Leave to Appeal in Criminal Cases: The Victorian Model

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Abstract

The right to appeal a conviction and/or sentence in criminal proceedings is fundamental to the administration of criminal justice in accordance with the rule of law. The right to have a conviction or sentence 'reviewed' is recognised under international law and, in some Australian jurisdictions, as a specific statutory human right. At the same time, many statutes in Australia provide that an applicant must first obtain leave (or special leave) to appeal a conviction or sentence (and other judgments) before the appeal proper can be determined. There thus exists a tension between the 'right' to appeal and the requirement to first obtain 'leave' to appeal. This article considers the way in which the law in Victoria, and other jurisdictions, regulates the grant of leave in criminal cases. It also addresses the broader question of whether the requirement of leave can be reconciled with what appears to be an absolute right to have a conviction and sentence 'reviewed' under international law, and under the Charters of human rights in the Australian Capital Territory and Victoria.

Keywords: appeal – leave – conviction – sentence – graduated stringency – review – human rights – Victoria – Australia

Introduction

Criminal appeals are an important component within the administration of criminal justice. Appeals serve to identify and correct miscarriages of justice (for both the accused person and the Crown), supervise the lower courts, enhance consistency in legal principles applicable to criminal trials and sentencing, enhance court efficiencies, clarify the law, and more generally serve to enhance public confidence in the administration of justice (New South Wales Law Reform Commission 2014, pp. 1–4; Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General 2010, pp. 33–8; *Postiglone v The Queen*). The ability of an aggrieved party to appeal a questionable decision or judgment is an aspect of access to justice, and part of the rule of law. Access to justice in this context means not just having a specific legal right (to appeal), but also being able to exercise that right in a timely and fair manner.

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It is not surprising that the right to 'review' a conviction and sentence is now recognised as a fundamental human right under international law and domestic law (see *International Covenant on Civil and Political Rights* ('ICCPR') art 14(5); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(4); *Human Rights Act 2004* (ACT) s 22(4)).

In all jurisdictions in Australia, the requirement of leave to appeal against conviction and sentence in indictable proceedings was derived from the *Criminal Appeals Act 1907* (UK). In summary, the 1907 Act provided that a convicted person could appeal against conviction on a question of law alone without leave, but leave was required for an appeal against conviction or sentence on a question of fact or a question of mixed fact and law. These principles were subsequently essentially copied in all Australian jurisdictions (see *Criminal Appeal Act 1917* (NSW) ss 5(1) and 6; *Criminal Code* (Qld) s 668D(1)(a); *Criminal Code* (NT) s 410(a); *Criminal Law Consolidation Act 1935* (SA) s 352(1)(a)(i); *Criminal Code* (Tas) s 401(1)(a)). In practice, very few appeals are on a question of law alone. However, in Victoria and Western Australia ('WA'), subsequent legislative reforms stipulate that leave is required for all appeals against conviction and sentence upon indictment (*Criminal Procedure Act 2009* (Vic) ss 274 and 278; *Criminal Appeal Act 2004* (WA) ss 23 and 27(1)). In the Australian Capital Territory ('ACT'), leave is not required for an appeal against conviction or sentence (*Supreme Court Act 1933* (ACT) s 37E).

It can thus be seen that in Australia the law governing leave to appeal in criminal cases is disparate and lacking in consistency.

Surprisingly, very little has been said by appeal courts about the requirement of leave (see, for example, the comments of Hunt J in *R v Ion* at 85).

What is leave?

'Leave' is a form of judicial approval or permission. In South Australia ('SA'), for example, the 'permission' of the Full Court is required for most criminal appeals (*Criminal Law Consolidation Act 1935* (SA) s 352). The basic purpose of requiring leave of the court is to ensure that unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quantity and quality of cases heard and determined on appeal.

In *Coulter v The Queen* at [9] the High Court stated:

> The jurisdiction which the court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation … It is a preliminary procedure recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention.

If leave to appeal is ultimately refused, the applicant (convicted person or the Crown) cannot, at that stage, appeal the decision which was the subject of the proposed appeal. However, a refusal to grant leave is not equivalent to a dismissal of an appeal (*Lowe v The Queen* at [6], [14]). The general principle is that a person can make a second or subsequent application for leave to appeal, but if the ground(s) of the application is the same, or in substance the same, as the ground(s) on the first application for leave, then leave will be refused (*R v McNamara (No 2)* at 268; *R v Grieson* at 434; *Burrell v The Queen* at 31).

If the grounds of the second application for leave are different to those in the first application, then an appeal court has jurisdiction to entertain the second application and, if appropriate, to grant leave to appeal (*Lowe v R* at 123*; Postiglione v The Queen* at 305).

