

# Sentence Appeals in Victoria

In March 2012, the Sentencing Advisory Council published a statistical research report on sentence appeals. The report was the culmination of extensive research conducted as part of a project to examine the broader operation of sentence appeals in Victoria.

## Background

This research was prompted by a number of concerns that had been expressed in relation to sentence appeals in recent years, particularly with regard to:

- the backlog of criminal appeals in the Court of Appeal in Victoria;
- the number of appeals against sentence by the Crown given the traditional principle that such appeals should be a 'rarity'; and
- the treatment of sentence appeals, including success rates, successful grounds of appeal and the effect of resentencing in successful sentence appeals.

A lack of available data to inform discussions of these concerns prompted the Council to undertake this project, under its statutory functions of providing statistical information on sentencing, conducting research and disseminating information on sentencing matters to members of the judiciary and other interested persons.

The report examines data from a range of sources on criminal and sentence appeals over different time periods within the context of the sentencing and appeal frameworks in Victoria.

In analysing the data, the Council consulted extensively with the Court of Appeal in the Supreme Court of Victoria and the County Court of Victoria. This consultation process involved discussions of data analysis in a consultation paper and the collection of additional data. The Council also discussed the data with a number of key stakeholders, including the Office of Public Prosecutions, Victoria Legal Aid and criminal appeal barristers.

## Sentencing and Appeal Frameworks

The Court of Appeal plays a crucial role in sentencing in Victoria. It reviews sentences imposed by judges of the County Court and the Supreme Court and determines whether an error has been made in the sentencing process. In doing so, the Court of Appeal may also provide guidance to sentencing judges about the correct approach to sentencing.

The framework governing sentence appeals is set out in legislation and the common law. The introduction of the *Criminal Procedure Act 2009* (Vic) changed the law in relation to Crown and offender sentence appeals. Prior to this, appeals against sentence were governed by provisions in the *Crimes Act 1958* (Vic) and the common law. Appeals against sentences imposed on or after 1 January 2010 are now governed by the *Criminal Procedure Act 2009* (Vic), which enshrines many common law principles.

Under the 'instinctive synthesis' approach set out in Australian common law and followed in Victoria, the sentencing 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 this process does the judge determine the sentence. While judges are encouraged to state the factors that they have taken into account in determining the sentence, they are discouraged from quantifying the precise weight given to any single factor.

The instinctive synthesis approach allows for a high level of individual discretion for sentencing judges. Under this approach it is accepted that there is no one correct sentence for any particular case, but there will be a range of sentences that may be appropriate within 'an ambit of reasonable disagreement'. However, this must also be balanced with the fundamental principle of achieving consistency in the approach to sentencing.

## Key Findings

### Backlog of Criminal Appeals

Trend data on criminal appeals examined in the report show that, between 2003–04 and 2009–10, there was a large and growing backlog of pending criminal appeals in the Court of Appeal. At the peak of the backlog, in 2009–10, when there were 569 pending criminal appeals, Victoria had the largest criminal appeal backlog compared with all other Australian states and territories.

The report finds that the immediate cause of the backlog, as it stood in 2009–10, was that increases in the number of criminal appeals lodged outnumbered criminal appeals finalised in each year. In particular, there were strong increases in lodged criminal appeals from 2005–06 to 2009–10. The differences over a number of years between criminal appeals lodged and criminal appeals finalised resulted in an accumulation of pending criminal appeal cases (Figure 1).

The report examines a number of possible reasons for the observed increases in criminal appeal lodgements and the subsequent backlog. It has not been possible to define the precise role of each factor, but the report sheds light on the following:

- Sentence appeals comprise a substantial proportion (approximately 60%) of the Court of Appeal's workload.
- The increase in criminal lodgements cannot simply be attributed to any significant increase in the *number* of criminal cases in the higher courts from which an appeal may be lodged. Rather, there has been increases in the *rate* at which such cases are appealed; that is, there have been increases in the proportion of higher court criminal cases that were appealed between 2005–06 and 2009–10.
- While there is some evidence of an increase in sentence severity between 2003–04 and 2009–10, investigation of the relationship between sentencing practices and the rate at which sentences are appealed was inconclusive.
- Reforms to sexual assault laws since 2006–07 have resulted in an increase in the number of sexual offence matters initiated and finalised in the County Court. Over this period, there have been increases in the proportion of criminal appeals that involve sexual offences. Sexual offences comprise a substantial proportion of the Court of Appeal's workload. In particular, rape is over-represented in both offender and Crown sentence appeals. Sexual offence cases may result in sentence appeals more commonly than in cases involving other types of offence.

