The Court of Appeal

Review of the 2011/12 Legal Year

July 2011 – June 2012

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Introduction

This is a review of the work of the Court of Appeal. It covers the legal year 2011/12 and records the work and performance of the Court of Appeal during that year.

The most important development in the Court of Appeal during the year was the introduction of criminal appeal reforms, which came into operation on 28 February 2011. The goal of the reforms is to expedite the hearing and resolution of criminal appeals consistent with justice.

This report outlines the impact of those reforms. The reforms, known as the Ashley-Venne Reforms, were modelled on the criminal appeal procedures of the English Court of Appeal with local adjustments.

The reforms were developed by Justices Ashley and Nettle of the Court of Appeal with the support of the Chief Justice and the President of the Court of Appeal. The reforms were endorsed by the Court and implemented in February 2011. The reforms have been supported by successive governments.

The criminal appeal reforms are set out in the Supreme Court of Victoria Practice Direction No 2 of 2011. The key aspects of the current criminal appeals regime are:

- the requirement for an applicant for leave to appeal to file a written case (10 pages maximum) accompanying the grounds of appeal which outlines the arguments in support of each ground.
- provision for the respondent to file a written case in response.
- closer management of each application for leave and appeal, if leave is granted, by the Registry of the Court including Registry lawyers appointed to manage cases from initiation to determination.
- Registry lawyers providing the Court and parties with a neutral summary that outlines the facts in each appeal.

Important to the success of the reforms has been a reference group made up of relevant Courts, agencies and bodies (Victoria Legal Aid, Victorian Office of Public Prosecutions, Law Institute of Victoria, Victorian Bar, Commonwealth DPP and Victorian Government Reporting Service, the County Court and Supreme Court of Victoria).

Establishing a reference group to oversee the implementation of the reforms and ensure effective communication between the Courts, agencies and relevant bodies was the suggestion of David Ware, the CEO of the Supreme Court. The reference group, chaired by Justice Maxwell the President of the Court of Appeal, met frequently in the first year of the reforms and continues to meet regularly. The reference group continues to monitor progress and receive feedback on the operation of the reforms. The assistance and contribution of the reference group members and organisations is acknowledged.

The success of the criminal appeal reforms has encouraged the Court to consider recommending similar reforms for civil appeals.

This report includes summaries of decisions handed down by the Court in the period July 2011- June 2012. The summaries represent a cross-section of the work of the Court with an emphasis on cases which establish a new principle, give guidance to lower courts, or apply the law to an interesting factual scenario. The bulk of the case summaries in this report were drafted by Sharyn Broomhead, former associate to the President, and Sophie Rushton, my former associate. I express my thanks to them.

This report contains statistics on the performance of the Court in the 2011/12 year (from page 55). I acknowledge the assistance of Michael Howe, Matthew French and Chris Temperley of the Court in preparing the statistics for inclusion in this report.

Mark Pedley

Judicial Registrar
Court of Appeal

May 2013

The work of the Registry

The 2011/12 financial year was a very successful year for the Court of Appeal. The impact of the criminal appeal reforms (see p2 and below) enabled the backlog of criminal appeals to be reduced dramatically. At the same time, the Court increased the number of civil appeals heard. Throughout the year, the Registry provided excellent support to the Court in achieving its goals.

The Court of Appeal Registry is responsible for vetting, processing and managing criminal and civil appeals and applications filed with the Court, to ensure they are determined expeditiously. Since the reforms relating to criminal appeals were adopted the Registry has provided the Court and the parties with a neutral summary of each criminal appeal to assist the Court in its preparation and the hearing of the appeal.

Criminal Appeals

From 28 February 2011, criminal appeals have been managed under a criminal appeals system known as the Ashley-Venne reforms. These reforms are modelled on the practices and procedures of the English Court of Appeal with local adjustments. Associate Justice Robyn Lansdowne and David Tedhams (Deputy Registrar-Legal) played key roles in planning for the implementation of the reforms and adjusting Registry processes in line with them.

The goal of the reforms is to expedite the hearing and resolution of appeals consistent with justice. The current criminal appeal regime procedures are set out in Practice Direction No 2 of 2011 (First Revision). Under the current criminal appeal regime, the practice of the Registry has been to receive applications and appeal documents electronically rather than in hard copy, wherever possible.

I was appointed Judicial Registrar in January 2011. Five Registry lawyers were appointed from February 2011, initially on a contract basis, to assist in the implementation of the criminal appeal reforms. Registry lawyers, in conjunction with other registry staff, now manage criminal appeals from initiation to hearing. The Registry lawyers prepare a neutral summary for the Court in each appeal where leave to appeal has been granted.

In the May 2012 Victorian State Budget, the Court received ongoing funding to continue the criminal appeal reforms. This ongoing support is very welcome. It allowed the Registry lawyer positions to be filled on an ongoing basis and for the reforms to continue.

The criminal appeal reforms have been very successful in enabling the Court to address the backlog of criminal appeals and to hear criminal appeals more expeditiously. The number of pending criminal appeals reduced by more than half in the 18 months from February 2011 to the end of the 2011/12 financial year. In January 2011, there were around 600 pending criminal matters and at the end of June 2012, there were 214 pending criminal matters. In the 2011/12 financial year, the number of pending criminal appeals reduced by 47%. The reduction in the number of pending criminal appeals resulted in a reduction in the median time to finalise criminal appeals to 10.7 months in 2011/12 compared to 12.5 months in 2010/11.

There was a 17% decline in criminal appeal initiations in the 2011/12 financial year by comparison to the previous year, which may have been the result of the more stringent requirements introduced by the reforms. Finalisations during the year also declined by 16%, though the number of finalised cases (524) was still very high when compared to the

number of initiations for the year (329). More information on the performance of the Court is set out in the statistical section of this report (from page 55).

The waiting time for criminal appeals is expected to reduce substantially now that the backlog of criminal appeals has been dealt with. Since the current regime commenced, the number of outstanding appeals commenced more than 12 months ago has reduced dramatically. If the number of pending criminal appeals remains at the current level, the Registry will be able to meet listing targets (sentence appeals determined within six to eight months and conviction appeals within eight to 10 months).

The following aspects of the current criminal appeal regime have contributed to the reduction in the backlog and more timely hearing of criminal appeals:

- the requirement that a written case, supporting the grounds of appeal, be filed with an application for leave to appeal;
- a neutral summary prepared by Registry lawyers for the Court in respect of each appeal;
- the more intense listing of criminal appeals during 2011;
- the more intense management of matters by the Registry;
- the collaborative engagement of the profession and relevant agencies, including through regular meetings.

The more intensive management of criminal appeals by the Registry has enabled the identification of cases that justify an expedited hearing. The legal profession has also assisted by identifying cases to the Registry that justify expedition, for reasons not apparent from the appeal papers.

Criminal appeals are most commonly expedited where:

- the sentence imposed or non-parole period imposed will expire shortly, and so the appellant may be eligible for release;
- the appellant is a young offender;
- the Crown has advised the Registry it will concede an appeal ground; and
- the applicant/appellant's life expectancy has reduced significantly through illness not known of at the time of sentencing.

Closer management of appeals by the Registry resulted in almost 80 dormant appeals being dismissed in the 2011/12 financial year for failure to comply with directions to file material in support of the appeal. Such dismissals are not dismissals on the merits and so do not preclude an applicant refiling an application for leave accompanied by the material required under the current system.

Closer management of appeals also identified appeals which justified listing the matter without the necessity of having leave to appeal granted in advance of the hearing of the appeal. During the 2011/12 financial year, 84 matters bypassed a separate leave hearing in this way. In those matters, the leave application and the appeal (if leave was then granted) was listed before two or three judges to be heard on the same day as the leave application. In each of those matters, the Registrar or the Court decided that the leave hearing should be listed in conjunction with any appeal, rather than as a separate hearing. This occurred in a range of cases including the more complex, those raising a novel point of law and those in which the sentence passed was unlawful and the applicant had to be resentenced.

In 2012, Practice Direction No 2 of 2011 (the practice direction that underpins the criminal appeal reforms) was reviewed in light of experience over the first year of reforms. This review was conducted in consultation with the profession and relevant agencies, and the Practice Direction was re-issued on 2 July 2012.

To support the reforms and ensure a high level of communication between the relevant agencies, groups and the Court a reference group was established prior to the commencement of the criminal appeal reforms. This was the suggestion of David Ware the CEO of the Court. The reference group includes representatives from Victoria Legal Aid, the Victorian Office of Public Prosecutions, Law Institute of Victoria, Victorian Bar, Commonwealth DPP, Victorian Government Reporting Service, the County Court and Supreme Court. The reference group, chaired by Justice Maxwell the President of the Court of Appeal, met frequently in the first year of the reforms and continues to meet regularly. The reference group monitors progress and gives feedback on the reforms.

To further the objectives of the reforms, the Chief Justice issued Practice Note No 8 of 2011. Where the Court of Appeal considers that its reasons for judgment in a criminal appeal contain no point of principle, the catchwords on the cover sheet will include the words “No Point of Principle”. A judgment so marked may not be cited in a subsequent appeal without the leave of the bench hearing the appeal.

During the 2011/12 financial year, the number of interlocutory criminal appeals, under Division 4 of Chapter 6 of the Criminal Procedure Act 2009, declined slightly though the issues covered in the appeals heard included a broad range of complex points of law. In 2011/12 there were 32 interlocutory appeals of which 6 were successful and 18 were unsuccessful.

In 2011/12, the Court heard appeals on circuit in Bendigo, Geelong and Shepparton. The Court is committed to hearing appeals outside of Melbourne and has circuits planned for 2012/13. The Court’s focus is to hear appeals, where feasible and appropriate, in the locality where the trial was heard.

In January 2012, the Court hosted a visit by Ms Susan Holdham, Senior Case Manager of the English Court of Appeal. During her visit, practices and procedures in managing criminal appeals in the Victorian and English Courts were discussed. The Victorian Court of Appeal is most appreciative of the English Court of Appeal allowing Ms Holdham to visit and hopes the discussions between the two courts and exchange of information will continue, to the benefit of both courts.

In 2013 the Registry will continue to look for ways to expedite matters consistent with justice. This includes considering ways in which technology might further assist the judges in their preparation for appeals, and in reviewing listing practices to streamline the handling of sentence appeals. In June 2012, the Court decided to trial an approach, from September 2012, of having two judges consider applications for leave against sentence in some cases. Where leave is granted this allows the Court to hear the appeal against sentence at the same hearing, if appropriate. Over the next year, it is expected that the time from initiation of a criminal appeal application to disposition will reduce further, given the dramatic reduction in the backlog of older cases in 2011/12.

Civil Appeals and Applications

Civil appeals and applications are managed by Registry staff, including one Registry lawyer. Since 2006, the Registry has applied front-end management to appeals and during the 2011/12 financial year, this approach was enhanced through the assessment of each new appeal by a Registry lawyer in conjunction with other Registry staff.

The number of pending civil applications and appeals rose during the year. Civil initiations increased by over 50 on the previous financial year. This was an increase of 29%. Since 2010 the pattern has been a substantial increase (40%) in the number of civil appeals and applications initiated. Notwithstanding this, the Court reduced the median time to finalise civil matters in the 2011/12 financial year from 9.7 months to 8.5 months.

On 1 July 2011, there were 190 civil matters and as at 30 June 2012, there were 202 matters pending. This occurred despite the Court hearing and determining over 50 more civil matters in the 2011/12 financial year than the previous year – an increase in dispositions of 30%.

A significant feature of the civil appeals and applications commenced in the Court in the 2011/12 financial year was the high proportion of matters initiated by self-represented litigants. In 2011/12, 60 (25%) of civil appeals and applications initiated were by self-represented litigants. Registry staff assist self-represented litigants by providing information about the appeal process, including providing the relevant forms to be completed, and advising them of the various pro bono legal services that exist.

During the financial year, the Registry undertook an audit of civil appeals. This resulted in a number of dormant appeals being referred to the Court by the Registrar with a recommendation that they be considered for dismissal for failure to comply with directions of the Court. In May 2011, 14 appeals were dismissed by the Court and one appeal was granted an expedited hearing as a result of the audit. In June 2012, the Court also trialled a call over of appeals ready for listing before a judge. The appeals were set down for hearing at the call over conducted by a judge. The established practice of the Registry has been to set civil appeals down for hearing after consulting the parties on suitable dates and obtaining an up-to-date estimate of the length of hearing.

More information on the performance of the Court is set out in the statistical section of this report from page 55.

The Court will shortly consider reforms to practice and procedure relating to civil appeals to enable the reduction of the backlog and more expeditious hearing and determination of civil matters. In particular, the Court will consider requiring the parties to provide a more detailed summary of their contentions on the appeal grounds at the commencement of the appeal, and by a respondent to an appeal shortly after the appeal is initiated. The Court is also considering ways to further enhance the front-end management of civil appeals and applications, including more intense management of applications and appeals consistent with the manner in which criminal appeals are now managed.

I record my thanks to the staff of the Registry for their work in supporting the Court. The Registry has worked harmoniously and collaboratively as a team to support the Court through more intense management of appeals. Registry staff worked closely with the judge's staff, particularly the associates. The senior Registry staff – David Tedhams (Deputy Registrar, Legal), Chris Temperley (Deputy Registrar, Administration), Megan Ellerton and Rob Schade – have each managed their responsibilities within the Registry with skill, dedication and a willingness to innovate.

Mark Pedley

Judicial Registrar
Court of Appeal

Cases of note

The Registry, in consultation with the Judges of Appeal and their associates, selected approximately **105** decisions of note handed down in the period July 2011–June 2012 for inclusion in this report. These cases represent a cross-section of the work of the Court, with a particular focus on cases which establish a new principle, give guidance to lower courts, or apply the law to an interesting factual scenario.

A large amount of the Court's work arises from criminal appeals. These can be grouped as follows: appeals against sentence, appeals against conviction and interlocutory appeals. The Court also hears appeals in civil matters.

Appeals against sentence

Children and young offenders

In ***CNK v The Queen*** **[2011] VSCA 228**, the Court considered the principles involved in sentencing children under the *Children, Youth and Families Act 2005* (Vic) ('CYF' Act) for offences committed with adult co-offenders. Under the Act, a child is a person who was under 18 (but above 10) years old at the time of the offence, but not 19 years old, or older, when proceedings were initiated.

The Court decided that the sentencing principle of general deterrence does not apply to children sentenced under the CYF Act. The Court stated that s 362(1) of the CYF Act contains an exhaustive list of the matters which must be considered by a sentencing judge in determining what sentence to impose on a child. That list does not include general deterrence. The stated policy objectives of the CYF Act include strengthening and preserving the child's relationship with his/her family; allowing him/her to live at home; allowing him/her to continue with education, training or employment; and avoiding stigma to the child. Authorities from Western Australia and New South Wales were distinguished on this point.

Leave to appeal was granted, the appeal was allowed and the applicant was resentenced. The original sentence of 3 years detention in a youth justice centre was reduced to the imposition of a youth supervision order (a non-custodial sentence).

The Court noted that under s 586 of the CYF Act, when the Supreme Court sentences a child to detention in a youth justice centre, the applicable maximum is three years (as set by s 32(3)(b) of the *Sentencing Act 1991* (Vic)), not two years (as set by s 413(2) of the CYF Act). Since the applicant was presented on a charge of attempted murder, over which the Supreme Court has exclusive jurisdiction, he was tried in the Supreme Court, rather than in the Children's Court. The Court observed that since the applicant was acquitted of attempted murder, he was entitled to be sentenced on the remaining charges as if sentencing had occurred in the Children's Court. The two year maximum was therefore applicable. Any other result would have had the effect of treating the applicant differently from another child in like circumstances solely because he had been proceeded against unsuccessfully for attempted murder.

The Court commented on the difficulty of sentencing co-offenders in the situation where different sentencing regimes (adult/child) apply. The Court expressed the view that wholly separate hearings should be held to deal with sentencing of the child offender(s) in like circumstances.

In ***Poutai v The Queen*** **[2011] VSCA 382**, the Court stated that any attempt at comparison between sentences under the adult and child sentencing regimes would be entirely inappropriate. This was in response to the adult appellant's grievance that he

received a sentence much greater than his 17 year old co-offender, who was sentenced under the CYF Act.

In ***Azzopardi v The Queen; Baltatzis v The Queen; Gabriel v The Queen*** **[2011] VSCA 372** the Court considered the mitigating factor of youth in the context of sentencing for persistent, serious violent offending by persons who were 19 years old when they offended. The appellants had been sentenced under the *Sentencing Act 1991* (Vic) rather than the CYF Act, given their age.

The Court noted the general primacy of youth as a mitigating factor in sentencing, but stated that where the degree of criminality requires deterrence, denunciation, just punishment and protection of the community, the weight to be attached to youth is correspondingly reduced. Mitigation for youth will be extinguished only in the context of the most grave offending and where there is no prospect of rehabilitation.

The principles set out in ***Azzopardi*** were applied in ***McGuigan v The Queen*** **[2012] VSCA 121**, which was heard at the same time as ***Azzopardi***.

In ***JPR v The Queen*** **[2012] VSCA 50**, the applicant, who was 17 at the time of offending, was sentenced in the Supreme Court for manslaughter (an offence not within the jurisdiction of the Children's Court) and recklessly causing injury (an offence for which he was to be sentenced under the provisions of CYF Act). The offences occurred close in time.

Following the earlier decision in ***CNK***, the Court decided that the sentencing judge should not have had regard to general deterrence when sentencing the applicant for the offence of recklessly causing serious injury under the CYF Act. The Court noted, in line with ***Azzopardi***, that even if general deterrence and denunciation are available when sentencing a young offender (as the applicant was to be sentenced under the *Sentencing Act 1991* (Vic) for manslaughter), the age of the offender may reduce the weight of those factors.

Application for special leave to appeal refused by High Court 14 December 2012

In ***CL (by his Litigation Guardian) v DPP*** **[2011] VSCA 227**, the Court decided that the Children's Court does not have jurisdiction to determine a question of fitness to plead.

A Magistrate had decided that the applicant's fitness to plead should be tested at a committal hearing, rather than in the summary jurisdiction of the Children's Court. The applicant filed an originating motion in the Supreme Court seeking orders requiring the Children's Court to hear and determine the charges against him in a summary manner.

The Court of Appeal upheld the magistrate's decision that the Children's Court does not have jurisdiction to determine the question of fitness to plead. The Court decided that the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) does not confer jurisdiction on that issue on the Children's Court expressly or impliedly, nor did the CYF Act, nor did the common law.

Mental illness

The relevance of an offender's mental illness to the sentencing task frequently arises in appeals before the Court. In ***Green v The Queen*** **[2011] VSCA 311**, the Court emphasised the importance of looking to the evidence when applying the principles in *R v Verdins* (2007) 16 VR 269. The appellant suffered from paranoid schizophrenia and there was a connection between this illness and his offending. On appeal, he argued that the sentencing judge made an error by giving significant weight to just punishment and specific deterrence. The Court held that both principles remained relevant when sentencing the appellant. Although his moral culpability was reduced due to his mental

illness, it was still necessary for him to be justly punished. Specific deterrence also remained a significant objective. On the psychiatric evidence tendered, the appellant knew what he was doing and knew that it was wrong. The appellant also argued on appeal that the sentencing judge was wrong to treat premeditation and the unnecessary use of force as aggravating his offending. The Court decided there was no inconsistency between the finding of reduced moral culpability and reliance on these aggravating factors, because the evidence demonstrated that the appellant was aware of the nature of his behaviour.

In ***Tran v The Queen*** **[2012] VSCA 110**, the Court confirmed that showing a causal connection between an offender's mental impairment and their offending is not the only way of establishing that moral culpability is reduced; and that any reduction in moral culpability turns on the evidence of impairment and the nature of the offending. The Court noted that *R v Verdins* (2007) 16 VR 269 set out various bases on which an offender's moral culpability may be reduced, including an impaired ability to exercise appropriate judgment, or make calm and rational choices. The Court reiterated that the task for a sentencing judge is to look at what the evidence shows about the offender's condition and how it affects and affected them. The extent to which this is explanatory of, and therefore might excuse the offending, also depends on the nature of the offending. The Court held that these principles were not altered by the High Court decision in *Muldrock v The Queen* (2011) 244 CLR 120. In *Muldrock,* the High Court observed that questions of causation were less likely to arise for "mentally retarded offenders", because their inability to reason as to the wrongfulness of their conduct will in most cases substantially lessen their moral culpability. Similarly, in ***Sikaloski v The Queen*** **[2012] VSCA 130**, the Court held that, notwithstanding the High Court's comments in *Muldrock*, a diagnosis of mental impairment does not automatically reduce the importance of deterrence as a sentencing factor – the extent of any reduction depends on the nature of the impairment.

Sentencing process

In ***Pesa v The Queen*** **[2012] VSCA 109**, the Court refused an application for leave to appeal. In doing so, the Court reiterated that the question of whether too much or too little weight was given to a particular sentencing factor by a sentencing judge is almost always untestable on appeal, as decided in *DPP v Terrick* (2009) 24 VR 457. The Court explained that sentencing decisions are conclusions arrived at by the process of intuitive synthesis and quantitative significance is not assigned to individual sentencing considerations. The Court's scope to review sentencing discretion is limited; appellate courts are not able to discern the weight given to individual sentencing factors. The Court emphasised that it is important that it be understood that apart from when there has been a specific error, questions of weight are for the primary decision-maker. An appeal against sentence is not to be used to re-argue plea in mitigation. A complaint which goes only to the weight given to a sentencing factor should be treated as a particular of a ground of manifest excess or manifest inadequacy.

In ***Slaveski v The Queen*** **[2012] VSCA 48**, an appeal was brought against the trial judge's orders following the applicant's conviction of contempt of court, including an order that the applicant would serve one month's imprisonment if he defaulted on costs. The Court decided that it is inappropriate for a trial judge to sentence a person convicted of contempt of court to imprisonment in default of payment of costs. Such an order is a pre-emptive sentence for a possible future contempt which has not yet been committed. Further, the effect of such an order is that if the offender fails to pay costs, they will be imprisoned, but will not need to pay costs on release. The successful plaintiff is therefore deprived of costs. While costs awards have a punitive element, costs orders are made substantially for the benefit of plaintiffs.

Current sentencing practices

In ***Ashdown v The Queen*** **[2011] VSCA 408**, the Court considered when it might be appropriate for the Court of Appeal to express a view on the adequacy of the current

sentencing practices for an offence. Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires a court to have regard to current sentencing practices when sentencing an offender.

Maxwell P noted that it is generally possible and necessary for the Court to express a view about current sentencing practices, to provide guidance where there is a distinct subcategory of an offence which can be identified. This was done in *Winch v The Queen* [2010] VSCA 141 for the 'glassing' offence subcategory of recklessly causing seriously injury. His Honour concluded that the present appeal was not such a case requiring guidance.

Ashley JA observed that the question of whether current sentencing practices adequately reflect the maximum penalty for recklessly causing serious injury was not before the Court as a matter requiring determination to dispose of the appeal. His Honour was concerned that any comments the Court may make on the issue may likely be unhelpful for sentencing judges, as any generalised statement would frustrate the process of 'objective synthesis' undertaken during sentencing. Ashley JA indicated that any argument that current sentencing practices are inadequate should be raised in a lower court hearing the matter, or at least foreshadowed there.

Redlich JA listed the circumstances in which the Court may comment on the adequacy of current sentencing practices:

1. where there has been an increase in the statutory maximum penalty and current sentencing practices have failed to reflect that increase.

2. where there is evidence that an offence has become more prevalent.

3. where community expectations have altered.

4. where there has been increased community disquiet over the offence.

5. where there has emerged a better understanding of the consequences for the victim of the offending conduct.

6. where there has been a persistent error in the manner in which a category of offenders has been treated.

7. where the objective seriousness of particular conduct has been wrongly categorised or a particular type of sentencing disposition is not ordinarily appropriate

His Honour concluded that none of the above applied to the present case. Redlich JA also pointed to the jurisdiction of the Court to make a Guideline Judgment under Part 2AA of the *Sentencing Act 1991* (Vic). His Honour noted that since that procedure had not been followed, the Court was unable to undertake the required breadth of analysis to express a view. In contrast to Ashley JA, Redlich JA considered that submissions about the adequacy of the current sentencing practice could be made first to the Court of Appeal and that it is not required that they be made initially in the sentencing court. His Honour also disagreed with Ashley JA in stating that the Court, subject to limitations, might express an opinion on an issue for the guidance of sentencing judges irrespective of whether the opinion is necessary for the determination of an appeal.

In ***Stalio v The Queen*** **[2012] VSCA 120**, the Court decided that the requirement the *Sentencing Act 1991* (Vic) that a court must have regard to 'current sentencing practices' in sentencing means 'present sentencing practices', namely those at the date of sentence. The Court rejected the applicant's argument that he should have been sentenced in accord with the sentencing practices that existed at the time of the offending (1974–1983).

The Court decided that the factors stated in s 5(2) of the Act to which a sentencing judge must have regard are not exclusive. The sentencing practices at the time of offending may be a factor the Court should have regard to in deciding on a sentence that is just in all the circumstances, as is required by s 5(1) of the Act. The Court stated that it would be wrong for a prisoner to be sentenced to a substantially higher sentence than another offender who committed like offences at or about the time of the offences in issue, simply because of the lapse of time. While in this case a lower historical maximum penalty applied at the time of the offending, there was no satisfactory evidence to establish a difference in sentencing practice from 1974 to 2011.

