



Judicial independence as institutional autonomy: Court-led reforms

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The obligation on judges to act independently and impartially is well understood. It is a core premise of judicial office and an essential component of the judicial oath. The High Court recognised in *NAALAS v Bradley*² that there is an implied guarantee under the Commonwealth Constitution that State Supreme Courts must be, and be seen to be, impartial and independent.

The quality of that independence is typically characterised as freedom from influence or interference in the performance of judicial functions. As the Honourable Murray Gleeson has said:

Confidence in the administration of justice depends upon a general assumption that judges act according to law, and free from pressure or interference of a kind that might deflect them from their duty.³

This freedom from external influence or interference secures the right of an individual litigant to

¹ A judge of the Court of Appeal, Supreme Court of Victoria.

² *North Australian Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 162-3 [27], [29].

³ Chief Justice Gleeson, 'The Right to an Independent Judiciary' (Speech delivered at the 14th Commonwealth Law Conference, London, September 2005).

a fair hearing by an independent and impartial tribunal according to law.⁴

There is an additional element to independence, however. This is the element to which Sir Anthony Mason adverted when he spoke of 'judicial independence in an extended sense'⁵ that is,

an independence that is something more than the ability of a judicial officer to make a decision free from governmental threat or favour, an independence that extends to the institutional autonomy of the courts.⁶

The idea of judicial independence as institutional autonomy is what I wish to address today. It seems to me that acquiring institutional autonomy is a challenge for courts in the 21st Century, the theme of your Conference. I wish to explore the idea not by discussing considerations of an abstract kind but by giving an example of recent reforms undertaken by the Victorian Court of Appeal that have asserted and enhanced its institutional autonomy.

My chosen example is the criminal appeals process and the reforms made to clear the backlog and reduce delays, in both conviction and sentencing appeals. This was in every sense a court-led initiative. Importantly, the impetus for the reforms came from the judges. The judges then had the carriage of an intensive consultation process and were able to bring the profession and the critical agencies along with them. Finally, the judges remained in control of the implementation of the reforms in 2011 and beyond. The Executive, and, in particular, the government department that then administered courts, the Department of Justice, played a minor role. It played no part in the policy development of the proposal; its role was largely to fund the reforms. The likely prospect of efficiencies won the support of the Executive. Success

⁴ See, for example, Article 14.1 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which provides that in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

⁵ Sir Anthony F Mason, 'Judicial Independence and the Separation of Powers — Some Problems Old and New' (1990) 13 *University of New South Wales Law Journal* 173, 174.

⁶ Ibid 174.

has since been measured in terms that Treasury can understand. It is both a useful model for reform and a reaffirmation of the judiciary as the third arm of government.

The aim of this discussion is to identify those aspects of the reforms that have led to their success. It is also to illustrate how a strong commitment to institutional autonomy can influence the process of reform.

The background to the criminal appeal reforms — backlogs and delays

The criminal appeal reforms were conceived in the face of an ever-increasing backlog of appeals. These included both appeals against conviction and appeals against sentence. To appreciate the significance of the reforms it is necessary to understand a little about the background against which they were introduced.

In 2006, the Victorian Court of Appeal had a backlog of around 300 criminal appeals.⁷ By January 2010, the number of outstanding appeals had climbed to 679. This backlog was inevitably accompanied by substantial delay in the hearing of appeals. In late 2010, the delays prompted the High Court to voice its dismay in the case of *Nguyen*.⁸

Nguyen had been convicted of murder and attempted murder following a trial by jury. The context was one in which Nguyen, in pursuit of recovering a debt owed for drugs previously purchased, waved a samurai sword around a small flat, injuring two persons. A co-accused, Ho, produced a pistol killing one person and wounding another. The Crown case against Nguyen was put on the basis of acting in concert with Ho, common purpose with Ho, and aiding and abetting Ho. Nguyen appealed to the Court of Appeal on the ground that the verdict was unsafe and unsatisfactory. The Court of Appeal agreed, overturned his conviction and directed that judgment and verdicts of acquittal be entered. However, it had taken eighteen

⁷ Sentence Advisory Council, 'Sentence Appeals in Victoria Statistical Research Report: Summary' (Research Report, Sentencing Advisory Council, March 2012) ('SAC Report Summary'), 3.

⁸ *R v Dang Quang Nguyen* (2010) 242 CLR 491, 506 [53]-[54].

months for Nguyen's appeal to come on for hearing. This aggravated a pre-existing delay caused by three earlier trials in which either instructions were withdrawn from counsel or the jury were discharged without verdict. There was a delay of about a year between the first trial and the fourth trial upon which Nguyen was convicted. Then the 18 months' wait for the appeal to be heard.

The High Court, on a Crown appeal, ultimately determined that the verdicts of guilty were open on the evidence but that a new trial should be ordered given that the trial judge had failed to direct sufficiently on manslaughter as an alternative verdict. Relevantly, the High Court pointed to the delay in the Court of Appeal before the appeal was heard and described it as 'unsatisfactory' and 'far too long'.⁹

The circumstances in *Nguyen* pointed to the reality that delays in appeals are not merely a matter of statistics. They involve persons whose liberty is at stake. They also aggravate any pre-existing delays in the system. They detract from the fairness of any re-trial because of the fading and changing nature of witnesses' memories.

The Supreme Court's 2009-10 Annual Report described the delays between filing and finalisation of criminal appeals as 'unacceptably long'.¹⁰ In some cases, the delays were in excess of two years.

By the time the High Court made its remarks in *Nguyen* moves were already afoot to address the delays. These were tried and true orthodox measures. There was an intensive listing of sentence appeals.¹¹ There was more vigorous monitoring of adherence to procedural timelines.

The Court of Appeal Registry engaged in an extensive audit of pending cases. Discussions took place about the cause of delays between the Court and the Office of Public Prosecutions,

⁹ Ibid 506 [54].

¹⁰ The Judges of the Supreme Court of Victoria, '2009-10 Annual Report' (Annual Report, Supreme Court of Victoria, September 2010) 14.

¹¹ This included the pilot program initiated by Maxwell P and Buchanan JA of hearing up to four applications for leave to appeal against sentence (full court hearings) every second day for no more than three days per week.

Victoria Legal Aid, and the transcription service, Victorian Government Reporting Service ('VGRS'). This provided valuable information about the inter-locking nature of the agencies and their dependence on each other.

A new statutory test for leave to appeal in sentence matters was introduced by which a judge may refuse leave to appeal if there is no reasonable prospect that a lesser sentence would be imposed, even if he or she considers that a ground of appeal is arguable.¹² Judges were encouraged to return to the practices of the earlier Full Court when many sentencing judgments were delivered *ex tempore*. In July to the end of October 2010, the number of criminal dispositions was 202 compared to 151 for the same period the year before. However, as Ashley JA observed, 'the dispiriting fact [was] that the number of outstanding criminal matters [had] continued to increase; and, particularly, conviction appeals [were] taking much too long to get on'.¹³

Despite the increase in the number of finalisations over this period, the pending caseload of criminal appeals mounted. Court output rose by 25 per cent in the three years following 2007-08 — but a constant increase in initiations outpaced these gains. The problem reached its apex with the 600+ backlog of 2010, which placed Victoria comparatively in the worst position of any Australian State or Territory.