An example is an application for leave to appeal a sentence, where disparity in sentence has arisen since the first application for leave to appeal was dismissed (*Lowe v The Queen*; *Postiglione v The Queen*). In SA and Tasmania, a second application for leave to appeal is possible pursuant to legislation (see Caruso & Crawford 2014; Sangha, Moles & Economides 2014; Sangha & Moles 2012).

As the requirement of leave is currently the only mechanism to control the number of cases coming before the appellate courts it is not surprising that, given the increasing number of cases coming before the appeal courts, the legislature and the courts have focused their attention on the requirement of leave.

Whilst an application for leave is a preliminary step in court proceedings, the determination of the leave application nevertheless involves the exercise of judicial power (*Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* at [36]). Deciding whether or not to grant leave is not a mere formality; rather, it requires a significant examination of the merits of the particular case.

The legal test for granting leave attempts to balance, on the one hand, the rights and interests of the aggrieved person in being able to have a questionable decision or judgment reviewed by a higher court with, on the other hand, the problem of appellate courts being swamped with huge numbers of appeals. The legal test should be neither too stringent nor too liberal. Whilst the legal test should be able to exclude unmeritorious appeal, the test ought not also exclude meritorious appeals

Legal tests for leave

In Victoria, the Victorian Court of Appeal is the superior appellate court for the most serious criminal matters and has jurisdiction to hear and determine many types of criminal appeals. All jurisdictions in Australia have a similar superior appellate court with similar jurisdiction.

For the purposes of this article the key criminal appeals are: (a) an appeal against a conviction; (b) an appeal against a sentence; (c) an appeal against a sentence of imprisonment imposed by the County Court (the intermediate criminal court) on an appeal from the Magistrates' Court; (d) an appeal against an interlocutory decision; and (e) an appeal from the decision of a single Supreme Court judge who has determined an appeal on a question of law. Before the Victorian Court of Appeal will hear and determine any of these five categories of appeal, the Court of Appeal must first grant leave to appeal. There is no single test for a leave application. The leave test varies depending upon the nature of the appeal, briefly explained below.

Many other types of appeal are 'of right' and do not require leave to appeal. Examples include an appeal from the Magistrates' Court to the County Court, and the right of the DPP to appeal a sentence imposed in the lowers courts or a sentence imposed in the higher courts. These appeals as of right raise their own set of issues and are beyond the scope of this article.

Leave to appeal conviction

In Victoria, in order to obtain leave to appeal a conviction imposed upon indictment, the applicant must persuade the Court of Appeal that one or more grounds of the proposed appeal is 'reasonably arguable' (*DeSilva v The Queen* at [73]). This is a merits-based test. Surprisingly, this test is not contained in any statute or Rules of the Court but has developed as a general common law principle.

The Victorian test is similar to the common law test used in other Australian jurisdictions. For example, in New South Wales ('NSW') the test is whether there is 'a sufficiently arguable case' (*Bailey v DPP* at 155). In SA, the test is whether there is an 'arguable case' or an error of law is identified (*R v O, B* at [14]) and, where the application is made pursuant to second appeal, the test is whether the ground is 'reasonably arguable' (*R v Keogh (No 2)*). In Queensland, the test is whether the grounds have a 'real prospect of success' (*R v Miller*).

In two jurisdictions the test is in statute. In WA, the test is whether 'the ground has a reasonable prospect of succeeding' (*Criminal Appeals Act 2004* s 27(2)). In Tasmania, where a second appeal is permitted, the test is whether '(i) the convicted person has a reasonable case to present to the court in support of the ground of appeal and (ii) it is in the interests of justice for leave to be granted' (*Criminal Code 1924* (Tas) sch 1 s 402A(5)).

The reasonably arguable test in Victoria is itself fair and reasonable. The stringency of the test is not unreasonable for the appellant. If a ground of appeal is not reasonably arguable then there is little point in the matter proceeding to a full appeal hearing.

In determining leave, the Court of Appeal evaluates the merits of the grounds of appeal presented by the applicant. This breadth of the leave test is required in order to take into account the plethora of different grounds of appeal which can be argued.

In order to determine if a ground of appeal is reasonably arguable, the Court must first consider the grounds upon which the Court of Appeal can uphold an appeal (if leave was granted). In Victoria, these grounds are set out in the *Criminal Procedure Act 2009* (Vic) ('CPA') s 276.[1] The Court must then consider and evaluate all of the relevant evidence which was led at the trial, and any directions or rulings given by the trial judge, if relevant. It is the responsibility of the applicant to refer the Court of Appeal to specific pages of the transcript of the trial where it is alleged an error is found (see Victorian Supreme Court *Practice Direction No 2 of 2011* s 5(g)(ii)). Often, the Court of Appeal is required to review all of the evidence led at the trial to determine, for example, whether the verdict of the jury is 'unreasonable or cannot be supported having regard to the evidence' (see *M v R*). This type of review can be equivalent to a 'full-blown' appeal, but not always.