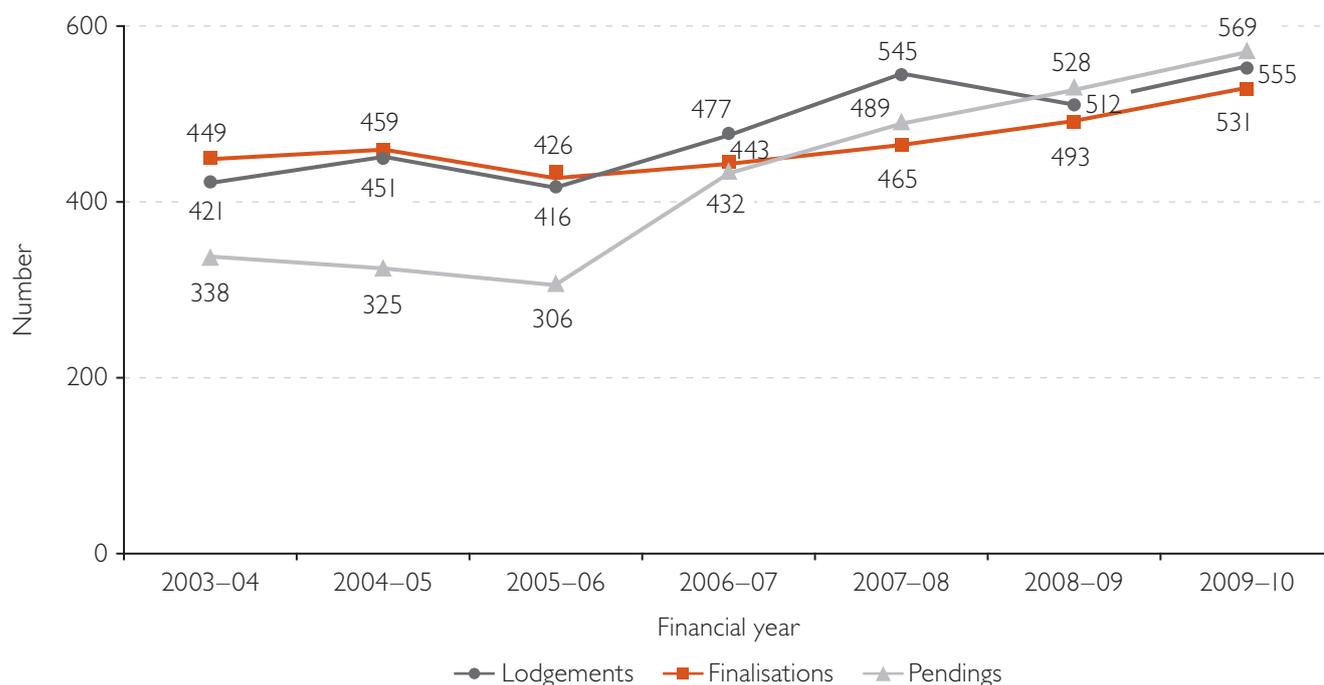
The report also analyses the most recent data available from the Court of Appeal's CourtView database. These data show that in the most recent years the backlog of criminal appeals in Victoria has dropped substantially. The number of pending criminal appeals reduced from 548 in 2009–10 to 404 in 2010–11. Criminal 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. Data for the first half of 2011–12 show that, while there is still a backlog, the number of pending criminal appeals has further reduced to 259 as at 31 December 2011.

A significant reform over this period has been the introduction by the Supreme Court of an 'intensive management' model of criminal appeal cases. The new regime is based on the Criminal Division of the Court of Appeal of England and Wales and applies to all criminal appeals lodged on or after 28 February 2011. 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 hearing where possible and more stringent monitoring of compliance with procedural timetables. A new Judge of Appeal position was also created in 2009, taking the number of Judges of Appeal from 11 to 12.

Data on the timing of sentence appeals confirm the need for the measures that have been put in place to address delay and reduce the criminal appeal backlog. 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. In almost one-third of cases, offenders had served more than half of the non-parole period when the appeal was determined. This is so despite the fact that 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. For example, in 2009–10 and 2010–11, almost 40% of sentence appeal judgments were delivered on the same day as the appeal hearing.

The report concludes that the reduction in the backlog provides an early indication of the positive effect of the significant legislative and procedural reforms to criminal appeals, although it is too early to conclusively determine their long-term impact on criminal appeal trends.

**Figure 1: Number of criminal appeal lodgements, finalisations and pendencies, by financial year, 2003–04 to 2009–10**



Source: Productivity Commission (2011)

## Hearing and Success Rates of Sentence Appeals

The report also examines detailed trends in the hearing and success rates of offender and Crown sentence appeals.