It remains unclear why initiations were rising at such a dramatic rate, although the Sentencing Advisory Council has suggested that it may have been partially attributable to sexual offences law reform which led to the expedition of a greater number of finalisations in the County Court, the primary trial court in Victoria, and thus a greater number of consequent appeals.¹⁴ It is

¹² *Criminal Procedure Act 2009* (Vic), s 284A. There were also other reforms introduced around the same time to increase efficiencies in the court system, including the introduction of interlocutory appeals and the establishment of a committee to simplify jury directions.

¹³ The Honourable Justice Ashley, 'Criminal Appeals' (Seminar to the Australian Institute of Judicial Administration's Appellate Judges' Conference, Melbourne 26 November 2010), 1-2.

¹⁴ In 2013/14, 88.6 per cent of applications for leave were from the County Court and 11.4 per cent from the Trial Division of the Supreme Court. Leave is required from convictions and sentences imposed by either the County Court or the Supreme Court: *Criminal Procedure Act*, ss 274, 278. The exceptions are an appeal against sentence brought by the Director of Public Prosecutions

certainly true that a large number of criminal appeals, now about 30 per cent, involve sexual offences including rape and incest.

There were also some self-imposed restraints, some of which have continued.¹⁵ With the establishment of a permanent Court of Appeal in 1995, the intention of the Parliament was evidently to have criminal and civil appeals heard by permanent appellate judges. There are 12 judges of appeal each of whom sit on both civil and criminal matters.¹⁶ There is scope for judges from the Trial Division of the Supreme Court to be appointed as additional judges of appeal, and under the stewardship of Warren CJ and the President of the Court of Appeal, Maxwell P, usually two judges from the Trial Division will sit each term in the Court of Appeal. Nevertheless, it is rare for an appellate judge to sit with two Trial Division judges on a criminal appeal, and seldom if ever would an appellate judge sit with a Trial Division colleague on a two-member sentencing bench. My understanding is that this is quite different from the practice in New South Wales where an appellate judge will often sit with two trial judges.

Before the reforms, all applications for leave to appeal against conviction were treated as the hearing of the appeal¹⁷ and afforded a full hearing in open court before three judges.

Applications for leave to appeal against sentence alone were heard and determined by a single judge of appeal¹⁸ but usually after a full hearing in open court. If a single judge refused leave, an applicant could elect for a re-hearing by a full bench of three judges,¹⁹ which was also treated as the hearing of the appeal.²⁰ Eventually two rather than three member benches were

(Supreme Court of Victoria, *Practice Direction No 2 of 2011 – Court of Appeal: Criminal Appeals (First Revision)* 26 July 2012 ('Practice Direction 2/2011'), s 1; *Criminal Procedure Act* s 287) and an appeal from the Magistrates' Court on a question of law (s 272).

¹⁵ See The Honourable Justice Ashley, 'Criminal Appeals', op cit 2.

¹⁶ The Government provided the funds for the appointment of a twelfth judge to the Court of Appeal in 2009: *SAC Report Summary*, 2.

¹⁷ Pursuant to then r 2.07.1 of the *Criminal Appeals and Procedure Rules 1998* (Vic).

¹⁸ Pursuant to s 315(1) of the *Criminal Procedure Act*

¹⁹ Pursuant to s 315(2) of the *Criminal Procedure Act*.

²⁰ Pursuant to then r 2.07.1 of the *Criminal Appeals and Procedure Rules 1998*.

able to sit on sentence appeals from the County Court.²¹

However, judgments typically involved extensive analysis, even where the matter raised no point of principle. The judgments invariably set out all the facts that had already been set out at first instance. All judgments were given an identifying VSCA number and published on AustLII. The then Registrar of Criminal Appeals of England and Wales, Master Roger Venne, who was to play a significant role in the reforms, described this approach as a ‘Rolls Royce treatment on a Morris Minor budget’. This was not simply a remark about funding; it was a deeper observation that it was a misconception to assume there ought be a uniform approach to all criminal appeals. He indicated that if the attempt was made in England to provide a Rolls Royce judgment in every case, the system would simply break down.

During this period there was another inhibitor to the expeditious disposition of criminal appeals that has since been removed. An earlier system of reserve judges had been changed and the Court no longer called on experienced retired appellate judges to serve as additional judges on the Court. We have recently reverted to what was in effect the previous system of reserve judges and almost all the judges who have retired from the Court of Appeal in the last three years are now regularly sitting as judges again. The wealth of their experience and the depth of their legal knowledge has been of enormous benefit to the operation of the Court.

But in 2009-10 the dispiriting sense Ashley JA spoke of weighed heavily, when the backlog kept getting larger despite the increase in dispositions. This was apparent to me when I was appointed to the Court of Appeal in September 2010. I recall being faced with a torrent of criminal appeals. Sentencing appeals in particular were almost the daily diet. I admit to being confused as to whether the intensive list of sentence appeals to which I had been assigned

²¹ Pursuant to the *Supreme Court Act 1986* (Vic), s 11(1B), and Rule 2.03 of the *Supreme Court (Criminal Procedure) Rules 2008*. Rule 2.03 came into force in 2011: *Supreme Court (Chapter VI Amendment No 6) Rules 2011*. Rule 2.03 only applies with respect to appeals from the County Court. Two-member benches do not sit on appeals from the Trial Division of the Supreme Court. Section 11(1A) of the *Supreme Court Act* confers power on the President of the Court of Appeal to determine in any case that two appellate judges can exercise all the powers of the Court of Appeal but this has not been used to permit two-member appeals from the Trial Division of the Supreme Court in criminal appeals.

was the exception or the norm. Nor was this easy to clarify. The boundaries were becoming blurred.

What I did recall were the remarks of Ormiston JA when he retired some years before that he had begun ‘to feel that [he] was desperately climbing up a large sand hill, where the sands keep on sliding away so that [he kept] treading at the same level, with the pinnacle just as high, but somehow of a constantly changing appearance’.²² Although his Honour was speaking of the threat to a settled understanding of the law by new legislation and case law, including, as he said, some created by his own colleagues, his remarks are apt to describe what was an ever-increasing mound of criminal appeals that a judge could not control despite the dedication and industry which my colleagues displayed in abundance.

Imagine then the sense of fascination and relief with which the judges of the Court of Appeal, myself included, approached the notion that there might be a different way of doing things. To foreshadow the success of the reforms, I should mention that we have now reduced the backlog from 679 in January 2010 to 177 in June 2014.²³

The model for reform

The origins of the reforms came from a visit by Ashley JA to the Royal Courts of Justice in London in 2009.²⁴ This was initiated and organised by our Chief Justice, who was a prime mover in the reforms. Ashley JA spoke in England with the Lord Chief Justice, several senior Court of Appeal judges, and the Registrar, Master Venne. He also observed the hearing and disposition of a number of criminal appeals. He has since remarked that the scale of the appeals staggered him. From about 70-80,000 convictions and pleas dealt with each year in England and Wales, there were about 7,000 applications for leave to appeal. Yet the elapsed

²² The Honourable Justice Ormiston, ‘Farewell speech from the Honourable Justice Ormiston’, (2006) Autumn *Victorian Bar News* 36, 38.

²³ The Victorian Court of Appeal, *The Court of Appeal: Review of the 2012-13 Legal Year* (July 2014) (‘2012-13 Review’), 53; The Victorian Court of Appeal, *Court of Appeal Monthly Statistical Report* (June 2014) (‘June 2014 Report’), 1.

