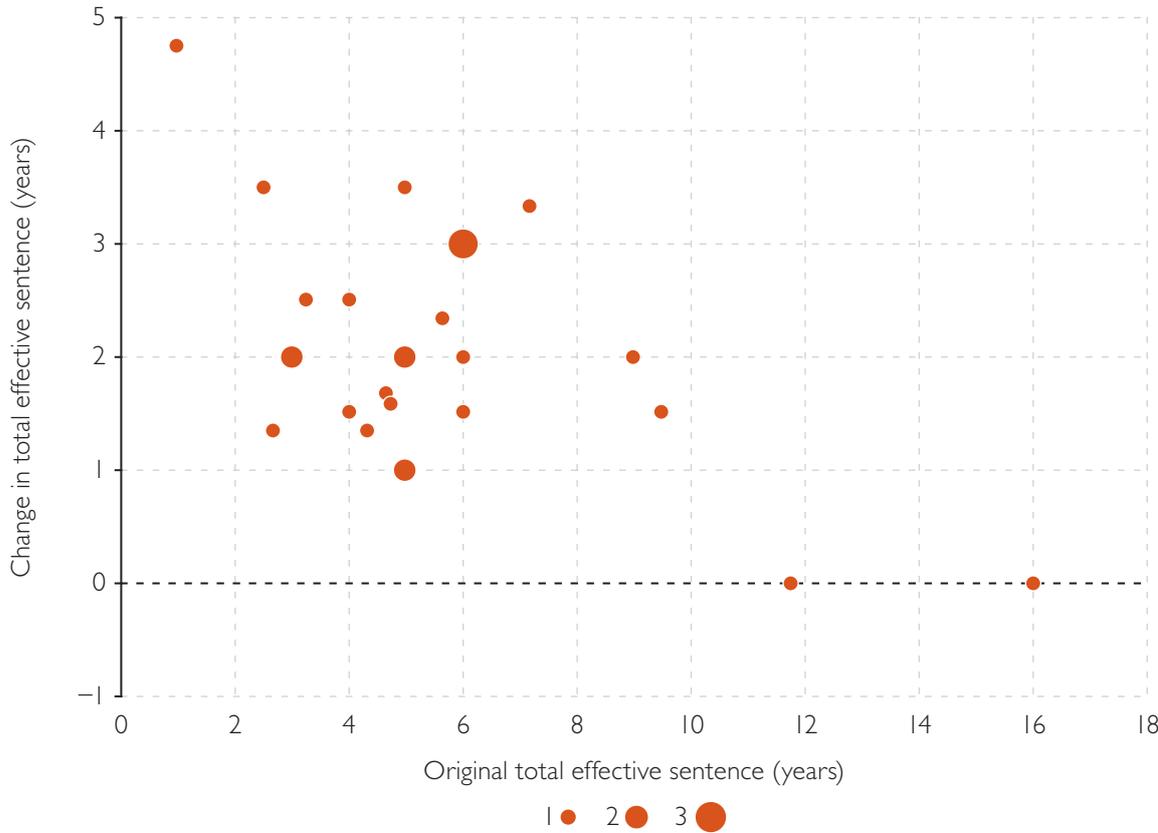
³⁷¹ There were four cases that did not involve imprisonment where the sentence type did not change in resentencing. Of these, two were suspended sentences, one was a partially suspended sentence and one was a youth justice centre order. The severity of all four sentences increased however, through the imposition of a longer sentence. The two cases receiving another wholly suspended sentence on appeal had the total effective sentence increased, one from 15 months to 26 months, the other from six months to 24 months. In the one case in which the sentence type remained a partially suspended sentence, the head sentence remained the same at 30 months and the period of suspension reduced from 36 months to 18 months. In the one case in which the sentence type remained a youth justice centre order, the total effective sentence increased from 12 months to 31 months.

³⁷² *Director of Public Prosecutions v Mourkakos* [2007] VSCA 312 (19 December 2007).

³⁷³ In the two cases with wholly suspended sentences, one sentence changed to a partially suspended sentence and one sentence changed to imprisonment. One intensive correction order was increased to imprisonment while another was increased to a youth training centre order; one youth justice centre order was increased to imprisonment.

- 7.46 Figures 32 and 33 both show two cases sitting on the 'zero line'. In these two cases, there was no change to the total effective sentence; however, there was some change to the non-parole period. Figure 33 also shows one case in which the offender's total effective sentence was increased by 140.0% after resentencing,³⁷⁴ but excludes another case in which the sentence was increased by 475.0%.³⁷⁵
- 7.47 Figure 34 shows the grouped percentage increase in total effective sentence in resented Crown sentence appeals in the relevant period. All but five of the 27 total effective sentences increased by more than 20.0% of the original total effective sentence as a result of changes made in resentencing. The largest percentage change is 475.0% (not shown in Figure 33).³⁷⁶

Figure 32: Number of resented Crown sentence appeals – change in total effective sentence, by original total effective sentence, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

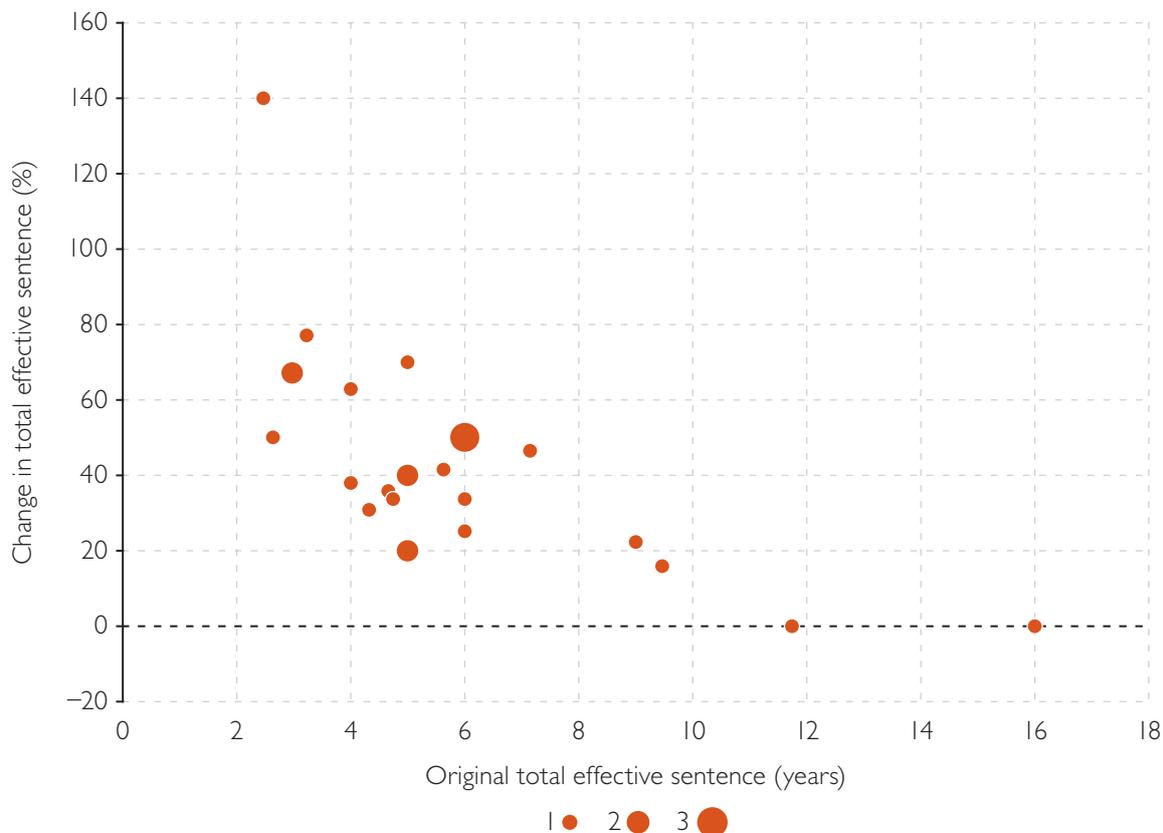
Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence, indicated by the horizontal axis, and the degree of change to the total effective sentence, indicated by the vertical axis (in years).