The applicant also argued that the sentencing judge erred by taking into account the current level of community abhorrence for sexual offences against children. The Court decided that the current abhorrence of the community for offending was a factor which the judge was entitled to consider when fixing a sentence which was just in all of the circumstances, reflecting the need for specific and general deterrence and the denunciation of the offender's conduct.

The Court reviewed sentencing practices for incest in ***DPP v DJ*** **[2011] VSCA 250**. The respondent had pleaded guilty to sexually assaulting his daughter (aged 7 on the first occasion and 15 on the subsequent occasions) on numerous occasions and, on one of these occasions, to having also hit her in the face. He was sentenced to six and a half years' imprisonment, with a minimum term of four years and four months. The Crown argued that this sentence was inadequate in light of the aggravating features and the seriousness of the offending. It submitted that the sentence was outside the normal course of incest offending because of the use of force, and the fact the assaults had been used as a sort of punishment. The Crown argued that incest involving violence or spite gave rise to a distinctly higher 'band' of sentences, which this case fell below.

The Court was not persuaded that the sentence imposed on the respondent was manifestly inadequate. By reference to a table of sentences for incest, which focussed particularly on whether violence was used, the Court concluded that the sentence imposed was not unusual for a case of incest with significant aggravating factors. The Court nonetheless emphasised that threats, violence or any intention to punish should be seen as very significantly increasing the offender's culpability for what is already a very serious crime.

In ***Gorladencheaurau v The Queen*** **[2011] VSCA 432**, the Court examined current sentencing practices for the offence of negligently causing serious injury. The maximum penalty for the offence was increased from five years' imprisonment to 10 years' imprisonment in 2008. This was the first time the Court was asked to consider the significance of the increase in the maximum penalty.

The appellant pleaded guilty to two counts of negligently causing serious injury and two counts of reckless conduct endangering serious injury following a car accident in circumstances where he was unlicensed, was speeding and had a blood alcohol concentration of 0.13 per cent. There were three victims, one of whom suffered extremely severe brain injuries leaving her reliant on care, with no capacity for work or domestic tasks. The Court decided that since driving-related negligently causing serious injury cases tend to involve similar features including speed, inattention, intoxication (alcohol or other drugs) and often prior convictions for driving offences, they form a class of cases. This means that sentencing comparisons are more readily drawn between cases than in relation to other offences which may occur in an infinite variety of circumstances, such as manslaughter.

Having particular regard to consistency of sentencing and in particular the previous decisions in *Mok v The Queen* [2011] VSCA 38 and *Shields v The Queen* [2011] VSCA 386, the Court reduced the appellant's sentence from five years' imprisonment (half the applicable maximum) to four years' imprisonment. Maxwell P commented that in the

future, it may be appropriate for the Court to consider whether sentencing practices for negligently causing serious injury by driving adequately reflect the increase in the maximum penalty. Earlier, Nettle JA had made a similar observation *Mok v The Queen* [2011] VSCA 247 in the context of offences other than in a driving context.

Application for special leave to appeal refused by the High Court 20 June 2012

In ***DPP (Vic) v Coates Hire Operations Pty Ltd*** **[2012] VSCA 131**, the Court considered the adequacy of a fine imposed on the respondent for two contraventions of s 21(1) of the *Occupational Health and Safety Act 2004* (Vic) which resulted in the death of a contractor driver. By pleading guilty, the company admitted that it had breached its duty as an employer to provide and maintain – so far as was reasonably practicable – a working environment for its employees that was safe and without risks to health.

The Court upheld the appeal and resentenced the respondent to a fine of $500,000, from a fine of $200,000 imposed by the sentencing judge. Increasing the penalty, the Court noted that prior to the death of the contractor driver, WorkSafe had taken enforcement action against the respondent on the issue of training contractor drivers. The Court also considered the failure of the respondent's Occupational Health and Safety Manager to enforce safety requirements when he knew they were being breached, and the disregard of the respondent for the safety of its workers. The Court decided that general deterrence is of great importance for this kind of offending and having regard to current sentencing practices, it was appropriate that the fine be increased substantially.

At the appeal hearing, the appellant sought leave to add a particular to the single ground of appeal, arguing that the sentence imposed did not reflect the fact that the count charged was a rolled-up count, based on three separate breaches. The Court decided that the term 'rolled-up count' is a term of art with an accepted meaning in the criminal law. While an indictment alleging a breach of s 21(1) based on more than one of the sub-paragraphs of s 21(2) has something of the same character as a rolled-up count, the use of the term may be misleading and should be avoided in the context of the *Occupational Health and Safety Act.* The Court decided that the appellant had no need to amend the notice of appeal by adding the particular as it was necessary to consider both contraventions of the section to determine whether the sentence previously imposed was manifestly inadequate.

In ***Felicite v The Queen*** **[2011] VSCA 274**, the Court emphasised that a domestic murder should not be treated as a less heinous category of murder because of the relationship between the offender and the victim. The labels of 'domestic murder' or 'spousal murder' are to be viewed as merely descriptive. They are do not represent a category of murder in any prescriptive sense, nor does a murder that fits that description of itself entitle the offender to any mitigation of sentence.

Sentencing range

In ***Va v The Queen*** **[2011] VSCA 426**, the Court decided that as a general rule, caution should be exercised when comparing the relative level of culpability involved in defensive homicide with unlawful dangerous act manslaughter. Some conduct amounting to defensive homicide may be less morally culpable than some conduct constituting unlawful and dangerous act manslaughter.

The Court reiterated the Crown's obligation to assist a sentencing judge with a submission on sentencing range as outlined in *R v MacNeil-Brown* (2008) 20 VR 677. The obligation is not discharged merely by nominating the top and bottom of the range. The narrower the range, the more a submission resembles one urging the imposition of a particular sentence. The Crown cannot recommend a particular sentence. The upper and lower

limits of the range submitted in the present case were separated by only 12 months. Except for where a sentence is under three years, a narrow range between six and 12 months cannot be said to represent an appropriate range, bearing in mind the need to have regard to reasonable differences in opinion as to the appropriate sentence in a particular case.

The Court again considered Crown submissions on sentencing range in ***Talbot v The Queen; Dux v The Queen*** **[2012] VSCA 118**. The case provided an opportunity for the Court to restate the nature and purpose of the submissions and to emphasise that submissions need to be well-founded to be of assistance in sentencing. Crown submissions on the sentencing range must be supported by 'a clearly articulated view of the gravity of the offence, the relevant sentencing principles and practices, and relevant aggravating or mitigating factors' as outlined in *R v MacNeil-Brown*.

The Court reiterated that a sentencing judge is free to disregard a Crown submission on range; it has the same status as any other submission of law. If on consideration, a submission on the sentencing range previously advanced is seen to be wrong, the Crown is obliged to correct it. The Court stated that every person pleading guilty should be advised that there is no guarantee that the sentencing range submitted by the Crown will be accepted by the Court. Defence lawyers have an obligation to ensure clients understand this. They are also obliged to make their own assessment of the appropriateness of any range the Crown proposes.

In ***Kneifati v The Queen; Taha v The Queen*** **[2012] VSCA 124**, the Court reiterated that there is no 'usual' or 'normal' ratio between a non-parole period and a head sentence. Apart from the requirement that a non-parole period be at least six months less than the head sentence, the length of a non-parole period is entirely within the sentencing judge's discretion, having regard to all relevant matters. Use of phrases like 'shorter than usual' and 'longer than usual' by a sentencing judge or by counsel are at best unhelpful and at worst, likely to mislead. The Court stated that such phrases should be avoided, but that there is no difficulty in a sentencing judge stating, or counsel suggesting that a non-parole period is or should be 'shorter than it might otherwise have been', for example, because of an offender's rehabilitation prospects or other relevant matters.

Technical aspects of sentencing

In ***Loader v The Queen*** **[2011] VSCA 292** and ***Lecornu v The Queen*** **[2012] VSCA 137**, the Court considered the rules against double prosecution, conviction and punishment where an offender is subject to an Interim Extended Supervision Order and/or an Extended Supervision Order under the *Serious Sex Offenders Monitoring Act 2005* (Vic).

In ***Loader*****,** the appellant was subject to both types of supervision orders and breached those orders by committing a number of indecent assaults. The Court decided that the appellant's conviction of offences of breaching his supervision orders did not constitute double punishment for the offences of indecent assault of which he was also convicted. There is no double punishment in the fact of entering a conviction on each offence, though a sentencing judge must take care to modify sentences imposed to avoid double punishment for the same conduct. The Court decided that offences of failing to comply with the conditions of supervision orders involve the added criminality of failing to comply with orders of the courts – this factor warrants additional punishment.

The Court decided that when an offence of breaching an Interim Extended Supervision Order or Extended Supervision Order is dealt with summarily by the County Court (pursuant to s 41(2) of that Act), the maximum penalty is two years' imprisonment. While five years' imprisonment is the maximum penalty for the offences prescribed by the legislation, that maximum applies when an offender is prosecuted on indictment in the County Court or the Supreme Court. Where such an offence is prosecuted summarily in

the Magistrates Court, there is a jurisdictional limit of two years' imprisonment pursuant to s 113 of the *Sentencing Act 1991* (Vic). The Court decided that the jurisdictional limit of two years' imprisonment also applies when an offence of breaching such an order is prosecuted summarily in the County Court.

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The appellant in ***Lecornu*** was subject to an Extended Supervision Order, when he breached that order by possessing child pornography. The appellant pleaded guilty to two counts of possession of child pornography and two counts of beach of the supervision order. Following the decision in ***Loader***, the Court decided that there was no abuse of process or double punishment in the appellant being prosecuted for and convicted of, the breach offence, and the child pornography offence. The offences were different in important respects and it was appropriate to convict the appellant on both charges since together they reflected the total criminality of his conduct. The sentences imposed on the appellant in respect of each charge did not suggest that the breach counts also punished him for the criminality involved in his possession of child pornography.

Since the appellant was prosecuted summarily, the maximum penalty for each breach offence was two years' imprisonment, as decided in ***Loader***.

In ***DPP v Johnson*** **[2011] VSCA 288**, the Court discussed the principles applicable when sentencing for an offence of breaching an intervention order. The respondent entered his former partner's home in the early hours of the morning carrying two knives, with the stated intention of killing himself in front of her. The conduct was in breach of an intervention order obtained by the former partner, which prohibited the offender from, among other things, contacting her, being violent towards her, or coming within 200 meters of her home. The respondent was sentenced to six months' imprisonment for breaching the intervention order, made wholly concurrent with other sentences imposed.

On appeal by the Director of Public Prosecutions, the Court decided that the sentence of six months for the offence of breaching an intervention order, and the order that this be served concurrently with the sentences for assault and aggravated burglary, were inappropriate in the circumstances. Those circumstances included the respondent's multiple previous convictions for breaching intervention orders, the fear caused to the victim and the distress to their daughter, who witnessed the offending. While components of the breach of the intervention order occurred in the same episode as the assault and aggravated burglary, the breach was distinct offending such that it was inappropriate to order the sentence be wholly concurrent. On resentencing the respondent, the Court increased the sentence for breaching the intervention order to 12 months' imprisonment and ordered that six months be served concurrently with the other increased sentences.

The respondent had asserted to the sentencing judge that his prior convictions for breaching intervention orders had been minor or innocuous, and gave various favourable explanations of them. The Court confirmed that it was not open to a sentencing judge to treat the respondent's perceptions of past offending as bearing on the gravity of the present breach. The respondent's repeated disobedience of court orders showed a contempt for the law, which had to be taken into account.

In ***DPP v Dickson*** **[2011] VSCA 222**, the Court explained how cancelled state parole should be taken into account when sentencing for later offences. In so doing, the Court endorsed its earlier decisions in *R v Hunter* (2006) 14 VR 336 and *R v Piacentino* (2007) 15 VR 501. Where an offender commits offences while on parole (the 'later offences'), ordinarily their parole will be cancelled by the Adult Parole Board. Unless that cancellation is revoked by the Board, the whole of the outstanding parole will be served.

The Court of Appeal outlined the following principles, which will apply where an offender is to be sentenced following the cancellation of state parole:

- The judge must assume when sentencing for the later offences that the whole of the cancelled parole will have to be served. This is because s 5(2AA)(a) of the *Sentencing Act 1991* (Vic) prohibits a sentencing judge from speculating about future executive action.

- When the offender comes to be sentenced for the later offences, any sentence imposed must be served cumulatively upon the cancelled parole term, in the absence of exceptional circumstances: s 16(3B) of the *Sentencing Act*. That offending was committed while on parole is an aggravating factor.

- When setting a non-parole period for the later offences, the sentencing judge must have regard to the principle of totality, and so have regard to as much of the head sentence for the original offences as has not been served.

- The *Sentencing Act* does not countenance the setting of a 'new non-parole period' for both sets of offending. The sentencing court must be satisfied that neither the head sentence nor the non-parole period fixed for the later offences is disproportionate to the total criminality represented by both the original offences and later offences. Beyond that, the parole sentence has no role to play in the sentencing for the later offences.

In ***RBN v The Queen*** **[2011] VSCA 261**, the Court confirmed that when an offender is sentenced on two presentments (or indictments) in the one sitting, it is not wrong for a sentencing judge to arrive at a total effective sentence for each presentment and cumulate as between the two, instead of cumulating for each count. The Court declined to express a preference for either methodology, but indicated that it would be more appropriate to cumulate as between presentments where there is a clear separation between the offending on each presentment. The Court noted that, whatever methodology is applied, the question for the Court of Appeal in the end is whether the sentence is affected by error. The Court also noted that the sentencing judge must always apply the totality principle and take the 'last look', as the High Court has described it, to ensure that the end result is not disproportionate to the total criminality comprised in both presentments.

Sentencing considerations

In ***Sherna v The Queen*** **[2011] VSCA 242** the Court considered the weight to be attached to an offer to plead guilty to manslaughter, as well as the categorisation of the range of offending for manslaughter.

The applicant argued that the sentencing judge had failed to give any or sufficient weight to his offer to plead guilty. In particular, that the utility aspect of the applicant's offer to plead guilty had been wrongly discounted. While the Court concluded that the ground was not made out on the facts, Whelan AJA conducted a lengthy survey of the relevant authorities and identified some differences of views on the principle of discount for utility in Victoria.

The applicant also argued that the sentencing judge erred in determining that the nature and gravity of the offending was at the upper end of the range for manslaughter. The applicant contended that the sentencing judge had wrongly acted on the Crown's submission on the plea that the elimination of the defence of provocation created a void at the serious end of the spectrum for manslaughter, and that sentences for other types of manslaughter should be increased to fill that void. The Court rejected the content of the submission, as well as the applicant's argument.

Hansen JA decided that the sentencing judge did not intend that sentencing practices for manslaughter should be revised upwards to take account of the abolition of provocation. His Honour found that the sentencing judge had commented that the offending in the current case would fall at the serious end of the range for manslaughter, now that provocation cases have vacated the field.

Whelan AJA stated that regardless of the view taken as to the significance of the abolition of provocation, the manslaughter in this case was of the most serious kind. The application was refused. In dissent, Ashley JA found that the sentencing judge may have been influenced by the Crown's argument on the provocation point.

In ***Phillips v The Queen*** **[2012] VSCA 140**, a five-member bench considered the value of a plea of guilty in sentencing.

The appellant pleaded guilty to murdering his elderly father. At sentencing, the judge noted that the fact of the plea was tempered by the overwhelming case against the appellant. The appellant argued on appeal that the sentencing judge erred by reducing the discount for his guilty plea on the basis of the strength of the Crown case, since the strength of the case against an accused is irrelevant to any aspect of the discount to be applied. Alternatively, he argued, if it was at all relevant, it was relevant only to an assessment of the extent of the applicant's remorse and the judge erred by treating it as if relevant also to the utilitarian value of the plea.

The Court set out the relevant matters which should inform the extent of a discount to be given for a plea of guilty:

1. A discount for the utilitarian benefit of the plea must always be allowed, save for the exceptional category of case.

2. It will be an exceptional case where the gravity of the offending is of such an order that no discount from the maximum sentence is appropriate.

3. The strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea, as it does not bear upon the objective benefits of the plea.

4. A greater discount for utilitarian benefit may be justified where the plea involves very considerable savings of costs to the community or some other very significant benefit can be seen to flow from the plea.

5. It is always a question for the sentencing judge whether remorse, a willingness to facilitate the course of justice, and an acceptance of responsibility are to be inferred from a plea of guilty.

6. Where there is evidence or a submission accepted by the sentencing judge as to the unqualified existence of subjective criteria, this should be fully reflected in the discount.

7. The utilitarian benefit flowing from a plea may also inform the extent of the discount to be allowed for the offender's willingness to facilitate the course of justice.

8. The weakness of the Crown case, if apparent, may also inform the extent of the offender's willingness to facilitate the course of justice.

9. The sentencing judge will not need to deal separately with the objective criteria of the utilitarian benefit of the plea and the subjective criteria, unless there is reason

to conclude that less than the full discount should be allowed for the subjective criteria.

10. The strength of the Crown case can only support an inference that the subjective criteria played little or no role in the decision to plead guilty where the state of the contextual evidence on the plea permits such a conclusion.

Although the majority of the Court was of the view that the sentencing judge was not entitled to reduce the discount available to the appellant for his plea of guilty, the Court did not consider it necessary to impose a different sentence. The appeal was dismissed.

Harper JA commented that remorse is frequently put forward as a mitigating circumstance in the expectation that the sentencing judge will simply accept that because a plea of guilty has been entered, remorse must be present. That expectation ought not to be encouraged. Whenever remorse is put forward as a basis for a sentencing discount of any significance, the prosecution should consider whether it is a matter which should be challenged; and if it is challenged, it will be for the offender to establish on the balance of probabilities that remorse exists.

Nettle JA observed that authority aside, there is no reason in principle why the strength of the Crown case should not be taken into account when a sentencing judge assesses the utilitarian value of a guilty plea. His Honour indicated that there is equally little reason in policy to pretend that the utilitarian value of a plea does not vary according to the strength of the Crown case. However, His Honour conceded that the Court is restrained by authority, and if the position is to be rectified it will need to be done elsewhere.

In ***DPP v De Castres; DPP v Kent*** **[2011] VSCA 377** the Court confirmed that the fact that an offence is committed in prison or in custody may be regarded as an aggravated feature of the offending for the purposes of sentencing. The Court emphasised that although the particular circumstances are important in each case, the fact that an offence of violence is committed in a custodial setting makes general deterrence of paramount importance as a sentencing consideration. The Court affirmed that previous decisions establishing this principle were decided correctly.

In ***Tsang v DPP (Cth)*** **[2011] VSCA 336** the Court considered whether pre-sentence detention arising out of remand of the appellant in Canada on unrelated offences, should have been taken into account in his later sentencing in Victoria for drug offences. While on remand in Canada, the appellant was also in custody awaiting extradition to Victoria to face drugs charges. Section 18 of the *Sentencing Act 1991* (Vic) allows for pre-sentence detention to be deducted from a sentence imposed, unless the Court otherwise orders. The Court decided that because a Canadian court had already taken the time in Canada into account in sentencing the appellant for the Canadian offences, the appellant was not entitled to have it taken into account a second time when sentenced on the Victorian offences. The Court decided that s 18 would allow for the taking into account of a period of pre-sentence detention spent outside Victoria in relation to a Victorian offence, however this was inappropriate because the pre-sentence detention had already been taken into account by the Canadian court.

Application for special leave to appeal refused by the High Court 17 August 2012

The applicants in ***Pham v The Queen; Tang v The Queen*** **[2012] VSCA 101** were convicted in connection with the largest importation of border controlled substances yet dealt with by the Court. The applicants were part of a highly organised and sophisticated criminal organisation involving many participants.

The applicants had tried to disguise their conduct and positions within the criminal operation both to investigators and to the courts. They gave implausible, demonstrably

false and inconsistent explanations for how they became involved and what roles they performed. The full nature and extent of the enterprise and their conduct was therefore unknown to the sentencing judge. The Court decided that in those circumstances, the applicants had no basis to complain about the limited findings of the sentencing judge as to their respective positions and roles within the criminal enterprise.

The Court decided that when categorising the role of co-offenders within a criminal enterprise, focus must be on the degree of criminality of the acts performed and on an individual's importance to the organisation's criminal purpose. This is preferable to a focus on any differences in charges laid, particularly where the maximum penalty is the same for those charges. When dealing with a number of co-offenders whose positions are difficult to identify or are closely aligned, it will be necessary to identify the features of each co-offender's conduct (whether they are the same or different) that justify the imposition of different sentences.

The Court confirmed that it would be incongruous to have regard to the separation of an offender from his family in his home country to reduce a sentence when the offender came to Australia for the sole purpose of committing a very serious crime. The Court also confirmed that in sentencing federal offenders, family hardship must be exceptional for there to be any amelioration of the sentence imposed.

In ***Day v The Queen*** **[2011] VSCA 243**, the Court considered the impact of delay on sentencing where an offender's conduct has contributed to the delay. The appellant was convicted of multiple charges of theft, obtaining property by deception, obtaining financial advantage by deception, and summary charges of misleading and deceptive conduct. He argued that the sentencing judge did not give the delay the weight it deserved in sentencing in the circumstances. The judge had found that the delay was not inordinate, particularly since a large amount of it was due to the appellant's own poor record keeping, and his failure to assist police and forensic accountants with their inquiries. The Court stated that it would be illogical and contrary to ordinary notions of justice and fairness if a sentencing judge did not take into account the extent to which an offender had stood by, declining to do whatever he could do to bring the matter to fruition. It would be preposterous if an offender could do as little as possible to assist investigators to accelerate the process of investigation, and then be able to claim the full benefit of so much delay as he had created.

The appellant also argued that the sentencing judge was wrong to have imposed identical individual sentences for all counts disclosing the wrongful use of investment funds, where the amounts involved differed significantly. The Court decided that the appellant's offending represented an ongoing fraudulent course of conduct that warranted a broad-brush approach to sentencing based on the sentencing categories the judge adopted. After receiving a warning from the Court that it might impose a more severe sentence, the appellant abandoned his appeal.

Commonwealth offences

In ***H A T & Ors v The Queen*** **[2011] VSCA 427**, the applicants pleaded guilty to dealing with the proceeds of crime exceeding $1million, contrary to s 400.3 of the *Criminal Code Act 1995* (Cth). The Court decided that it was correct to have regard to individual transactions during the relevant period which aggregated to more than $1million, rather than only to individual transactions of $1million or more. Section 400.12 of the *Code* provides that several contraventions of the money laundering provisions can be combined into a single charge if the charge is based on two or more instances, and the value of the money (and other property) dealt with is an element of the offence. The Court decided that an agreement to deal in individual amounts less than $1million but amounting in total to $1million or more, can constitute a conspiracy to commit the substantive offence.

Another issue on appeal was the relevance of the offenders' cultural background to sentencing. At the time of offending, s 16A(2)(m) of the *Crimes Act 1914* (Cth), required that the sentencing judge take into account an offender's cultural background. On appeal, it was conceded that this section applied because the offending occurred before the section was repealed. The Court outlined how cultural background can be relevant to sentencing and said that where the legislation permits cultural background to be taken into account, it is required to be established by the offender.

In ***Lau v The Queen*** **[2011] VSCA 324**, the Court examined the impact of an offender's state of mind on sentencing for the importation of a border controlled drug under s 307.2 of the *Criminal Code Act 1995* (Cth). The specified fault element for the offence is recklessness – defined as awareness of a substantial risk that a drug is to be imported, it being unjustifiable to take that risk having regard to the circumstances. Through the operation of the Code, proof of intention or knowledge can satisfy the fault element. The Court found that the legislative scheme makes it clear that offenders who are reckless as to the nature of a substance imported are to be treated the same way as offenders who do so intentionally. The Court decided that the presence of intention or knowledge is an aggravating factor, but that the absence of intention or knowledge is not a mitigating factor.

In ***DPP (Cth) v Coory*** **[2011] VSCA 316**, the Court considered the adequacy of a sentence imposed on the respondent for importation and possession of the 'border-controlled drug' Methylmethcathinone (4-MMC) (an analogue of the drug Methcathinone) under s 314.4 of the *Criminal Code Act 1995* (Cth). Dismissing the appeal, the Court made some observations about the status of 4-MMC in Victoria under the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic). The Court confirmed that there is doubt whether 4-MMC falls within the definition of 'drug of dependence' under s 4 of the Victorian Act. While s 4 and schedule 11 of the Act criminalise possession and trafficking of Methcathinone, it is not clear whether an analogue such as 4-MMC is 'a form of the drug' within the meaning of the legislation, and so a drug of dependence under state law. The Court emphasised that it is desirable that this doubt about 4-MMC's status as a drug of dependence be resolved by an amendment to the Victorian Act.

Appeals against conviction

Tendency and coincidence evidence

The Court heard several appeals which involved assessment of the probative value of tendency and coincidence evidence. In ***R H B v The Queen*** **[2011] VSCA 295**, the Court held that, where evidence of prior acts is led to establish an accused has a tendency to act in a particular way, the question to be asked is whether the degree of peculiarity is such that the evidence has significant probative value. This peculiarity can arise from the acts themselves, the circumstances in which they were committed, the persons against whom they were committed or by reason of a combination of these and possibly other considerations. The test for admissibility of tendency evidence is one of fact and degree, and depends on the facts of the instant case. The Court dismissed the application for leave to appeal from an interlocutory ruling which allowed evidence to be led that the accused had earlier pleaded guilty to indecently assaulting his two daughters, on a charge of committing an indecent act against his granddaughter.