²⁴ Justice Cummins also attended.

time to disposition was very much shorter than in Victoria.²⁵ The system was routinely achieving a rate of dispositions of between eight and ten cases per day, including at least one conviction appeal per day, with the Court sitting three and a half days each week.²⁶

Ashley JA returned to Victoria saying that he had seen the future of criminal appeals. He recognised that the rate of dispositions in England resulted from a very efficient and streamlined system that he considered could be replicated in Victoria at modest cost. England seemed an obvious model for Victoria, as it has a similar legal culture to our own, with similar required standards of criminal process.

Under the English system, the Registrar is an experienced criminal practitioner. The Registrar has the status of a Circuit Judge. In the Criminal Appeals Office there is a staff of lawyers and administrators. They are divided into teams, some of whom deal exclusively with sentence cases, with a Team Leader who is a lawyer and is responsible for specialist training, both internally and externally, and for maintaining best practice.

The Office is responsible for processing applications for leave to appeal; obtaining the necessary papers; preparing the case to enable a judge to determine it; writing a case summary for the Court; and taking all steps to ensure that cases are heard at the earliest opportunity once fully prepared. Staff also advise appellants and their legal representatives on matters of procedure and deal with a substantial volume of correspondence and telephone queries. The focus is on giving the judges what they need to deal with a matter quickly. The Office is attentive to the circumstances of the particular matter rather than having a 'one size fits all' approach.

Master Venne emphasised that throughout each application or appeal in England the Court 'is in the driving seat'. Each case has an assigned case officer who is responsible for the timely

²⁵ In 2008-9, it was 4.3 months in sentence appeals and 9.4 months in conviction appeals.

²⁶ The Honourable Justices Ashley and Nettle, *Proposal for Adoption of a New Criminal Appeals Procedure*, [9].

progression of each matter from the beginning to completion. This is a key feature of the English system — the idea that each criminal matter should be managed from cradle to grave by a dedicated, legally qualified Registry officer. This contrasted with the long-observed practice in Victoria at that time, which was that different staff members, mainly administrative staff, handled discrete aspects of the appeal preparation process, with no continuity of involvement in any one matter.

In England, upon receipt of an application for leave to appeal, a lawyer in the Registry examines the proposed grounds of appeal, and then orders copies of any transcript of the trial proceedings, or documents considered necessary for the determination of the matter. On sentence matters, copies of the Crown Opening and sentencing remarks are obtained along with any relevant pre-sentence medical reports. On a conviction appeal, a transcript of the charge to the jury and any rulings will be obtained and, if the case officer considers transcript of other matters necessary, that will also be obtained, for example, the charge to the jury relating to a co-accused.²⁷

These materials are sent to counsel for the applicant for comment and so that the grounds of appeal can be perfected with direct reference to the relevant transcript.

Typically, the disposition of the application for leave is ‘on the papers’ by a single High Court judge. This is another key feature of the English system. The materials in both conviction and sentence matters are usually sent off by the case officer to a judge to grant or refuse leave, on the papers. The test is whether there exist ‘reasonable prospects of success’.

Written reasons are given whether the application is granted or refused. The judge may also grant leave on limited grounds. Reasons are brief.

²⁷ Rule 68.3(c) of the *Criminal Procedure Rules 2014* (UK) provides for counsel to ‘identify the transcript that the appellant thinks the court will need, if the appellant wants to appeal against a conviction’. It is a matter for the individual case officer to order that transcript. A relevant manual states that Registry staff will determine whether any further transcript ought to be ordered: Her Majesty’s Court Service, *A Guide to Commencing Proceedings in the Court of Appeal: Criminal Division* (October 2008) (*‘The Guide’*) 14.

An applicant can request an oral hearing, although there is usually no public funding for counsel for the hearing.²⁸ If an oral hearing is held, it is ordinarily listed early in the morning, before Full Court business.

If leave to appeal is granted, the judge is authorised to grant legal aid by way of a 'representation order'.²⁹

If leave to appeal is refused, the applicant may seek a review by two judges, namely, a member of the Court of Appeal and another judge. This review is called a 'renewal' and this is also dealt with on the papers unless counsel for the applicant requests an oral hearing. Public funding is generally not available for renewals. Counsel either appear privately instructed or on a pro bono basis.

To deter speculative applications for review, the single judge who refuses leave may indicate, if he or she considers that the application is hopeless, when giving reasons, that there should be a penalty known as a 'Loss of Time' order if the renewal fails.³⁰ This is effectively an increase in sentence, for example, of four to six weeks, the duration between the initial refusal of the application and the determination of the renewal. This is genuinely punitive.

If leave is granted, an appeal will be heard by the Full Court. The Court of Appeal in its criminal jurisdiction normally comprises one Lord Justice who is a member of the Court of Appeal and two High Court judges. Sometimes a Circuit Judge sits as one of the two so-called 'wingers'.

The Registrar may also refer an application directly to the Full Court where a case merits special attention. These so-called 'flagged cases' might, for example, raise a point of principle, involve a short sentence, or have an element of notoriety.³¹

²⁸ *The Guide*, 19.

²⁹ *Ibid* 20.

³⁰ Court of Appeal (UK) (Criminal Division), *Practice Direction — Criminal Proceedings: Consolidation* [2002] 1 WLR 2870, [16.1].

³¹ Overall, it appeared that in 2007/08 about 42 per cent of sentence matters, and 31 per cent of conviction matters, went to a Full Court either by reason of a grant of leave or by a direct

If leave to appeal is granted by a single judge, or the matter is referred to the Full Court, the case officer writes a neutral summary, which includes a resume of the facts, any relevant rulings at trial, and the grounds of appeal. In sentence appeals, the summary is ordinarily some three to four pages in length.³² In a conviction appeal, it can be up to 30 or 40 pages.

The neutral summary is sent to counsel, both defence counsel and the prosecution, if the latter is appearing.³³ Corrections can be suggested and these may be incorporated in a revised summary. The summary provides the basis for the factual part of the Court's judgment.

The Full Court also has the documents that supported the leave application and 'skeleton' arguments of counsel. Like all barristers anywhere, English counsel prepare these skeletons of argument seeking maximum advantage. As a consequence, 'skeleton' is something of a misnomer. However, they must be provided *early* in the appeal process and argument *must* focus on the true issues which arise.³⁴

Defence counsel from the trial would generally run the appeal. He or she would have familiarity with all aspects of the trial and would be unlikely to rely on a ground of appeal raising an issue on which no exception was taken at trial and no explanation was forthcoming on appeal. In England there is no specialized criminal appellate bar, whereas Victoria has had such a specialized bar since the 1980s.

On the hearing of sentence appeals, the Crown does not ordinarily appear, although it can do so.³⁵ If an appellant is unrepresented, it appears that even if the Crown does appear, it will not volunteer assistance. There is also scope for appeals to be brought by the Crown against

referral.

³² In sentence appeals, the neutral summaries may be prepared by administrative staff. Ben Jellis, *Justice in criminal appeals: A comparison between the appellate jurisdiction of the English Court of Appeal and the Court of Appeal of the Supreme Court of Victoria* (paper submitted as part of requirements for Bachelor of Civil Laws, Oxford University, 2010-11), 3.

³³ *Ibid* 3, Appendix 3.

³⁴ The Honourable Justices Ashley and Nettle, *Proposal for Adoption of a New Criminal Appeals Procedure*, 14 [5].

³⁵ If it does appear, it must provide a skeleton argument.

undue leniency of sentence.

In over 90 per cent of conviction and sentence appeals, judgments are delivered *ex tempore*.

For a sentence appeal, including the giving of an *ex tempore* judgment, 25 minutes is allowed.