Overall, the rates at which sentence appeals are lodged and successfully resentenced are relatively low compared with the number of sentences imposed in the higher courts. For example, of all the cases sentenced between July and December 2007, in 8.2% a sentence appeal was lodged and in 3.2% the offender was resentenced. However, the likelihood of a sentence being appealed and successfully resentenced increases where the appealed sentence is one of imprisonment and as the imprisonment length increases. For example, in the same pool of cases sentenced, of those that involved a sentence of imprisonment of more than three years, 11.6% were successfully appealed.

### Offender Sentence Appeals

Offenders sentenced in the higher courts do not have an automatic right to appeal against their sentence; they must first obtain leave to appeal from the Court of Appeal. The usual practice of the Court of Appeal is that this hearing is conducted by one Judge of Appeal. This process is designed to operate as a filter so that there is a substantive sentence appeal hearing (heard by two or more Judges of Appeal) only in cases that have merit.

The data show that, between 2008 and 2010, there were increases in the listing and hearing of applications for leave to appeal against sentence and substantive offender sentence appeals. This may indicate that more sentence appeals are being lodged. This could also indicate that the recent reforms introduced by the Court of Appeal to target delay are increasing the Court of Appeal's capacity to hear and determine more offender sentence appeals.

There have also been changes in the success rates for offender sentence appeals in the seven-year period examined in the report.

Prior to 2008, the success rates for both applications for leave to appeal and substantive sentence appeals were increasing. The success rates of applications for leave to appeal reached a peak of 71.8% in 2007. From 2008 to 2010, this trend declined to 50.2%. This change in the success rates could be linked to a change in the law for determining such applications introduced by the *Criminal Procedure Act 2009* (Vic).

The success of substantive sentence appeals increased to reach a peak of 61.8% in 2008 and have since fluctuated (Figure 2).

### Crown Sentence Appeals

Crown sentence appeals differ from offender sentence appeals in a number of ways, partly due to the historical concerns about giving the Crown a right of appeal. Traditionally, Crown appeals were only to be brought in rare and exceptional circumstances, for example, in cases that 'shocked the public conscience' or to establish a point of principle. The Court of Appeal also has a discretion not to intervene in Crown appeals, even if it thinks the sentence imposed at first instance was too lenient. This discretion may be exercised having regard to a number of considerations, including delay, rehabilitation, parity, totality or fault on the part of the Crown. Even if the Court of Appeal considered that an error had been made in the sentence, the sentencing double jeopardy principle required the Court of Appeal to impose a lesser sentence than the sentence that it thinks should have been imposed to recognise that the offender had already faced sentence. The double jeopardy principle was abolished by the *Criminal Procedure Act 2009* (Vic) but applied to the sentence appeals analysed in the report.

The report shows that in the past decade to 2009–10, the number of Crown sentence appeals increased. While they are far from common compared with offender appeals – for example, in 2007–08 and 2008–09 there were 76 Crown appeals compared with 300 offender appeals – Crown sentence appeals can no longer be described as a 'rarity'.

The success rates of Crown sentence appeals have fluctuated over the past decade, although overall the trend has been downward. Thus, it is unclear whether success rates have had a role in increasing the prevalence of Crown sentence appeals. Over the period examined, there have been changes in sentence appeals policy made by different Directors of Public Prosecutions that may have also contributed to the increased numbers. However, it is not expected that the removal of the double jeopardy principle will affect the frequency of Crown sentence appeals. The principle is still relevant to the decision by the Director of Public Prosecutions to lodge an appeal against sentence.

### Grounds of Appeal

The report makes available, for the first time, disaggregated data from two discrete time periods (2008 and 2010) on the grounds of appeal argued in sentence appeals and found to be successful by the Court of Appeal.

The instinctive synthesis approach to sentencing means that the scope for appellate intervention is narrowly confined. Gaining an accurate knowledge of the nature of the grounds of appeal in sentence appeals leads to a better understanding of the work of the County and Supreme Courts in imposing sentences and the Court of Appeal in their review on appeal.