In ***D R v The Queen*** **[2011] VSCA 440**, the Court considered whether, in a trial for sexual offences against two step-daughters, the evidence of each complainant was cross-admissible in relation to the other's allegations. The Court said that tendency evidence of sexual abuse against a child, step-child or grandchild should not be regarded as having limited probative value in relation to allegations made by another child, step-child or grandchild. Sexual offending against family members is unusual, and in ***D R***, other common features, including the age of the victims, the use of fear and the context and

features of the offending, meant that the evidence of offending against another child in the position of the complainant had significant probative value.

In ***BSJ v The Queen*** **[2012] VSCA 93**, the Court considered the admissibility of coincidence evidence when there is a possibility of concoction of that evidence by complainants. The Court decided that whether there is a 'real chance' that concoction has occurred will ordinarily not involve any assessment of the reliability or credibility of individual witnesses. Rather, it will involve a fact-finding exercise, in which a judge should objectively consider what the record shows about the relationship between the complainants, the opportunity for any concoction to have occurred, and the motive behind it. Such a fact-finding exercise would not usurp the function of the jury. The Court emphasised that the probative value of coincidence and tendency evidence lies in the improbability of complainants having concocted similar lies. This is destroyed if it appears that the evidence may have been concocted. As such, whether the evidence may have been concocted is an issue to be addressed by a judge when determining the admissibility of coincidence and tendency evidence. The Court could not discern any error to the trial judge's approach in deciding that the possibility of concoction had been excluded.

In ***Middendorp v The Queen*** **[2012] VSCA 47**, the Court considered whether evidence admitted as tendency evidence was probative on a count of defensive homicide, and the extent to which there was a requirement of similarity between the tendency evidence and the offending conduct.

The applicant was acquitted of murder, but convicted of defensive homicide. He had killed the victim by stabbing him four times. Tendency evidence had been admitted, pursuant to section 97 of the *Evidence Act 2008* (Vic), involving five instances of the applicant's violence towards the victim in situations where the victim posed no risk of harm. The applicant contended that this evidence was inadmissible for the purpose of the jury considering the crime of defensive homicide, as there was no substantial similarity between the prior conduct and the charged conduct. The applicant argued that the trial judge should not have admitted the evidence.

The Court decided that the tendency evidence was correctly admitted and the application for leave to appeal against conviction was refused. The Court reasoned that prior conduct that is not "substantially and relevantly similar" to offending conduct can amount to admissible tendency evidence if it is significantly probative (in that it would rationally affect the assessment of the probability of the existence of a fact in issue). In this case, it was open to the jury to conclude that the applicant had the tendency to attack the deceased in circumstances that did not call for any act of self-defence. This may have affected the jury's view as to whether there were reasonable grounds for the applicant's claimed belief that the victim posed a risk to his life, or might cause him really serious injury, or that it was necessary to stab the victim for the sake of his safety. The evidence was also relevant to the credibility of the applicant's evidence regarding the reasonable grounds for his claimed belief, and the likelihood that there were no reasonable grounds for the applicant to have an honestly held belief that he was defending himself, or that it was necessary to stab the victim four times.

Elements of offences

In ***Ho v The Queen; Leech v The Queen*** **[2011] VSCA 344**, the Court confirmed that legal ownership of one person by another is impossible under Australian law. The slavery offences under the *Criminal Code Act 1995* (Cth) arise when a person treats another person 'as if' that person were a slave. Indicia of slavery include being subject of a sale and purchase; being used at another's behest without restriction; being exploited by receiving wholly inadequate remuneration for labour; being physically confined; being denied the choice between continued service and freedom; and being deprived of the means of returning to one's country of origin. The exercise of dominion by one person

over another is to be determined by looking at all aspects of the relationship. It is for the jury, guided by the judge's directions, to determine whether the line between exploitative employment and slavery has been crossed. A judge does not need to provide the jury with an exhaustive list of circumstances denoting slavery; to do so may usurp the jury's function as tribunal of fact.

In relation to directions on the meaning of possession of a slave under s 270.3 of the Code, the Court decided that if the trial judge had equated possession with ownership, this would have more likely confused, rather than enlightened the jury, as it is not possible to own another person as a matter of law. It was sufficient that the judge had said that possession of a slave was the exercise of a power associated with ownership, as is reflected in the legislation, and that ownership means the complete subjection of the will of one person by another.

The Court emphasised that when directing a jury, a judge must give the jury practical assistance. A judge cannot simply provide a sterile recitation of legal principles. In a case where the Crown alleges that 'the powers attaching to the right of ownership' are possession and use of the person, matters of fact and degree are involved. A judge should make the jury's determinative function clear.

The Court decided that it is possible for an accused to be guilty of both possessing and using a slave, as the elements of the offences are not the same. Where both offences are charged, it will be necessary to prove the common element that the complainant was in a condition of slavery, then to establish that the complainant was possessed (to prove the offence of possession) and was used by the accused (to prove the offence of using a slave). The elements of the offences charged against Leech did not overlap, nor did the evidence, so there was no double jeopardy. In the case of each offence, the Crown had to prove the complainant was in a condition of slavery. To do so, it was enough that any powers attaching to the right of ownership was exercised over her; possession was one such power. Proof that the complainant was in a condition of slavery and in turn proof of the possession offence did not depend on proof of use.

In relation to sentencing however, the Court found that the evidence of possession and use by Leech could only be segregated to an extent. To impose the same sentences for possession and use (as the sentencing judge did) where there was considerable overlap between the conduct constituting the offences, demonstrated that there was double punishment to some extent. Leech's total effective sentence was reduced by 6 months from 6 years' imprisonment, to 5 years', 6 months imprisonment.

Application for special leave to appeal refused by the High Court 17 August 2012

In ***King v The Queen*** **[2011] VSCA 423**, the Court considered the directions to be given when a person is prosecuted for incest against a child (or other lineal descendant or step child, under 18 years old) of their de facto spouse. The Court decided that normally, it will be sufficient to instruct the jury that a de facto relationship arises when a heterosexual couple openly live together in a relationship similar to marriage, which involves substantial emotional commitment. It will not be necessary to address all of the criteria used to determine the existence of a de facto relationship in the context of social security or property law.

Where the existence of a de facto relationship is a necessary element of an offence, it may be necessary for the judge to outline the difference between a de facto relationship and a marriage; the factors establishing the existence of a de facto relationship; and the lack of formality of the commencement and termination of de facto relationships. This is particularly important where guilt of the crime depends on the date of termination of the de facto relationship.

The Court suggested that it might be appropriate for the *Crimes Act 1958* (Vic) to be re-drafted to apply 'incest provisions' to cases where a person sexually penetrates a child for whom he or she has had parental functions and responsibilities. Such a formulation would not require satisfaction that the accused is or was in a de facto relationship with a parent of the child.

In ***Croxford v The Queen*** **[2011] VSCA 433**, the Court held that there was no inconsistency between a principal offender's conviction for defensive homicide, and his co-offender's conviction for manslaughter. The applicant and another man, Mr Doubleday, were charged with the victim's murder. Mr Doubleday struck the fatal blow, using a garden stake, but said he did so in self-defence. Both men were involved in verbal and physical altercations with the victim in the lead up to the fatal blow. Mr Doubleday was convicted by a jury of defensive homicide. It could be inferred from that verdict that the jury found he believed his actions were necessary to defend himself or the appellant from death or serious injury, but was not satisfied he had reasonable grounds for this belief. The applicant was convicted as an aider and abettor of manslaughter by unlawful and dangerous act.

The Court found that the applicant's conviction for manslaughter was not inconsistent with Mr Doubleday's conviction for defensive manslaughter. An accomplice can be convicted of a different offence to the principal, or even convicted where the principal is acquitted. Such verdicts are not inconsistent because either the principal has a defence available, which the accomplice cannot rely on, or the two offenders have differing mental states. Ordinarily, different verdicts are possible where the physical elements of the offences overlap but where the mental/fault element is different. In this case, Mr Doubleday's conviction for defensive homicide implied that he intended to cause the victim death or really serious injury, but had a statutory defence available. His offence contained all of the essential circumstances of manslaughter by unlawful and dangerous act, and it could not be seriously argued that he did not have the mental element for this offence (knowledge of the risk of serious injury). There was therefore no inconsistency with the jury's conclusion (implicit in the conviction for aiding and abetting manslaughter) that the applicant assisted the unlawful and dangerous act which killed the victim, while intending that the victim suffer something less than death or serious injury.

In ***Hafner v The Queen*** **[2011] VSCA 431**, the Court confirmed that s 73(2) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) is an evidentiary aid to determine whether possession of a drug of dependence amounts to 'trafficking' that drug (as defined by s 70 of the Act). Under s 73(2), possession of a drug of dependence by a person in a quantity not less than a traffickable amount, is prima facie evidence of trafficking by that person, in the absence of contradictory evidence.

The Court decided that in the absence of direct evidence of trafficking, it is appropriate for the judge to inform the jury of the effect of s 73(2) because otherwise the jury may think the prosecution is bound to fail. When instructing a jury on the effect of the section, the phrase 'evidence to the contrary' should be avoided and replaced with the more neutral phrasing 'absence of other evidence', to avoid the possibility of incorrectly suggesting an accused has a burden of proof. This should be coupled with a caution that the mere possession of the prescribed quantity of a drug does not mean that the jury should or must conclude that the person is trafficking the drug; the existence of prima facie evidence does not relieve the prosecution of the burden of proving the offence beyond reasonable doubt.

In ***Grozdanov v The Queen*** **[2012] VSCA 94**, the Court considered the legal definition of 'cultivate' in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). Cultivate is defined to include tend and nurture. The Court decided that the ongoing maintenance of equipment to deliver water or nutrients to a growing crop can amount to cultivation as encompassed by the verbs 'tend' or 'nurture' in the Act. The Court decided that the trial judge erred by directing the jury that the appellant's servicing of the hydroponic system

amounted to cultivation, rather than that it could amount to cultivation. A retrial was ordered on the relevant count.

In ***Eade v The Queen; Vanstone v The Queen*** **[2012] VSCA 142**, the Court considered the mental element required for the offence of intentionally damaging or destroying property under s 197(6) of the *Crimes Act 1958* (Vic). While intoxicated, the appellants set fire to plastic wrapping on milk crates on the floor of the heritage-listed Camperdown Milk and Cheese Factory. The appellants left the factory when the plastic was still burning. The factory burnt down. The appellants pleaded guilty to intentionally having destroyed the factory and were each sentenced to 2 years, 4 months' imprisonment in a youth justice centre.

On appeal, the Court found that the appellants could never have committed the offence of intentionally destroying the factory, since neither of them had intended to burn the building down. The offence they committed was the very low culpability offence of intentionally destroying milk crates. The element of intention for the offence they had been convicted of is exhaustively defined in s 197(4) of the *Crimes Act*. The Act requires proof that an offender: (a) had the purpose of destroying or damaging the subject property; or (b) knew or believed that their conduct was more likely than not to result in the destruction or damage to the subject property. The Court decided that the intention required to commit the offence meant that it was not open to convert a minor crime such as damaging milk crates, into a major crime such as destroying the factory. The two are different crimes. The Court amended each appellant's indictment pursuant to s 165 of the *Criminal Procedure Act 2009* (Vic), to record that each had pleaded guilty to intentionally and without lawful excuse destroying by fire property, namely plastic sheeting and milk crates.

In considering the appellants' appeals against sentence, the Court had regard to the impact of the offending on the victim(s), as was required by the *Sentencing Act 1991 (*Vic). The Court decided that s 5(2)(daa) and s 5(2)(db) of the *Sentencing Act* displace the common law requirement that the loss or damage suffered by a victim must be reasonably foreseeable for it to be taken into account. Now under the *Sentencing Act*, the only requirement for loss or damage to a victim to be taken into account is that the injury or loss or damage to the victim(s) be a 'direct result' of the offence. In re-sentencing, the Court had regard to financial loss and damage caused to the factory owner.

The Court decided that the emphasis placed on general deterrence by the sentencing judge was misplaced given that the appellants were young offenders aged 19 and 20. The Court decided that having spent four months in detention before the appeal hearing, the appellants had already been much more severely punished than was justified for the offence they had committed. No further penalty was warranted.

In ***Butler v The Queen*** **[2011] VSCA 417**, the Court considered whether the applicant's failure to give evidence at his trial more readily enabled the jury – and the Court of Appeal – to reject a factual hypothesis consistent with manslaughter, rather than for murder (for which he had been convicted). The applicant appealed his conviction for murder on the ground that it was unsafe and unsatisfactory.

The prosecution case against the applicant was wholly circumstantial, including that he killed the victim and disposed of the body. The prosecution relied on post-offence conduct by the applicant and lies told by him to establish that he was aware that he had killed the victim with murderous intent and was seeking to conceal the fact of the death and avoid responsibility for it. The post-offence conduct included disposing of the victim's car and dog, and variously telling people that the victim was in Bathurst, that the victim had disappeared, and that he had seen the victim. The lies relied on were that the last time he saw the victim, the victim had said that he was going to Bathurst and then possibly to Sydney. The applicant said he did not know whether the victim had taken his car with him, nor what had happened to the victim's dog. The defence case at trial was that there was

no evidence that the applicant was responsible for the victim's death, if he was dead rather than missing.

A majority of the Court (Ashley JA and Ross AJA) decided that the post-offence conduct and lies were capable, in combination, of sustaining an inference that the applicant killed the victim with murderous intent. They decided that this behaviour was not necessarily equally consistent with murder and manslaughter. The majority also decided that in the circumstances of the case, the jury must have had a reasonable doubt of the applicant's guilt of murder and this was not a case where the applicant's silence at trial was capable of supporting the inference that the applicant killed the victim with murderous intent. There were two competing inferences as to intention; namely murder and alternatively, manslaughter on the basis that the applicant's conduct was consistent with him being conscious of having caused the victim's death by an unlawful and dangerous act without an intention to kill or cause really serious injury. The appeal was allowed and the conviction for murder quashed. The applicant was ordered to be retried on a count of manslaughter.

Maxwell P dissented. His Honour considered that if there was any evidence to support a version of the facts that the applicant believed exposed him to a charge of manslaughter, then this would have been within the applicant's sole knowledge. The fact that the applicant chose not to give evidence in these circumstances meant that the 'unlawful and dangerous act' hypothesis ceased to be rational or reasonable.

Application for special leave to appeal refused by the High Court 17 August 2012

In ***PJ v The Queen*** **[2012] VSCA 146**, the Court considered the elements of the federal offence of aggravated people smuggling (at least five persons) contrary to s 233B of the *Criminal Code Act 1995* (Cth). The Court examined whether the offence requires the prosecution to prove a fault element of knowledge that the intended destination was Australia.

The trial judge ruled that it was sufficient that the prosecution established that the accused knew that the intended destination was a place within Australian territory, whether or not the accused was aware that that this place was part of Australia. The applicant sought leave to bring an interlocutory appeal from this ruling. The Court allowed the appeal, deciding that it was a necessary fault element for an offence of aggravated people smuggling for the prosecution to prove that the accused was aware that the intended destination was Australia. The Court reasoned that the provision when read as a whole required that the prosecution proved that the accused knew the intended destination was part of Australia.

Conspiracy and derivative liability

In ***Rolls v The Queen; Sleiman v The Queen*** **[2011] VSCA 401** the Court decided that s 321 of the *Crimes Act 1958* (Vic) does not require a person who has entered into an agreement to commit an offence to actively participate in the commission of that offence before they can be convicted of conspiracy.

The appellants were recorded discussing a plan to murder Mr Rolls' wife. Each was convicted of conspiracy to murder. On appeal, the appellants argued that s 321 requires that each of the alleged conspirators play an active role in carrying out the object of their agreement. On that basis, it was argued that since Mr Rolls alone was to commit the act of murder, there could be no conspiracy. The Court rejected that contention and found that since there was an agreement between the appellants to murder Mrs Rolls, it was immaterial that the commission of the actual crime was assigned to only one of them.

The Court emphasised that acquiescence in a plan would not be sufficient to prove conspiracy. In this case, there was a joint plan by which Mr Rolls would act on behalf of himself and Ms Sleiman in murdering Mrs Rolls.

Application for special leave to appeal refused by the High Court 17 August 2012

In line with the decision in ***Rolls v The Queen; Sleiman v The Queen*** **[2011] VSCA 401**, in ***Bui v The Queen; Hargrave v The Queen*** **[2011] VSCA 404**, the Court decided that a person could be convicted of conspiracy to commit an offence (contrary to s 321 of the *Crimes Act 1958* (Vic)) where they had entered into an agreement to commit an offence, but had not actively participated in committing the offence. The Court decided that Parliament intended that persons who arrange for a third party to commit a crime should be liable to prosecution for conspiracy. The conspiracy provisions do not require that one or more of the parties to the conspiracy must commit the actual offence, rather that they must be involved in the commission of the offence. Involvement existed in this case because the conspirators agreed that the crime would be committed by their paid agent.

Application for special leave to appeal refused by the High Court 15 March 2013

The Court reiterated that it is preferable for a judge to give a formal ruling on an application for severance, as stated in ***Baini v The Queen*** **[2011] VSCA 298** (summarised below).

Application for special leave to appeal refused by the High Court 17 August 2012

In ***Smith, Garcia & Andreevski v The Queen*** **[2012] VSCA 5** the Court considered the principle of acting in concert for complicity in manslaughter and recklessly causing injury. It also considered when the sentencing discretion would be re-opened on a successful sentence appeal.

The appellants were members of a gang of young men who had gathered at a house prior to going to a prearranged fight against a another group of young men at a public reserve. Mr Smith killed a man from the rival group with a knife he took to the fight, and inflicted life-threatening injuries on another. Mr Smith pleaded guilty to murder, intentionally causing serious injury and affray.

Mr Garcia admitted to knowing that Mr Smith had a knife with him at the house and to being present at the reserve, however he maintained that once the attack began, he stopped and stood still. Mr Andreevski maintained that he did not realise that Mr Smith had taken a knife to use in the fight.

On appeal, it was contended that Mr Garcia and Mr Andreevski could only be convicted of manslaughter and recklessly causing injury if it was proved that there was a specific arrangement or understanding between the three co-offenders that the victims would be stabbed during the attack. The Court rejected this and decided that Mr Garcia and Mr Andreevski could be convicted of manslaughter if either was party to an agreement that an unlawful and dangerous act would be committed. This could be established by proving that Mr Garcia and Mr Andreevski agreed to take part in a fight where someone might be attacked with a weapon, so creating an objective significant risk of serious injury. To be guilty of recklessly causing injury it was sufficient that Mr Garcia and Mr Andreevski realised that by their actions, and the actions of their co-accused, it was probable that someone would be injured.

In resentencing Mr Smith for the offence of affray, the Court reimposed a fully concurrent sentence with his other two sentences. The alteration did not change the total effective head sentence or non-parole period. The Court decided that the re-sentencing on the

affray did not open up consideration of the sentences imposed on the other offences, as it was not established that the other sentences were manifestly excessive.

Jury directions

In ***Tognolini v The Queen*** **[2011] VSCA 394**, the Court considered whether a mistaken reference to the incorrect burden of proof during the judge's charge was capable of confusing the jury about the appropriate standard to be applied. After viewing a video recording of the charge, the Court decided that the error made was not a material error. The Court decided that it was appropriate to use video technology in conjunction with a reading of the transcript to determine the issue.

In ***CMG v The Queen*** **[2011] VSCA 416**, the Court allowed an appeal against conviction where the trial judge had directed the jury on the reliability of children as witnesses, but the issue had not been the subject of evidence in the trial. In the charge, the judge included an observation of the Chief Justice of the New South Wales Supreme Court from a 2006 decision, that there was a substantial body of psychological research indicating that children, even young children, give reliable evidence. The judge then cited a study from 1993, which found that children, even very young children, are able to remember and retrieve from their memory very large amounts of information, especially when the events are personally experienced and highly meaningful.

The Court decided that when charging a jury on the law, a judge cannot summarise expert evidence where no expert was called by the parties to give that evidence. The comments made by the trial judge were not within the scope of directions of law. It is inappropriate for the judge to introduce evidence as part of the charge. The Court stated that a permissible alternative may have been for the trial judge to tell the jury that the collective experience of the courts is that 'the age of a witness is not determinative of his or her ability to give truthful and accurate evidence'. The Court indicated that it was open to the judge to inform the jury that they were entitled to put to one side defence counsel's statements in closing address (which included that the young child complainant may blend fantasy and reality) if they did not agree with them. These were preferable alternatives to address the issue in the circumstances.

Rights of accused

In ***HP v The Queen*** **[2011] VSCA 251**, the Court had to consider whether an acquittal on a charge in a previous trial required that the evidence of a witness to the events giving rise to that charge be ruled inadmissible in a later trial.

The applicant was convicted of incest offences against his step-daughter. A witness (who was a child at the time of the offences) had given evidence that she was present when an act of incest was committed. In an earlier trial, the applicant was acquitted on a charge of committing incest in the presence of a child. In the later trial for the offences against his step-daughter, the trial judge ruled that the evidence of the witness was admissible against the applicant. On appeal, the applicant contended that the trial judge erred by admitting the evidence of the witness, as admission of the evidence (in the later trial) relating to the charge on which the appellant had been acquitted (in the first trial), deprived him of the full effect and benefit of the earlier acquittal. The Court decided that it was bound by the earlier acquittal to accept that the witness was not present at the relevant time. The Court decided that the admission of the witness' evidence had deprived the applicant of the full effect and benefit of the acquittal and no direction to the jury could have been given consistent with that benefit. Another retrial was ordered.

The applicant also contended that the trial judge was in error in refusing an application to allow cross-examination of his step-daughter about her sexual experiences. The Court decided the trial judge was correct to reject the application as such cross-examination is impermissible unless the trial judge gives leave (then, under s 37A(5) of the *Evidence Act*

1958 (Vic); currently under s 342 of the *Criminal Procedure Act 2009* (Vic)). The circumstances required to be established before leave is granted under the relevant legislation had not been established by the applicant.

Role of the trial judge/jury directions

In ***Waters v The Queen*** **[2011] VSCA 415**, the Court found that the judge's excessive interference during the trial was impermissible. The Court observed that the trial judge had led the prosecutor to reformulate the Crown case in ways which the judge, by rulings, permitted.

As opened to the jury, the case against the applicant was one of trafficking by sale of ecstasy. As reformulated, it became a case of trafficking of twice the amount of the drug, in part by sale; by offering to sale; and by possession for sale. The defence case as outlined to the jury in the opening remarks was adversely affected by this change to the Crown case over the course of the trial. The intervention had led to the Crown case being enlarged and strengthened. In the circumstances, the Court found this gave rise to a miscarriage of justice. The Court emphasised that this was particularly so because in one of His Honour's rulings, the judge appeared to have regarded changes adverse to the appellant's position as being less important than the Crown having the opportunity to present a case which narrowed the scope for a successful defence.

The Court confirmed that the authorities suggest that it is not consistent with the role of a trial judge to:

- excessively question witnesses;
- direct, in substance, that a witness or prospective witness be asked a particular question;
- seek to influence one or other party to call a particular witness;
- advance an argument in the charge which was not advanced by counsel for the party;
- re-direct a jury that it might decide the case before it on a basis not advanced by the Crown and not subject of the address by counsel.

The Court confirmed the position in *R v Esposito* (1998) 45 NSWLR 442 that despite these requirements, in some circumstances it may not be inappropriate for the judge, in the absence of the jury, to remind a prosecutor of a point which has been overlooked.

The role of the trial judge was also considered in ***Goussis v The Queen*** **[2011] VSCA 117**. In that case, the trial judge drew the jury's attention to a possible inference that could have been drawn from established facts, but was not put to the jury by either party. On appeal, the applicant argued that the trial judge had introduced a new theory by outlining the competing inference, and that this was unfair to him. The Court decided that if a party relies on an inference as being relevant to proof of a fact in issue, there will be circumstances in which the trial judge may consider it necessary to draw to the jury's attention to any competing inferences which may be drawn. To direct a jury that there are competing inferences is not to introduce a new theory, or change the Crown case, where the competing inferences are inherent in the evidence. A trial judge need not necessarily confine the jury's consideration to inferences the parties have chosen to identify. Rather, the evidence dictates the inferences the jury may draw from established facts.

Application for special leave to appeal refused by the High Court 28 October 2011

In ***SM v The Queen*** **[2011] VSCA 332**, the Court decided that the trial judge had erred in deciding not to adjourn a trial to investigate the appellant's fitness to stand trial. The failure to adjourn gave rise to a miscarriage of justice because there had been a real and substantial question of the appellant's fitness to plead. The Court emphasised that case

management considerations can never justify a failure to pursue a legitimate concern as to an accused's fitness to plead. Courts must prioritise the consideration of justice over efficiency and case management in exercising discretion to adjourn proceedings, particularly in a criminal case. Case management is a relevant consideration, but the overriding requirement is that the Court must do justice between the parties.

In ***Tsang v DPP (Cth)*** **[2011] VSCA 336** the Court decided that it is a matter for the jury to determine the existence or extent of any abuse of an accused person's use of an interpreter to give evidence at trial. An accused has a right to use an interpreter if English is not their first language, however a jury is entitled (in assessing credibility) to take into account any alleged tactical abuse of this right. Counsel may comment and make submissions on the issue. The Court noted that justice would best be served by the trial judge giving a direction to the jury about the care and caution required to be exercised when making any assessment of the use/abuse of an interpreter by an accused person to give evidence at trial.