As a means of expediting sentence appeals, when the Court is minded to re-sentence the appellant it will frequently give a provisional indication at the outset of the hearing of a possible different sentence. If the appellant indicates a preparedness to accept the Court's indication, and given that ordinarily only the appellant will appear, the matter can be brought to a conclusion quickly.

For the hearing of a conviction appeal, about two to two-and-a-half hours is allotted on average. In a few cases, the hearing time allowed may be a matter of days.

In many cases judgments are given by one judge on behalf of the Court.

Very few judgments determining either conviction or sentence appeals are reported or go on the Court's website, although some cases are sent to the equivalent of AustLII, the British and Irish Legal Information website ('BAILII'). A weekly database is compiled by a senior lawyer in the Registry, to minimise the risk of conflicting judgments.

Particularly in sentencing appeals, judgments seldom refer to authorities. Lord Judge, the former Lord Chief Justice of England and Wales, enunciated the guiding principle in this respect when he said, 'if it is not *necessary* to refer to a previous decision of the court, it is *necessary* not to refer to it'.³⁶ Resort is had instead to guideline judgments and sentencing statistics.³⁷

In summary, the key features of the English system which contribute to its efficiency are the

³⁶ *R v Erskine* [2010] 1 WLR 183, 203 [75] (Lord Judge CJ, delivering the judgment of the Court).

³⁷ Ben Jellis, *op. cit.* It appears that sentencing statistics are considered as a guide to the sentencing range by trial judges and by judges considering leave applications but do not appear to the same extent in Court of Appeal judgments.

following:

- high-level preparation by a registry staffed by experienced criminal lawyers and driven by someone with the standing of a judge;
- continuity of management by a single case officer for each matter;
- use of single judges for almost all applications for leave to appeal against both conviction and sentence;
- disposition of applications on the papers with brief reasons;
- where leave is granted, skeletons of argument are provided early usually by counsel who appeared at trial;
- time-limits are imposed on a hearing;
- disposition by full courts is very largely through the use of *ex tempore* judgments without reference to specific authorities based upon agreed neutral summaries of facts.

It was proposed that these key features be reproduced in Victoria.

The Victorian process

In May 2010, Master Venne came to Victoria at the invitation of Warren CJ. Master Venne was in Melbourne for not much more than a week. During that time he and Ashley JA spoke about the English system, and its possible implementation in Victoria, at numerous meetings held, respectively, with judges of the Court; the Registry; representatives of Victoria Legal Aid; the Director of Public Prosecutions ('the DPP') and senior prosecutors; members of the Victorian Bar and solicitors practising in criminal law; the Commonwealth DPP; the Sentencing Advisory Council; representatives of the Department of Justice; the Attorney-General and the shadow Attorney-General. From the beginning the proposal for reform was carefully explained to those likely to be affected and their support sought. The Attorney-General could see that the proposal

was an initiative that the Court identified with and which it had the drive to deliver.

Master Venne repeated his view in these meetings that the Victorian Court of Appeal was producing judgments with a greater level of detail and complexity than resources allowed for.³⁸ The representative from Victoria Legal Aid has since described Master Venne as engaging and passionate about the English system, sufficiently senior to be credible and, because he was distant from Victoria, capable of criticising features of the local system without giving offence. He said that the presence of a credible external judicial figure, working together with senior members of the Court in a court-led initiative, gave the process a gravitas.

A major meeting was held with the profession. Significantly, it was held in a courtroom. Ashley JA and Nettle JA sat not on the bench but on an equal level with those who attended. The judges were armed with notes to distribute on the English system and examples of specimen case materials from English cases. Critically, the judges spoke with a united voice.

Maxwell P had become involved from the time of Master Venne's visit and took an active part in the process of consultation. The ethos was one of negotiation. What struck the lawyers participating was the level of confidence that the Court had in the merits of the reforms and its absolute commitment to implementing them. As a practitioner described it, 'this was consensus-building with backbone'. The consultation was conducted by the judges in the knowledge that funding would need to be given to other agencies in order for them to participate, as well as to the Court for additional staff.

Justices Ashley and Nettle made a formal proposal to the Judges of Appeal for a suite of reforms. The proposal was unanimously endorsed in June 2010 and later passed by the Council of Judges.

A Reference Group was established in December that year which met monthly for two years. At these meetings practitioners could raise issues important to their constituency and then

³⁸ The Honourable Justices Ashley and Nettle, *Proposal for Adoption of a New Criminal Appeals Procedure*, [77].

return to their members with explanations. The Reference Group was chaired by Maxwell P. The Group also consisted of a judge of the County Court; the DPP; the Director, Criminal Law at Victoria Legal Aid; the Chair of the Criminal Bar Association; the Chair of the Law Institute's Criminal Law Section; the Deputy Director of the Commonwealth DPP; the manager of the VGRS and judges of the Court of Appeal. This was a 'sleeves rolled-up' form of inclusive consultation which one of the non-judicial representatives described as 'gold standard'. This was not reform by departmental fiat.

One of those who attended the meetings, a solicitor with an extensive private practice in criminal law, said that although he was initially unconvinced, it was the first time he had felt properly included in court reform at a stage when issues could genuinely be responded to and simple concessions made. He said the atmosphere was polite and constructive, and suggestions were respected. The clear understanding conveyed by the President to the Reference Group was that the process of reform would be much more likely to succeed if everybody was listened to, even if that involved modifications to the proposal.

There was some opposition, however. During December 2010 a group of individual members of the Criminal Bar who had not previously been involved voiced their opposition by way of a formal submission on the reforms. This was the only negative response the Court had faced. By contrast, the Criminal Bar Association had been very positive from the beginning. Fortunately, by this time, the support that the principal judges had garnered, first within the Court, and then within the profession, meant that they were able to work their way through this late resistance.

The reforms were ultimately introduced in early 2011 by a combination of Court Rules and a Practice Direction.³⁹ It was recognised at the outset that the Victorian system, while modelled

³⁹ Practice Direction 2/2011, ss 4, 5. There were also legislative changes occurring simultaneously. Part 4 of the *Courts Legislation Miscellaneous Amendments Act 2010* (Vic) amended the *Supreme Court Act* the *Criminal Procedure Act*, and the *Constitution Act 1975* (Vic) to make provision for the office of Judicial Registrar, including the Registrar of Criminal Appeals in the Court of Appeal. This included the insertion of s 11 (4A) into the *Supreme Court Act* which

on that of the UK, would not be a mirror image of it. There was a need for accommodation to our own legal culture.

The reforms fall, broadly, into five categories.

The first major aspect of the reforms is the requirement that an application for leave to appeal against conviction, or sentence, is to be commenced by filing the true grounds in support of the appeal within 28 days of the applicant being sentenced.⁴⁰ A practice had previously developed in Victoria whereby barristers, following an adverse outcome at trial, would lodge an appeal with formulaic or 'holding' grounds, containing nothing more specific than, for example, 'the sentence was manifestly excessive' or 'the verdict was unsafe and unsatisfactory'. There was no intellectual rigour applied at this stage. There was no filtering out of unmeritorious appeals by the profession. A different barrister, generally one experienced in appellate work, would subsequently come along and trawl through the transcript with a fine-toothed comb, searching for appeal points. Those points would often include directions or rulings from the judge where no exception had been taken at trial. This would infuriate the court hearing the appeal.⁴¹ So too would the attempts made to rely on grounds that bore little resemblance to the way in which the trial had been run.⁴² With specialist appellate counsel preparing the finalised appeal grounds,

allows the Judicial Registrar to exercise certain powers of the Court of Appeal in certain circumstances. These changes facilitated the criminal appeal reforms but did not grow out of them; there was also a Judicial Registrar position created for the Costs Court and subsequent Judicial Registrars have been appointed in other areas of the Court.