If the ground is not reasonably arguable, then the application for leave to appeal (on that ground) will be dismissed. The Court can grant leave to appeal on some ground(s) but dismiss the application in respect to other grounds.

There is an argument that in Victoria the test for leave to appeal conviction should be included in the CPA. Such a reform would enhance consistency and clarity, given that the CPA provides detailed tests for leave to appeal in other types of appeal, as discussed below. The wording of the test for leave to appeal a conviction could simply be along the lines: 'The Court of Appeal (constituted by a single Judge of Appeal or two or more Judges of Appeal) may grant leave to appeal a conviction on a ground of appeal if that ground is "reasonably arguable".'

A single Judge of Appeal can determine the application for leave (CPA s 315(1)). If leave to appeal is refused by a single judge, then the applicant has a right to elect for the application to be reheard by two or more Appeal Judges (CPA s 315(2)).

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[1] These are (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or (b) as the result of an error or irregularity in, or in relation to, the trial, there has been a substantial miscarriage of justice; or (c) for any other reason there has been a substantial miscarriage of justice (CPA s 276). The effect of these grounds of appeal is that the Court of Appeal must be satisfied that a substantial miscarriage of justice occurred in the trial. The Victorian provisions differ from other jurisdictions where the 'common form' grounds of appeal still apply.

Leave to appeal sentence

In Victoria, the test for determining whether leave to appeal a sentence (imposed on indictment) should be granted is expressed in the negative in CPA s 280(1). Under s 280(1), the Court of Appeal may refuse an application for leave to appeal a sentence (under CPA s 278) in relation to any ground of appeal if:

> (a) there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence first imposed; or
>
> (b) there is no real prospect that the Court of Appeal would reduce the total effective sentence despite there being an error in the sentence first imposed.
>
> (2) An application may be refused under subsection (1) even if the Court of Appeal considers there may be a reasonably arguable ground of appeal.

It could be argued that an alternative way of expressing this test is to say that if there is a 'reasonable prospect' that the Court of Appeal would impose a less severe sentence, then leave should be granted.

Section 280(3) of the CPA states if leave is refused because of the application of s 280(1)(b):

> the Court of Appeal may, if it considers it appropriate to do so—
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> (a) amend the sentence first imposed by substituting a less severe sentence; and
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> (b) make any other order that the Court of Appeal considers ought to be made.

Section 280(1) provides a merits based test.

This somewhat complicated formulation of the leave test in CPA s 280(1)(a) is different from the previous test at common law and from the test used in other jurisdictions. At common law, the test in Victoria was whether it was 'reasonably arguable' that there has been a sentencing error (the same test for an application for leave to appeal a conviction). If it was reasonably arguable, then leave must be granted. This formulation was the majority judgment in *R v Raad* and is currently the approach taken in most other jurisdictions in Australia.

It can be seen that under CPA s 280(1) it is not sufficient that an error is 'reasonably arguable'— the issue is whether the Court of Appeal is likely to impose a less severe sentence on appeal. This is a more stringent test than the common law test and is designed to screen out unmeritorious appeals at the earliest possible stage, without requiring a full appeal hearing. This test focuses upon the likely result of the appeal, not the cause of the appeal.

The test in CPA s 280(1)(a) incorporates the ultimate criteria that the Court of Appeal must apply in determining the appeal itself; namely whether there is an error in the sentence first imposed, and whether a different sentence should be passed (CPA s 281(1)). The current test for leave under s 280 does not 'bypass' the requirement for error, but narrows down the type of eligible cases to those where the error is serious enough to justify a lesser sentence being imposed. In this way the application for leave process streamlines the previous common law approach.

Regardless of whether the test for leave is expressed in the negative or the positive, there is no doubt that this statutory formulation is more strict and harder to satisfy than the common law formulation which applied prior to the CPA coming into force. To repeat, the common

law formulation was that an application for leave to appeal a sentence should be granted if the applicant can show that one or more grounds was 'reasonably arguable'.

It is also important to note that the second limb in CPA s 280(1)(b) (which focuses on whether the total effective sentence is likely to be affected) was inserted in 2010 in response to *Ludeman, Thomas and French v The Queen*. In *Ludeman* the Victorian Court of Appeal considered whether the power to refuse leave to appeal a 'sentence' provided the court with a power to refuse leave when, despite an error in the individual sentence, there was no reasonable prospect that the Court of Appeal would impose a less severe total effective sentence. The Court held that, in these circumstances, leave must be granted because the definition of 'sentence' (at the time of the judgment) did not include the total effective sentence. The judgment in *Ludeman* was very significant because it meant that leave to appeal had to be granted if there was error in an individual sentence even though, upon hearing the appeal, there was no reasonable possibility that the Court of Appeal would interfere with the overall or total effective sentence. The current CPA s 280(1)(b) was thus inserted to overcome this technical difficulty.

