

OUTLINE OF NEW VICTORIAN REGIME FOR APPLICATIONS FOR LEAVE TO APPEAL AND APPEALS TO THE COURT OF APPEAL

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On 28 February 2011 a new regime for applications for leave to appeal against sentence and/or convictions will commence in the Victorian Court of Appeal. This note outlines those changes and the context in which they have been introduced.

Context of reforms

In total there are currently around 500 outstanding applications for leave to appeal and appeals to the Court of Appeal.

The median time for determining appeals against conviction last financial year was 10.7 months. The median 'run time' for appeal against sentence was 10.6 months. Some appeals (both conviction appeals and sentence appeals) took much longer than the median time though some took less.

Over the last year or so the Court of Appeal has adopted the following practices to expedite matters:

- Two Judges are now determining the majority of appeals against sentence.
- Some leave applications against sentence are being dealt with on the papers.
- An intensification of the listing and hearing of matters – two Judges hearing four sentence appeals a day, two or three days a week.
- The Court has endeavoured to write more concise judgments wherever possible and appropriate.

New reforms

On 28 February 2011 new Rules and a Practice Direction will come into operation which will establish a new regime for applications for leave to appeal and appeals in the Court of Appeal.

The new regime applies to applications for leave filed on or after 28 February. The new regime may be applied to some existing applications and appeals at the discretion of the Registrar on a case by case basis (see below).

The reforms are modelled on the practice and procedure that applies in the English Court of Appeal. The reforms are designed to streamline process to the extent that it is consistent with justice in the individual case.

A related objective of the reforms is to ensure that matters of fact and law that are in issue at trial are clearly identified and properly ventilated and that appeal grounds are drawn and argued by what took place at the trial. Experience suggests that this is more likely in

cases where trial counsel is involved in the appeal process. There will be some cases where a challenge to a conviction or sentence will require consideration of a matter of law not argued at trial, and so requires the involvement of counsel other than, or in addition to, trial counsel. There will also be cases where the involvement of additional counsel is required for other reasons.

So, in summary, the core objectives of the reforms are to streamline the process of appellate review to the extent that it is consistent with justice. That will require greater involvement by trial counsel in the appeals process.

The new reforms will be reviewed in light of experience and considered comments by individuals and organisations are sought and are most welcome.

Leave applications

The central points of the new regime in relation to leave applications are:

- Leave to appeal is required in all cases of appeals against conviction or sentence ie not just sentence applications. Appeals by the DPP/CDPP do not require leave.
- It is anticipated that VLA will provide legal aid for trial counsel to advise on the merits of an appeal (as an incident of trial/plea aid) and where counsel advises in favour of an appeal VLA will provide aid to draw the grounds of appeal and a written case in support (see below).
- The usual practice of the Court in respect of applications for leave to appeal against either conviction or sentence will be for applications to be determined by a single Judge of Appeal.
- It is intended that in most cases a single Judge will consider the application for leave to appeal on the papers along with any ancillary any application eg. for extension of time.
- The Court assumes that most applicants for leave will be content to rely on their grounds of appeal and written case (see below) and will not require an oral hearing.
- The Court will continue to rely on the Crown to draw the Court's attention to factual and legal errors in material filed by the applicant. It will often be sufficient if this is done in writing. The Registrar may invite the Crown to respond by filing a written case in light of the nature of the particular case, or the Crown may respond on its own initiative by filing a written case in response.
- A single Judge has the discretion to refer an application to two or more Judges.
- An oral hearing may be requested by the applicant and, if so requested, the application cannot be determined without an oral hearing.
- The time allocated to oral argument will be as the Judge/Court directs, or in default of an order, will be:
 - the applicant: 15 minutes
 - the Crown (if appearing): 10 minutes