³⁷⁴ In that case, *Director of Public Prosecutions v CPD* (2009) 22 VR 533, the defendant pleaded guilty to four charges of sexual penetration with a child under 10 and two charges of indecent act with a child under 16. The original sentence imposed was two and a half years with a non-parole period of 13 months. The Court of Appeal acknowledged the relevant mitigating factors but concluded that the sentence was manifestly inadequate and resented the offender to six years' imprisonment with a non-parole period of four years.

³⁷⁵ In that case, *Director of Public Prosecutions v Rongonui* (2007) 17 VR 571, the imprisonment term increased from one year to five years and nine months (a 475.0% increase). The offender was convicted of one count each of aggravated burglary and intentionally causing injury, and the offences were committed while the offender was on parole. The President of the Court of Appeal, Justice Maxwell, acknowledged that the case was 'very troubling' due to the combination of the offender's youth and 'long and quite shocking, record of unprovoked violence'. The offender's 'bleak' prospects of rehabilitation and the fact that the offence was a very serious example of aggravated burglary were the main considerations in increasing the sentence so significantly.

³⁷⁶ *Ibid.*

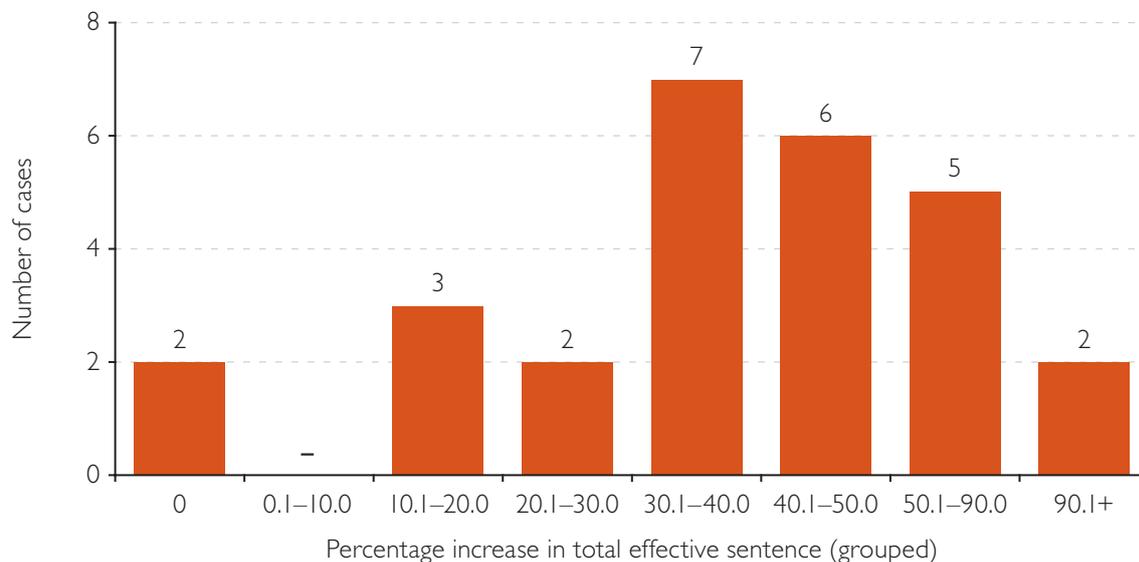
Figure 33: Number of resentenced Crown sentence appeals – percentage change in total effective sentence, by original total effective sentence, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original length of the total effective sentence, indicated by the horizontal axis, and the degree of change to the total effective sentence, indicated by the vertical axis (as a percentage of original total effective sentence length).

Figure 34: Number of resentenced Crown sentence appeals that received imprisonment before and after resentencing, by percentage change in total effective sentence, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

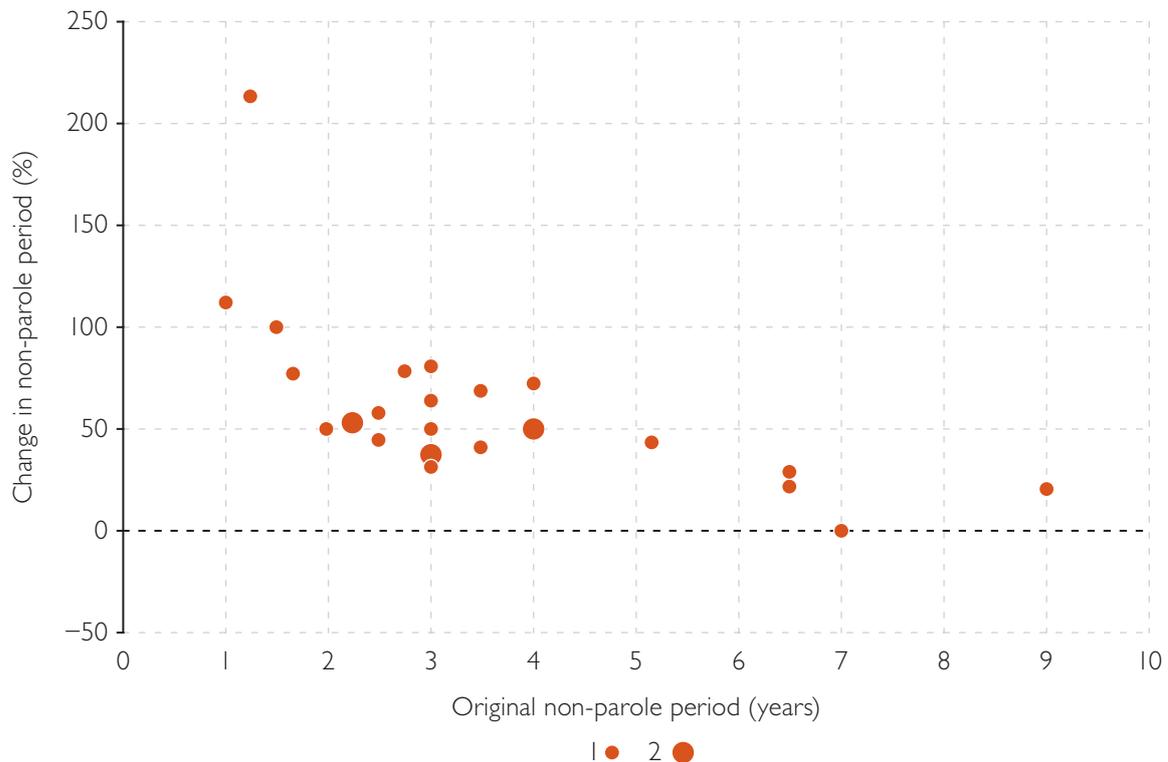
7.48 For the vast majority of resentenced Crown sentence appeals, the increase in total effective sentence length is over 30.0%, as shown in Figure 34. This is a substantial increase. The mean percentage increase in total effective sentence is 39.4%; however, this percentage does not include the two cases in which the increase in total effective sentence length was more than 100.0%.³⁷⁷ There is an inverse relationship between percentage change and original total effective sentence length: the larger percentage changes tend to occur for shorter sentences and the smaller percentage changes tend to occur for longer sentences.