The result of CPA s 280(1) and (2) is to create in effect a two-step process on a leave application. The first step is to establish that there is a 'reasonably arguable ground of appeal'. This is a necessary but not a sufficient condition (s 280(2)). The second step is then to determine if there is a 'reasonable prospect' the Court of Appeal would impose a less severe sentence.

Section 280(3) of the CPA is a discretionary mechanism to correct a defective individual sentence even if the statutory leave test is not satisfied. The section only applies where leave to appeal has been refused under s 280(1)(b). It enables the Court to remedy a defective individual sentence without affecting the total effective sentence.

As with applications for leave to appeal a conviction, a single Judge of Appeal can determine the application for leave to appeal a sentence (CPA s 315(1)). If leave to appeal sentence is refused by a single judge, then the applicant has a right to elect for the application to be reheard by two or more Appeal Judges (CPA s 315(2)).

It is not surprising that the number of applications for leave to appeal a sentence has reduced since the introduction of the CPA, the implementation of the 'Ashley-Venne' reforms in 2011 (discussed below), and the introduction of s 280(1)(b) in 2012. There are various ways that any change in appeal rates can be measured. According to Victoria Legal Aid, the rate of appeals in Victoria has reduced from one in five in 2008–09 to one in nine by 2012–13 (VLA 2014, p. 13).

The Victorian law governing leave to appeal a sentence appears to be the most complicated and the most stringent in all jurisdictions in Australia, apart from applications for special leave to appeal to the High Court. It is not difficult to see the logic in the Victorian statutory test. The ultimate issue is whether the Court of Appeal is likely to impose a lesser sentence and there is little point in raising the hopes of an applicant just by demonstrating there is an error in the sentence.

Appeal decision of County Court to impose term of imprisonment on appeal

On an appeal to the County Court by either the convicted person or the Director of Public Prosecutions, if the County Court judge imposes a sentence of imprisonment when the Magistrates' Court had not imposed a term of imprisonment, then the person sentenced to imprisonment can apply to the Court of Appeal for leave to appeal that decision (CPA s 283). In this situation the function of the Court of Appeal is to correct a possible miscarriage of justice for the person convicted and sentenced, and to supervise the lower courts by

identifying legal errors made in the hope that such error will not be committed in the future. Similar appeals are available in other jurisdictions.

The test for leave to appeal (the sentence of the County Court judge) is identical to that for appealing a sentence imposed in the Supreme Court or the County Court following a trial (as discussed above). That is, under CPA s 284A, leave to appeal may be refused if:

> (1) …(a) there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence imposed by the County Court; or
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> (b) there is no real prospect that the Court of Appeal would reduce the total effective sentence despite there being an error in the sentence imposed by the County Court.
>
> (2) An application may be refused under subsection (1) even if the Court of Appeal considers there may be a reasonably arguable ground of appeal.

Under CPA s 284A(3), if leave is refused because of the application of s 284A(1)(b), the Court has a discretion to amend the sentence imposed by the County Court by imposing a less severe sentence.

Through the use of an identical test for leave to appeal under CPA s 284A, and a conventional appeal against sentence following a trial (CPA s 278), consistency and uniformity in the appeal system is enhanced. There is no reason in principle why the same test for leave should not apply to both types of appeals. In both appeals, the same basic issue is whether the applicant can persuade the Court of Appeal that a sentencing error was made *and* a different sentence should be imposed. There are, in effect, two parts to the test. The first is whether error can be demonstrated and the second is whether the error is significant enough that there is a real prospect that the Court of Appeal would impose a less severe sentence.

Leave to appeal interlocutory decision

The requirement of leave for interlocutory appeals varies considerably in Australia (see NSWLRC 2015, 11.5 for details). In summary, in the ACT, leave is required. In WA and SA, either party can appeal, with leave, specified decisions. In Queensland, the convicted person can only appeal a pre-trial ruling after conviction and sentence. In Victoria, under CPA s 297(1), the Court of Appeal may grant leave to appeal against an interlocutory decision only if the Court is satisfied that:

> it is in the interests of justice to do so, having regard to —
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> (a) the extent of any disruption or delay to the trial process that may arise if leave is given; and
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> (b) whether the determination of the appeal against the interlocutory decision may-
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> (i) render the trial unnecessary; or
>
> (ii) substantially reduce the time required for the trial; or
>
> (iii) resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or
>
> (iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial; and
>
> (c) any other matter that the court considers relevant.
>
> (2) The Court of Appeal must not give leave to appeal after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.