⁴⁰ Practice Direction 2/2011, s 5(1). An extension of time may be granted under s 313 of the *Criminal Procedure Act*.

⁴¹ For example, in *R v Ngo* [2002] VSCA 188, Winneke P (with whom Chernov JA and O'Bryan AJA agreed) described the ground of appeal (at [14]) as 'surprising having regard to the fact that little or no exception was taken to what seems to me to be adequate directions both on the law and on the facts'. He cited a number of authorities in support of the proposition that grounds of appeal asserting misdirection will rarely succeed where counsel at the trial has taken no exception to the charge; see *R v Tripodina* (1988) 35 A Crim R 183, 191 (Yeldham J); *R v Clarke & Johnstone* [1986] VR 643, 661-2; *R v Gallagher* [1998] 2 VR 671, 681-4. See also *Romero v The Queen* (2011) 32 VR 486, 489-90 [11] where Redlich JA made it plain that the Court of Appeal would not lightly entertain arguments not raised on the plea, or arguments explicitly eschewed on the plea.

⁴² See *R v Staszewski* [2004] VSCA 176, [50] where Hansen AJA (with whom Charles and Nettle JJA agreed) said: 'The present argument ... is tantamount to a request for an opportunity to re-run the case on a basis that was clearly deliberately not run at trial and upon which in my view it was not open to do so. I would reject the proposed ground'.

an Amended Notice of Appeal would often not be filed until the day before the leave hearing, which obviously caused huge difficulties for the judges. Solicitors conceded during the process of consultation the obvious truth that it was also difficult for them not knowing what the appeal was truly about until very close to the hearing. This failure of the applicant to define early the actual content of the appeal meant that Registry staff were unable to obtain documents relevant to the appeal, and to prepare a useful appeal book for the bench, until late in the piece.

The current requirement under the Practice Direction is that proper, particularized appeal grounds be filed at an early stage. This has been immeasurably useful to the bench in preparing for the hearing of applications for leave and appeals. The grounds have to be drafted with sufficient particularity to enable the Registrar, and the Court, to identify clearly the matters relied upon. What is more, the grounds must be accompanied by a 'written case'. This sets out brief supporting argument for each ground. It must identify all relevant documents in support. Counsel and solicitors must not prepare or sign a notice of appeal or written case unless they consider the grounds to be reasonably arguable and would be prepared, if necessary, to argue them in court.⁴³

The written case has a maximum page-limit of ten pages and is a variation on the skeleton arguments used in England. It is in effect the submissions for the appeal. There is scope for the Crown to respond with its own written case.⁴⁴ In conviction matters, there is also scope for revision once trial transcript has been obtained but a revised written case is still filed at an early stage.⁴⁵ Whether transcript should be provided was a source of contention between the criminal Bar and the judges during the consultation. The judges ultimately accepted the Bar's position that barristers had a need for more than access to a sound recording and the Court

⁴³ Practice Direction 2/2011, s 4.

⁴⁴ Practice Direction 2/2011, s 8.

⁴⁵ Practice Direction 2/2011, s 7(4). The revised written case has to be filed within 21 days of the provision of transcript or a period specified by the Registrar. New grounds may be added in the revision period without leave.

established a protocol with VGRS for the timely provision of transcript.⁴⁶

The proposal for such significant front-end loading was aimed at ensuring that the judge who determines an application for leave to appeal has all the material he or she needs to grasp quickly the facts and issues in the case.

The requirement for the early filing of substantive grounds of appeal and supporting argument was also associated with the second major aspect of the reforms, the expectation that counsel who had appeared at trial would also run the appeal. This is reflected in the Practice Direction which says:

A core objective of the new practice is to ensure that matters of fact and law which are in issue at trial are clearly identified and properly ventilated at trial, and that appeal grounds are drawn and argued by reference to what took place at trial. Experience suggests that this objective is likely to be achieved in most cases by the involvement of trial counsel in the appeal process.⁴⁷

To encourage the participation of trial counsel in appeals and in the preparation of a written case, joint training courses were conducted by the Bar and Legal Aid. The Registry was involved.⁴⁸ There are now criminal appellate advocacy courses run at the Court in which Court of Appeal judges take part.

During the consultation process, Victoria Legal Aid accepted that, in the future, every grant of legal aid for a criminal trial would include a fee to trial counsel to advise on prospects of appeal in the event of an unsatisfactory outcome at trial, and to draw grounds of appeal, if the advice was to appeal. The close co-operation between Victoria Legal Aid and the Court was critical as Legal Aid was funding about 80 per cent of appeals at the time.

⁴⁶ The newly appointed Judicial Registrar, Court of Appeal, Mark Pedley, signed a protocol on behalf of the Supreme Court with VGRS in early 2011.

⁴⁷ Practice Direction 2/2011, s 2(5).

⁴⁸ Mark Pedley and the Reform Project Manager, David Tedhams, (Deputy Registrar (Legal)) undertook a 'roadshow' to the Bar with examples of written cases.

Some solicitors in private practice were sceptical. They were concerned that trial counsel might miss errors, especially where their performance at trial had contributed to error. They were also initially resistant to the idea of being required to identify true grounds of appeal promptly. They viewed as onerous the need for the early filing of a written case. From their perspective, the fundamental change was one of timing and they expressed doubts during the consultation process about the demanding nature of the reforms. However, they were supportive of the need to reduce delays and prepared to see if the reforms could achieve efficiencies.

Many of the sceptical solicitors have discovered, however, that the English-based Victorian system works better for them. Under the old system, while it was easy for solicitors to file holding grounds of appeal, it meant that their client sat effectively in purgatory, awaiting an appeal hearing with the potentially false hope that they had a real chance of success. When the hearing of the appeal was off in the never-never, and there was no rational evaluation of the prospects of success for months, if not years, it had the consequence of distancing solicitors from the assessment of the trial, even though they may have instructed keenly throughout. It also had the effect of absolving trial counsel from the outcome. Solicitors would not infrequently find that trial counsel, faced with an adverse outcome at trial, raised a client's expectations by claiming baldly that the judge had got it all wrong and that 'Blind Freddy' could win the appeal. Solicitors ended up having to explain to their clients much later that appellate counsel inspecting the transcript had detected no error. They then had to persuade their client, sitting in prison, to abandon their appeal. Alternatively, they were sometimes left trying to explain to a client why an appeal had failed when the trial counsel, long since gone, had warranted their prospects to be so great.

Furthermore, as one solicitor recounts it, the time between the filing of a holding notice of appeal and the ultimate hearing of the appeal was not only drawn-out for the client. The convicted prisoner sitting in custody falsely assumed he or she had a substantive appeal on foot. There may have been no one else to talk to but the solicitor. The solicitor was on speed dial. About every three weeks the client would call asking, 'What's happening to my appeal?'

The solicitor felt obliged to chat at the same time knowing that there had been no considered and rational evaluation of the prospects of the appeal. The solicitor had not yet received any formal advice. The client's follow-up would be for the solicitor to arrive one morning to find that waiting out in reception was the client's cousins whom the client has sent in to have a more detailed chat about tactics for the appeal.