Effect of changes on non-parole period

7.49 Figure 35 shows the degree of change to the non-parole period in each of the 39 resentenced Crown sentence appeal cases.

7.50 The size of each bubble represents the number of cases according to the length of the original non-parole period and increase in the non-parole period after resentencing on appeal. The precise position of each bubble in the grid is a reflection of the original length of the non-parole period – indicated by the horizontal axis – and the degree of change to the non-parole period – indicated by the vertical axis – by percentage of the original non-parole period.

Figure 35: Number of resentenced Crown sentence appeals – percentage change in non-parole period, by original non-parole period, 2007–08 and 2008–09



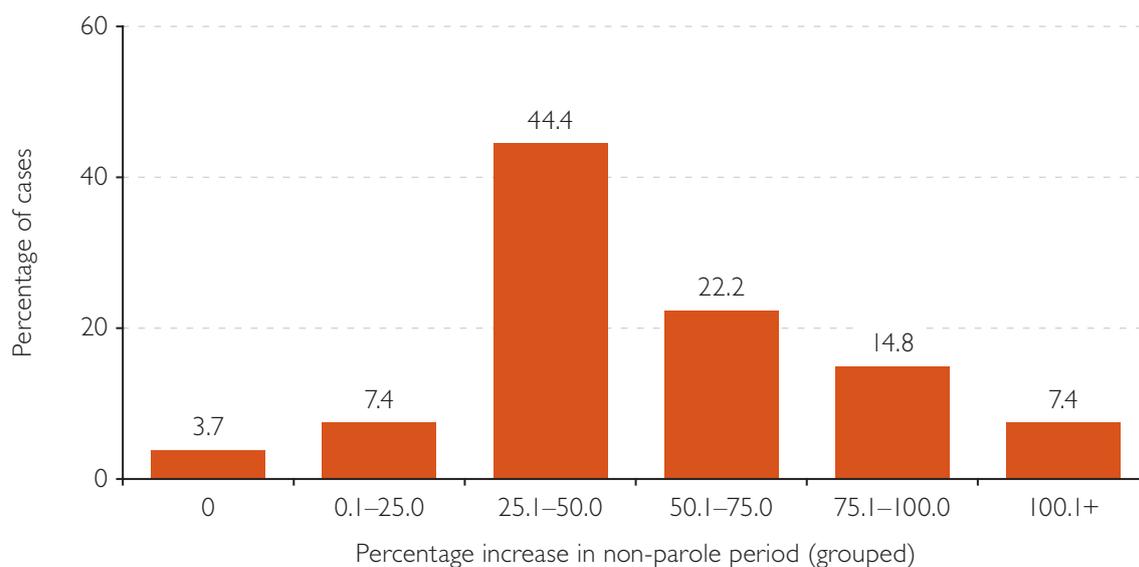
Source: AustLII and higher courts sentencing database.

Note: The size of each bubble denotes the number of cases. The precise position of each bubble in the grid is a reflection of the original non-parole period, indicated by the horizontal axis, and the degree of change to the non-parole period, indicated by the vertical axis (as a percentage of the original non-parole period).

³⁷⁷ These are *Director of Public Prosecutions v CPD* (2009) 22 VR 533 (140.0% increase in total effective sentence) and *Director of Public Prosecutions v Rongonui* (2007) 17 VR 571 (475.0% increase in total effective sentence).

- 7.51 Figure 35 shows that the percentage increase in the new non-parole period tends to decline as the length of the original non-parole period increases. It excludes one case for which the percentage increase could not be calculated, as the non-parole period increased from 0 to 45 months.
- 7.52 Figure 35 shows a pattern similar to the increases in the total effective sentence after resentencing in Figure 33. As might be expected, in most cases (88.9%) in which the total effective sentence increased, the non-parole period also increased.
- 7.53 Figure 36 shows the number of resentenced Crown appeal cases according to the percentage change to the non-parole period represented by the new non-parole period imposed in resentencing. It includes one case, presented in the 100.1+ category, in which the non-parole period increased from 0 to 45 months (this case is excluded from Figure 35).
- 7.54 The most common percentage increases in non-parole periods are between 25.1% and 50.0% (44.4%). In two cases (7.4%), the increase is over 100.0% of the original non-parole period. The average increase in non-parole period for resentenced Crown appeal cases is 20.7 months, while the mean percentage increase is 53.8% (excluding one outlier at 220.0%).
- 7.55 The mean percentage increase indicates that substantial increases to non-parole periods have been made in successful Crown appeals.

Figure 36: Percentage of resentenced Crown sentence appeals that received imprisonment before and after sentence, by percentage change in non-parole period, 2007–08 and 2008–09



Source: AustLII and higher courts sentencing database.

Summary

7.56 This chapter has examined the resentencing practices of all successful sentence appeals in the Court of Appeal from 1 July 2007 to 30 June 2009.

Offender sentence appeals

7.57 In relation to successful offender appeals, 19.5% resulted in no change, or only a minor change, to the total effective sentence. The data suggest that there are often cases involving multiple offences in which an error made in the individual sentence is corrected by the Court of Appeal and a new sentence imposed. This is so, notwithstanding the possibility that the total effective sentence may not have been inappropriate and the correction may have had little effect on the total effective sentence.

7.58 The implications of this issue have been recognised and discussed by the Court of Appeal in *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen*.³⁷⁸ Changes to individual sentences are significant and have further implications for the consistency of sentencing practices, not immediately evident from the effect of changes to the total effective sentence:

The conclusion which we have expressed with respect to a grant or refusal of leave is therefore apt to save an offender from himself or herself. The uncorrected individual sentence remains a prior conviction. Although the 'total effective sentence' is probably all that an offender immediately cares about, it is in truth the product of that and the other individual sentences and orders for cumulation/concurrency. We say 'immediately' because, if the person re-offends, that individual sentence which is manifestly too heavy, or erroneously high for some other reason ... may come back to haunt the offender as a prior conviction.³⁷⁹

7.59 A consequence of this, however, is that the current law requires time and resources to be invested in sentence appeals in which no fault can be found in the total effective sentence and/or the outcome of the appeal may have little effect on the total effective sentence. As Justice Nettle commented in the same case:

For a while after the enactment of the Criminal Procedure Act 2009 ... I dared to hope that 'a different sentence' in s 281(1)(b) meant a different total effective sentence. Were it so, it would save the lamentably large amounts of time and effort which are invested in dealing with leave applications and correcting individual sentences in cases where the total effective sentence is unexceptionable ... however ... I am compelled to agree with their Honours that 'a different sentence' means a different individual sentence for a discrete offence. Consequently, we must continue to invest time and effort in correcting individual sentences in cases in which the total effective sentence is not inappropriate. If it matters, I do not consider that the supposed objectives and advantages of correcting individual sentences in cases of that kind are sufficient to warrant the application of the resources which it entails.³⁸⁰

7.60 This analysis allows for further consideration of whether, and if so how, the current definition of 'sentence' in the *Criminal Procedure Act 2009* (Vic) should be modified, given the data on resentencing practices and the workload of the Court of Appeal.