Application for special leave to appeal refused by the High Court 17 August 2012

In ***Slaveski v The Queen*** **[2012] VSCA 48**, the Court decided that a court does not act in an administrative capacity when determining an adjournment application made during a criminal trial. Where the power to grant or refuse an adjournment of a trial is vested in a trial judge, it is to be inferred that the power is to be exercised judicially and is judicial in character. It is not an administrative function, so the provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which regulate administrative decisions, do not apply to a court when determining an adjournment application made in a criminal trial.

New appeal test

With the commencement of the *Criminal Procedure Act 2009* (Vic) in January 2010, the test to be applied by the Court when deciding an appeal against conviction was substantially reformed. Under the old test, set out in s 568(1) of the *Crimes Act 1958* (Vic), where the appellant relied on an error made during the course of the trial, an appeal had to be allowed unless the Crown could establish that, despite the error, no substantial miscarriage of justice occurred (the 'proviso'). Under the new test, set out in s 276(1)(b) of the *Criminal Procedure Act*, the appellant must establish that, as a result of an error or irregularity in (or in relation to) a trial, there has been a substantial miscarriage of justice. More generally, the changes sought to simplify the grounds on which an appeal can be allowed.

In *Weiss v The Queen* (2005) 224 CLR 300, the High Court held that, under the *Crimes Act*, the task of an appellate court in determining whether there had been a substantial miscarriage of justice was to make an independent assessment of the evidence and decide whether, allowing for the natural limitations of an appellate court's position, guilt was proved beyond reasonable doubt. That is, the question should not be approached by attempting to predict what a jury would have done but for the error.

In ***Finn v The Queen; Finn v DPP*** **[2011] VSCA 273**, the Court was required to apply the new appeal test under the *Criminal Procedure Act 2009* (Vic). In analysing the new appeal test, the Court considered High Court authority on the *Crimes Act* proviso (including *Weiss*). It set out the following guiding principles for the application of the new appeal test:

- The Court should conform closely to the statutory language of the test, and to avoid substituting for that language tests developed in other contexts.
- The Court should avoid predicting or speculating on what the jury would have done but for the error which was made.

- No universally applicable description of what amounts to a substantial miscarriage of justice can be set out.

In ***Sibanda v The Queen*** **[2011] VSCA 285**, the parties agreed that the trial judge had misdirected the jury, so the question for the Court was whether the misdirection had caused a substantial miscarriage of justice, applying the new appeal test of the *Criminal Procedure Act*. The applicant argued that the effect of the amendment introducing the new test was to exclude High Court jurisprudence on the application of the proviso.

The Court held that the effect of the new appeal test was to simplify the grounds on which an appeal may be allowed, and to place the onus on the applicant to establish that there had been a substantial miscarriage of justice. It was not intended to do away with the principle established by the High Court in *Weiss*. The Court rejected the applicant's submission that the new test under the *Criminal Procedure Act* had become a question of whether the error was material, requiring the Court to ask whether the error or irregularity deprived the applicant of a real chance at acquittal. The Court said there was nothing in the language, context or structure of the new test to indicate that any substantive change to the approach of the Court was intended.

The Court decided that the misdirection in the applicant's trial did not cause a substantial miscarriage of justice. Leave to appeal against conviction was refused.

Application for special leave to appeal refused by the High Court 17 August 2012

In ***Quach v The Queen*** **[2011] VSCA 390**, the Chief Justice (in dissent) considered whether the proviso in the *Criminal Procedure Act* should be applied, but did not find it necessary to determine the precise content of the new test.

In ***Baini v The Queen*** **[2011] VSCA 298**, the Court considered when the failure of a trial judge to sever counts on a presentment and order a separate trial of an accused on a particular count, gives rise to a substantial miscarriage of justice.

The applicant was presented on 48 counts of blackmail against one complainant (Rifat) and a single count of blackmail against a second complainant (Srour). The trial judge refused an application to sever the Srour count without giving a formal ruling, and relied instead on reasons explored in oral argument. The applicant was found guilty on 36 of the Rifat counts and was also found guilty on the Srour count. On appeal, the applicant argued that the trial judge had erred by failing to sever the Srour count from the presentment and that this had resulted in a substantial miscarriage of justice.

The Court commented that the failure of the trial judge to give a formal ruling outlining his reasons for refusing severance of the Srour count was unsatisfactory. The Court emphasised that the question of whether severance should be granted is a serious one, with serious consequences for an accused. At minimum, a trial judge must explicitly state the reasons leading to a refusal to order any severance requested, in a manner sufficient to enable the matter to be properly considered on appeal.

The Court considered that the trial judge's decision to refuse severance of the Srour count was attended by error. In the absence of a formal ruling, the Court assumed from transcript of the oral argument (in the applicant's favour), that the trial judge had applied an erroneous view of the law. The next issue was to consider whether the error had resulted in a substantial miscarriage of justice as required by s 276 of the *Criminal Procedure Act 2009* (Vic) for the appeal against conviction to be successful.

The Court stated that generally, the significance of any failure to sever must be examined in the particular case (in accordance with *Weiss v The Queen* (2005) 224 CLR 300), with proper weight given to the adjective 'substantial'. The Court decided that a substantial

miscarriage of justice had occurred on the Srour count and ordered a retrial on that count. A great deal of evidence relevant to the Rifat counts, which had no possible relevance to the trial on the Srour count and was highly prejudicial, went into evidence as a result of the refusal to sever. It could not be inferred that the jury was unaffected by that prejudicial material in its consideration of the Srour count. No substantial miscarriage of justice had occurred in relation to the Rifat counts, however, as the evidence was very strong, the jury was given a strong separate consideration direction and the verdicts on those counts (some not guilty) demonstrated a very obvious application of the separate consideration requirement.

The applicant was granted special leave to appeal to the High Court from this Court of Appeal decision on two grounds. First, the applicant argued that the Court of Appeal erred by not ordering a retrial on all counts; and second, that the Court of Appeal erred in adopting the approach in *Weiss* and thereby failed to properly apply s 276 of the *Criminal Procedure Act 2009* (Vic). A majority of the High Court decided that the requirement that there be a substantial miscarriage of justice before allowing the appeal required a different approach to assessing whether the conviction was unsafe and unsatisfactory. The majority decided that in the context of the particular case the question the Court of Appeal ought to have answered, when it considered whether there had been a substantial miscarriage of justice in relation to the Rifat counts, was whether the jury's verdicts on those counts were inevitable, had the evidence relevant to the Srour count not been admitted at trial (that is assuming there had been no error). The appeal was remitted to the Court of Appeal to consider afresh whether there had been a substantial miscarriage of justice on the Rifat counts. Subsequently the Court of Appeal decided in *Andelman v The Queen* [2013] VSCA 25 that the strength of the Crown case is not, by itself, a determinant factor in assessing whether a substantial miscarriage of justice occurred as some serious departures from trial process warrant the conclusion that there has been a substantial miscarriage, regardless of effect-[92]. As to the persuasive onus, the Court of Appeal noted that the majority view in the High Court was that the appellant need show 'no more than that, had there been no error, the jury may have entertained a doubt as to his or her guilt'. Once that has been shown, then 'as a practical matter' it will be for the prosecution to 'articulate the reasoning by which it is sought to show that the appellant's conviction was inevitable'- see [101-2].

Juries

In ***MJR v The Queen*** **[2011] VSCA 374** the Court suggested that if a jury conveys to a judge that there has been difficulty in arriving at a unanimous verdict, they should receive an instruction that they should not reveal the numbers in favour of conviction and acquittal.

The jury in ***MJR*** revealed in a note to the trial judge that they were unable to reach a unanimous verdict, but had reached majority verdicts for eight of nine counts. The note advised the judge what the majorities were, including that on three counts the majority was in favour of conviction by 11 votes to one – a statutory majority. The Court decided that the jury should not have told the judge the details of votes cast in the course of deliberations; but once they had, the judge should have informed counsel of the contents of the note as it was relevant to applications to discharge the jury, as well as the trial judge's discretion to take majority verdicts. Disclosure to the parties was required in this case due to the nature of the information conveyed, and its significance to the judge's discretion to take majority verdicts, since the judge knew the information, but counsel did not. The Court concluded there had been a breach of procedural fairness occasioning a miscarriage of justice, and ordered a retrial.

In ***LLW v The Queen*** **[2012] VSCA 54**, the Court confirmed that a jury cannot find an accused guilty on an alternative count unless they have reached a unanimous verdict of not guilty on the principal count.

The appellant was charged with one count of rape and in the alternative, one count of sexual penetration of a child under 16. As the latter is not an included offence within the scope of the general alternative verdicts provision in s 239(1) of the *Criminal Procedure Act 2009* (Vic), nor is it a statutory alternative to rape in s 425(1) of the *Crimes Act 1958* (Vic), it was alleged as a separate count on the indictment. The Court decided that where sexual penetration of a child under 16 is charged as, in substance, an alternative count to rape, the approach required of a jury under s 425(1) should apply by analogy. Under s 425(1), if the jury are not satisfied that the defendant is guilty of rape or attempted rape, they may then (and only then) go on to consider lesser offences. If a jury was able to bypass the primary count being unable to agree upon it, and move directly to the alternative, it would have the effect of denying the Crown the right to have its primary case of rape determined by a jury by conviction or acquittal. That would be wrong in principle.

The Court stated that where the defence position is clear and does not involve any suggestion of consent or belief in consent (as where the accused has totally denied any sexual contact with the complainant), it will usually be inappropriate and unduly confusing to include the alternative. A sexual penetration count included on an indictment should be abandoned by the prosecution, or withdrawn by the trial judge, if it becomes clear that neither consent nor belief in consent is in issue at trial. This can be done by amending the indictment or, in an appropriate case, filing over a fresh indictment.

The Court affirmed the decision in ***MJR***, emphasising that juries should be told that they must not reveal the numbers of votes in favour of conviction or acquittal when conveying to a judge that they are having difficulty in arriving at a unanimous verdict.

Role of the prosecutor

In ***AJ v The Queen*** **[2011] VSCA 215**, the Court emphasised the obligation of prosecuting counsel to disclose information relevant to the credit of a prosecution witness. The applicant had been found guilty of committing an indecent act with his daughter, XN. Unbeknown to the defence at trial, XN was also the complainant in a previous rape trial. In the course of the previous rape trial, XN's credibility was demonstrated to be questionable.

The Court was highly critical of the trial prosecutor's failure to disclose that XN had given evidence in the previous rape trial, and in particular, the issue of XN's credibility in that previous trial, to the defence. The Court emphasised that the credibility of XN was central to the Crown case in the applicant's trial, and that if XN's evidence was doubted, the applicant was entitled to be acquitted. The Court ordered a retrial.

In response to the findings above (judgment December 2010), there was a further hearing in the matter (July 2011). The trial prosecutor submitted that that she believed that a person other than herself had informed the defence about the previous rape trial and XN's evidence on behalf of the Crown. This was a mistaken belief. The Court commented that the prosecutor should have ensured that the defence lawyers were informed about the previous rape trial, if not before the trial, then when it was apparent that they were ignorant of it at trial. The Court emphasised that it is a prosecutor's personal responsibility to ensure that the duty to disclose has been discharged. This includes when a brief is subsequently delivered to a different prosecutor.

Interlocutory appeals

Nature of interlocutory review

Since the introduction of interlocutory criminal appeals in 2010, there has been ongoing debate and discussion regarding the Court's role in reviewing decisions of trial judges. In ***KJM v The Queen*** **[2011] VSCA 268**, a five-member bench ruled that in appeals from decisions on the admissibility of tendency evidence, the question for the Court is whether the decision was open to the trial judge. In determining an interlocutory appeal, the Court does not 'decide for itself' whether the evidence is admissible. Rather, in accordance with the principles in *House v The King* (1936) 55 CLR 449, the Court can only intervene if an error has been made by the trial judge. The approach may be different, however, in a conviction appeal where a decision regarding tendency evidence falls for review.

In ***DPP (Cth) v J M*** **[2012] VSCA 21**, the Court decided that a trial judge cannot state a case for consideration by the Court of Appeal (under the procedure provided for in s 302 of the *Criminal Procedure Act 2009* (Vic)) on the basis of assumed facts. J M was charged with the offence of market manipulation, pursuant to s 1041A of the *Corporations Act 2001* (Cth). That provision prohibits a person from carrying out or taking part in a transaction that has or is likely to have the effect of creating or maintaining an artificial price for a financial product. Before J M's trial commenced, a dispute arose between the accused and the Crown regarding the meaning of the term 'artificial price'. The trial judge reserved a question of law for consideration by the Court of Appeal and made findings of fact for the 'limited purpose' of the question reserved. The accused opposed this course on the basis that the facts giving rise to the question were contested.

A majority of the Court found that it was not possible for a trial judge to make factual assumptions (which, for this purpose, the limited factual findings amounted to) for the purpose of reserving a question of law for the Court of Appeal. There was long-standing authority to the effect that a case stated on the basis of factual assumptions was merely advisory and so impermissible, and nothing in the *Criminal Procedure Act* changed this. It would however, be permissible for a trial judge to make assumptions of fact for the purpose of a pre-trial determination under s 199 of the *Criminal Procedure Act*, from which any unsatisfied party could bring an interlocutory appeal. Indeed, that course would have been preferable in this case. The Chief Justice dissented on this point, deciding that it was apparent from the s 302 and relevant authority that a trial judge can state a case on the basis of assumptions of fact.

The Court also considered the meaning of 'artificial price'. The majority's conclusions meant that they could only answer the reserved questions to the extent they could be conceived of as pure questions of law, capable of being answered without reference to disputed facts. As a result, the majority concluded that the words 'artificial price' (in the abstract) were intended to include conduct of the sort typified by market 'cornering' and 'squeezing', as described in US case law. This conduct involves the misuse of monopoly or dominant market power, by cornering supply or taking advantage of a shortage of supply, to drive true market prices up or down, into an artificial range. Whether conduct amounts to cornering or squeezing turns on the extent of market dominance and whether this dominance led to an artificial price and the intention of the dominant party. The Chief Justice disagreed. Her Honour thought that that the words 'artificial price' encompassed a broader range of conduct, and denoted any price generated other than by transactions reflecting basic forces of supply and demand in an open, efficient and well-informed market. Finally, members of the Court went on to make some observations about the fault element of the offence in s 1041A.

Application for special leave to appeal referred to an enlarged bench
14 December 2012

Illegally and improperly obtained evidence

In ***Director of Public Prosecutions v Marijancevic*** **[2011] VSCA 355**, the Court declined to overturn a trial judge's decision to exclude evidence obtained as a result of irregularities in police procedures. Affidavits presented in support of search warrant applications had not been properly sworn. The affidavits had been signed (not sworn) in the presence of an authorised witness, in an apparently widespread practice within Victoria Police. The trial judge found that the search warrants were invalid and that the evidence seized pursuant to them was illegally obtained. He also found that the police officers had acted deliberately or with recklessness of the highest order. The trial judge exercised his discretion under s 138 of the *Evidence Act 2008* (Vic) to exclude the illegally obtained evidence, on the basis that the undesirability of admitting evidence obtained in these circumstances outweighed the desirability of admitting this evidence against the accused.

The Court rejected the Director's interlocutory appeal against the ruling. In accordance with earlier authority, the Court applied the principles of *House v The King* (1936) 55 CLR 449 to the interlocutory review of the s 138 ruling. Although the Court expressed concern about his Honour's reasoning and factual findings, the Court decided the ruling was reasonably open to the trial judge. The Court indicated however, that the discretion to exclude such evidence could well be exercised differently in future trials. The Court also provided guidance to courts asked to assess the gravity of contraventions by law enforcement agencies.

Similar irregularities in police procedures were considered by the Court in ***G A v The Queen*** **[2012] VSCA 44**. Police had intercepted a vehicle travelling from Sydney to Melbourne, believing it contained drugs. A roadside search failed to locate any drugs. The vehicle was transported to a police station and a search warrant was obtained. A canine search failed to find any drugs. Police returned to a different magistrate and obtained a direction to transport the vehicle to the Police Forensic Sciences Centre. A search conducted at the Centre, which would not have been possible on the highway or at the station, located over 1kg of methylamphetamine hidden in the body of the vehicle. A number of irregularities occurred in this process. First, police did not obtain any authority to initially transport the vehicle back to the police station, which the parties agreed was required. Second, the affidavit supporting the application for a search warrant was not properly sworn. Third, the search warrant had been drafted so that it appeared the vehicle was the object of the search, not (as should have been the case) the suspected drugs – indeed, the defects were such that the Court found that the warrant should not have been issued. Fourth, after the magistrate signed the form purporting to authorise a further search, a police officer amended the form, adding false information.

The trial judge ruled that, notwithstanding these irregularities, the evidence of the drugs should be admitted into evidence in the trial of the accused. His Honour ruled, pursuant to s 138 of the *Evidence Act 2008* (Vic) that the desirability of admitting this evidence outweighed the undesirability of evidence obtained in these circumstances. The Court refused the accused leave to appeal from this ruling. It held that the conduct of police was not knowingly unlawful or designed to gain an advantage that could not have been achieved by lawful means. The conduct therefore fell at a point in the spectrum of behaviour which did not, in a sound exercise of discretion, require the evidence to be excluded. More fundamentally, the Court thought it doubtful that any of the conduct relied upon was unlawful. Under s 82 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), where a police officer has reasonable grounds for suspecting that a vehicle in a public place contains illicit drugs, they may search the vehicle with such assistance as they think necessary. The Court thought it was at least arguable that everything which followed the interception of the vehicle was within the scope of the 'assistance' referred to

in s 82. Nonetheless, the Court indicated that, given the way events unfolded, questions had been raised about the adequacy of the investigators' training and available advice.

The illegality relied upon by the accused in ***Marijancevic***, which was apparently a widespread practice within Victoria Police, was addressed by the *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* (Vic). That Act retrospectively deemed irregularly sworn affidavits to be effective, and search warrants obtained on the basis of such affidavits to be valid. It did not affect the parties to the appeal in ***Marijancevic***, but did render the irregularly sworn oath in ***GA*** retrospectively valid.

In ***W K v The Queen*** **[2011] VSCA 345**, the Court considered the admissibility of 'pretext conversations'. The complainant reported to the police that her former partner, W K, had sought to blackmail her by threatening to distribute intimate photos of her unless she agreed to have sex with him. At the suggestion of police, and with their assistance (providing a recording device and instructions on how to use it), the complainant recorded her phone conversation with W K, in which he made admissions. A transcript of the conversation was sought to be led against W K at trial. Such conversations, in which a complainant seeks to extract admissions from the alleged offender after the event, are commonly referred to as 'pretext conversations'. The trial judge ruled that, in assisting the complainant to record the phone conversation, the police had breached the *Surveillance Devices Act 1999* (Vic), but that the evidence was nonetheless admissible.

The Court of Appeal dismissed W K's interlocutory appeal against the ruling admitting the evidence. The Court agreed that the evidence was admissible, but found that the judge was in error in concluding that the making of the recording breached the *Surveillance Devices Act*. In particular, it held that the police did not 'use' a recording device for the purposes of the Act by making it available for use by the complainant and accessing the recording that she made. The Court held that there was no infringement of the right to privacy where a party to a private conversation records it for their own purpose, which in these circumstances was to give it to the police investigating a crime alleged by that party.

Trial procedure

In ***MAC v The Queen*** **[2012] VSCA 19**, the Court refused to grant an interlocutory appeal against a decision by a judge of the County Court to extend time for holding special hearings pursuant to s 371(2) of the *Criminal Procedure Act 2009* (Vic). When a complainant is under 18 years old or has a cognitive impairment, the complainant's evidence is usually (subject to exceptions) given at a special hearing which is recorded as an audiovisual recording. The recording is later presented to the court at trial.

Section 371 of the *Criminal Procedure Act* requires that if a special hearing is to be held, it must be held within three months of the accused being committed for trial. This time may be extended if there are exceptional circumstances and the court considers it is in the interests of justice to do so. Due to a mistake, special hearings were conducted out of time in the applicant's matter, without an extension of time first being sought or granted. Once the parties and the judge became aware of the situation, the prosecutor made an application for an extension of time to conduct the special hearings which would take effect retrospectively. The judge found that there were exceptional circumstances sufficient to warrant the extension, and that it was in the interests of justice to do so because the hearings had already been held. If the hearings were to be held again, it would mean that the young complainants would need to be cross-examined again.

The applicant contended that the judge did not have the power to make an order extending time after the hearings had been held. The applicant also argued that there were no exceptional circumstances sufficient to warrant an extension and that it would not be in the interests of justice to do so.

The Court decided that s 371(2) confers the power to extend time for the holding of special hearings retrospectively in an appropriate case. The Court also decided that the circumstances were exceptional, particularly because the judge, the prosecutor and the defence counsel all made the same mistake as to whether an extension of time had been granted. It was in the interests of justice to grant the extension due to the very short period of time outside three months after which the hearings were held and having regard to other considerations identified by the County Court judge.

The Court emphasised that it is not appropriate to adopt a course of routinely setting down special hearings for a date more than three months after committal and then extending time to the date appointed. In most cases the three month time limit must be observed and there should only be deviation from that in exceptional circumstances where the interests of justice require it.

Civil appeals

This section on civil appeals includes cases dealing with the validity of a criminal charge and the power of the Magistrates' Court to amend a charge after the time limit for commencement has expired (DPP v Kypri [2011 VSCA 257) and of the elements of the drink driving offences contrary to sections 55(1) and 55(9A) of the Road Safety Act 1986 (Vic), namely DPP v Piscopo [2011] VSCA 275 and DPP v Rukandin [2011] VSCA 276.

Sex offender detention and supervision

In ***IK v The Secretary to the Department of Justice*** **[2012] VSCA 12**, the appellant brought an appeal against a supervision order made in the County Court pursuant to s 96 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). Section 96 enables a court to make an order; renew or extend an order; impose conditions (other than core conditions) on an order; impose a particular period of operation of an order; not revoke an order on a review under Part 5; or revoke the order and make a new supervision order or detention order. The appellant argued that the judge erred by finding that he posed an unacceptable risk of committing a relevant offence and by imposing a supervision order on him. The appellant contended that Her Honour erred in taking into account offending which was not relevant offending. He also took issue with the conditions of the supervision order.

The Court observed that the legislation confers a discretion upon a judge who determines an application under s 96 and that discretion will not be interfered with on appeal unless some error of principle has occurred. The Court decided that there had been no error in the County Court judge's exercise of discretion to grant a supervision order. The Court emphasised that the Act does not require satisfaction to a high degree of probability that the offender will commit a relevant offence if a supervision order is not made. What is required is that the judge be satisfied by acceptable, cogent evidence and to a high degree of probability, that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made. Whether the risk is acceptable or not will depend on the likelihood of it becoming reality and on the seriousness of the consequences if it does. If the offence is particularly grave, then satisfaction that the risk is unacceptable will be reached according to a different (lower) standard than that required for a less grave from of sexual offending.

The Court decided that Her Honour was entitled to take into account the appellant's subsequent violent offending which while not 'relevant offending' within the meaning of that expression in the Act, it was a 'relevant consideration' under s 9(3). If an offence which is not a relevant offence bears upon the probability of the offender posing an unacceptable risk that he or she will commit a relevant offence in the future, then that circumstance must be taken into account. In fact, if the County Court judge had not taken the violent offending into account, she would have failed to take into account a relevant consideration.

In relation to the conditions of the order challenged by the applicant, the Court stated that in fairness to the offender and to those who must ensure his compliance, conditions imposed must contain as little ambiguity as possible. They need to be imposed for a proper purpose and cannot constitute more than minimum interference with an offender's liberty, privacy or freedom of movement which is necessary to ensure that effect is given to the purposes of the conditions. Almost any condition, the limits of which cannot be readily ascertained, is potentially one which interferes more than minimally with an offender's liberty.

Asset confiscation

In ***Chalmers v The Queen*** **[2011] VSCA 436**, the Court considered the interpretation of the phrase 'used in connection with the offence' in the definition of 'tainted property' under s 32 of the *Confiscation Act 1997* (Vic). The Court set out the following propositions from decisions of the High Court and other intermediate appellate courts, to be used when deciding whether any property is 'tainted property':

1. The word 'used' should be given its ordinary meaning of 'employed, or made use of, for a particular end or purpose'.

2. The inclusion of the words 'in connection with' was plainly intended to extend the scope of the definition of 'tainted property' beyond circumstances where the property could be said to have been 'used in the commission of' the offence.

3. Whether there is a connection between the use of the property and the commission of the crime is a question of fact and degree. It is not necessary for it to be established that there was a 'substantial' connection, or that the crime could not have been committed without using the property.

4. The nature, extent and significance of the use of the property in connection with the commission of the crime will be matters which go to the Court's discretion whether or not to order forfeiture of the property.

The Court went on to state that if an offender uses property for a purpose associated with committing offences, it will follow that the property was 'used in connection with the commission' of the offence. The fact that an act is done in or on a particular property will ordinarily not be enough to bring that property within the definition. It is only when the property, or some feature or attribute of it, has been turned to advantage by the offender, or enlisted for the offender's purpose, that it will have been 'used' in the required sense. Conduct after an offence is completed may contribute to use of property in connection with the commission of an offence.