- It is assumed that ordinarily the Crown will not appear at an oral hearing for leave against sentence or conviction but the Registrar can give notice to the Crown that it is required to appear.
- The single Judge in determining a leave application, may:
 - grant leave to appeal on all grounds
 - grant leave to appeal on some grounds but refuse others (limited leave)
 - refuse leave to appeal
 - deal with any ancillary application
- If the Court considering the leave application is composed of two or more Judges the court may, in addition to the powers of a single Judge, treat the leave application as hearing of the appeal.
- If the leave application is refused or limited leave is granted the applicant can elect for the application to be determined by two or more Judges (a renewed application for leave). This election won't be open if a single Judge has earlier referred the application to two or more Judges who have then determined the application- see 315(2) Criminal Procedure Act 2009.
- Where there is a renewed application it is intended that:
 - the applications will be dealt with on the papers without oral hearing
 - unless the Registrar gives notice to the Crown requiring it to appear it will be assumed the Crown will not appear at an oral hearing of a renewed application for leave.
- An oral hearing in respect of a renewed application for leave may be requested and, if so requested, the renewed application cannot be determined without an oral hearing .It is expected that, if eligible for legal aid ,an applicant will be represented by counsel and aid will be granted for the renewed application. Unless directed otherwise, the time limits for oral hearing noted above will apply.

Appeals

The main points in relation to the hearing of appeals, following the granting of leave to appeal, are:

- It will be the aim of the Court to dispose of a significantly increased number of appeals each day whilst recognising that some complex appeals will require more time than this.
- It will be the aim of the Court wherever possible to deliver judgment orally shortly after the completion of the argument.
- The time for argument may be limited by order of the Court or direction of the Registrar.
- Where leave is granted, or in a DPP/CDPP appeal, the Registrar, in consultation with the parties, will prepare a neutral summary which will include a resume of the facts, the grounds of appeal and the written case or case(s). Generally the

summary will be short in sentence appeals and longer in conviction appeals. To prepare the neutral summaries the Court is in the process of recruiting five legal officers.

- Counsel will be required to work co-operatively with the Registrar and each other to achieve a full and complete summary on which the Court can rely to deal with the bulk of the cases by judgment after oral argument.

The mechanics of applying for leave

The main points in relation to applying for leave under the reforms are:

- An application for leave to appeal against conviction or sentence must be filed within 28 days after the day on which the applicant is sentenced or any time as extended under section 313 -sections 275,279 and 284 of the Criminal Procedure Act 2009.
- Grounds of appeal must be prepared with sufficient precision to enable the Registrar and the Court to identify the issues and matters relied upon.
- Grounds of appeal expressed in general terms (for example the sentence is manifestly excessive or the conviction is unsafe and unsatisfactory or unreasonable or cannot be supported by the evidence or there has been a substantial miscarriage of justice) must be sufficiently particularised to identify the matters relied on otherwise the application will not be accepted by the Registrar and time will continue to run against the applicant.
- Leave applications filed on or after 28 February 2011 must be accompanied by a **written case** in support of the application. The written case must be signed by counsel or, if not retained, by the applicant's solicitor or, if not legally represented, by the applicant personally. The written case must not exceed 10 pages unless directed by the Registrar. The written case must:
 - specify the conviction and/or sentence from which leave to appeal is sought
 - in sentence applications identify the applicable statutory maximum penalty and any other relevant statutory provisions
 - summarise the relevant facts
 - state, and number consecutively, each ground of appeal
 - under the heading for each ground of appeal:
 - Outline concisely each argument to be advanced in support of the ground and as part of the argument, include a pinpoint reference to each authority relied upon or sought to be distinguished.
 - Identify each passage of transcript, by date and time, considered necessary to be taken into account for the purpose of deciding the application. These may be preliminarily identified by notes in the written case.

- Identify any document mentioned in the ground, by exhibit number or other sufficient means.
 - If counsel proposes to rely on any unreported authority a copy must be filed with the written case.
- It is not ordinarily expected that the Crown will present a written case in opposition to the application for leave to appeal sentence but as noted above the Court will continue to rely on the Crown to draw the Court's attention to factual and legal errors in material filed by the applicant and, where a point of law is disputed, to articulate counterarguments.
- It is expected that ordinarily the Crown will file and serve a written case where the application is for leave to appeal a conviction and ,as noted above, the Court will continue to rely on the Crown to draw the Court's attention to errors in material filed by the applicant and to articulate counterarguments where a point of law is disputed.
- The Registrar might also invite the Crown to respond in particular cases. Such cases include, but are not limited to homicide offences, serious sexual offences, serious fraud cases, cases that involve complex questions of law and other cases of particular significance.
- Where the Crown is invited to respond ,or where responds of its own motion, the Crown must file and serve a written case within 21 days of being provided with a copy of the notice of application.