³⁷⁸ *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen* [2010] VSCA 333 (10 December 2010).

³⁷⁹ *Ibid* [81] (Ashley and Redlich JJA).

³⁸⁰ *Ibid* [4]–[5] (Nettle JA).

Crown sentence appeals

- 7.61 In relation to successful Crown sentence appeals, the fact that both total effective sentences and non-parole periods tend to increase by substantial amounts suggests that the Director of Public Prosecutions is justified in instituting the appeals in these cases. This should, however, be balanced against the fact that just over half of the appeals only were successful during the period from July 2007 to June 2009.
- 7.62 The removal of the double jeopardy principle governing Crown appeals may affect resentencing practices in future Crown appeals determined under the new appeals framework. The *Criminal Procedure Act 2009* (Vic) expressly states that, in determining, or resentencing on, a Crown appeal against sentence, 'the Court of Appeal must not take into account any element of double jeopardy involved in the respondent being sentenced again'.³⁸¹ The Court of Appeal retains its residual discretion not to intervene, but this cannot be on the basis of double jeopardy.³⁸²
- 7.63 The effect of the removal of double jeopardy on Crown appeals will depend to some extent on the interpretation given to the relevant provisions by the Court of Appeal. The Court of Appeal's consideration of this issue in *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis*³⁸³ suggests that the removal of the principle will change the approach taken by the Court of Appeal in determining Crown appeals. In that case, the Court of Appeal unanimously held that the relevant provisions in the *Criminal Procedure Act 2009* (Vic) operate to remove the principle from all stages of the Court of Appeal's determination of Crown appeals. However, the Court of Appeal was divided on whether the principle still remains as a consideration in the Director of Public Prosecutions' discretion to lodge an appeal against sentence.³⁸⁴
- 7.64 The removal of the double jeopardy principle may allow Crown appeals to be more effective in promoting consistency in sentencing. The Court of Appeal may now provide guidance to the lower courts on the actual sentence that would have been appropriate in particular cases, rather than a sentence moderated by the concern that the offender is facing sentence for the second time.³⁸⁵
- 7.65 Further, the change to the legislation could affect both the success of Crown appeals and the sentences imposed in resentencing those cases. In the period examined by the Council, there were seven cases in which the Court of Appeal explicitly identified double jeopardy as a factor in deciding not to allow the appeal. There were other considerations in those cases. However, it is probable that, without double jeopardy, in at least some of those cases, the appeal would have been allowed and the offender's sentence increased.
- 7.66 In addition, as the principle of double jeopardy has effectively operated to reduce the sentences imposed by the Court of Appeal on a successful appeal, the removal of this 'discounting' factor may lead to an increase in the sentences imposed in resentencing in successful Crown appeals. As the mean increase in total effective sentence is already 40.0%, it is possible that the removal of the principle could lead to very significant increases in sentences on appeal, although it is difficult to predict with any level of certainty how the Court of Appeal will apply its wider discretion.

³⁸¹ *Criminal Procedure Act 2009* (Vic) ss 289(2), 290(3).

³⁸² Explanatory Memorandum, *Criminal Procedure Act 2009* (Vic) cl 298.

³⁸³ *Director of Public Prosecutions v Karazisis*; *Director of Public Prosecutions v Bogtstra*; *Director of Public Prosecutions v Kontoklotsis* (2010) 206 A Crim R 14.

³⁸⁴ *Ibid* 42–43 (Ashley, Redlich and Weinberg JJA). The minority concluded that parliament intended to remove double jeopardy as a consideration for both the Court of Appeal and the Director of Public Prosecutions: *ibid* 17, 20–23 (Warren CJ and Maxwell P). See *R v JW* (2010) 199 A Crim R 486 for a discussion of the New South Wales Court of Criminal Appeal's approach to the relevant legislation in that jurisdiction.

³⁸⁵ Explanatory Memorandum, *Criminal Procedure Act 2009* (Vic) cl 298. For a discussion of how the principle of double jeopardy limits the efficacy of Crown appeals as a vehicle for promoting consistency in sentencing, see also Hugh Donnelly, 'Sentence Appeals in New South Wales: Success Rates and Recent Law' (Paper presented at the Sentencing 2008 Conference, Canberra, 9 February 2008) 14–15.

Appendix 1

Data sources and methodology

Sources

Data in this report have been obtained from a variety of sources:

- The 2011 *Report on Government Services*³⁸⁶ is the source for time series data on the number of appeal lodgements, finalisations and pendings.
- The Victorian Office of Public Prosecutions supplied time series data on the number and success of offender sentence appeals, offender conviction appeals, Crown sentence appeals and section 582 applications for leave to appeal against sentence. These data relate to appeals in matters concerning Victorian offences.
- The Office of the Commonwealth Director of Public Prosecutions supplied time series data on the number and success of offender and Crown sentence appeals in relation to Commonwealth offences.
- The Court of Appeal supplied data that had recently become available due to the establishment of its new 'CourtView' database. These data relate primarily to financial years 2009–10, 2010–11 and the first half of 2011–12 and calendar years 2008, 2009 and 2010. In some cases, due to gaps in the CourtView data, these data have been supplemented by manual collection by Court of Appeal staff.
- The higher courts sentencing database, based on conviction returns information, is the source for data on characteristics of sentence appeal cases. This database is maintained and owned by the Business Intelligence area of the Courts and Tribunals unit of the Department of Justice, Victoria.
- The Australasian Legal Information Institute (AustLII) website³⁸⁷ is the source of data on appeal outcomes, timing of appeal determinations and grounds of appeal for sentence appeals determined between 2007–08 and 2008–09.
- The Council collected data on the grounds of appeal in sentence appeals determined and published on the AustLII website³⁸⁸ in 2008.
- The Court of Appeal also provided data, collected by its staff, on the grounds of appeal in sentence appeals determined and published on the AustLII website³⁸⁹ in 2010. The methodology used for this data collection is described on pages 132–133. The raw data in both datasets for 2008 and 2010 are contained in Appendix 2.

³⁸⁶ Steering Committee for the Review of Government Services Provision (2011), above n 172, vol 1.

³⁸⁷ Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/cases/vic/VSCA/> at 31 December 2009.

³⁸⁸ *Ibid.*

³⁸⁹ Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2011) <www.austlii.edu.au/cases/vic/VSCA/> at 9 August 2011.

Data collection and preparation

Information from appeal transcripts on the AustLII website have been obtained by reading through the transcripts themselves.

A number of analyses in this report have required comprehensive information about the case comprising the subject of a sentence appeal. This includes analyses of offence types, appealed sentences, resentencing practices, appeal rates and time between original sentence date and appeal determination date.

While transcripts of appeals have provided some information about the case being appealed, some types of information, such as date of original sentence, are not consistently present across transcripts. Therefore, another source needed to be relied on. The higher courts sentencing database, which contains information about all cases sentenced in the higher courts, has been used as both a source of primary information and a check on information contained in appeal transcripts.

Cases subject to sentence appeals were located on the AustLII website through a variety of criteria matching with information in the higher courts sentencing database (including defendant name, sentence date, offence and sentencing information). Of the 376 cases subject to appeals determined in 2007–08 and 2008–09, 19 could not be located in the higher courts sentencing database. For these cases, only the information provided in the appeal transcript has been used.