In determining whether property was used in connection with the commission of an offence, the Court noted that the following may require close examination: the nature of property; its precise use; the nature of the offence that was committed; and the manner, if any, in which the property was used in connection with the commission of the offence. The Court observed that the more passive the use of property, and the more incidental its role in the offending, the less likely it is that on the facts of the case, the Court will find the required connection exists.

Application for special leave to appeal refused by the High Court 14 December 2012

In ***DPP & Anor v Moloney*** **[2011] VSCA 278** the Court decided that s 18(1) of the *Confiscation Act 1997* (Vic) does not provide the Court with a general discretion as to whether to grant a restraining order over property after grounds have been established.

Section 18(1) of the Act provides that a court must make a restraining order if it is satisfied that:

- the defendant has been charged with a Schedule 2 offence; and

- it considers that having regard to matters contained in the supporting affidavit and any other sworn evidence, there are reasonable grounds for making the order.

'Reasonable grounds' was interpreted by the Court to mean the satisfactory proof of the conditions defined as necessary for the making of a restraining order as set out by the

Act, rather than providing a general discretion to decide whether or not to make an order based on justice or convenience in all the circumstances.

The Court decided that the requirement that 'any relevant matters' be addressed in a police officer's affidavit in support of a restraining order application, is a reference to matters set out in s 16(2) of the Act, rather than a reference to all the circumstances of the case. Section 16(2) sets out the necessary pre-conditions for an application for a restraining order. Reference to all the circumstances of the matter would render the statutory provisions unworkable. Given the statutory scheme, the Court decided that the deponent to an affidavit in support of an application for a restraining order in this case, did not have an obligation to disclose that some Schedule 2 offences had been withdrawn as a result of a plea bargain and the factual basis for the plea.

In ***Lemoussu v DPP (Vic)*** **[2012] VSCA 20**, the Court considered the time limits for making an application for an exclusion order under the *Confiscation Act 1997* (Vic). The Court decided that the present scheme provides two opportunities for an offender to obtain the exclusion of property from a restraining order in relation to property subject of automatic forfeiture. The first arises where a restraining order is made prior to conviction, and is governed by s 20 (30 days). The second arises where a restraining order is made after conviction, and is governed by s 35 (60 days). The Court noted that this construction was assumed by the Court in *DPP (Vic) v Nguyen* (2009) 23 VR 66, though was not then the subject of controversy.

Application for special leave to appeal refused by the High Court 17 August 2012

International arbitration

In ***IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*** **[2011] VSCA 248** the Court set out the principles to be applied when beneficiaries of international arbitral awards seek to enforce them in Victorian courts. The respondent received an arbitral award in its favour against IMC Mining Inc. The applicant, a company registered in Australia and part of the same corporate group as IMC Mining Inc, was also made liable under the award, despite not having been a party to the arbitration, nor the contract which enabled it. The respondent was successful in obtaining an enforcement order from a judge of the trial division of the Supreme Court against the respondent. This order was overturned on appeal. A majority of the Court held that, before an international arbitral award can be enforced, its beneficiary must establish that on the face of the material that:

- an award has been made by a foreign arbitral tribunal granting relief to the beneficiary against the respondent;
- the award was made pursuant to an arbitration agreement; and
- the beneficiary and respondent are parties to the arbitration agreement.

In addition, the Court stated that where these matters are not established, it would not be appropriate for a court to hear the enforcement application ex parte.

Negligence

In ***Saric v Tehan (No 2)*** **[2011] VSCA 421**, the Court considered the circumstances in which an award of damages to a vehicle owner should be reduced because the owner was in receipt of an independent benefit. The respondent was involved in a motor vehicle accident which was caused by another driver's negligence. His vehicle was damaged, but a repairer completed the repairs before any written authority was signed. The *Accident Towing Services Act 2007* (Vic) barred the repairer from recovering any payment from the respondent for those repairs in the circumstances, with the result that the respondent received them at no cost to himself. The respondent sued the negligent driver in the Magistrates' Court for the repair costs and related losses. A magistrate held that he was

unable to recover the repair costs from the negligent driver because he had not suffered any loss in relation to the repairs.

A judge of the Supreme Court held that the respondent should have been awarded damages for the cost of the repairs. The Court of Appeal dismissed the negligent driver's appeal from this decision. It was accepted by the parties that the effect of the *Accident Towing Services Act* was to confer a benefit on the respondent, as it meant he did not have to pay for the repairs to his vehicle. The Court reviewed the authorities on benefits received by claimants after their cause of action arises. It decided that the benefit received by the respondent was conferred on him independently of any right or redress against the negligent driver, such that he might enjoy the benefit (free repairs) even if he enforced the right (to recover from the negligent driver). The benefit was conferred by legislation which was intended to protect consumers and deter unscrupulous repairers. Parliament did not intend that the benefit would provide relief to negligent drivers liable to compensate the vehicle owner. The benefit derived by the respondent was therefore entirely collateral, and should not have been deducted from the damages he received.

In ***Powercor Australia Ltd v Thomas*** **[2012] VSCA 87**, the Court considered whether the respondent (a farmer) could claim the cost of reinstating/repairing farm fixtures, including fences damaged in the Black Saturday bushfires of 2009, given that the respondent had reinstated them himself with help from volunteers. The Court upheld the decision of the trial judge by deciding that the appropriate method of assessing damages of farm fixtures damaged or destroyed by fire was the reasonable commercial cost of repairing or reinstating such items. The fact that repairs were done by the respondent and volunteers did not preclude a claim for damages on that basis. The Court decided that the labour of volunteers was designed to assist the respondent and was not intended to relieve the liability of the person whose negligence caused the damage.

In ***Karatjas v Deakin University*** **[2012] VSCA 53**, the Court considered whether the respondent owed the appellant (an employee of Spotless, a contractor retained to operate the campus cafeteria) a duty to take care to prevent her from being assaulted by a third party while walking from the cafeteria to the car park on the University campus after dark.

The respondent retained Spotless to run the cafeteria and required the cafeteria to stay open after dark. The respondent knew or ought to have known that Spotless employees were likely to walk to and from the cafeteria to the car park in darkness. The respondent retained control over a well-lit pathway to and from the car park. The well-lit pathway was closed off due to a student function and had not been reopened after the function. The appellant was attacked by a man as she walked to her car via an alternative non-lit pathway. On request, the respondent had made security escorts available to people on campus after dark, but this was not offered directly to the appellant (nor was it offered to her through Spotless, her employer) before the attack. A security escort was provided to the appellant following the assault.

The Court decided that the respondent owed the appellant a duty of care. The respondent needed to do no more than comply with the obligations to which it was subject under s 26 of the *Occupational Health and Safety Act 2004* (Vic) to ensure as far as reasonably practicable, that the appellant's means of entering her workplace were safe and without risk to health.

Consumer protection

In ***Director of Consumer Affairs Victoria v Operation Smile (Aust) Inc*** **[2012] VSCA 91**, the Court decided that s 9(1) of the *Fair Trading Act 1999* (Vic) (engaging in misleading or deceptive conduct or conduct likely to mislead or deceive) does not require proof that an accused knew, or was reckless as to whether their conduct was misleading or deceptive. The provisions impose strict liability, there is no mens rea element. The Court noted that s 9 was enacted as part of a national scheme to reflect Part V of the

Trade Practices Act 1974(Cth) and s 9(1) was identical to s 52 of that Act. Section 52 had a well understood and settled meaning that did not require proof of knowledge or recklessness of the misleading or deceptive nature of the conduct.

The Court rejected a submission that s 32 of the *Charter of Human Rights and Responsibilities 2006* (Vic) requires s 9(1) to be interpreted as incorporating a mens rea element. Section 32(1) of the Charter requires the selection of a human rights compatible interpretation of a provision only if that interpretation is consistent with the purpose of that provision. The Court decided that to incorporate a requirement of mens rea would be to defeat the purpose of s 9(1).

The Court decided that what is relevant under s 9(1) is whether, when tested objectively, conduct is misleading or deceptive or likely to mislead or deceive. A person's state of mind is immaterial unless a statement is explicitly about that state of mind.

The appeal was allowed. The Court declared that the respondent's statements and representations were misleading or deceptive, or likely to mislead within the meaning of s 9 of the *Fair Trading Act 1999* (Vic). Those statements and representations were that its treatments, services, techniques and procedures could cure cancer, reverse, stop or slow its progress; prolong the life of a person suffering from cancer; benefit cancer sufferers; were or are supported by generally accepted findings, published research findings; and were or are evidence based therapies.

Unconscionable conduct

In ***Kakavas v Crown Melbourne Limited*** **[2012] VSCA 95**, the Court dismissed an appeal by the appellant from the dismissal of his claim for damages against the respondent in the Trial Division of the Supreme Court. The appellant alleged that the respondent had acted unconscionably in its dealings with him contrary to s 51AA of the *Trade Practices Act 1974* (Cth). The appellant, a 'high-rolling gambler', met the criteria for pathological gambling as set out in the DSM-IV (a diagnostic manual produced by the American Psychiatrists Association). He argued that the respondent, the casino, had acted unconscionably by luring him to gamble and exploiting his condition to its financial advantage. The appellant asserted that his condition put him in a position of special disability or disadvantage in dealing with the respondent and that his gambling losses were loss and damage suffered by reason of the respondent's unconscionable conduct.

The Court decided that the appellant was not in a position of special disadvantage in his dealings with the respondent. The evidence showed that his condition had not affected his ability to conserve his own interests, nor had it seriously affected his ability to make judgments in his best interests. The appellant had demonstrated a capacity to gamble in a controlled manner and had withheld his custom from the respondent for periods when he did not get what he wanted in negotiations on the terms of his gambling at Crown.

The Court highlighted that the diagnosis of someone as a pathological gambler alone says nothing as to that person's capacity to exert control over their behaviour at any particular time. The Court reasoned that the appellant's status as a pathological gambler was therefore not particularly relevant to determining whether he was in a position of special disadvantage, nor whether the respondent had acted unconscionably in its dealings with him.

Appeal dismissed by the High Court 5 June 2013

Practice and procedure

In ***Saric v Tehan*** **[2011] VSCA 224**, the Court decided that the non-availability of particular counsel for an appeal hearing cannot, of itself and without more, be a ground to justify an alteration of an appeal date in civil proceedings.

In this case, the respondent sought to have the appeal date vacated because Senior Counsel was unavailable. The respondent submitted that he would be prejudiced if the appeal was to occur on the fixed date, given the requirement of briefing new Senior Counsel.

The Court found that the only prejudice which might be suffered by the respondent was in relation to costs, and this was not sufficient to justify changing the appeal date.

In ***Ebner & Anor v Clayton Utz*** **[2012] VSCA 56**, the Court considered the nature of an order refusing to extend the period for service of a writ. The Court decided that such an order is interlocutory because it does not finally determine the rights of the parties in the proceeding. The first reason for this is that such an order does not prevent a plaintiff from issuing a fresh proceeding based on the same causes of action. The second reason is that the order does not prevent a plaintiff from making a further application for an extension of the period for service of the writ; it is irrelevant that such a further application would be unlikely to succeed.

As the Court decided the order refusing to extend the period was interlocutory, leave to appeal that decision was required (pursuant to s 17A of the *Supreme Court Act 1986* (Vic)). There was no right of appeal.

In ***Secretary to the Department of Justice v XQH*** **[2012] VSCA 72**, the Court considered the obligations of a model litigant. The Secretary was granted leave to appeal a decision by which VCAT granted the respondent a favourable assessment for a working with children check. The Secretary failed to file and serve her Notice of Appeal and Notice of Proposed Contents of the Appeal Book within the required timeframe. The Secretary sought an extension of time to file the documents and an order that the appeal not be taken as abandoned.

The Court decided that as a general approach, if delay arises from oversight, is of short duration and there is no prejudice to a respondent, the Court is generally disposed to grant an extension of time. However, high standards are set for government parties who are expected to conduct themselves as model litigants. The Court expressed that it was unfortunate that the Secretary had not acted in a model way.

The respondent sought a condition attached to the extension of time which would require the Secretary to undertake to pay costs regardless of the outcome of the appeal. At the leave stage, the Court had expressed reservations as to the strength of the Secretary's appeal, but noted that it raised a matter of some public importance. The Court indicated that where a party has a less than, or barely arguable case, but an important principle of public interest is potentially involved, leave will be sometimes granted on the condition of the undertaking as to the other party's costs. While ordinarily such an undertaking will be considered at the leave stage, the respondent in this matter was not legally represented at the leave hearing and lacked the legal knowledge to make such a request himself.

Given the delays experienced by the respondent and the important public interest element of the appeal, the Court allowed the extension of time with the condition that the Secretary pay the respondent's costs irrespective of the outcome of the appeal. It was not sufficient or appropriate that the respondent rely on protections in the provisions of the *Appeal Costs Act 1998* (Vic).

The Court applied the reasoning in ***XQH*** on the issue of an undertaking as to costs in ***Secretary, Department of Justice v LMB; Secretary, Department of Justice v PMY*** **[2012] VSCA 143**.

In ***Love v Roads Corporation*** **[2011] VSCA 434**, the Court considered whether it is open to a trial judge to have regard to an offer of settlement made 'without prejudice save as to costs' (also known as a '*Calderbank'* offer) when exercising the discretion to award costs

under s 91 of the *Land Acquisition and Compensation Act 1986* (Vic). The section requires the Court, when making a costs order, to have regard to any unreasonable conduct of a party which affected the proceedings.

The appellant's land was compulsorily acquired by the respondent under the Act. The appellant claimed $16 million compensation, however the respondent did not agree to that sum. After a trial, the trial judge awarded the appellant $444,344.92 in compensation, but also awarded partial costs against the appellant on a solicitor-client basis. In awarding costs, the trial judge took into account the appellant's refusal of a 'without prejudice' offer of settlement from the respondent to the order of $950,000.

On appeal, the Court decided there had been no error of principle as a result of the trial judge's consideration of the appellant's refusal of the settlement offer. The appellant's conduct in refusing the offer of $950,000 was unreasonable conduct in the circumstances, and was correctly taken into account pursuant to s 91(1)(b)(i) of the Act. The Court decided that it was open to the trial judge to have regard to the 'without prejudice' offer when considering whether there had been any unreasonable conduct that had affected the proceedings.

The Court reiterated that a *Calderbank* offer is one that is expressed to be without prejudice save as to the question of costs, and indicates that the offer will be adduced into evidence on the question of costs. If an offer satisfies both of those criteria, the absence of express reference to the decision in *Calderbank v Calderbank* [1975] 3 All ER 333 and/or any claim of solicitor-client or indemnity costs if the offer is not accepted, does not deprive an offer of its effect as a *Calderbank* offer.

Appeals from the Victorian Civil and Administrative Tribunal (VCAT)

In ***Director of Housing v Sudi*** **[2011] VSCA 266**, the Court decided that in considering an application for an order of possession in respect of public housing occupied without consent, VCAT does not have power to examine whether the Director of Housing's decision to make the application complies with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Court held that when VCAT exercises its original jurisdiction, it has no power to review the lawfulness of a decision to commence proceedings at VCAT. In particular, VCAT could not decide not to grant an order for possession on the basis that the Director's application was an unlawful infringement of the occupant's human rights. VCAT is limited to considering the merits of the Director's application. The lawfulness of the Director's decision to apply could, however, have been challenged in the Supreme Court, since the Supreme Court possesses a judicial review jurisdiction.

In ***Morris v Riverwild Management Pty Ltd*** **[2011] VSCA 283**, the Court considered VCAT's jurisdiction to grant injunctions and declarations. The appellant had sought an injunction and a declaration from VCAT relating to payment of costs. VCAT refused to grant the injunction and the declaration. The matter was subject to Supreme Court proceedings and then an appeal to the Court of Appeal. On appeal, the appellant argued that despite injunctive and declarative relief having been sought from VCAT, VCAT lacked jurisdiction to grant such relief, and therefore had lacked the jurisdiction to decide that the appellant was not entitled to it.

The Court decided that VCAT has no jurisdiction to grant injunctions related to the enforcement of a costs order when the costs order has been registered in the Supreme Court. The enforcement of an order of the Supreme Court and the imposition of any restraints on its enforcement are matters for the Supreme Court.

In relation to the declaration, the Court decided that although VCAT has jurisdiction to grant declarations relating to questions of law, to do so in this case without giving counsel an opportunity to present argument and evidence was a breach of the hearing rule of

natural justice, and thus a denial of procedural fairness. The Court decided that VCAT's refusal of the declaration sought by the appellant when the transcript of the VCAT proceedings clearly indicated that the parties had not intended the matter to be dealt with without another hearing, was to be regarded in law as no decision at all.

The outcome of the appeal was ultimately determined by the Court's finding that there had been no double recovery of costs by the respondent and that there was no occasion for the appellant to claim credit in respect of any amount paid by other contributors to the respondent's costs. The appeal was dismissed. Weinberg JA took the occasion to examine generally whether a decision at VCAT is capable of giving rise to issue estoppel. His Honour concluded that there seems to be no reason why a decision made by VCAT should not be capable of giving rise to issue estoppel, but noted that this conclusion arguably creates disconformity between state and federal law.

Application for special leave to appeal refused by the High Court 9 March 2012

In ***Director of Public Transport v XFJ*** **[2011] VSCA 302**, the Court considered the requirements of Victoria's taxi driver accreditation scheme. The respondent had sought accreditation to drive taxis. His application was refused. The Director of Public Transport was satisfied that the respondent was technically competent, sufficiently fit and healthy, and would meet the 'public care objective' – that is, he would provide taxi services with safety, comfort, amenity and convenience. However, the Director was not satisfied that the respondent was 'suitable in other respects' to provide the service because, 18 years earlier, he had killed his wife. At the time of the killing, the respondent had suffered from a severe mental illness, and had been found not guilty of murder on the basis of insanity. By the time his application was considered, the respondent had been symptom free for 14 years and was able to safely provide taxi services. Although this meant he was capable of meeting the public care objective, the Director considered he was nonetheless not 'suitable in other respects' because allowing him to drive taxis may damage public confidence in the taxi industry and the accreditation regime.

VCAT overturned the Director's decision. It found that the respondent was suitable in other respects to drive taxis. The Director appealed, first to the Supreme Court and then to the Court of Appeal, on the ground that the Tribunal's decision to accredit the respondent contained an error of law. On both occasions, VCAT's decision was found to contain no error of law. The Director argued on appeal that the requirement that applicants be 'suitable in other respects' to drive taxis required decision makers to have regard to the effect that an individual's accreditation would have on public confidence in the taxi industry. The Court held that the other requirements for accreditation – competency, physical fitness, the public care objective – are designed to ensure drivers meet community expectations, and there is thus no occasion for separate consideration of public confidence. The Court also emphasised the importance of assessing the respondent's conduct by reference to all the relevant circumstances, particularly the jury finding of not guilty and the low risk he now posed, and not through simplistic labels.

In ***John Vincent Mulholland v Victorian Electoral Commission & Anor*** **[2012] VSCA 104**, the Court considered a challenge to the 2008 election for the position of Secretary at the Victorian State Conference of the Democratic Labour Party of Australia ('DLP'). The appellant had been replaced as Secretary by Mr Farrell in that election by only one vote. The appellant contended that two people who had voted in the election were ineligible to vote according to the DLP rules. The Court ordered that the decision of the Victorian Electoral Commission to register Mr Farrell as the registered officer of the DLP (in the place of the appellant) following the election, which had been affirmed by VCAT, be set aside. The Court ordered that the appellant's name be reinstated as the registered officer of the DLP in the period 18 December 2008 to and including 2 August 2009.

The Court reasoned that under the rules of the DLP, only those eligible to vote in Commonwealth elections were members of the DLP and so were eligible to vote at the State Conference of the DLP. The Court decided that the two people whose entitlement to vote was challenged had not been entitled to vote, as they were not entitled to vote in Commonwealth elections. To be eligible under the *Commonwealth Electoral Act 1918* to vote in an election for the House of Representatives, a person can only vote in the division in which they live. The challenge to eligibility to vote was successful on the basis that the two who voted did not live in the division in which they voted.

In ***Secretary, Department of Justice v LMB; Secretary, Department of Justice v PMY*** **[2012] VSCA 143**, the Court considered the nature of the 'public interest' that VCAT must consider under s 26(3) of the *Working with Children Act 2005* (Vic) when determining whether to give an assessment notice to a category one applicant for a working with children check. A person falls into category one if they have been convicted or found guilty (as an adult) of any one of a range of sex offences committed against a child, or of a child pornography offence. The Act requires the Secretary of the Department of Justice to give an automatic negative notice to a category one applicant for a working with children check. A sub-category of category one applicants is entitled to apply to VCAT to grant an assessment.

The Secretary gave negative notices to the respondents as they were both category one applicants. Both respondents then applied to VCAT for favourable assessment notices. Having regard to the matters in s 26(2) of the Act, and determining that it was in the public interest to do so (under s 26(3) of the Act), VCAT granted assessment notices to the respondents.

The Secretary brought appeals against the grant of notices to the respondents, challenging the scope of the public interest to which VCAT must have regard under s 26(3). The Secretary argued that VCAT's consideration of the public interest must (or may) include consideration of the effect of giving a notice to a category one applicant on public confidence in the assessment system.

The Court emphasised that if VCAT has decided that giving an assessment notice is in the public interest, as in the respondents' cases, it will be difficult to disturb that conclusion. The Court decided that public perception of risk is not a factor identified as relevant by the Act, nor is it imperative to the achievement of the purpose of the Act. The speculative risk of adverse public perceptions cannot rationally be given weight; such an approach would require VCAT to effectively disregard its own view of the merits of the case for fear of uninformed public backlash. The Court considered that in the long term, public confidence is better served by rational decision making based on objective evidence. The Court decided that the public interest requirement in s 26(3) of the Act of which VCAT must be satisfied before granting an assessment notice to a category one applicant for a working with children check, does not include the consideration of public confidence in the assessment system.

The appeal in ***LMB*** was dismissed. Leave was refused in the appeal in ***PMY*** as the Secretary declined to proffer an undertaking as to costs, as was required in the circumstances, as decided in ***Secretary to the Department of Justice v XQH*** **[2012] VSCA 72**.

Validity of charges and amending charges

In ***DPP v Kypri*** **[2011] VSCA 257**, the Court decided that while the particular subsection alleged to have been breached is an essential element of an offence, failure to identify the subsection in the charge will not necessarily mean that the charge is fatally flawed. The

Court decided that the charge and summons are to be read as a whole and if it is clear what offence is alleged, the charge will not be invalid.

A second issue on appeal was whether a defective charge against the respondent could have been amended by a magistrate under s 50 of the *Magistrates' Court Act 1989* (Vic), after the expiry of the limitation period applicable to the offence. Section 50 contains the power to amend a charge where there is a defect or error in form. The Court decided that a magistrate could consider amending a charge and that an application by the prosecution was not a necessary precondition. The Court decided that in considering allowing an amendment to a charge, information otherwise disclosed to the defendant before the expiration of the limitation period can support the application. The Court found that if sufficient information has been conveyed to a defendant to enable him or her to determine the true nature of an offence, a charge may be amended even after expiration of the limitation period to correct what was always understood to be its substance. Ashley JA was of the view that such information should be in documentary form and should be unambiguous, since the consequences of an amendment being permitted are potentially serious for a defendant.

Nettle JA provided guidance on what magistrates should consider in determining whether a charge should be amended:

a) whether the police brief was supplied to the defendant or his representatives, and whether it was made clear that the case alleged against the defendant was one of failing to comply with a specific requirement;

b) if so, whether the defendant was able to point to anything which showed he could not have reasonably understood the specific requirements constituting the charge;

c) whether there was any reason which would render it unjust to allow the charge to be amended to make specific reference to the particular provision.

The matter was remitted to the magistrate to consider amending the charge in light of the guidance given.

Section 55(1) of the *Road Safety Act 1986* (Vic) was analysed by the Court in ***DPP v Piscopo* [2011] VSCA 275**. Section 55(1) states that if a police member believes a person's breath contains alcohol, or a person refuses to take a breath test, the police member may require that person to accompany them to a place or vehicle for a breath test, and to remain there until the sample is furnished. The Court decided that the requirements to accompany and remain are separate requirements. In coming to that conclusion, Ashley JA relied on the reasoning of Winneke P in *DPP v Foster* [1999] 2 VR 643, emphasising two requirements (rather than a compound single requirement) is better reconciled with the notion of informed choice. His Honour considered that this interpretation is also more compatible with human rights than the single requirement construction. For a direction by a police officer to remain to be valid, it must be accompanied by the temporal requirement 'until the sample is furnished'. The direction to accompany a police officer on its own does not have such a temporal requirement.

In ***DPP v Rukandin* [2011] VSCA 276** the Court decided that there was no relevant difference between the language of s 55(1) (dealing with breath testing) and the language of s 55(9A) (dealing with blood testing) in the *Road Safety Act 1986* (Vic), when considering the requirement to accompany and remain. The Court decided that for the reasons in ***Piscopo***, the two are separate requirements.

Contracts

In ***Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64**, the Court considered the enforceability of a restraint of trade clause imposed by appellant, a major firm of chartered

accountants, against the respondent, a former trainee accountant at the firm. The restraint clause, which operated for three years, was limited to the provision of services to particular clients of the appellant with whom the respondent had established a continuing relationship by virtue of his employment with the firm. The clause did not absolutely prohibit the respondent from performing work for clients or former clients, but imposed a liability to pay damages if this occurred.