By contrast, the front-end management demanded by the reforms involves evaluating the prospects of success on an appeal expeditiously and in a robust and rational manner. Seizing the issues straight after the trial when everyone has a fresh recollection of exactly what occurred means a solicitor is quickly in possession of a well-considered advice. The solicitor can advise clients either that there is no chance of success for an appeal and the sentence should be served, or they should file a properly prepared written case with true grounds of appeal. One of the practical advantages is that the client in custody quickly has in his or her possession all the documents needed for the appeal and the speed-dial gets little use.

Another positive change from the perspective of solicitors is that they have become more involved in assessing the merits of an appeal. Having recently instructed at the trial, they are in a position to discuss with trial counsel the way things went and what might have gone wrong, rather than waiting to hear an analysis of the transcript from counsel who did not appear at trial and when the trial is little more than a distant memory. Specialist counsel can still be brought in when necessary.

Some of the specialist criminal appellate Bar are now engaged for trial work as well as appeals. Trial defence counsel are now retained in about 44 per cent of appeals and that figure has been increasing since the reforms were introduced.⁴⁹ Unlike the Commonwealth DPP, the Office of Public Prosecutions in Victoria has been less committed to providing continuity of counsel. This has been something of a lost opportunity to develop the advocacy skills of young

⁴⁹ The VLA has been supportive of the use of trial counsel as it avoids the need to repeatedly establish knowledge of the case, and trust with the client. It seems also to have encouraged improvement of performance at trial level.

prosecutors. It has also created an inefficiency in the system, because extensions of time are regularly sought. This is probably the major limitation on further improving timeliness in the system.

The third major aspect of the reforms has been the focus upon the Registry. The Court determined to elevate its commitment to criminal appeals by recruiting someone with criminal appellate experience to become the Registrar of Criminal Appeals, a Judicial Registrar position. This led to the appointment of Mark Pedley who was committed to the reform process from the outset.⁵⁰ He insists upon strict compliance with requirements for filing. Attempts to file 'holding' grounds of appeal are not accepted and time continues to run against the applicant. Practitioners have acknowledged his consistency and fairness.

The Court also appointed to the Registry four criminal lawyers, who act as case managers for individual matters from initiation through to finalization. The case managers, on receipt of the written case, identify the documents that are relevant for the judge to receive. In conviction appeals, depending upon the grounds raised, there may not be a need for the full trial transcript, as was standard before. The case managers are also intended to provide a layer of protection against the risk that an obvious point has been missed in an application for leave. They are expected to raise any such issue with the judge.

The other important task undertaken by the new Registry staff is the preparation, if leave is granted, of neutral summaries for the appeal, which are prepared in consultation with the parties as an agreed base for the appeal. They are provided to the bench with the appeal books. These are directed at providing a crisp summary of the facts and the nature of the issues raised. They involve no deliberative reasoning. In sentencing matters they provide a short summary of the sentencing remarks. They also include a sentencing table, called a 'tabular summary',⁵¹ which incorporates all the relevant sentencing information, including the

⁵⁰ Mark Pedley visited the English Criminal Appeals Office to observe its processes in July 2011.

⁵¹ See Practice Direction 2/2011, Annexure 1.

amount of cumulation, total effective sentence, non-parole period and so on. The table enables the critical information to be absorbed at a glance and is especially useful when issues of parity are raised.⁵² It has since been enthusiastically adopted in England.⁵³ I invariably use such a table in sentencing judgments.

The Registry also produce extensive statistical reports on the Court's performance. Before the reforms, there was a considerable lack of statistical monthly or annual data. This was partly due to the deficiencies of the former IT system — now discredited — under which the Court had been obliged to operate.

Fourth, under the reforms, every criminal matter is subject to a discrete leave application before the appeal can be heard, with the exception of Crown appeals.⁵⁴ The practice of hearing all applications for leave to appeal against conviction orally before a bench of three has been abolished. The Practice Direction provides that all leave applications in both conviction and sentence matters are dealt with on the papers by a single judge unless an oral hearing is requested. Reasons are brief and are largely unpublished. However, the requests for oral hearings have been frequent — in the first two years of the reforms it was only a bare majority of applications that were determined before a single judge on the papers — 52 per cent in 2011/12 and 53 per cent in 2012/2013.⁵⁵ This contrasts with the English experience of about 80 per cent. Although the requests for oral hearings have reduced in this last year,⁵⁶ it has proven difficult to dissuade practitioners in Victoria from what they see as the virtues of an oral

⁵² Maxwell P and Neave JA independently started using a sentencing table in 2006-2008.

⁵³ Alix Beldam and Susan Holdham, *Court of Appeal Criminal Division — A Practitioner's Guide* (Sweet & Maxwell, 2012). This followed a visit by Susan Holdham from the Criminal Appeals Office, London to the Victorian Court of Appeal in February 2012.

⁵⁴ See *Criminal Procedure Act*, ss 274, 275, 278, 283, 287.

⁵⁵ 2012-13 Review, 59.

⁵⁶ The June 2014 Report indicates that only 24 per cent of applications for leave to appeal before a single judge were heard orally. This may be attributable, however, to more matters by-passing the single judge stage and going straight to a bench of two or three judges on a preliminary assessment of the merits by the Registry often in consultation with a judge. Those that are left are being largely determined on the papers. Where the application is from a sentence imposed by the County Court, it is often more efficient for both the leave application and the appeal to be heard together by two judges who can finally dispose of the matter.

hearing. Where an oral hearing is held before a single judge there are time-limits imposed under the Practice Direction of 15 minutes for the applicant and 10 minutes for the Crown, if appearing.⁵⁷ These are not often enforced although hearings tend to be brief.

As an aside, we are currently in the throes of reforms to our civil appeals process. Given the difficulties experienced in criminal matters in eliminating the expectation for an oral hearing of an application for leave, we decided, when imposing a requirement for leave for all civil appeals⁵⁸ that it would not simply be a matter for the parties as to whether an oral hearing should take place. Rather, the new legislation, passed 10 days ago,⁵⁹ provides that an application for leave may be heard by one or more judges, with or without an oral hearing.⁶⁰ It will be a matter for the judge to determine. If the application for leave is dismissed, the parties may apply to have the dismissal set aside or varied at an oral hearing.⁶¹ However, and here's the rub, if the judge who dismissed the application determines that it is totally without merit the applicant has no right to apply to have the dismissal set aside or varied.⁶² This largely reflects English civil appeals practice. Matters wholly without merit can be identified early and determined entirely on the papers. This ought to save judge-time without creating unfairness.

We are also reproducing in the civil sphere another element we take to have been responsible for the success of the criminal appeal reforms, namely, the requirement for the parties to commit early to substantive grounds of appeal supported by concise argument, the 'written case'.

In the criminal appeal process we found the expectation that the Crown would not attend or

⁵⁷ Practice Direction 2/2011, s. 11(7).

⁵⁸ *Courts Legislation Miscellaneous Amendments Bill 2014* ('the *Courts Bill*'), cl 4 inserting s 14A(1) into the *Supreme Court Act*. There are exceptions including appeals from a refusal to grant habeas corpus and in relation to appeals under the *Serious Sex Offenders (Supervision and Detention) Act 2009* (Vic).

⁵⁹ The *Courts Bill* passed the Legislative Assembly of Victoria on 19 August 2014.

⁶⁰ The *Courts Bill*, cl 4, inserting s 14D(1) into the *Supreme Court Act*.

⁶¹ *Ibid* s 14D(2).