Appeal rates

The rate at which cases are appealed is a difficult concept to measure precisely, due primarily to the lag between sentencing and appeal determination. This lag means that the appeals determined in a given period may have been sentenced in a preceding period. The precise appeal rate, therefore, is not simply the number of appeals determined in a given period as a proportion of the number of sentences imposed in that period (although this can provide a crude indicator of the actual appeal rate).

Rather, the appeal rate is the proportion of all cases sentenced in a given period that are appealed at any point in the future. To measure this precisely, a group of cases sentenced over a given period needs to be established and then sufficient time needs to be allowed after that period for an appeal determination to take place. In this report, the sentencing period is July 2007 to December 2007 and the appeal period is July 2007 to December 2009. Thus, the period of time that cases have had for an appeal determination is 24 to 30 months. This has been deemed sufficient because separate analyses have found that over 90.0% of appeals determined in 2007–08 and 2008–09 were completed within two years of the original sentence.

Other indicators of appeal rate are also used in this report, including the number of all criminal appeal lodgements as a proportion of all criminal appeal finalisations in a given financial year. This has been used to compare jurisdictions. Another indicator of appeal rate is the number of all criminal appeal lodgements as a proportion of sentenced cases in the higher courts. This has been used to examine the appeal rate in Victoria over time.

Earliest release date

The earliest release date for offenders serving imprisonment sentences is required in order to compare the timing of an appeal determination with the portion of the offender's time remaining to be served. The earliest release date has been calculated by adding the number of days of a non-parole period to the original sentence date.

Earliest release dates have also been calculated for offenders serving partially suspended sentences. This date is based on the length of the non-suspended portion of the sentence and the date of sentence. Earliest release dates have not been calculated for other defendants serving non-imprisonment sentences.

These earliest release dates for imprisonment sentences and partially suspended sentences do not account for days already served prior to sentence (such as those served in pre-sentence detention), which reduce the minimum time to serve from the sentence date.

Where an offender has been sentenced while already serving a separate sentence, earliest release dates have not been determined, and these offenders are excluded from the earliest release date analysis.

Appeal outcomes

Appeal outcome includes both the success and the resentencing of the appeal. A successful appeal is deemed to be one that has been allowed by the Court of Appeal. It is straightforward to determine successful appeals for appeals against sentence only.

Appeals against both conviction and sentence, however, require a decision to be made about whether the outcome of the appeal is based on the conviction element of the appeal or the sentence element of the appeal.

As the appeal outcome analyses in this report concern only sentence appeals, conviction and sentence appeals have been excluded where the outcome is due to the conviction element of the appeal. Where the outcome is due to the sentence element of the appeal, conviction and sentence appeals have been included in the outcomes analyses.

Grounds of appeal

The data on grounds of appeal are contained in two datasets. The first dataset comprises data collected by the Council on sentence appeal cases determined in 2008. The second dataset comprises data collected by the Court of Appeal on sentence appeal cases determined in 2010. The methodology used by the Court of Appeal for the collection of these 2010 data has been adapted, in consultation with the Council, from the methodology used by the Council in the collection of the 2008 data. The Council conducted the analysis on both datasets.

Data collection for 2008 sentence appeals

The Council has collected data on grounds of appeal in sentence appeal cases determined and published between January 2008 and December 2008 on the AustLII website.³⁹⁰

There are a large number of possible grounds of appeal. To establish which grounds are sufficiently frequent to warrant a quantitative examination, information about all grounds in each appeal has been collected and analysed. The types of grounds differ between offender sentence appeals and Crown sentence appeals.

In relation to both offender and Crown sentence appeals is the issue of broad grounds and particularisations of the ground. Grounds of manifest excess or manifest inadequacy may have a large number of particularisations, such as insufficient weight given to prospects of rehabilitation or insufficient weight given to the effect on the victim. In assessing the grounds of appeal, particularisations have been treated as equivalent to grounds.

Once it has been established that a ground was raised, the Court of Appeal's treatment of the ground has been determined. A difficulty arises when the grounds raised in the appeal have not explicitly been referred to in the appeal judgment. Therefore, a multi-level system has been devised to attempt to capture meaningful information. This includes the following responses: successful, considered favourably, not considered, neutral and not successful.

Data collection for 2010 sentence appeals

The Court of Appeal has also collected data on grounds of appeal in sentence appeal cases determined and published between January 2010 and December 2010 on the AustLII website.³⁹¹ The Court of Appeal has provided these data to the Council for analysis.

The data provided by the Court of Appeal for 2010 sentence appeals have been collected using a slightly different methodology from that used for the collection of the data for 2008 sentence appeals. Thus, care should be taken in comparing the two datasets.

In offender appeals, a ground of appeal has been counted once as having been raised where:

- the matter was argued as a separate ground of appeal; or
- the matter was argued as a separate ground of appeal and raised as part of another ground of appeal, such as manifest excess.

³⁹⁰ Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2009) <www.austlii.edu.au/au/cases/vic/VSCA/> at 31 December 2009.

³⁹¹ Supreme Court of Victoria, *Supreme Court of Victoria – Court of Appeal* (AustLII, 2011) <www.austlii.edu.au/au/cases/vic/VSCA/> at 9 August 2011.

Where a matter was only raised under another ground of appeal, namely manifest excess, and not as a separate ground of appeal, it has not been coded as having been raised. Arguments have only been coded separately as having been raised if they were argued as a stand-alone ground.

For the classification of the success of grounds of appeal, a matter has been coded as successful if it was successful as a separate ground of appeal. If the matter was argued as a separate ground of appeal and as part of another ground of appeal, such as manifest excess, separate codes have been used to denote whether the matter was:

- successful as a separate ground of appeal and considered as part of a manifest excess ground; or
- not successful as a separate ground of appeal but considered as part of a manifest excess ground.

A slightly different approach has been taken to coding grounds of appeal raised in Crown appeals. Where a matter was only raised in support of a manifest inadequacy ground but was given particular attention by the Crown in argument, it has been coded as having been raised and considered as part of manifest inadequacy.

Where matters have been coded as having been raised as part of a manifest inadequacy ground, separate codes have been used to denote whether the matter was:

- successful as a separate ground of appeal and considered as part of a manifest inadequacy ground; or
- not successful as a separate ground of appeal but considered as part of a manifest inadequacy ground.

The raw data in both datasets (for 2008 and 2010) are contained in Appendix 2.

Offence

In the parts of this report that examine offences sentenced, the offence considered is the principal offence in the case. The principal offence is the offence charged that received the most severe sentence according to the sentencing hierarchy.