After the respondent ceased employment with appellant, he commenced part time employment with a major client of the appellant, as well as another firm of accountants. Thereafter, he provided accounting services to that client as well as other former clients of the appellant to whom he had provided accounting services while employed by the appellant.

The Court decided that the trial judge had been correct in finding that the restraint clause was enlivened in the circumstances, but was incorrect to find it was unreasonable and therefore unenforceable. The Court noted that the connections created between accountants and clients are well established, and decided that these are exactly the kind of connections an employer is entitled, within reasonable limits, to protect. The Court decided that the restraint was no more than what was reasonably required to protect the appellant's legitimate interests, and so was not an unreasonable restraint of trade.

In ***RSA v 3143 Victoria St Doncaster Pty Ltd*** **[2012] VSCA 134**, the Court considered the principles of contract construction when there is an 'entire agreement' clause in a contract. Such a clause provides that all agreements and understandings between the parties are embodied in the parties' written agreement, which supersedes all prior agreements and understandings. The key issue was the extent to which surrounding circumstances can be used to construe such a contract.

The dispute was about the management of a retirement village. The appellant and respondent had entered into a written agreement to form a joint venture to create and run the retirement village. The written agreement did not specify that the appellant was to provide a nurse at the village at its expense, nor did it specify that the appellant was responsible for marketing the village as providing respite services. The written agreement between the parties contained an entire agreement clause. The respondent brought an action for breach of contract when the appellant did not provide a nurse and did not market the village as providing respite services. At trial, the respondent and the appellant adduced evidence of the parties' pre-contractual negotiations and intentions. The judge below accepted the evidence on the basis that it was evidence of the objective background facts to the written agreement between the parties.

The Court noted that the rights and liabilities of parties to a contract are determined objectively and of all the objective facts available to a judge who construes a contract, the words of a written agreement stand out as the quintessentially objective way to discover the intentions of the parties.

The Court decided that since the parties had included an entire agreement clause in the contract and the contract did not provide for the provision of a nurse or marketing of respite services, evidence relating to those matters was not admissible to aid interpretation of the contract. The existence of the entire agreement clause precluded a contention that the parties had not embodied the entire agreement in writing. Evidence of those matters did not contribute to the objective background of facts. The evidence was excluded by the parol evidence rule, which prevents parties from adducing direct evidence as an aid to interpretation of the contract including the actual (subjective) intentions of the parties, evidence of parties' negotiations and evidence of parties' subsequent conduct.

Application for special leave to appeal refused by the High Court 14 December 2012

Property law

In ***Central Pacific Holdings v State of Victoria*** **[2011] VSCA 322**, the Court considered the applicability of a land tax indemnity clause intended for the purchasing company (the appellant), to a subsidiary of that company, as part of a property sale agreement.

The relevant clause in the sale agreement between the appellant and the respondent stipulated that the appellant 'and/or nominee' would be indemnified against potential liability under the *Land Tax Act 1958* (Vic) in relation the period prior to settlement. Unbeknown to the respondent, the tenant of the property (Southern Cross Properties Pty Ltd (SCP)) against whom long-standing land tax assessments were expected to be made (in conjunction with assessments against the Melbourne City Council 'MCC'), was acquired by the appellant and became a wholly owned subsidiary.

The appellant contended that since SCP was a subsidiary of the purchaser (the appellant), SCP was indemnified against all land tax assessments issued against it. The Court determined that this was not the purpose of the indemnity, and accepted the respondent's submission that the purpose was to indemnify the owner of the property against potential liability when the assessments were issued against SCP and MCC. The purpose of the clause was to protect the purchaser of the hotel site against any liability under any charges that might arise in the future to secure the payment of land tax relating to the period before the date of sale. This precluded the appellant from claiming indemnity for SCP in respect to the period before the date of sale. The appeal was dismissed.

In ***Solak v Registrar of Titles*** **[2011] VSCA 279**, the Court decided that the *Transfer of Land Act 1958* (Vic) does not exclude *Anshun* estoppel – a doctrine which prevents a party from making a claim which should have been pursued in earlier proceedings. An intention to entirely exclude *Anshun* estoppel from a statutory regime cannot be lightly imputed to the legislature.

The appellant alleged that an imposter fraudulently obtained a mortgage in his name. He commenced proceedings against BankWest in the Supreme Court, seeking declarations that the mortgage was void, and an order that it be discharged. The Registrar of Titles was not joined in that proceeding. The claim was dismissed on the basis of the indefeasibility provisions of the *Land Transfer Act*. The appellant then issued a second proceeding in the Supreme Court against the Registrar of Titles, seeking indemnity under the *Land Transfer Act* for his loss. The Registrar applied for, and was granted, summary dismissal of the second proceeding on the basis of *Anshun* estoppel. The trial judge found that the respondent could have made his claim against the Registrar in the first proceeding and that as a result, he was estopped from bringing a second proceeding.

On appeal, the Court overturned the decision that the appellant was estopped from bringing the second proceeding. The Court emphasised that the question on appeal was whether it was unreasonable for the appellant not to have joined the Registrar in the first proceeding, not whether it was reasonable to have done so. The Court found that the arguments in support of *Anshun* estoppel were unpersuasive in this case; there was no risk of inconsistent judgments (the most important factor going to the existence of *Anshun* estoppel); joining the Registrar would have had significant costs implications for the appellant; and it was impossible for both the claim against BankWest and the claim against the Registrar to succeed.

The Court suggested that the Act should be amended to require notice of relevant proceedings to be provided to the Registrar and to allow the Registrar to intervene in relevant proceedings at an early stage.

In ***Love v Roads Corporation*** **[2011] VSCA 434**, the Court considered s 5A of the *Valuation of Land Act 1960* (Vic). Section 5A contains provisions relevant to determining the value of land. The Court decided that s 5A(3)(a) of the Act does not permit an aggregation of inconsistent potential uses of land to constitute the 'highest and best use' of land. It also does not permit the value of land to include potential uses in addition to the highest and best use, even when a potential is incompatible with the highest and best use. The Court decided that s 5A(3)(f) does not permit an aggregation of conflicting and inconsistent potential uses of land because such an approach could lead to highly inflated and unfair valuations which may not be reflective of what a hypothetical purchaser would be prepared to pay for the land.

Accident compensation

In ***AG Staff Pty Ltd v Filipowicz; Arnold Ribbon Co Pty Ltd v Filipowicz*** **[2012] VSCA 60**, the Court set out the appropriate process to determine an application for leave to commence common law proceedings under the *Accident Compensation Act 1985* (Vic) when a plaintiff has claimed compensation from two employers, as a result of two different injuries. The steps a trial judge should follow are:

1. Identify each injury.

2. Delineate the impairment consequences of each injury.

3. Determine whether each injury is a serious injury under s 134AB(37) of the Act as amplified by s 134AB(38).

4. Compare the plaintiff's condition after the first injury (but before the second injury) to the plaintiff's condition after the second injury, making an assessment of the additional impairment.

5. As the two injuries arose from separate incidents, they cannot be accumulated. Each injury must satisfy the requirements of a serious injury in its own right, rather than in combination with each other.

In ***Transport Accident Commission v Kymantas*** **[2012] VSCA 135**, the Court considered the meaning of s 40(1)(c)(ii) of the *Transport Accident Act 1986* (Vic). When a person who has been injured in a transport accident was an 'earner' before the accident (as defined by s 3 of the Act), the Commission is ordinarily liable to pay a weekly payment in respect of loss of earnings. Sections 39 to 44A outline exclusions to the Commission's liability to make these payments. Section 40(1)(c)(ii) provides that liability is excluded if the injured person was the driver of a motor vehicle at the time of the accident and his or her licence had been suspended or cancelled at that time.

The respondent was attempting to push his car off a highway after it had run out of petrol, when he was struck by an oncoming car. Two months earlier, his licence had been cancelled for a period of 18 months. It was not controversial that the respondent was 'in charge of' his vehicle and was therefore deemed the 'driver' of that vehicle at the time of the accident for the purposes of the Act. VCAT applied the s 40(1)(c)(ii) exclusion to the respondent. On appeal from the VCAT decision, a Supreme Court judge held that the exclusion did not apply to the respondent. The present appeal was an appeal from the decision in the trial division.

The question for the Court was whether s 40(1)(c)(ii) required the phrase 'driver of a motor vehicle' to be read as referring to the driver of the motor vehicle which had directly caused the accident. The Court decided that this reading was neither open nor required. To interpret it that way would require words to be read into the legislation, overriding the plain text and structure of the provision.

The Court decided that the respondent was excluded from receiving payments to compensate him for his loss of earnings because he satisfied the factual matters required by exclusion in s 40(1)(c)(ii). It was immaterial that the accident was caused solely by the driving of another person in a different motor vehicle. The orders of the trial division judge were set aside and the Court ordered that in lieu thereof, the appeal to the trial division be dismissed.

Tort law

In ***Tuohey v Freemasons Hospital*** **[2012] VSCA 80**, the Court answered a case stated to determine the correct interpretation of s 28F(2) of the *Wrongs Act 1958* (Vic). Section 28F limits damages available to plaintiffs in tort actions with respect to past and future economic loss by imposing a cap on the maximum amount recoverable in a claim for loss of earnings. The subsection requires the Court to disregard the amount (if any) by which a claimant's gross weekly earnings would (but for the death or injury resulting from the tort) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award.

In issue was whether s 28F(2) requires the amount claimed as damages to be capped, or alternatively, if it requires the amount of average weekly earnings before injury to be capped. The Court decided that the literal meaning and correct interpretation of the subsection is for a claimant's earnings before injury to be capped before damages are calculated. In so far as a claimant's average 'without injury' earnings before injury exceed three times the average weekly earnings at the date of the award, the amount by which the 'without injury' earnings exceed the average weekly earnings should be disregarded. This has the effect that where 'with injury' earnings exceed the capped maximum of 'without injury' earnings, a claimant will not have any entitlement to damages for past and future economic loss.

Family law and wills

In ***Apostolidis v Kalenik*** **[2011] VSCA 307** the Court gave guidance on how domestic contributions and third party liabilities should be accounted for in de facto property settlements. Mr Apostolidis and Ms Kalenik lived as de facto partners for many years. Mr Apostolidis was a business owner and had, over the course of the relationship, built up significant assets. Ms Kalenik had earned very little income, putting her time towards domestic duties and caring for Mr Apostolidis's son. She also performed some unpaid work for the business. Following the termination of the relationship, Ms Kalenik successfully obtained an adjustment of interests of de facto partners under s 285 of the *Property Law Act 1958* (Vic). Considering an appeal and cross appeal, the Court set aside the adjustment and re-exercised discretion on the issue.

The Court held that, in calculating the adjustment amount, the trial judge had erred in assessing the value of Ms Kalenik's domestic contributions in isolation from her contributions to the business. This overlooked the fact that the unpaid work she contributed to the business was only performed because of her relationship with Mr Apostolidis. Similarly, the trial judge did not sufficiently recognise that, by discharging the bulk of the household duties, Ms Kalenik had left Mr Apostolidis free to focus on building up his business. It is not correct for trial judges to approach this analysis as if the parties to a de facto relationship were strangers involved in a commercial transaction, or to assess the value of work or labour outside of the context of the relationship.

The Court also considered the relevance of the substantial tax liability (made up of debts and penalties) owed by Mr Apostolidis. That liability greatly exceeded the value of his assets at the date of judgment, such that an adjustment in Ms Kalenik's favour would reduce the amount the Deputy Commissioner of Taxation (a third party to the appeal) could recover. The Court held that it had jurisdiction to order an adjustment in these circumstances. Further, while it was usual for a court to have regard to the net value

(assets minus liabilities), in this case it was not appropriate for all liabilities to be deducted in making an adjustment of interests in Ms Kalenik's favour. When making orders adjusting interests under s 285, a court should have regard to the interests of third party unsecured creditors, in this case, the Deputy Commissioner of Taxation. However, in some cases, a court may conclude that a liability should be wholly or partly excluded from the asset calculation because of the circumstances in which it was incurred – for example, where a liability is incurred in deliberate or reckless disregard of the other party's potential entitlement. In this case, the Court decided to disregard so much of Mr Apostolidis's tax liability as was incurred after the separation date, because Ms Kalenik had no input or control over it after this time, and had been adversely affected by freezing orders the Deputy Commissioner had obtained.

In ***Perpetual Trustees Victoria Limited v Barnes & Anor*** **[2012] VSCA 77**, the Court considered the power to vary a trust under 63A(1)(a) of the *Trustee Act 1958* (Vic). Section 63A(1)(a) allows a court to approve an arrangement varying a trust on behalf of a person who, because of their age or incapacity, is incapable of assenting, provided that the arrangement is for the benefit of that person.

The appellant was a trustee appointed under Ms Barnes' father's will. Ms Barnes was the surviving life tenant in relation to her father's estate. She suffers from autism and was sufficiently incapacitated to be unable to give consent to an arrangement varying the trust to allow for access to capital to meet her living expenses and care needs. The appellant applied to the Supreme Court for an order under s 63A approving, on her behalf, an arrangement varying the trust by amending the will to permit Perpetual to advance capital to her from time to time to cover her expenses. The appellant made the application as Ms Barnes lacked the necessary funds to do so. The Attorney-General was the second respondent to the application, representing those who might benefit under the trusts for charitable purposes created by the will. Under the will, the capital and income of Ms Barnes' father's estate was to pass to charitable purposes or organisations after Ms Barnes' death.

The Court decided that when determining if an order under s 63A(1)(a) should be made, it first had to be satisfied that the arrangement was for Ms Barnes' benefit and was fair and proper overall. The Court noted that the testator's intent was to provide for the care and well-being of his disabled daughter, and generally to give priority to the needs of his widow and child over the interests of the nominated charities who may benefit after their deaths. The testator did not appear to have anticipated the possibility of Ms Barnes needing additional funds for her living expenses. The Court decided that although the benefits and advantages of a new arrangement must be considered overall, the attitude of the Attorney-General was significant. There was no opposition from the Attorney-General (representing the Crown as the protector of charity); the Attorney-General submitted that there was no impediment to the Court making the order sought. The Attorney-General declined to consent however, submitting the decision was for the Court to make.

Allowing the appeal, the Court emphasised that s 63A does not expressly make a court's power to vary a trust conditional on consent by those beneficially or otherwise interested under the terms of the trust. The Court decided that the trial judge had erred in law by concluding that he lacked the power to make the order sought under s 63A in the absence of consent by the Attorney-General.

Role of the trial judge

In ***AJH Lawyers Pty Ltd v Careri & Ors*** **[2011] VSCA 425**, the Court summarised the principles determining whether a judge has displayed apprehended bias. The Court set out eight relevant principles:

1. When a ground of appeal is based on actual or apprehended bias, the Court must deal with that ground first. If bias is established, the Court will remit the matter to

the lower jurisdiction, even if it is satisfied as to the correctness of the decision on the merits.

2. Judges should not accept recusal (judicial disqualification) simply because a party has demanded it. An objection of a party should not prevail unless based upon a substantial concern.

3. The test for reasonable apprehension of bias is 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'. 'Might' means real, not remote possibility, and no attempt need be made to inquire into the thought process of the judge.

4. The relevant apprehension is an apprehension that the judge will not decide the case impartially, not merely that he or she will decide it adversely to one party.

5. The test has two steps. The first is identifying what might lead a judge to decide a case other than on the legal and factual merits. The second is expressing the logical connection between the issue and the deviation from the course of deciding the case on its merits. This two-step process is also applicable to cases of apprehended bias on the ground of pre-judgment.

6. The perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer. Judges will often form tentative opinions on matters in issue and counsel are usually assisted by hearing those opinions. Expression of tentative views during the course of argument as to matters subject to submissions does not manifest partiality or bias.

7. There is a line between strong indications of a trial judge's tentative views on an important point, and an impermissible indication of prejudgment that has the effect of disqualifying the judge from conducting the proceedings.

8. Judges do not have to devote unlimited time to listening to unmeritorious arguments, however when a party makes an application, the judge must afford the party reasonable opportunity to make submissions in support of that application.

In ***AJH Lawyers***, the judge had refused to permit counsel to make submissions on two separate recusal applications, before ruling that they would be refused. This displayed an unwillingness to entertain arguments advanced by counsel. The Court decided that this, in conjunction with remarks the judge had made earlier in the proceedings, indicated that a fair-minded lay-observer might have reasonably apprehended that there was a real and not remote possibility that the judge did not bring an impartial and unprejudiced mind to the resolution of the dispute. The appeal was allowed and the matter was remitted to the County Court for hearing and determination by a different judge in accordance with law.

In ***Pamamull v Albrizzi (Sales) Pty Ltd (No 2)*** **[2011] VSCA 260** the Court considered the duty of a judge to ensure a fair trial where a party appears without legal representation.

A judge's most fundamental obligation is to ensure a fair hearing, including fair opportunity for parties to prepare and present their cases. This duty has an extra dimension when one of the parties appears without legal representation. Although performance of the duty will depend on the circumstances of the particular case, a judge should exercise patience and forbearance, as well as a sense of fairness and reasonableness as between the parties. The Court emphasised that a judge is obliged to advise an unrepresented appellant of his/her rights as a participant in trial proceedings and to afford proper assistance to an unrepresented party so that they may understand and participate in proceedings. The

Court affirmed that assistance to unrepresented litigants may extend to issues concerning substantive legal rights as well as issues concerning procedure, but a judge cannot become the advocate of the self-represented litigant. The assistance must be proportionate in the circumstances – the judge must ensure a fair trial, not afford an advantage to the self-represented litigant.

The Court emphasised the duty owed by counsel to draw the attention of the Court to relevant matters, especially when the opposing litigant is unrepresented. A costs order against the applicant's solicitor was set aside, but the appeal was otherwise dismissed because the applicant had no arguable defence on the merits.

Application for special leave to appeal refused by the High Court 9 March 2012

Rights

In ***Slaveski v Smith & Anor*** **[2012] VSCA 25**, the Court considered whether the *Charter of Human Rights and Responsibilities Act 2006* (Vic) contains an enforceable right to legal representation, and whether the right to a fair trial under the Charter includes the right to be legally represented.

The Court decided that the right of a person to legal representation under the Charter is conditional upon the person being eligible for legal representation under the *Legal Aid Act 1978* (Vic). A person's eligibility for legal assistance under the *Legal Aid Act* is dependent on the favourable exercise of discretion by Victoria Legal Aid. Neither s 25(2)(d) nor (f) of the Charter confers an entitlement to legal assistance which is independent of the exercise of discretion by Victoria Legal Aid.

The Court also decided that if a judge comes to the view that a just decision cannot be reached without a plaintiff being legally represented, then s 24(1) of the Charter may warrant staying the appeal until legal representation is provided. The Court emphasised this Charter right is limited and is no more than reflective of the common law. A person does not have a right at common law to be represented at the State's expense on a serious criminal offence, rather a person has a right to a fair trial. A proceeding should only be stayed on the basis of an accused's lack of legal representation if the judge is truly satisfied that without legal representation, the accused will not receive a fair hearing.

The Court also considered whether s 197 of the *Criminal Procedure Act 2009* (Vic) applied to the appellant. Section 197 of the *Criminal Procedure Act* provides that a court may order legal representation for an accused. That section is contained in Chapter 5 which is headed 'Trial on Indictment'. Appeals from the Magistrates Court to the County Court are dealt with separately in Chapter 6 of the Act, which does not contain an equivalent provision. The Court decided that s 197 of that Act does not apply to an appeal from the Magistrates Court to the County Court, and therefore did not apply in the appellant's case.

Application for special leave to appeal refused by the High Court 13 November 2012

The Court confirmed the content of the right to legal representation as decided in ***Slaveski v Smith*** in ***Slaveski v The Queen*** **[2012] VSCA 48**. The Court also confirmed, in ***Slaveski v The Queen***, that the fact that a party to a proceeding has, by their own conduct, deprived themselves of competent legal representation, will not ordinarily lead to the conclusion that a judge's refusal to adjourn proceedings is a denial of natural justice. The Court cited comments made by the High Court when it dismissed an application for special leave from the decision of ***Pamamull v Alibrizzi (Sales) Pty Ltd*** (above) on this point (*Pamamull v Albrizzi (Sales) Pty Ltd* [2012] HCATrans 63).

Application for special leave to appeal refused by the High Court 13 November 2012

In ***Rich v Scaife*** **[2012] VSCA 92**, the Court decided that subject to possible exceptions, to prevent a prisoner from speaking with a person approved by the Governor on an approved telephone number, is to withdraw a privilege within the meaning of s 50 and 54A of the *Corrections Act 1986* (Vic). A phone number can only be removed from a prisoner's approved list of phone numbers in accordance with the procedure set out in s 50 of the Act, or on an interim basis in accordance with s 54A. The Court decided that as this procedure had not been followed, it was appropriate to quash the decision to remove a phone number from the prisoner's list of approved phone numbers.

Legal profession

In ***Legal Services Board v Gillespie-Jones*** **[2012] VSCA 68**, the Court considered whether a barrister can recover compensation for pecuniary loss suffered because of a default by a solicitor who has misappropriated funds held on trust.

The solicitor's client had paid money to the solicitor to be applied for the purpose of the conduct of his defence. Subsequently, the solicitor misappropriated a significant proportion of the money. The solicitor had retained the respondent as counsel for the client, however due to the misappropriation, the solicitor did not pay the balance of the respondent's fees out of the money set aside for that purpose. The respondent brought a claim for compensation for actual pecuniary loss from the Fidelity Fund under the *Legal Profession Act 1994* (Vic) to recover his fees.

The Court decided that the provisions of the Act, which enable 'a person' to bring a claim are to be seen as affording protection to all persons for or on whose behalf trust money is held. To sustain a claim against the Fidelity Fund, a claimant must be able to point to a particular sum of money or property held in trust and establish that they have suffered actual pecuniary loss. The Court decided that the need to establish actual pecuniary loss does not require a claimant to demonstrate a legal or equitable interest in the money or property in question, it is enough that the claim relates to direct loss.

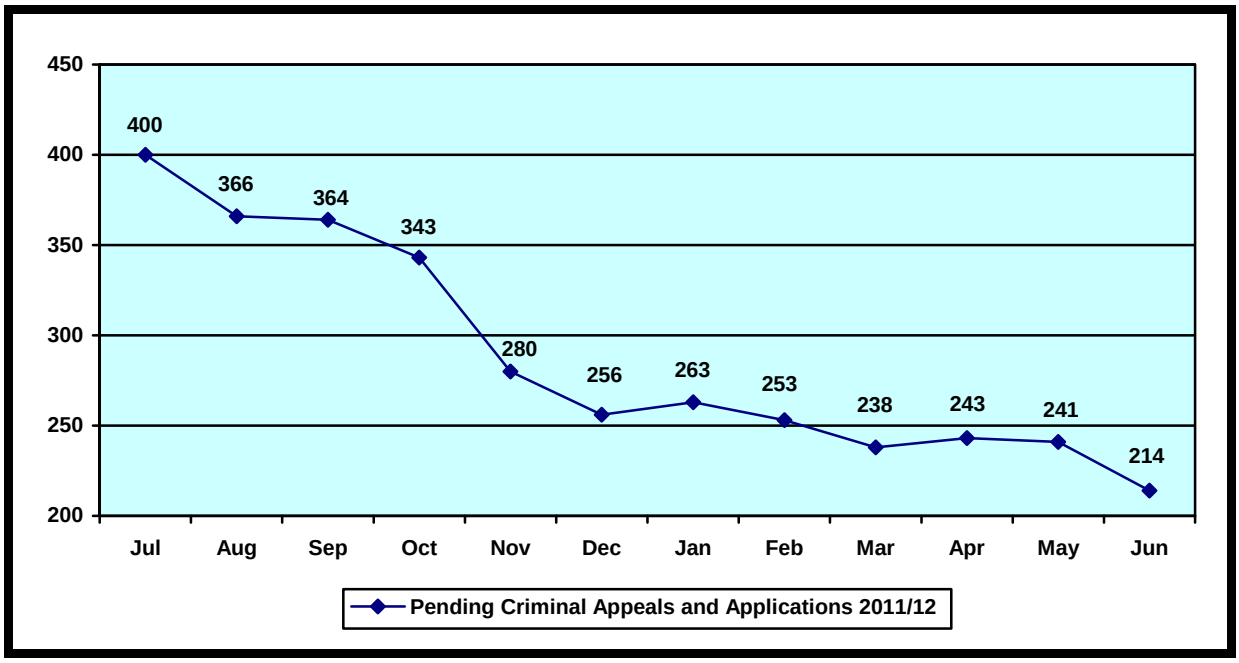
The Court decided that the fact that the client had paid the money for the particular purpose of conducting his defence, was indicative of the existence of a trust whereby the solicitor held the money for payment of the barrister and other consultants engaged for the client's defence. The Court found that, even before the respondent's fees fell due, the barrister had a contingent interest in the money. So far as the barrister had a contingent interest, the money was held for or on behalf of the barrister within the meaning of s 3.1.1 of the *Legal Profession Act*. The solicitor's failure to pay the barrister out of the money in accordance with the terms of the implied trust caused the barrister loss equal to the sum of his fees and this was actual pecuniary loss within the meaning of the *Legal Profession Act*.

The Court rejected the appellant's arguments that the barrister did not have an immediate right to payment and that the claim was barred by lack of a costs agreement.