The key words here are 'in the interests of justice'. This is a far more stringent test for leave than either a conviction or sentence leave application because the applicant must address matters that go beyond the merits of the case. This stringency reflects the long-standing concern of the law with unnecessary fragmentation of criminal law proceedings, particularly a criminal trial (*R v Elliot* at 257).

The Court of Appeal has made it clear that interlocutory appeals should only be used for exceptional or unusual circumstances and should not be seen as a routine avenue by which the parties can challenge directions or rulings of the trial judge (see, for example, *MA v The Queen* at [13]; *Pace II* at [26]).

The concept of 'in the interests of justice' is quite different from simply showing that a ground of appeal is 'reasonably arguable'. It is not sufficient that the ground of appeal in the interlocutory appeal is reasonably arguable. There must be a clear public benefit in permitting the appeal to be heard. In deciding whether to grant leave, the Court must take into account all the factors set out in CPA s 297(1)(a)–(c). The setting out of such detail in CPA s 297 makes the leave requirements for interlocutory appeals unique and difficult to satisfy. This detail is indicative of the legislature's concern that interlocutory appeals should only be permitted in limited circumstances, such as those set out in CPA s 297(b)(i)–(iv). Indeed, if the trial has formally commenced, there is a strong presumption that leave should not be granted unless the Court is satisfied that the reasons for permitting the appeal must 'clearly outweigh any disruption to the trial' (s 297(2)). These words reflect the importance attached to not disrupting the functions of the jury and criminal trial processes in general.

This test for leave to appeal an interlocutory decision is thus concerned not just with controlling the *number* of cases appealed, but also the *type* of decisions being appealed. Only appropriate cases should be the subject of an interlocutory appeal.

Importantly, CPA s 297(3) provides that if leave is refused, the refusal does not prevent any other later appeal on the issue that was the subject of the proposed interlocutory appeal. Thus, if the applicant was ultimately convicted, he or she can still appeal that conviction on the same ground that was argued on the application for leave to appeal. An application for leave to appeal can only be made if the trial judge certifies that the decision in question is, in effect, suitable for an interlocutory appeal (see CPA s 295(3)). If the trial judge refuses to certify, the applicant can apply for review of the refusal (CPA s 296(1).

Leave to appeal decision of single Supreme Court judge on a question of law

Finally, under the CPA s 272(1), a party to proceedings in the Magistrates' Court can appeal (as of right) a question of law, from a final order, to the Supreme Court. The appeal is heard and determined by a single judge in the Civil Division of the Supreme Court. An appeal on a question of law to the Supreme Court is a civil proceeding.[2] The decision to quash a charge on the summons or to dismiss the charge, for example, can be the subject of this type of review. The appeal is in the *Judicial Reviews and Appeals List* and is subject to the Supreme Court *Practice Note No 9 of 2015*. An appeal on a question of law to the Supreme Court precludes an appeal to the County Court (CPA s 273).

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[2] According to Corns, Borg and Castles (2017), '[b]ecause question of law appeals and judicial reviews are conducted as civil proceedings they are subject to the costs provisions of O 63 of the *Supreme Court (General Civil Procedural) Rules 2015*' (p. 368). If the appeal is successful, the Court will normally order the respondent to pay the appellant's costs. Unlike a criminal appeal, the Supreme Court does not separately notify the Magistrates' Court, the Office of Public Prosecutions or the informant of the appeal proceedings.

Decisions made by Supreme Court judges in this civil jurisdiction can have significant ramifications for the conduct of criminal proceedings in the lower courts as the decisions are binding on magistrates and often involve key substantive or procedural issues.

If a party is dissatisfied with the decision of the single judge, he or she can apply to the Civil Division of the Court of Appeal for leave to appeal that decision (*Supreme Court Act 1986* (Vic) s 14A). The application for leave to appeal can be determined by one or more Appeal Judges with or without an oral hearing (*Supreme Court Act 1986* (Vic) s 14D(1)).

Leave to appeal will only be granted if the Court of Appeal is satisfied the appeal has 'a real prospect of success' (*Supreme Court Act 1986* (Vic) s 14C). The test of 'real prospect of success' is arguably more stringent than 'reasonably arguable', although much depends on how the Court of Appeal treats each of the tests in practice. It is suggested that this stringency is not based on a concern with controlling the number of such appeals, but rather reflects a presumption that the decision of the single Supreme Court judge (sitting in the appellate jurisdiction of the Supreme Court) is correct and will not be interfered with by an appellate court unless clear and significant error can be identified. The presumption of the correctness of the single judge's decision can be seen as a domestic application of the principle of comity. The applicant must therefore be able to demonstrate (from the transcript of the proceedings) that the single appellate judge has fallen into appealable error. Ordinarily this will be difficult to establish.