Glossary of data sources

Data	Period	Source	Reference in report	Details and counting rules	Jurisdiction
Criminal appeal lodgements, finalisations and pendings	1996 to 1999	Priest and Holdenson (2000)	Figure 1	Number of criminal appeals lodged, finalised and pending, by calendar year Counts criminal appeals in Court of Appeal	Victoria
	2003–04 to 2009–10	Productivity Commission (2011)	Figures 2–5	Number of criminal appeals lodged, finalised and pending, by financial year Counts criminal appeals in Court of Appeal and appeals to the Trial Division of the Supreme Court from the Magistrates' Court on a question of law	Victoria New South Wales National
	2009–10 to 2010–11	CourtView (Court of Appeal, Supreme Court of Victoria)	Paragraphs [4.52]–[4.61]	Number of criminal appeals lodged, finalised and pending, by financial year Counts criminal appeals in Court of Appeal	Victoria
Breakdown of criminal appeal lodgements	2008 to 2010	CourtView (Court of Appeal, Supreme Court of Victoria)	Figure 6	Number of criminal appeal lodgements by type of appeal, by calendar year (offender sentence, offender conviction and sentence, interlocutory criminal, Crown sentence, offender conviction, miscellaneous/not categorised)	Victoria
Criminal case lodgements in higher courts	2004–05 to 2009–10	Productivity Commission (2011)	Figure 7	Number of criminal cases lodged in the higher courts, by financial year	Victoria
Criminal appeal rate	2003–04 to 2009–10	Productivity Commission (2011)	Figure 8	Percentage of criminal appeal lodgements as a proportion of criminal case finalisations in the higher courts, by financial year Counts criminal appeals in Court of Appeal and appeals to the Trial Division of the Supreme Court from the Magistrates' Court on a question of law	Victoria New South Wales

Data	Period	Source	Reference in report	Details and counting rules	Jurisdiction
Offence types in sentence appeal cases and sentenced cases	2007–08 to 2008–09	AustLII Higher courts sentencing database	Figure 9	Percentage of Crown sentence appeals, offender sentence appeals and sentenced cases in higher courts, by principal offence	Victoria
Criminal cases sentenced in the higher courts	2001–02 to 2009–10	Higher courts sentencing database	Figure 10	Number of sentenced cases in the higher courts, by financial year Number of sentenced cases with an immediate custodial sentence in the higher courts, by financial year	Victoria
Sentence appeal rate	2003–04 to 2009–10	Higher courts sentencing database Productivity Commission (2011)	Figure 11	Percentage of criminal appeal lodgements as a percentage of all cases sentenced in the higher courts, by financial year Counts criminal appeals in Court of Appeal and appeals to the Trial Division of the Supreme Court from the Magistrates' Court on a question of law	Victoria
Listing and hearing of applications for leave to appeal against sentence	2003 to 2010	Office of Public Prosecutions (Victoria) Office of the Director of Public Prosecutions (Commonwealth)	Figure 12	Number of listed and heard applications for leave to appeal against sentence, by calendar year for sentences imposed for Victorian offences and Commonwealth offences	Victoria
Success rates of applications for leave to appeal against sentence	2003 to 2010	Office of Public Prosecutions (Victoria)	Figures 13–14	Number and percentage of granted and refused applications for leave to appeal against sentence, by calendar year for sentences imposed for Victorian offences	Victoria
Listing and hearing of substantive offender sentence and Crown sentence appeals	2003 to 2010 (offender) 2003–04 to 2009–10 (Crown)	Office of Public Prosecutions (Victoria) Office of the Director of Public Prosecutions (Commonwealth)	Figures 15–16	Number of listed and heard substantive offender sentence appeals and Crown sentence appeals, by calendar year for sentences imposed for Victorian offences and Commonwealth offences	Victoria

Data	Period	Source	Reference in report	Details and counting rules	Jurisdiction
Success rates of substantive offender sentence appeals	2003 to 2010	Office of Public Prosecutions (Victoria) Office of the Director of Public Prosecutions (Commonwealth)	Figures 17–18	Number and percentage of allowed and dismissed substantive offender sentence appeals, by calendar year for sentences imposed for Victorian offences and Commonwealth offences	Victoria
Success rates of Crown sentence appeals	2000–01 to 2009–10	Office of Public Prosecutions (Victoria) Office of the Director of Public Prosecutions (Commonwealth)	Figures 19–20	Number and percentage of heard and allowed Crown sentence appeals, by calendar year for sentences imposed for Victorian offences and Commonwealth offences	Victoria
Likelihood of a sentence being appealed	1 July 2007 to 31 December 2007	AustLII Higher courts sentencing database	Figure 21	Percentage of cases sentenced that are appealed and resented, by length of original imprisonment length, July 2007 to December 2007	Victoria
Timing between hearing and determination of sentence appeals	2007–08 to 2008–09	AustLII	Figure 22	Percentage of sentence-only appeals determined by time, grouped by months, between hearing and judgment date, by financial year Includes offender sentence-only and Crown sentence appeals but excludes offender appeals against conviction and sentence	Victoria
	2009–10 to 2010–11	CourtView (Court of Appeal, Supreme Court of Victoria)	Figure 23	Percentage of sentence-only appeals determined by time, grouped by months, between hearing and judgment date, by financial year Includes offender and Crown appeals but excludes offender appeals against conviction and sentence	Victoria

Data	Period	Source	Reference in report	Details and counting rules	Jurisdiction
Timing of sentence appeal outcomes	2007–08 to 2008–09	AustLII Higher courts sentencing database	Figures 24–25	Percentage of sentence appeals by time, grouped by months, between original sentence date and appeal judgment date, by financial year Percentage of sentence appeal cases with a non-parole period, by length of non-parole period and timing of appeal decision, by financial year	Victoria
Grounds of appeal in sentence appeals	2008	AustLII (coded by the Sentencing Advisory Council)	Tables 1, 3 Appendix 2, Tables A–B	Number and percentage of grounds raised and successful grounds in sentence appeals, by type of appeal, offender and Crown, calendar year 2008	Victoria
	2010	AustLII (coded by the Court of Appeal)	Tables 2, 4 Appendix 2, Tables C–E	Number and percentage of grounds raised and successful grounds in sentence appeals, by type of appeal, offender and Crown, calendar year 2010	Victoria
Resentencing in sentence appeals	2007–08 to 2008–09	AustLII (coded by the Sentencing Advisory Council) Higher courts sentencing database	Figures 26–36	Number of resentenced offender and Crown sentence appeals by changes, in years and percentage, in total effective sentence and non-parole period, by financial year Includes offender sentence-only, offender conviction and sentence and Crown sentence appeals but excludes offender appeals against sentence and conviction where the sentence has been changed as a result of a conviction being quashed	Victoria

Appendix 2

Raw grounds of appeal data

Table A: Number and percentage of offender sentence appeals by ground of appeal raised and treatment of ground, 2008

Ground	Number of offender appeals where ground raised	Treatment where ground raised		
		Successful/considered favourably	Neutral treatment/not considered	Not successful
Manifest excess	81	28	10	43
Approach to totality	21	9	5	7
Approach to parity	24	6	5	13
Weight to guilty plea/assistance to police	37	17	5	15
Weight to rehabilitation/prospects of rehabilitation	29	11	4	14
Weight to youth	8	2	2	4
Weight to deterrence	8	2	1	5
Weight to offending history/prior convictions	9	2	1	6
Weight to hardship of offender/family	11	1	1	9
Weight to mental illness/disability	17	4	3	10
Weight to drug/alcohol/gambling addiction	12	4	1	7
Weight to delay	12	3	1	8
Allowed irrelevant facts	6	2	0	4
Mistook facts	20	8	1	11
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	8	6	0	2
Approach to <i>Confiscation Act 1997</i> (Vic) ss 5(2)(A)–(B)	2	2	0	0
Applicable maximum penalty	6	6	0	0
Increase in maximum penalty	2	0	0	2
Clerical error in sentencing	2	2	0	0