⁶² *Ibid* s 14D(3).

make submissions on applications or appeals relating to sentence has not been fulfilled. There was an initial attempt on the DPP's part to meet this expectation, but it has since become extremely rare for the prosecution not to appear and make submissions. This may well be because of the importance attached by the DPP to victims' issues. This is an example where there had been a need to adapt the English process to Victoria's legal culture in order to maintain support from agencies and the profession. I have not seen the Crown's involvement as unduly protracting any matter.

An unsuccessful applicant for leave can 'elect' to seek 'renewal' of the application and the elections will be determined by two or three judges. Where a single judge has refused all of the grounds, the renewals are determined by two judges. In 2012/13 applicants elected to renew 44 per cent of refusals of leave or partially granted leave applications.⁶³ This was down to 41 per cent for 2013/14.⁶⁴ Again it has been difficult to guide the profession into an acceptance of matters being dealt with on the papers. Only 16 per cent in 2011/12 and 29% in 2012/13 — were dealt with on the papers.⁶⁵ 88 per cent of elections were heard orally over the last year. This high percentage is partly due to the fact that some elections are merged with the hearing of the appeal and all appeals are dealt with by way of an oral hearing. This occurs, for example, where the single judge has refused leave on some grounds and granted leave on others; to minimise judge-handling those matters proceed straight to an appeal and the renewal application in relation to the refused grounds will be heard at the same time. This will also depend on an evaluation of the seriousness of the matter, and its prospects, as assessed by the Registrar and the relevant judges.

The Registrar plays a critical role more generally in identifying important matters that should proceed quickly to the hearing of the appeal. This was a matter of learning from experience — in the early stage of the reforms I recall sitting on separate renewals (often several in a

⁶³ The June 2014 Report, 4.

⁶⁴ Ibid.

⁶⁵ 2012-13 Review, 61.

morning) where it was inevitable that some of them would require a full appeal hearing. This has led to the consequence that it tends to be only those renewals lacking merit that end up being heard separately, and, in particular, the failure rate for renewals determined on the papers last year was 100 per cent. For renewals heard separately but with an oral hearing 73 per cent were refused.⁶⁶

One of the strengths of the reforms has thus been the early detection of matters that lack merit. The staged process has allowed for expeditious rejection of unmeritorious matters. This is what we also hope to achieve with our civil reforms.

It was not proposed that the Victorian reforms include conferring a power on judges determining hopeless applications to make a 'loss of time' order. This is again an example of adapting to local culture and standards. It is unlikely that there would be sufficient support for such a practice and I would most certainly oppose it.

Fifth, it was expected that there would be a great increase in the number of appeal judgments delivered *ex tempore*. As I mentioned, in England about 90 per cent of appellate judgments, in both conviction and sentence matters, are delivered *ex tempore*. To encourage this in Victoria it was proposed that judgments not be invariably sent to AustLII, but be retained in the Supreme Court library, and that where appropriate 'No Point of Principle' be recorded on the cover-sheet to indicate that the judgment was fact-specific and involved a conventional application of familiar legal principle. A Practice Note⁶⁷ was also issued saying that such judgments could not be relied upon without leave.

Suffice it to say that old habits die hard. In my experience judgments arising from oral hearings of applications for leave to appeal are mostly delivered *ex tempore*. But in appeals the

⁶⁶ Where a renewal is dealt with separately and an oral hearing is requested, there are time-limits imposed under the Practice Direction but these are again rarely enforced: Practice Direction 2/2011, s 14(7) provides that the time for oral argument on the renewed application will be limited, in the case of the applicant to 15 minutes and in the case of the Crown (if appearing), to 10 minutes.

⁶⁷ Supreme Court of Victoria, *Practice Note No 8 of 2011 — Court of Appeal: Decisions marked 'No point of principle' not to be cited without leave*, 7 November 2011.

experience is different. The statistics indicate that, at the start of the reforms, for most of 2011/12, judgments in sentence-only appeals were delivered *ex tempore* at a rate of 50 per cent.⁶⁸ By 2013-14, in sentence-only appeals 40 per cent of judgments were handed down on the day of hearing.⁶⁹ For all criminal appeals the figure was 28 per cent.⁷⁰ This suggests that in conviction appeals the Court is reluctant to deliver *ex tempore*.

Few judgments are labelled as 'No Point of Principle' or left unpublished.

In my view, in other than very simple matters, there is a real risk that an *ex tempore* determination of a criminal appeal may be interpreted, wrongly, as reflecting a pre-determination by the Court. There is also a risk that, in the need for expedition, there may not have been a proper opportunity for the judge to grapple with the complexity of the legal issues. And the right to liberty is at stake. I concede that this is one aspect of the reforms for which I lack enthusiasm. A more realistic aim is the delivery of judgments in criminal appeals, especially sentencing appeals, within 30 days. In 2013/14, 55 per cent of all criminal appeals judgments were delivered within 30 days and in sentence-only appeals this occurred in 68 per cent of cases.⁷¹

But the emphasis on *ex tempore* judgments was a minor aspect of a suite of reforms which overall have had a palpable measure of success.

Results

Indeed, the reforms, now described as the Ashley-Venne reforms, have been spectacularly successful. What is more, their likely success was evident immediately.

⁶⁸ There were a number of judgments handed down in June 2012, many of which had been reserved. This pushed down the 2011/2012 figure of *ex tempore* judgments in sentence-only appeals to 44 per cent.

⁶⁹ June 2014 Report, 8.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

As I mentioned before, there were 679 pending appeals in January 2010. In December 2010 the backlog was standing at 608. Then there was the period of intense listings and the finalising of old pending cases. Pending appeals were reduced by around 100 over three months, down to about 500. The reforms were introduced in February 2011. Within nine months of their introduction, by November 2011, the number of pending criminal appeals had declined from over 679 to well under 300.⁷²

Suffice it to say that in this early stage Ashley JA and Nettle JA set about the carriage of the intense listings, and the early implementation of the reforms, with something close to missionary zeal. The same high energy and commitment was exhibited by Maxwell P in court and in his presentations to the Attorney-General. It soon became a team effort.

The number of pending criminal appeals continued to drop over the following years. By June 2012 it was down to 214.⁷³ By February 2014, the third anniversary of the reforms, the backlog sat at 163.⁷⁴ As I mentioned earlier, in June 2014 we had 177 pending appeals.⁷⁵ We started the financial year with 22 criminal appeals or applications being over 12 months old; by June 2014 only 8 were in that category. During 2013/14, 80 per cent of sentence appeals were resolved within 9 months of filing, and 80 per cent of all criminal appeals within 12 months.⁷⁶ The median time to resolution of a conviction appeal is 10.8 months, down from 12.8 in 2012/13. The median for sentence appeals is 5.1 months, down from 6 months in the same period.⁷⁷

The success rate, conceiving of success as first obtaining a grant of leave to appeal and then achieving a successful result on the appeal proper, is higher in Victoria than in England. On

⁷² 2012-13 Review, 53.

⁷³ 2012-13 Review, 53.

⁷⁴ The Victorian Court of Appeal, *Court of Appeal Monthly Statistical Report (February 2014)* (February 2014), 1.

⁷⁵ June 2014 Report, 1.

⁷⁶ Ibid 6.