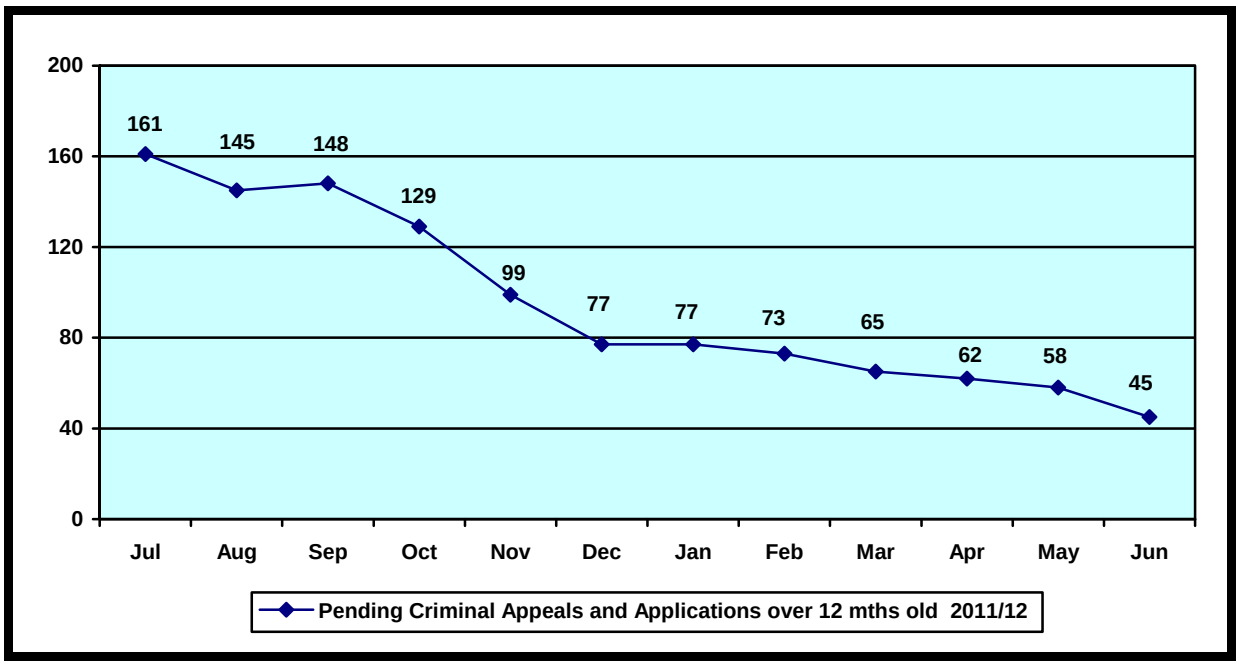
Application for special leave to appeal granted by the High Court 15 March 2013

Statistics

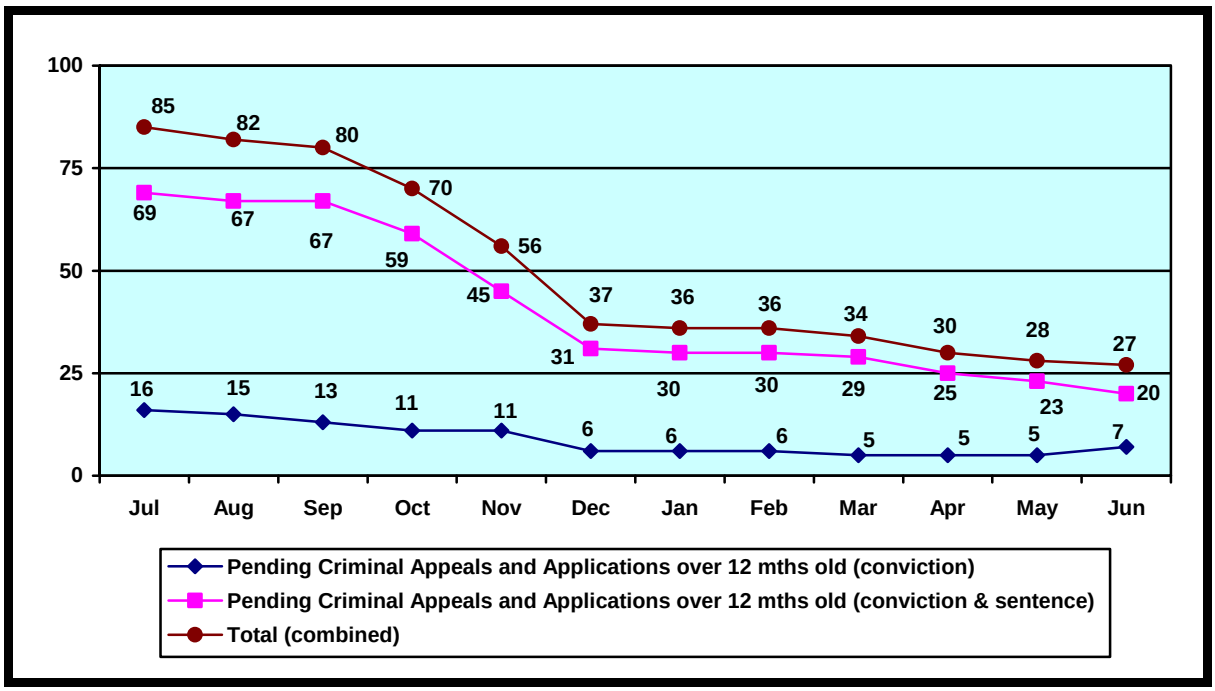
Pending criminal appeals and applications in 2011/12



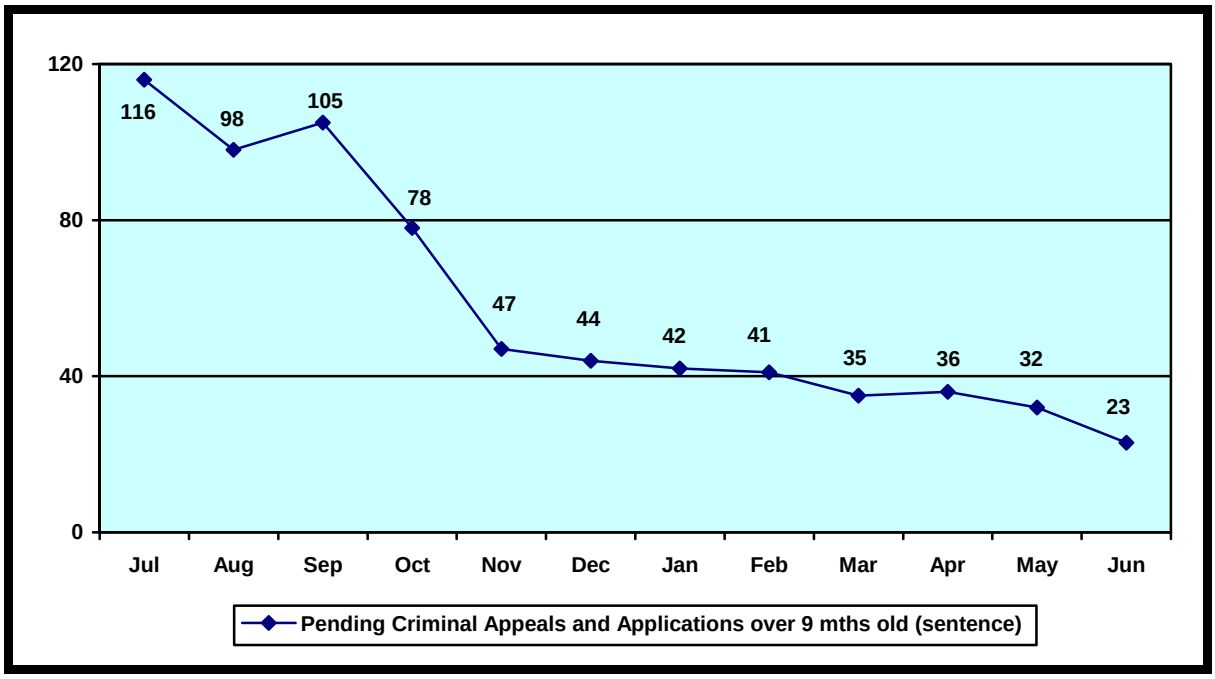
Pending criminal appeals and applications over 12 months old in 2011/12



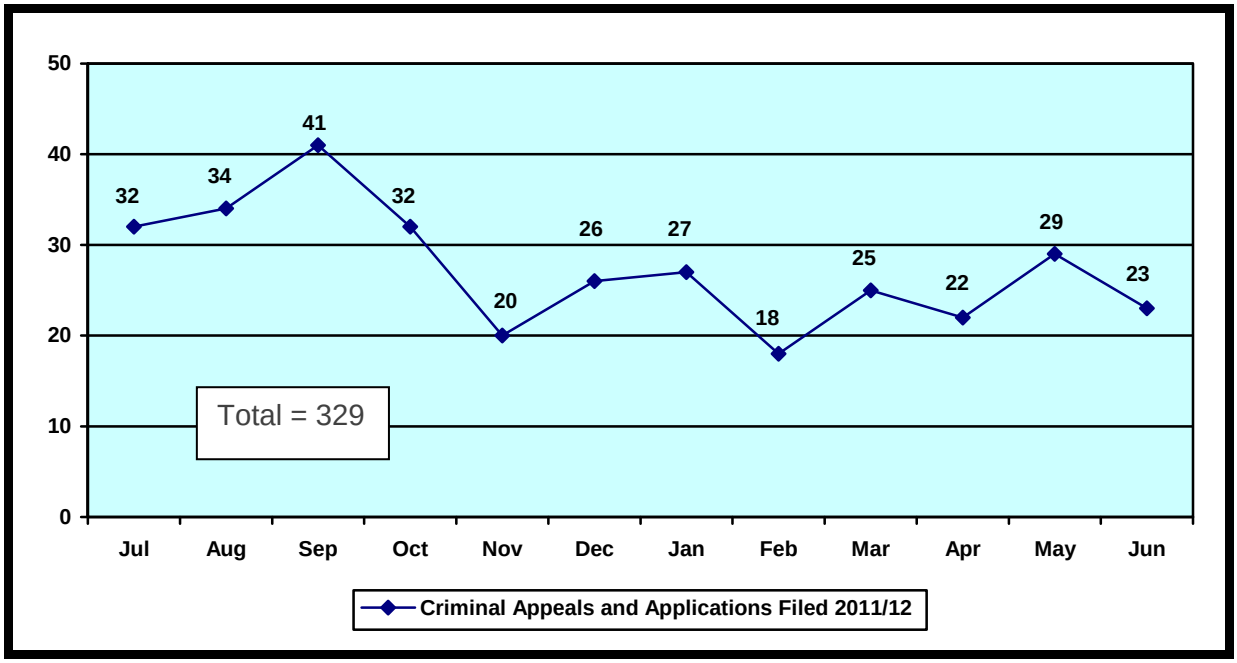
Pending appeals and applications against conviction over 12 months old in 2011/12



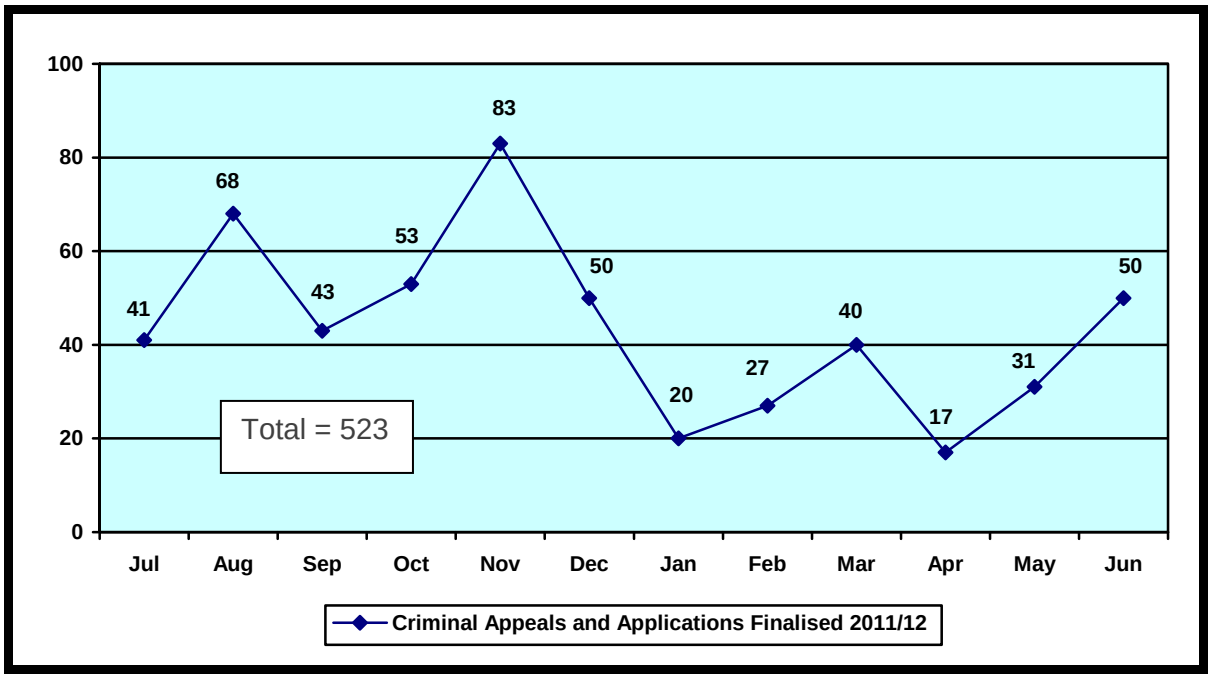
Pending appeals and applications against sentence over 9 months old in 2011/12



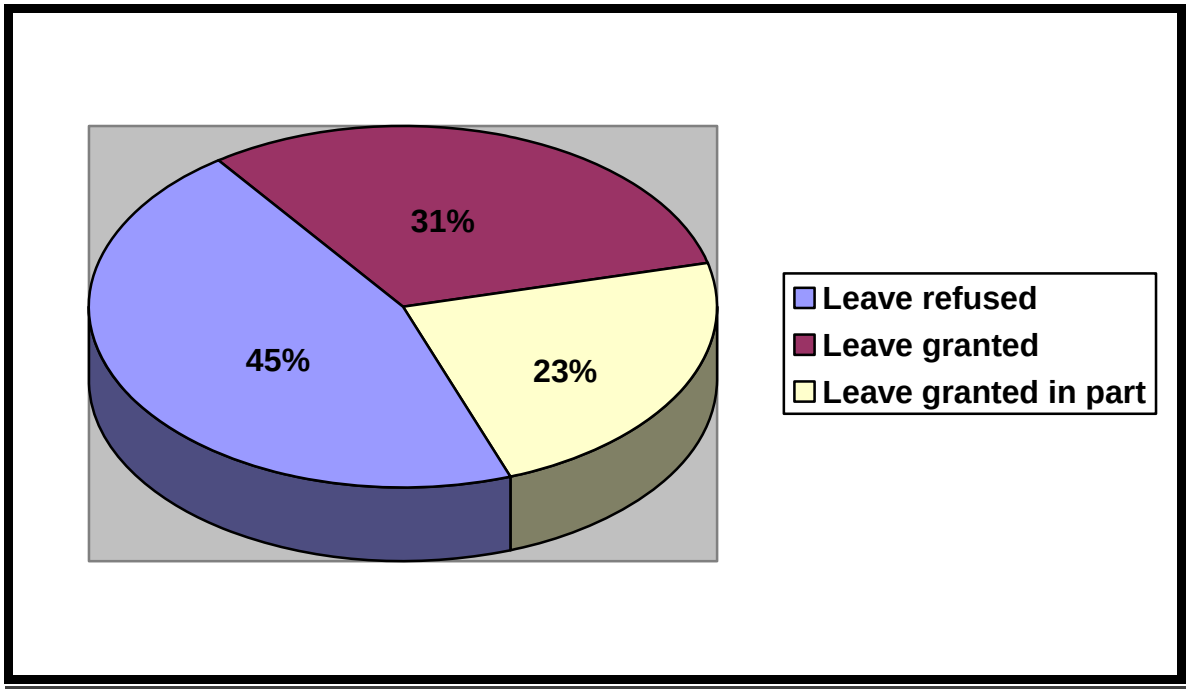
Initiations (criminal) in 2011/12



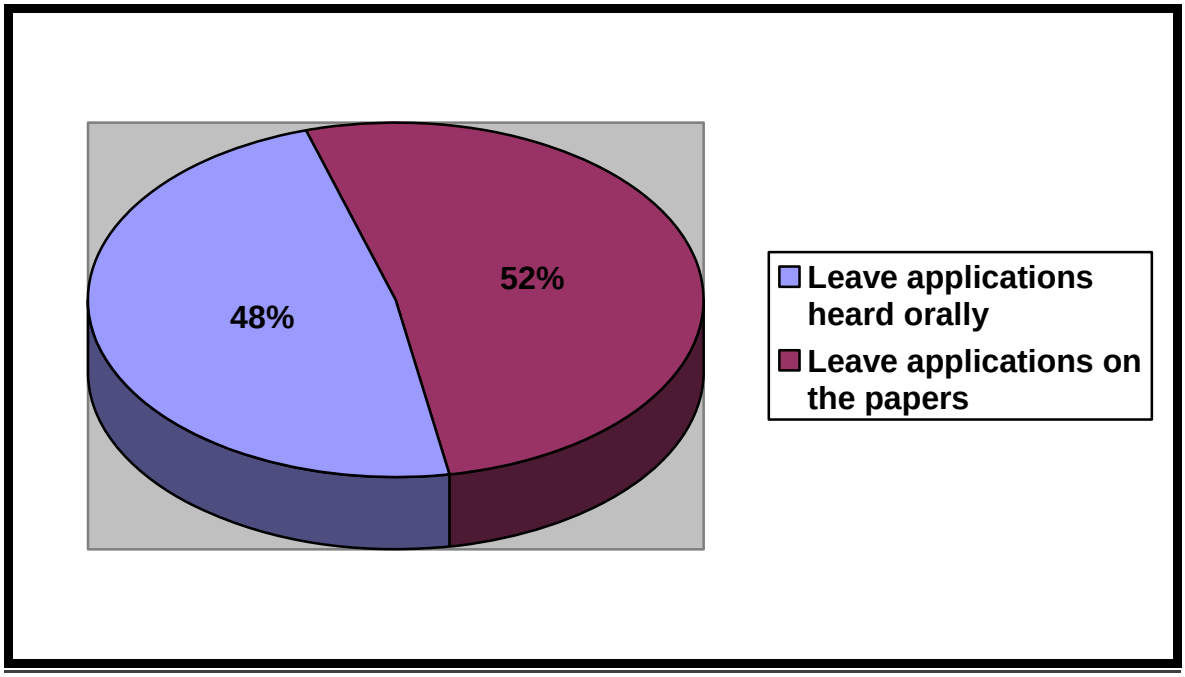
Finalisations (criminal) in 2011/12



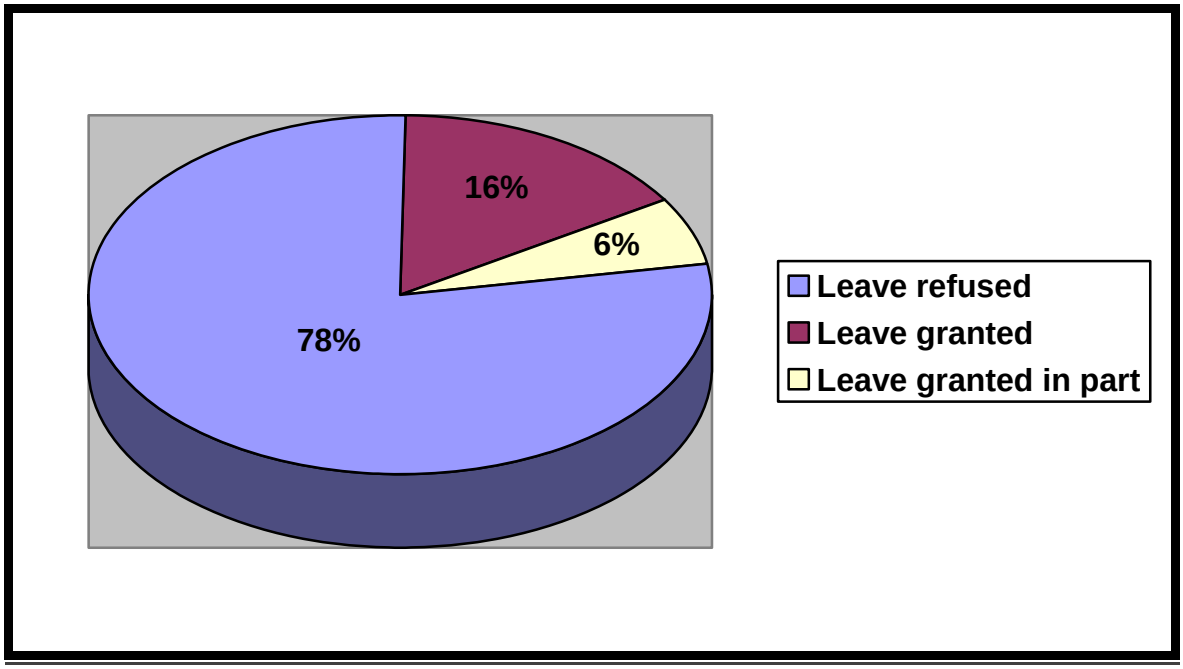
Leave applications (criminal) – success rate in 2011/12



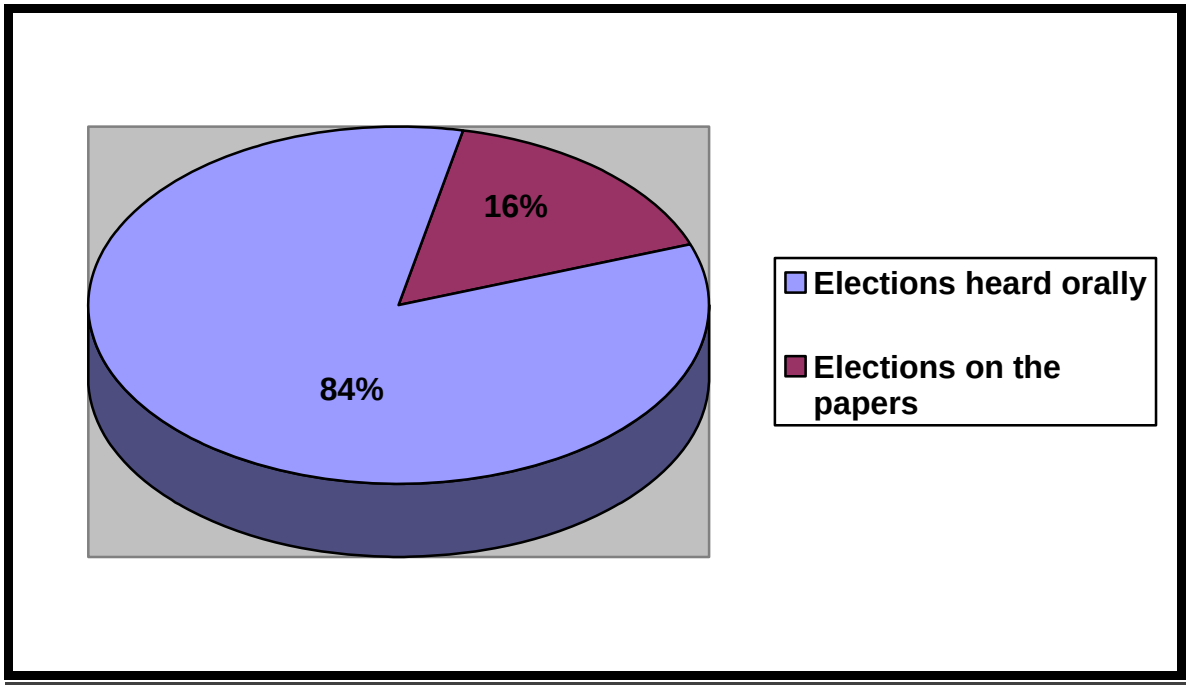
Leave applications (criminal) – percentage of oral hearings in 2011/12