Table A cont.: Number and percentage of offender sentence appeals by ground of appeal raised and treatment of ground, 2008

Ground	% of offender appeals	% of offender appeals where ground raised		
		Successful/considered favourably	Neutral treatment/not considered	Not successful
Manifest excess	71.1	34.6	12.3	53.1
Approach to totality	18.4	42.9	23.8	33.3
Approach to parity	21.1	25.0	20.8	54.2
Weight to guilty plea/assistance to police	32.5	45.9	13.5	40.5
Weight to rehabilitation/prospects of rehabilitation	25.4	37.9	13.8	48.3
Weight to youth	7.0	25.0	25.0	50.0
Weight to deterrence	7.0	25.0	12.5	62.5
Weight to offending history/prior convictions	7.9	22.2	11.1	66.7
Weight to hardship of offender/family	9.6	9.1	9.1	81.8
Weight to mental illness/disability	14.9	23.5	17.6	58.8
Weight to drug/alcohol/gambling addiction	10.5	33.3	8.3	58.3
Weight to delay	10.5	25.0	8.3	66.7
Allowed irrelevant facts	5.3	33.3	0.0	66.7
Mistook facts	17.5	40.0	5.0	55.0
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	7.0	75.0	0.0	25.0
Approach to <i>Confiscation Act 1997</i> (Vic) ss 5(2)(A)–(B)	1.8	100.0	0.0	0.0
Applicable maximum penalty	5.3	100.0	0.0	0.0
Increase in maximum penalty	1.8	0.0	0.0	100.0
Clerical error in sentencing	1.8	100.0	0.0	0.0

Source: AustLII.

Note: The percentage breakdown of treatment of grounds for grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers. The table contains data on grounds argued in two or more cases only.

Table B: Number and percentage of Crown sentence appeals by ground of appeal raised and treatment of ground, 2008

Ground	Number of Crown appeals where ground raised	Treatment where ground raised		
		Successful/considered favourably	Neutral treatment/not considered	Not successful
Manifest inadequacy	33	19	0	14
Weight to denunciation	16	7	3	6
Weight to general deterrence	25	11	1	13
Weight to specific deterrence	21	7	3	11
Weight to seriousness of offending	24	12	0	12
Weight to offence seriousness	14	6	1	7
Weight to effect on victim	19	8	3	8
Other error of law	4	2	0	2
Weight to offending history/prior convictions	11	2	2	7
Weight to absence of remorse	4	1	0	3
Weight to maximum penalty	11	4	4	3
Regard to current sentencing practices	7	2	4	1
Weight to youth	4	3	0	1
Weight to rehabilitation/prospects of rehabilitation	7	6	1	0
Weight to guilty plea/assistance to police	3	1	1	1
Weight to denunciation	16	7	3	6
Weight to general deterrence	25	11	1	13
Weight to specific deterrence	21	7	3	11

Table B cont.: Number and percentage of Crown sentence appeals by ground of appeal raised and treatment of ground, 2008

Ground	% of Crown appeals	% of Crown appeals where ground raised		
		Successful/ considered favourably	Neutral treatment/ not considered	Not successful
Manifest inadequacy	97.1	57.6	0.0	42.4
Weight to denunciation	47.1	43.8	18.8	37.5
Weight to general deterrence	73.5	44.0	4.0	52.0
Weight to specific deterrence	61.8	33.3	14.3	52.4
Weight to seriousness of offending	70.6	50.0	0.0	50.0
Weight to offence seriousness	41.2	42.9	7.1	50.0
Weight to effect on victim	55.9	42.1	15.8	42.1
Other error of law	11.8	50.0	0.0	50.0
Weight to offending history/prior convictions	32.4	18.2	18.2	63.6
Weight to absence of remorse	11.8	25.0	0.0	75.0
Weight to maximum penalty	32.4	36.4	36.4	27.3
Regard to current sentencing practices	20.6	28.6	57.1	14.3
Weight to youth	11.8	75.0	0.0	25.0
Weight to rehabilitation/prospects of rehabilitation	20.6	85.7	14.3	0.0
Weight to guilty plea/assistance to police	8.8	33.3	33.3	33.3
Weight to denunciation	47.1	43.8	18.8	37.5
Weight to general deterrence	73.5	44.0	4.0	52.0
Weight to specific deterrence	61.8	33.3	14.3	52.4

Source: AustLII.

Note: The percentage breakdown of treatment of grounds for grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

Table C: Number and percentage of offender sentence appeals by ground of appeal raised and treatment of ground, 2010

Ground	Grounds raised		Treatment where ground raised							
	Number of offender appeals	% of offender appeals	S	CF	NC	N	NS	CU	C (ME)	S (ME)
			% of offender appeals where ground raised							
Manifest excess	126	82.4	28.6	5.6	8.7	0.0	55.6	1.6	0.0	0.0
Approach to totality	21	13.7	14.3	0.0	19.0	0.0	47.6	0.0	19.0	0.0
Approach to parity	28	18.3	32.1	7.1	0.0	0.0	53.6	3.6	3.6	0.0
Weight to guilty plea/ assistance to police	27	17.6	14.8	7.4	3.7	0.0	29.6	0.0	44.4	0.0
Weight to rehabilitation/ prospects of rehabilitation	6	3.9	0.0	0.0	16.7	0.0	33.3	0.0	33.3	16.7
Weight to youth	3	2.0	0.0	0.0	0.0	0.0	33.3	0.0	66.7	0.0
Weight to deterrence	7	4.6	14.3	0.0	14.3	0.0	42.9	0.0	14.3	14.3
Weight to offending history/prior convictions	3	2.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Weight to hardship of offender/family	6	3.9	0.0	0.0	0.0	0.0	50.0	0.0	50.0	0.0
Weight to treatment of mental illness/disability and approach to 'Verdins' framework ^a	17	11.1	23.5	0.0	0.0	0.0	47.1	0.0	23.5	5.9
Weight to delay	12	7.8	0.0	0.0	0.0	8.3	50.0	0.0	41.7	0.0
Allowed irrelevant facts	19	12.4	15.8	0.0	10.5	0.0	73.7	0.0	0.0	0.0
Error of fact	31	20.3	32.3	0.0	6.5	0.0	58.1	3.2	0.0	0.0
Error as to, or excessive, cumulation	15	9.8	20.0	6.7	26.7	0.0	46.7	0.0	0.0	0.0
Error in characterisation or assessment of offence seriousness	6	3.9	33.3	0.0	16.7	0.0	33.3	0.0	16.7	0.0
Approach to <i>Sentencing Act 1991</i> (Vic) pt 2A (serious offenders) or pt 2B (continuing criminal enterprise offenders)	4	2.6	50.0	0.0	0.0	0.0	25.0	0.0	25.0	0.0
Applicable maximum penalty	4	2.6	50.0	0.0	0.0	0.0	50.0	0.0	0.0	0.0
Clerical error in sentencing	6	3.9	33.3	0.0	0.0	0.0	50.0	16.7	0.0	0.0
Natural justice/procedural fairness	9	5.9	33.3	0.0	11.1	0.0	55.6	0.0	0.0	0.0

Table C cont.: Number and percentage of offender sentence appeals by ground of appeal raised and treatment of ground, 2010

Ground	Grounds raised		Treatment where ground raised							
	Number of offender appeals	% of offender appeals	S	CF	NC	N	NS	CU	C (ME)	S (ME)
			% of offender appeals where ground raised							
Failure to take into account delay	2	1.3	100.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Error in approach to, insufficient discount for or failure to take into account, 'dead' or 'Renzella' ^b time	5	3.3	20.0	0.0	0.0	20.0	60.0	0.0	0.0	0.0
Other error of law	15	9.8	40.0	0.0	6.7	6.7	40.0	0.0	6.7	0.0
Fresh evidence	13	8.5	38.5	0.0	7.7	0.0	53.8	0.0	0.0	0.0
'Other error' ^c	47	30.7	–	–	–	–	–	–	–	–
Use of subsequent materials	9	6.3	–	–	–	–	–	–	–	–
Crown concession	25	19.5	–	–	–	–	–	–	–	–

S = successful as a separate ground of appeal, CF = considered favourably, NC = not considered, N = neutral, NS = not successful, CU = considered unfavourably, C(ME) = not successful as a separate ground of appeal but considered as part of manifest excess, S(ME) = successful as a separate ground of appeal and considered as part of manifest excess.