An important safeguard is provided in the *Supreme Court Act 1986* (Vic) s 14D(2), which states that if an application for leave to appeal is determined without an oral hearing and dismissed, then the applicant can apply to have the dismissal set aside or varied at an oral hearing before two or more Judges of Appeal. However, if the Court of Appeal has dismissed the application without an oral hearing, and has determined that the application is 'totally without merit', the applicant has no right to apply to have the original dismissal set aside or varied. This exclusion does not apply to an appeal from a refusal to grant habeas corpus or an appeal under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (*Supreme Court Act 1986* (Vic) s 14D(4)).

If the application for leave to appeal is determined and dismissed with an oral hearing, then the applicant has no further right to have that dismissal set aside or varied (*Supreme Court (General Civil Procedure) Rules* r 64.17).

Graduated stringency levels

It can be seen from this brief review of the various tests for leave to appeal that, whilst there can be some degree of overlap between the various tests, there are significant differences in the formulation of the test leave, depending upon the nature of the appeal. It is suggested that the most liberal test is that for an application for leave to appeal a conviction ('reasonably arguable') and the most stringent is that for an application to appeal an interlocutory decision ('in the interests of justice'). In between are the tests for an appeal against sentence ('no real prospect Court of Appeal would impose a less severe sentence') and an appeal against the decision of a Supreme Court Judge ('real prospect of success').

In terms of how these tests operate in practice, much depends upon how the appeal courts interpret and apply them. For example, it appears that the Victorian Court of Appeal treats the 'reasonably arguable' test as a relatively high hurdle an applicant must overcome. To this extent, the test may be equivalent in practice to the 'real prospect of success' test for an appeal from the decision of a single Supreme Court judge.

Through these graduated stringency levels, the law attempts to strike an appropriate balance between (public) considerations of efficiency and effective use of scarce court resources, and the (private) interests of aggrieved parties who wish to challenge a questionable judgment or decision. It appears that these statutory and common law tests do strike an appropriate balance and cannot, in themselves, be described as overly harsh for potential appellants.

The 'Ashley-Venne' reforms

As a consequence of the growing backlog of appeal cases waiting to be heard by the Court of Appeal, increasing delays between the time of filing an application for leave to appeal and the determination of the case, and increasing numbers of appeals, in 2011 the Victorian Court of Appeal implemented a wide range of procedural reforms. These reforms were very much 'judge-led' rather than imposed by the executive government. They became known as the 'Ashley-Venne' reforms as they were led by His Hon Justice Ashley of the Victorian Supreme Court (Court of Appeal) in consultation with Master Venne, who was the Registrar of the English Court of Appeal (see Redlich J 2015; Tate 2014). The Supreme Court *Practice Direction No 2 of 2011* sets out the new procedures, in conjunction with revised *Supreme Court (Criminal Procedure) Rules 2008* (Vic). See also Supreme Court of Victoria Court of Appeal, Practice Statement No 1 of 2016, *Interlocutory Appeals and reserved questions of law in criminal proceedings.*

Victoria is not the only jurisdiction to have experienced what could be described as a 'crisis' in delays and backlogs in appeal cases. Western Australia has also introduced similar reforms. In WA, for example, a single Judge of Appeal initially determines the leave application without an oral hearing. If the judge concludes the leave application is unlikely to succeed then an oral hearing is held (Mildren 2015, p. 55). More recently, the High Court of Australia has also introduced significant reforms, discussed below.

The main reforms in Victoria were, in summary, that the true grounds of appeal now have to be set out in the notice of application for leave within 28 days of the decision, counsel who appeared at the trial now has an integral role to play in the appeal process, and the work of the Supreme Court Registry has been transformed with a new position of Registrar of Criminal Appeals and additional support solicitors. Another key reform was that all appeals were now subject to a discrete application for leave to appeal before the appeal itself can be heard.

The key features of the contemporary leave procedures in Victoria are as follows.

Single judge decides application for leave to appeal

In all of the five categories of appeal discussed above, the appeal is commenced by filing a Notice of Application for Leave to Appeal. The person wishing to appeal is the 'applicant' not the 'appellant'. As discussed above, the application for leave to appeal can be heard and determined by a single Appeal Judge or by two or more Appeal Judges (CPA s 315(1)(a) and *Supreme Court Act 1986* (Vic) s 11). The practice of permitting a single judge to determine applications for leave was first introduced in 1999. Prior to this reform, a bench of three judges of the Court of Appeal sat to hear and determine applications for leave to appeal a conviction — that practice has now been abolished. The traditional model in all jurisdictions has been that a bench of three judges heard and determined the application for leave.