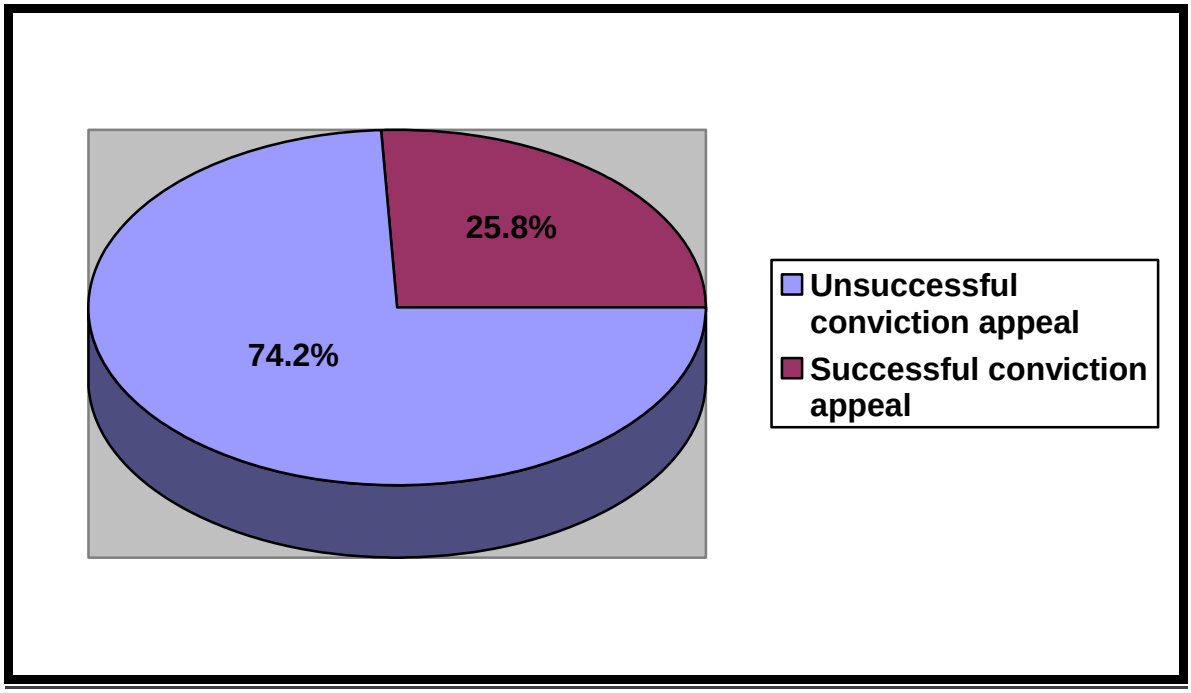
Elections and renewals (criminal) – success rate in 2011/12



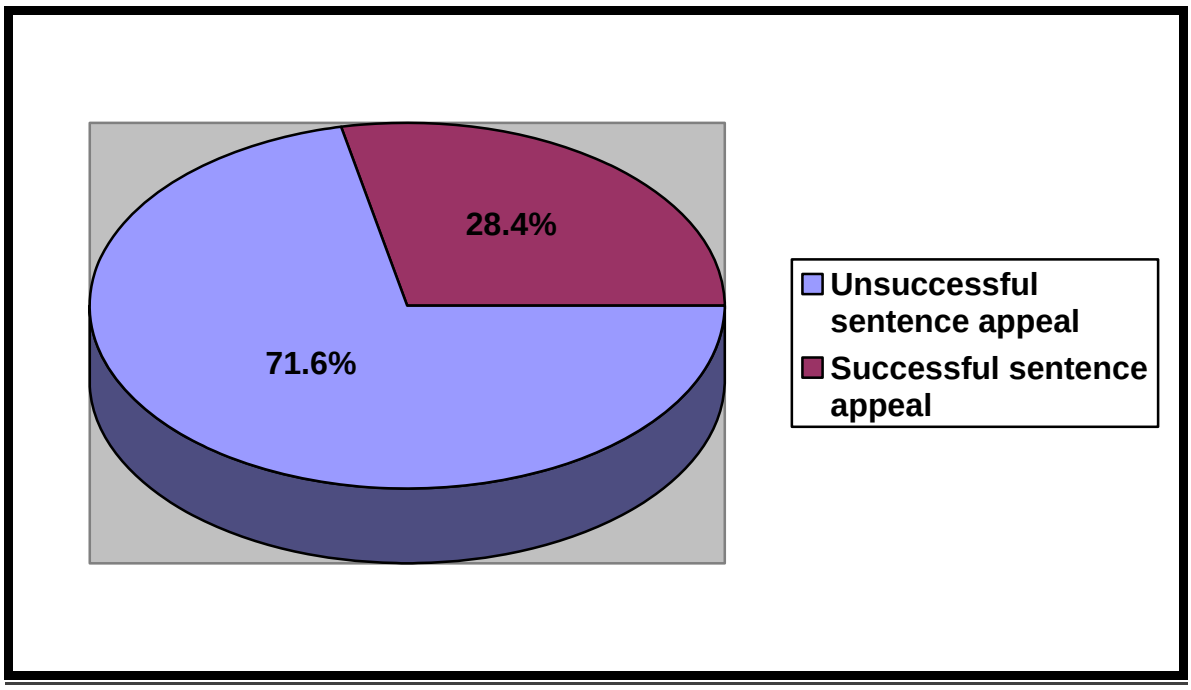
Elections and renewals (criminal) – percentage of oral hearings in 2011/12



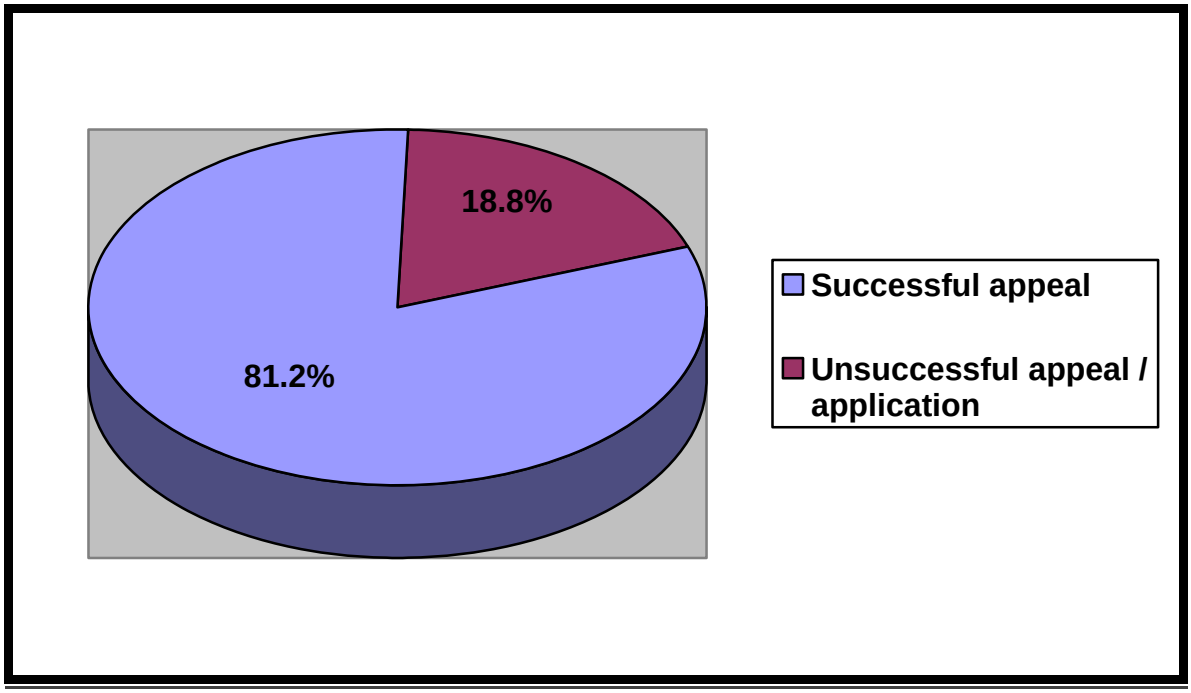
Conviction appeals – success rate of applications filed in 2011/12



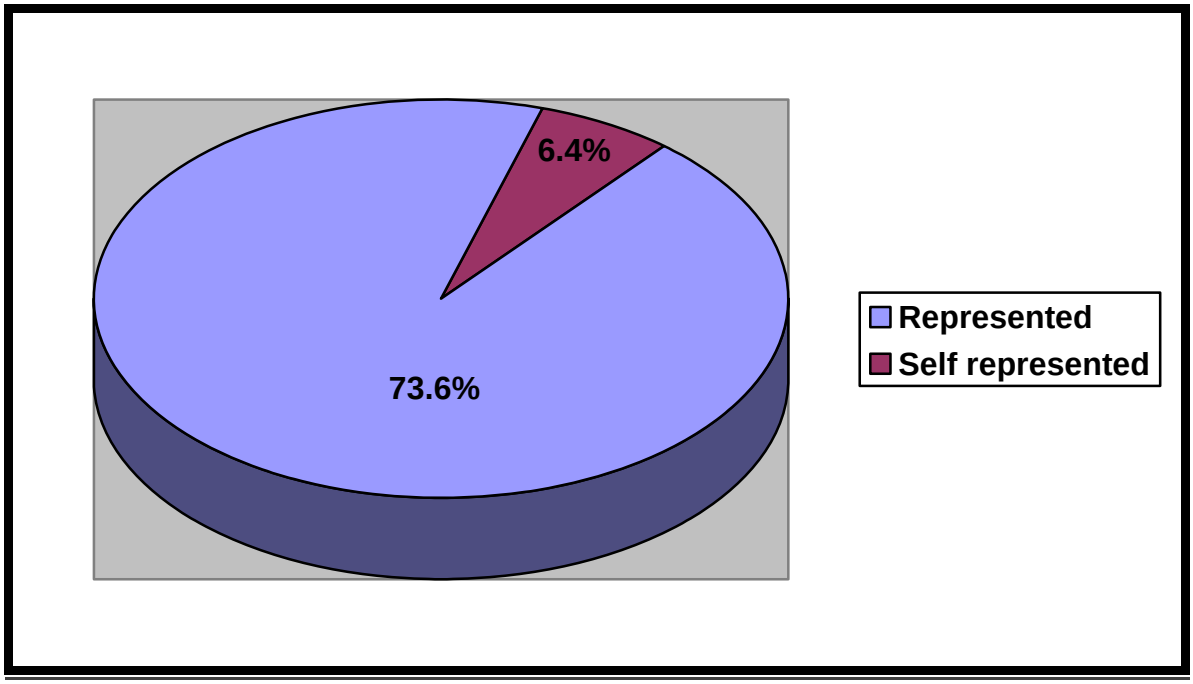
Sentence appeals – success rate of applications filed in 2011/12



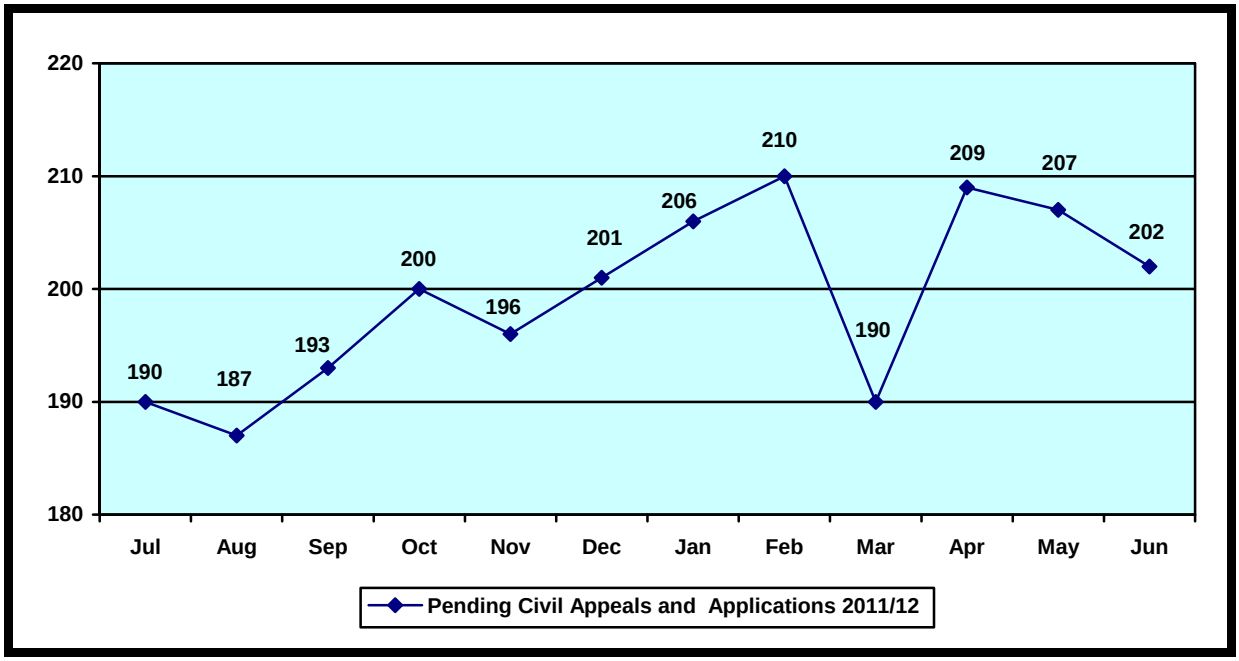
Interlocutory applications (criminal) – success rate of applications filed in 2011/12



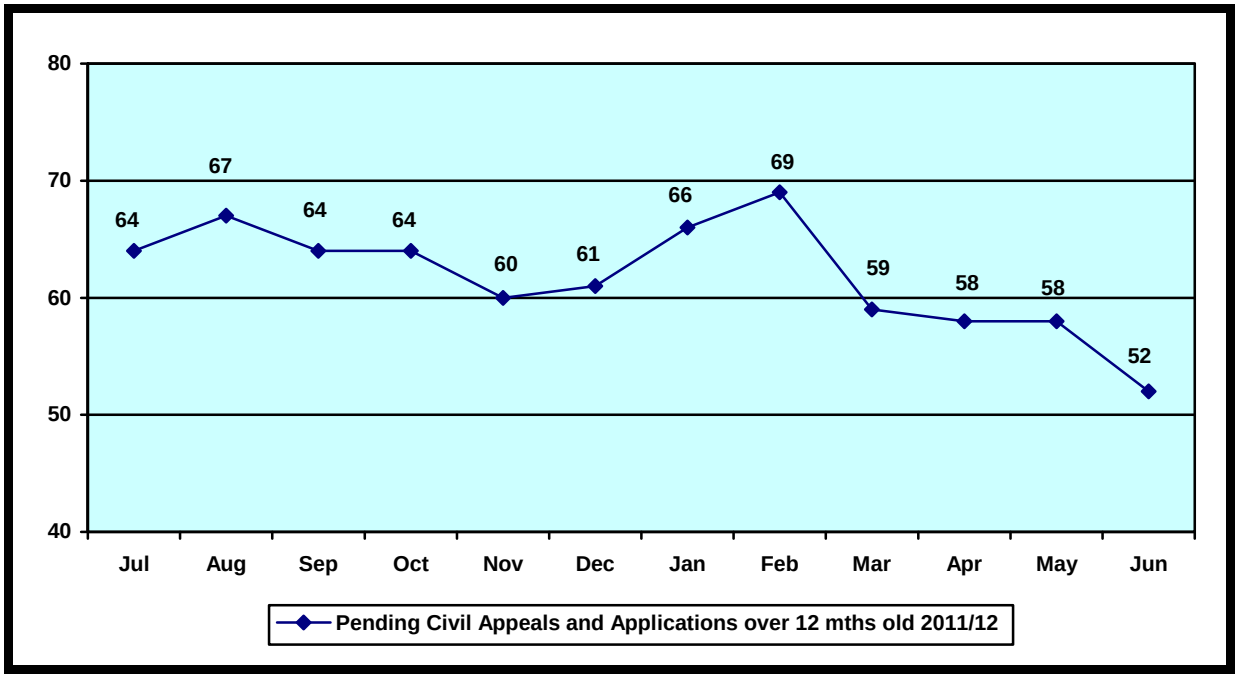
Percentage of criminal initiations that were filed by self represented litigants in 2011/12



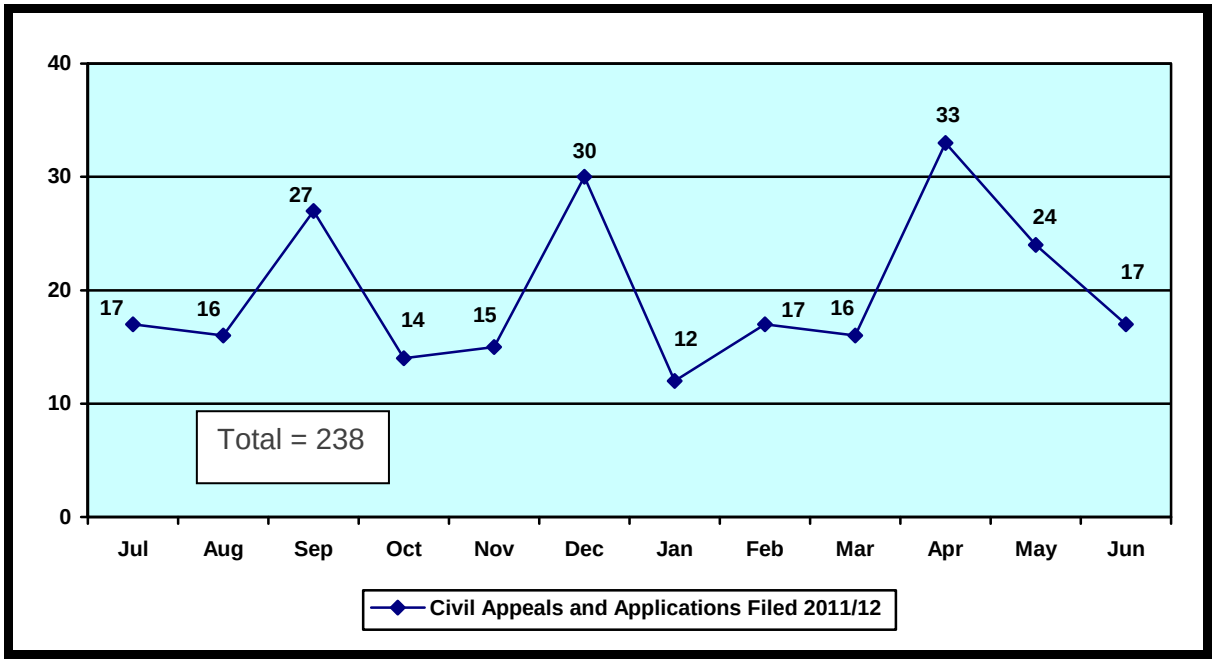
Pending civil appeals and applications in 2011/12



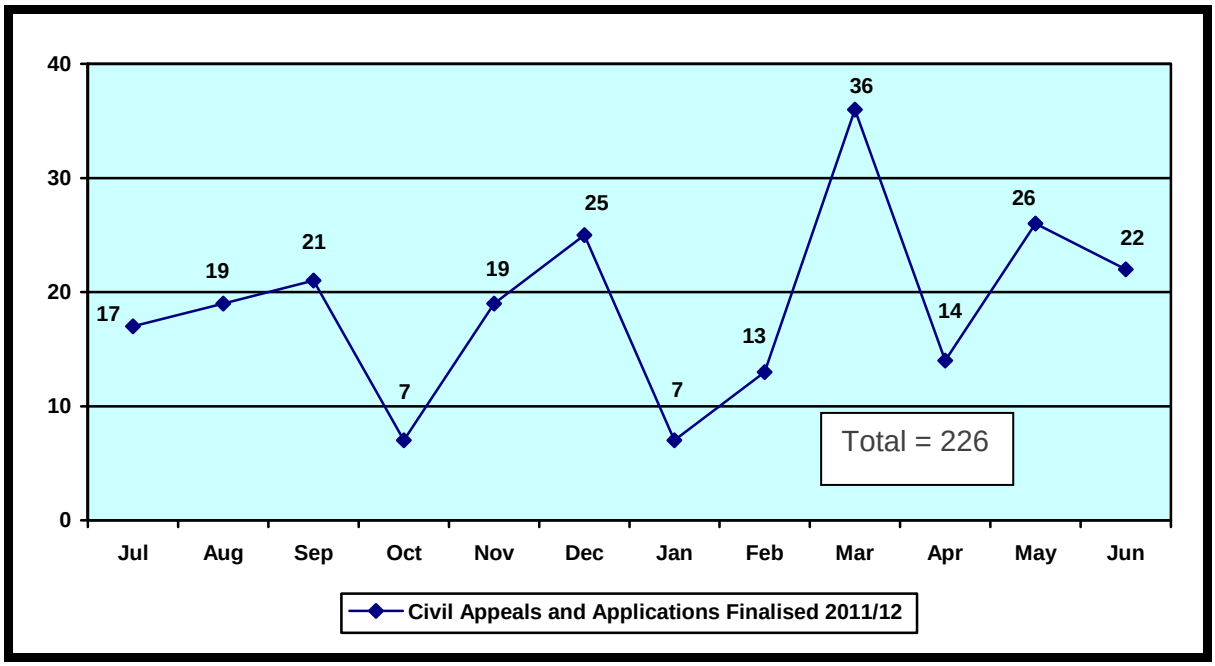
Pending civil appeals and applications over 12 months old in 2011/12



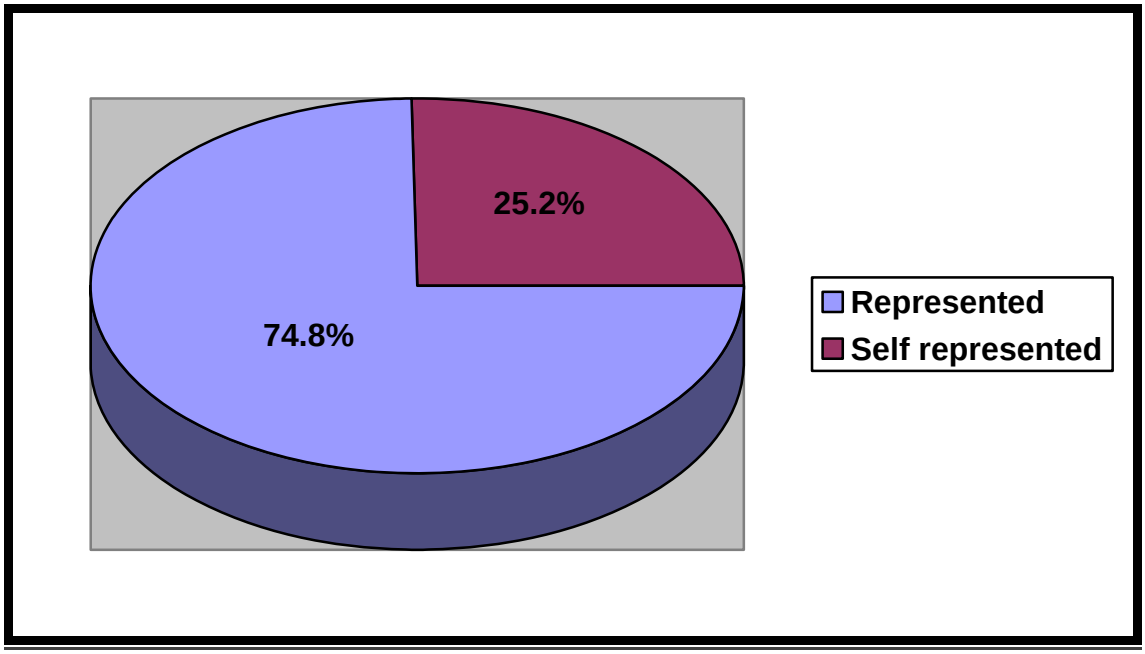
Initiations (civil) in 2011/12



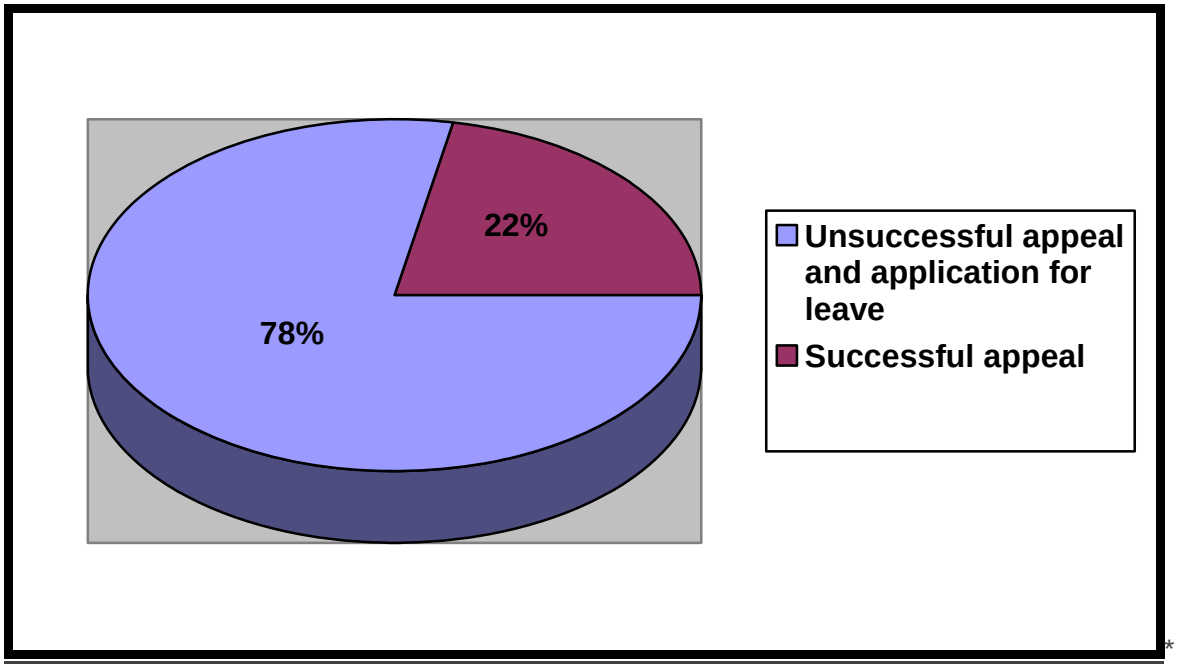
Finalisations (civil) in 2011/12



Percentage of civil initiations that were filed by self represented litigants in 2011/12



Success rate for civil appeals and applications for leave filed in 2011/12



*Note: The unsuccessful appeals / applications for leave includes those cases that were discontinued, settled, abandoned or withdrawn after filing.