- ^a This includes both errors of weight and errors made within the framework required by the decision of *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269. For example, it includes alleged errors in the assessment of an offender's moral culpability based on mental illness and failure to take into account the hardship of prison.
- ^b *R v Renzella* [1997] 2 VR 88. This refers to pre-sentence detention that section 18 of the *Sentencing Act 1991* (Vic) does not apply to, that is, pre-sentence detention in respect of an offence carrying a sentence of imprisonment or a period of detention that is not deducted from the sentence imposed.
- ^c For offender appeals, this table only shows grounds argued in two or more cases. There are 47 instances of error in offender appeals that appears only once in cases and thus these are coded and described as 'other error'. These errors and their success rates are listed in Table E.

Source: Court of Appeal, Supreme Court of Victoria.

Note: These data have been collected using a different methodology from that used to collect the data on grounds of appeal in sentence appeals determined in 2008. The percentage breakdown of treatment of grounds for grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers. The table contains data on grounds argued in two or more cases only.

Table D cont.: Number and percentage of Crown sentence appeals by ground of appeal raised and treatment of ground, 2010

Ground	Grounds raised	%	Treatment of grounds							
	Number of Crown appeals	% of Crown appeals	S	CF	NC	N	NS	CU	C (MI)	S (MI)
			% of Crown appeals where ground raised							
Weight to maximum penalty	3	7.4	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Regard to current sentencing practices	1	11.1	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Weight to youth	2	40.7	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Weight to rehabilitation/prospects of rehabilitation	2	7.4	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Weight to guilty plea	3	22.2	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0
Other error	4	17.4	–	–	–	–	–	–	–	–
Court exercised residual discretion not to intervene	No.	%	–	–	–	–	–	–	–	–
	7	25.9	–	–	–	–	–	–	–	–

S = successful as a separate ground of appeal, CF = considered favourably, NC = not considered, N = neutral, NS = not successful, CU = considered unfavourably, C(MI) = not successful as a separate ground of appeal but considered as part of manifest inadequacy, S(MI) = successful as a separate ground of appeal and considered as part of manifest inadequacy.

Source: Court of Appeal, Supreme Court of Victoria.

Note: These data have been collected using a different methodology from that used to collect the data on grounds of appeal in sentence appeals determined in 2008. The percentage breakdown of treatment of grounds for grounds raised in fewer than 10 cases should be interpreted with caution because of volatility due to small numbers.

Table E: Grounds argued in one instance only and collected under 'other' grounds of appeal in offender sentence appeal cases, 2010

No.	List of grounds of appeal coded under 'other'	Treatment of ground
1	Insufficient weight to offender's sexual abuse as child	Not successful
2	Uncertainty in basis for sentencing	Not successful
3	Failure to set minimum term	Successful as a separate ground of appeal
4	Failure to comply with <i>Sentencing Act 1991</i> (Vic) s 14	Successful as a separate ground of appeal
5	Double punishment	Not successful
6	Failure to have regard to victim's attitude	Not successful
7	No regard to relationship breakdown	Not successful
8	Treating drug consumption as aggravating	Not successful
9	Failure to comply with <i>Crimes Act 1914</i> (Cth) s 16F(1)	Not successful
10	Incorrect test of liability applied	Neutral
11	NPP imposed did not reflect judge's stated intention	Successful as a separate ground of appeal
12	Error in concluding culpability equal to co-offender	Not successful
13	Error in assessing level of remorse	Not successful
14	Relationship between NPP and TES	Not successful
15	Excessive weight to consequences for victim	Not successful as a separate ground of appeal but considered as part of manifest excess
16	Insufficient weight to victims' attitudes	Not successful
17	Too much weight to maximum penalty	Not considered
18	Insufficient weight to prospect of deportation	Not successful
19	Failure to have regard to applicant's distress	Not successful
20	Erroneous submission as to range	Not successful
21	Treating failure to assist as aggravating	Not successful
22	Sentence does not reflect judge's intention due to Commonwealth complexities	Successful as a separate ground of appeal
23	High NPP without explanation	Successful as a separate ground of appeal
24	Failure to have regard to prospect of deportation	Successful as a separate ground of appeal
25	Error in approach to NPP	Not successful
26	Failure to give any or sufficient weight to company finances, cost of upgrades, contribution to tourism industry	Not successful as a separate ground of appeal but considered as part of manifest excess
27	Error in approach to licence disqualification	Neutral

Table E cont.: Grounds argued in one instance only and collected under 'other' grounds of appeal in offender sentence appeal cases, 2010

No.	List of grounds of appeal coded under 'other'	Treatment of ground
28	Insufficient weight to provocation	Not successful as a separate ground of appeal but considered as part of manifest excess
29	Error in reducing weight given to remorse due to belief complainant was a willing participant	Successful as a separate ground of appeal
30	Failure to have regard to social isolation arising from imprisonment	Successful as a separate ground of appeal
31	Judge incorrectly characterised appellant's role	Not successful
32	Insufficient weight to police abuse	Not considered
33	Different sentence imposed from that intended	Successful as a separate ground of appeal
34	Failure to differentiate between past and future cooperation	Not considered
35	Insufficient weight to health problems	Not successful as a separate ground of appeal but considered as part of manifest excess
36	Need for protective custody	Not successful as a separate ground of appeal but considered as part of manifest excess
37	Good character	Not successful as a separate ground of appeal but considered as part of manifest excess
38	Ill health of applicant not properly taken into account	Successful as a separate ground of appeal
39	Excessive NPP	Successful as a separate ground of appeal
40	Error in assessment of rehabilitation prospects	Not successful
41	Error in construction of sentence and NPP (Commonwealth/state issue)	Not successful
42	Insufficient weight given to influence of father on offending	Not successful as a separate ground of appeal but considered as part of manifest excess
43	Incorrect exercise of power to impose residential treatment order	Successful as a separate ground of appeal
44	Failure to find mitigating factor – intoxication	Not successful
45	Too much weight to protection of the community	Considered favourably
46	Weight to drug/alcohol/gambling addiction	Not successful
47	Approach to <i>Confiscation Act 1997</i> (Vic) ss 5(2)(A)–(B)	Not successful

Source: Court of Appeal, Supreme Court of Victoria.

Note: These data have been collected using a different methodology from that used to collect the data on grounds of appeal in sentence appeals determined in 2008.

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