⁷⁷ The median for all conviction and sentence appeals is 6.8 months, down from 7.3 months in 2012-13.

this basis, in Victoria, a party appealing a conviction in 2013/14 had a 23 per cent chance of success. By contrast, in England conviction appeals had a 8 per cent chance of success.⁷⁸ Sentence appeals in Victoria were successful in 32 per cent of cases. In England sentence appeals had a 22 per cent chance of success.⁷⁹

From the more limited perspective of having obtained leave, the rate of success was much higher. In Victoria in 2013/14, taking both conviction and sentence appeals together, after leave was granted, 46 per cent were allowed and 54 per cent refused.⁸⁰ This would appear to be again a higher rate of success than in England.⁸¹ It provides some comfort to those who had raised concerns that the emphasis of the new reforms upon expedition might inevitably bring about lower rates of successful appeals.⁸² This was associated with a concern expressed that some of the mechanisms in the English system that promote efficiency do so at the expense of the Court's ability to identify errors, and to rectify them.⁸³

There has been some reduction in initiation rates⁸⁴ but that was to be expected with the lapse of holding grounds of appeal. Victoria Legal Aid has commented that the filings made now are stronger filings; that they are 'better focused' and the reforms are saving it money.

The reforms were initially supported by seed funding that Maxwell P secured from the Attorney-General to fund the appointment of a senior qualified criminal practitioner as the Registrar and the case workers. The seed funding also gave considerable support to Legal Aid, the Office of Public Prosecutions and the transcription service VGRS to assist with the reforms. It was

⁷⁸ In 2012/13.

⁷⁹ In 2012/13.

⁸⁰ June 2014 Report, 5.

⁸¹ It is difficult to compare this exactly as the Victorian figures for success after leave has been granted are not broken down into conviction and sentence appeals.

⁸² Ben Jellis, *op. cit.*, 23. Jellis referred to a disparity between the rate of successful conviction appeals in England and in Victoria. Jellis reports that in England in 2012/13 the rate of success for conviction appeals for which leave had already been granted was 34 per cent (122 out of 358).

⁸³ *Ibid.* This was also a concern expressed by the submission made by members of the criminal Bar referred to above.

⁸⁴ 2012-13 Review, 56.

apparent from the Court's understanding of the inter-locking nature of those agencies, an understanding gained through the work done before the reforms were proposed, that changes in Court processes alone would not achieve the desired outcomes unless efficiencies could also be driven in those agencies. Obtaining this funding depended upon the Court gaining the trust of the Executive to finance reforms to remodel appeals that were not derived from policy development within Government. This was a major change to the customary way in which things were done. It reflected an increasing maturity in the Court's relationship with Government and in its own internal bureaucracy.

But the funding did not all come at once.

The initial funding was for six months and then there was a drip-feed for another six months. The source of funding was the revenue retention from the Supreme Court which the Attorney-General administered. The Court then made a successful budget bid and in 2012, the State budget provided recurrent funding for the reforms, in the form of \$3.2 million to be spread over a four-year period. This was a strong statement of support by the Government for the reforms, which the Government publicly acknowledged had been Court-led. The funding to the Court has since been confirmed as on-going.⁸⁵

We have not achieved the speed of our English counterparts in the hearings of appeals nor in the rate of disposition. This is so for many reasons. We do not give provisional indications at the outset of an appeal of any likely re-sentence. Again, this is an aspect of accommodating the English process within our own legal culture. Moreover, the convention of giving counsel an undefined period of time in which to argue an appeal has proved too stubborn to change. Although the Practice Direction indicated that the time for argument on an appeal may be limited by direction of the Registrar or Judge,⁸⁶ a direction is seldom given. This may be due to the strength of the oral tradition in Australia and, more prosaically, the expectations of

⁸⁵ There has not been the same level of on-going commitment to the various agencies involved.

⁸⁶ Practice Direction 2/2011, s 19.

practitioners and, for that matter, the expectations of judges. It is often observed that barristers tend to conform to the cultural expectations within a court about the length of a hearing. Expectations can vary widely between jurisdictions.⁸⁷ It needs to be recognised in Victoria that time limits can encourage good advocacy. There is scope for requiring counsel to be better organised and to identify their best points first.

The hesitation to impose strict time limits may be associated with the concern I have identified to detect and rectify all errors below and thereby avoid the possibility of wrongful conviction. In England there is a statutory body called the Criminal Cases Review Commission that is responsible for the investigation of possible cases of miscarriage of justice. The existence of such a safety net must give English judges the necessary confidence to hear and determine appeals with great expedition.

In conviction appeals, there have been some inroads into the traditional practice of providing lengthy reasons that rely substantially upon careful analysis of relevant case law. However, progress has not been marked. In sentence appeals, we have not eschewed authority in favour of sentencing statistics, in part because of the observation of the High Court, with which the Victorian Court of Appeal enthusiastically agrees, that in sentencing 'the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence'.⁸⁸ However, we decry any unmeritorious reliance on sentencing cases as precedent and do not encourage the citing of authority on anything other than strict legal principle. We have delivered no guideline judgments, although we have the power to do so and an application by the DPP for a guideline judgment is currently reserved.⁸⁹

⁸⁷ For example, participants in the reform process observed that New Zealand, and Queensland, operated with much shorter hearings for criminal appeals.

⁸⁸ *Hili v The Queen* (2010) 242 CLR 520, 527 [18]; see also *Hudson v The Queen* (2010) 30 VR 610, 616-9 [27]-[37].

⁸⁹ Part 2AA of the *Sentencing Act 1991* (Vic) deals with guideline judgments, with s 6AB granting the Court of Appeal the power to give one. The Office of Public Prosecutions applied for a guideline judgment in relation to the imposition of Community Correction Orders last year, in the matters of *DPP v Boulton* (Unreported, County Court of Victoria, McInerney J, 20 June 2013); *DPP v Fitzgerald* (Unreported, County Court of Victoria, Pullen J, 23 August 2013) and *DPP v Clements* (Unreported, County Court of Victoria, McInerney J, 28 June, 4 July 2013). Leave to

More recently, as the reforms have become an accepted part of the appellate process in Victoria, the Reference Group has ceased meeting, but the Registry has, for the last two years, been publishing on the Court's website a regular newsletter and sending it to major agencies. This includes recording appellate statistics. As I've indicated, the monitoring and statistical record-keeping is much more rigorous than before.

So too the Court of Appeal Registry relies upon electronic filing of court documents, available to the judges well ahead of the physical appeal book, and it communicates electronically with all parties. Video-links to prisons are used regularly in hearings. These are areas where we have sought to improve upon the English system. The reforms encouraged the Registry to have the increased professionalism and confidence to make these further changes.

Conclusion

My final observation is that the acceptance of the reforms is derived, I believe, from the visible commitment and dedication shown by the judges to driving down the backlog and ensuring that appeals can be heard without delay but also, importantly, without undermining fairness. That internal leadership from within the Court engendered trust amongst the profession. The process of the reforms also engendered trust within the Executive of court-led reforms. It is no coincidence that the relationship between the Supreme Court and the Executive is now much more independent than before, with the Court now being administered by its own agency, Court Services Victoria ('CSV'),⁹⁰ chaired by the Chief Justice rather than the Department of Justice. The unmistakable commitment to the criminal appeal reforms showed that the judges, and the Court, were in charge of their own processes. It demonstrated that the Court could function as its own master. The reforms thus stand as an expression of the Court's institutional

appeal was granted in November (by Nettle, Redlich and Coghlan JJA), and a bench of five (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) heard the matters together on 31 July/1 August. That bench will determine whether a guideline judgment ought to be written.

⁹⁰ *Courts Services Victoria Act 2014 (Vic)*.

autonomy.⁹¹

⁹¹ I am grateful for the assistance of my associate, Carina Moore, and a researcher to the Court of Appeal, Bryn Davies, in the preparation of this paper.