Procedure following the sentence

It is expected that within 7 days following the conviction or sentence (as the case may be), trial counsel, and/or instructing solicitors, will confer with the offender either in person, by video link or phone, and counsel will express his/her view on the prospects of a successful appeal.

If counsel advises against an appeal, this advice should be confirmed in writing as soon as practicable after conferring with the offender.

Where an appeal is advised and instructions are received to seek leave to appeal counsel should prepare and sign the grounds of appeal and accompanying written case (see above).

Prior to the filing of the application for leave to appeal a transcript of the oral rulings, charge, plea and sentencing remarks may not be available to the practitioners. Trial counsel will have received the transcript of the evidence during the trial and will have access to a sound recording of the charge, plea and sentence.

In preparing the application for leave, the grounds and the written case it is expected that counsel will rely on notes and/or the Court's audio from VGRS that ordinarily will be supplied within 48 hours of a request. A request form to VGRS (copy attached) will be available from the VGRS home page and it will be linked to the Practice Direction. This

will mean that a sound recording of the charge will be available for review very soon after it has concluded and consideration can be given to a possible conviction appeal in the period before sentence is passed and so before time begins to run. Written rulings will continue to be available from the associate to the trial Judge .

Following the filing of an application for leave to appeal

Following the filing of an application for leave, that complies with the Practice Direction, the Registrar will obtain and supply to the parties the following unrevised transcript in electronic form (unless revised- in which case the revised version will be supplied):

- Conviction application – the charge and of proceedings from the conclusion of the charge down to verdict
- Sentence application – the plea and sentencing remarks

Further transcript can be requested by the Registrar if relevant to the grounds of appeal and the written case.

Revision of grounds of appeal and written case

In certain circumstances the written case may be revised before the application for leave is first determined.

The purpose of revision is to enable modification or addition of grounds where necessary following a review of the transcript and to cross-reference the transcript to each ground.

The Registrar might consider revision necessary and, if so, will invite revision. A request for revision in respect of a conviction application will ordinarily be invited.

The applicant can also request revision following a review of the transcript, but in the case of an application for leave to appeal against sentence alone, revision will ordinarily not be required or permitted. A request for revision will be allowed if the Registrar considers it to be necessary for the assistance of the Court.

Where the applicant is invited to revise, or following a successful request to revised, the applicant will have 21 days to file and serve the revised grounds of appeal and revised written case. Failing any response within 21 days, the existing grounds of appeal and written case will be placed before the Court for determination.

If, after considering the Registrar's invitation and the transcript, counsel is of the opinion there are no valid grounds of appeal, counsel should advise the instructing solicitors in writing. Instructing solicitors should send a copy of counsel's advice to the applicant and obtain instructions.

The Crown must be served with a copy of the revised grounds and the written case at the time of filing .The Crown will have 21 days to respond.

Crown appeals against sentence

In addition to specific and concise grounds of appeal a written case must be submitted by the DPP/CDPP in a Crown appeal.

A respondent to a DPP/CDPP appeal may file and serve on the DPP/CDPP a written case in response within one month of being given notice of appeal, but is not required to.

Bail pending appeal

An application for bail pending appeal must be served on the DPP/CDPP at least 24 hours before the application is filed so the Crown can make representations (written or oral) about the application and any condition of bail.

Ordinarily an application for bail will not be considered before the applicant's grounds of appeal and accompanying written case have been served.

Application of new regime to existing matters.

The Rules and the Practice Direction will allow for the new regime ,or parts of it, to be applied to existing matters.

Whether the new regime will be applied will be a decision made on a case by case basis by the Registrar. In general, the further a matter has progressed under the existing regime will be taken into account in determining the directions made in the particular matter. Again in general, existing matters that are at the early stages of the existing regime will be more amenable to being dealt with under the new regime procedures.

Attached to the Practice Direction will be an annexure which sets out in general how the new regime will be applied to existing matters, but a decision may be made in each case and communicated to the parties in writing after 28 February 2011.

21 February 2011



DEPARTMENT OF JUSTICE

VICTORIAN GOVERNMENT REPORTING SERVICE

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ORDER FOR AUDIO RECORDING OF PLEA, CHARGE AND SENTENCING REMARKS

CASE DETAILS

CASE NAME:

COURT:

JUDGE:

Please tick the box to indicate if you require an audio recording of the Plea, Charge or Sentencing Remarks and include the date of hearing.

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CHARGE:

SENTENCING REMARKS:

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