Victoria is not the only jurisdiction to permit a single judge to determine an application for leave to appeal. In SA and WA, applications for leave are routinely determined by a single

judge. In the Northern Territory ('NT'), a single judge must determine applications for leave to appeal (*Supreme Court Rules* (NT) r 86.14E. For details of other jurisdictions see NSWLRC 2015, [10.36]; Mildren 2015, pp. 54–5.

It is now the general practice for a single Appeal Judge to determine the application (Supreme Court of Victoria *Practice Direction No 2 of 2011* s 1(2)). This is clearly for administrative efficiency in terms of streamlining the appeal process and freeing up the time of the appellate judges. The decision as to whether one or more appeal judges determines the application for leave is initially made by the Registrar of the Court of Appeal. The application is more likely to be referred to two or more judges where a novel point of law is involved or the sentence is clearly unlawful and the applicant must be resentenced. In deciding whether to refer the matter to one or more judges, the Registrar will take into account the 'efficient and expeditious dispatch of applications' (Supreme Court of Victoria *Practice Direction No 2 of 2011* s 9(3)). However, the single Judge can refer the application to two or more Appeal Judges, of whom the referring judge can be one. An example of this is *R v Raad*. In this case the single judge referred the application (to a bench of five judges) because there was a difference of opinion between members of the Court of Appeal regarding the test to be applied on an application for leave to appeal a sentence.

In the High Court, two judges can determine an application for special leave to appeal, discussed below.

Application decided 'on the papers'

An application for leave to appeal can be determined by way of an oral hearing or purely on the written material provided by the applicant and the respondent otherwise known as 'on the papers' (*Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.07(2)). If the matter is heard on the papers, then by definition the application is determined in private, not in open court. Traditionally, an application for leave (particularly for conviction applications) was made on the basis of an oral hearing. There is now a clear expectation in Victoria that the application for leave to appeal will 'ordinarily' be decided on the papers rather than on the basis of an oral hearing (Supreme Court of Victoria *Practice Direction No 2 of 2011* ss 1(2) and 11(1)).

One implication of this policy is that the written materials need to be comprehensive, concise, accurate, and delivered in a short period of time. The notice of application for leave must be accompanied by a Written Case, which sets out the arguments in support of the grounds and reference to relevant parts of the transcript. If the applicant wishes to have an oral hearing, then he or she must request an oral hearing. In this sense the applicant must 'opt in' for an oral hearing.

In *Coulter v The Queen* the High Court held that the determination of an application for leave in private is not a denial of natural justice for the applicant (at [9] and [11]). An application for leave is not a proceeding in the ordinary course of litigation and the requirement of open court does not apply.

Again, Victoria is not the only jurisdiction to permit a leave application to be determined on the papers (see NSW Law Reform Commission 2015, p. 179). In the NT, for example, the application must be determined on the papers and in the absence of the parties. A party is not entitled to make submissions on the application and the Court of Criminal Appeal is not required to give reasons for its decision (*Supreme Court Rules* (NT) r 86.14(2)).

The High Court has taken this reform to a higher level by providing that a panel of two judges will initially determine the merits of the leave application on the papers and then decide if an oral hearing for leave will be required, discussed below.

Renewal of application

As already discussed, in Victoria, if the application for leave to appeal is determined and refused by a single judge, then the applicant has a statutory right to have the application heard and determined by two or more Appeal Judges (CPA s 315(2)). This is clearly an important procedural right of an applicant and operates as a check on efficiency concerns. It is expected that the renewed application for leave will also be determined on the papers rather than by way of an oral hearing. However, the applicant can request that an oral hearing be held and if such a request is made an oral hearing must be conducted. In this sense the applicant must 'opt in' for an oral hearing.

In other jurisdictions the renewal of the leave application is also permitted (Mildren 2015).

Treat the application for leave as the appeal hearing

In Victoria, if the application for leave to appeal is determined by two or three Appeal Judges, then the Court can treat the application for leave as the determination of the appeal itself (*Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.09.1). In this situation the application/appeal can be seen as a 'one-stop' process rather than the traditional two-step process whereby the Court determines the leave application first and then, at a later date, assuming leave to appeal is granted, determines the appeal itself. The notice of application for leave to appeal will be treated as the notice of appeal. It is not uncommon for the Court of Appeal to grant leave to appeal and then immediately dismiss the appeal. Again, this is to streamline the procedure. Two judges of the Victorian Court of Appeal can thus hear and determine the leave application and the full appeal.