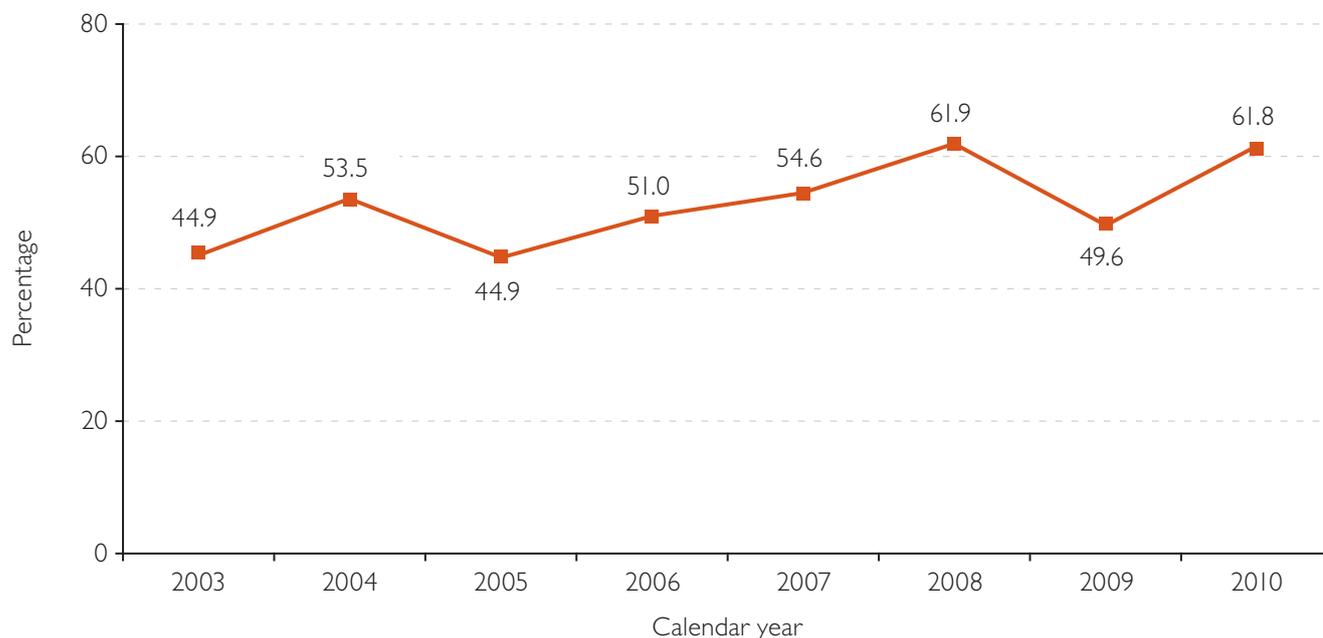
The data in the report show that these matters are overlapping and complex. In each appeal case, applicants may have argued more than one ground of appeal. Further, there may be an overlap in the relevance of particular issues between different grounds of appeal. Despite this, the data show consistent trends in the types of errors argued as grounds of appeal and found by the Court of Appeal to have been made in the sentencing process.

The most prevalent grounds of appeal argued and found to have been successful in 2008 and 2010 relate to the sentence being too harsh (manifest excess) or too lenient (manifest inadequacy).

The grounds of manifest excess and manifest inadequacy are ordinarily difficult to establish. They focus on whether the sentence is clearly outside the range of sentences open to the sentencing judge in the circumstances of the case. They are linked to one of the main functions of the sentence appeal process: 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.

Also common were grounds of appeal relating to the weight given to specific sentencing factors or principles, such as weight to guilty plea or weight to prior convictions. Under the instinctive synthesis approach to sentencing in Victoria, judges must not identify or apportion a precise weight to any individual sentencing factor or principle. Therefore, issues relating to the weight given to such factors and principles are not specific sources of sentencing error but are considered to be particulars of the broader grounds of manifest excess or manifest inadequacy and are determined by the Court of Appeal looking at the sentence ultimately arrived at.

**Figure 2: Percentage of offender sentence appeals allowed by the Court of Appeal, by calendar year, 2003 to 2010 (sentences imposed for Victorian offences)**



### **Resentencing in Successful Sentence Appeals**

Finally, the report provides for the first time analysis of data on resentencing practices in sentence appeals in 2007–08 and 2008–09.

In resentencing, the Court of Appeal may make changes to 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 data in the report show different trends for Crown and offender sentence appeals in terms of the impact that changes made in resentencing have on total effective sentences and non-parole periods.

For offender sentence appeals, resentencing can often result in no or minimal changes to the original overall sentencing outcome. The overall mean percentage reduction in total effective sentence was 16.8%. In 19.5% of successful offender appeals in the relevant period, resentencing resulted in no change being made to the original total effective sentence. In 13.1% of successful offender appeals, resentencing resulted in no change being made to the original non-parole period.

In contrast, when Crown sentence appeals were successful, this resulted in substantial increases from the original sentencing outcome. The overall mean percentage increase in the total effective sentence was 39.4%. In the vast majority of successful Crown sentence appeals, the increase in total effective sentence in resentencing was over 30%. In four in 10 successful Crown sentence appeals, resentencing resulted in increases of more than 50% of the non-parole period. These appeals were determined when the sentencing double jeopardy principle applied. Since its abolition, higher success rates for Crown sentence appeals and greater increases in sentences in successful Crown sentence appeals may be expected.

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