As a consequence of these and related reforms, the backlog of cases in the Victorian Court of Appeal has radically decreased, as has the delay between filing and determination. The overall number of appeals against conviction and sentence has also decreased as has the time taken for the Court to determine an application and an appeal. For example, in the five years since the introduction of the Ashley-Venne reforms, 'the median time for finalisation of criminal appeals has been reduced from approximately 12 months to six months and the number of pending appeals has been reduced by more than 85%' (Redlich 2015, p. 9). In 2010, the backlog of appeals waiting to be heard was 679, but by June 2014 was 177 (Tate 2014, p. 28). In 2010, there were delays of up to 18 months/24 months from filing of notice of application to determination of appeal but by 2014 the median time was five months for sentence appeals (Tate 2014, p. 28).

The involvement of the Judges of Appeal in Victoria in these significant procedural overhauls is in contrast to the traditional model of the relationship between the appellate judiciary and court administrators. Whilst the Registrar and the Prothonatory continue to perform key roles, the Victorian Judges of Appeal led the way in creating new procedural processes. The extent to which appeal judges should be involved in case management and administrative arrangements for the processing of cases is a unique aspect of judicial independence.

High Court reforms

The test for special leave to appeal to the High Court is the most stringent of all leave tests (s 35A of the *Judiciary Act 1903* (Cth)). In summary, the test requires the High Court to be

satisfied that the proposed appeal involves a question of law that: (a) is of public importance; or (b) requires the High Court to resolve a difference of opinion between different courts as to the state of the law, and whether the interests of the administration of justice require the High Court to consider the judgment that is being appealed.

In June 2016, the High Court also introduced significant reforms to the procedure for applications for special leave. An application for special leave to appeal must now be in a new Form 23 'Application for Leave or Special Leave' and this form must contain all of the forms that previously were separate documents (for example, the grounds of appeal, the orders sought, the special leave question said to arise, and the arguments in support of the application). A maximum of 12 pages is permitted. Further, the notice of application must be filed within 28 days of the judgment being appealed. The right to request an oral hearing of the application for special leave (previously in r 41.07.3) has been removed. Rule 41.08.1 of the High Court Rules provides that: 'Any 2 Justices may determine an application without listing it for hearing and direct the Registrar to draw up, sign and seal an order determining the application.' The High Court judges can therefore determine an application for special leave to appeal on the papers without any opportunity for the applicant to present oral argument.

Through these measures the delay between the date of judgment the subject of the application and the determination of the application by the High Court is substantially reduced, as are the costs to the parties. At the same time, the reforms place greater stress on practitioners to prepare an application for special leave within tightly constrained timeframes, and tightly constrained page limits on applications.

Effect of leave requirements on meritorious appeals

Although this article focuses on the legal test for determining applications for leave to appeal and the effect of those requirements on unmeritorious appeals, there are equally important questions concerning the impact of the leave tests and procedural reforms upon meritorious appeals — not just in Victoria, but for all jurisdictions. This article does not purport to provide answers to these questions. Further research will be needed to provide any definitive insights, but it is important to raise the issues.

For an appeal which has strong merit, and is very likely to succeed, the requirement to first obtain leave to appeal could be seen as delaying the outcome and adding to the overall financial cost of the proceedings. Such appellants would presumably prefer to have the substantive appeal heard and determined directly. In New Zealand, for example, a person who has been convicted on indictment can appeal the conviction and sentence at first instance without the need to obtain leave (see *Criminal Procedure Act 2011* (NZ) pt 6).

In terms of court resources, to the extent that an appeal court on a leave application does determine the merits of the substantive appeal, the court is in effect considering the case twice.

As a result of the strict page limits for the written case, it is possible that some meritorious appeals are wrongly screened out through an inability of the applicant to fully express the true grounds and arguments of the application, particularly in complex and lengthy cases. It is also possible that some *potential* applicants simply decide not to pursue an appeal because of the financial costs involved with a combined leave and appeal process. Another issue is the extent to which it is difficult for practitioners to comply with the new time limits, particularly given the likely need to obtain additional funding and possibly the appointment of new counsel. A further issue is the extent to which the reduction in delays is due to fewer applications being commenced, as distinct from more efficient processing by the courts, and the extent to which

the reduction in the number of leave applications is due to a reduction in the number of meritorious, as well as unmeritorious, appeals.

These and related questions could be explored through further research into the experiences of appellate practitioners to more accurately determine the impact of the leave tests and the recent reforms.

The requirement of leave and Charter rights to a review

Section 25(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') states that 'any person convicted of a criminal offence has the right to have the conviction and any sentence involved in respect of it reviewed by a higher court in accordance with law'. The *Human Rights Act 2004* (ACT) s 22(4) provides the same right. Both of these provisions are based on the *International Covenant on Civil and Political Rights* ('ICCPR') art 14(5), which refers to the right to have a conviction and sentence 'reviewed' in accordance with law. Under art 14(5), the Australian Government has a responsibility to ensure that all persons have the right to have their conviction and sentence 'reviewed' by a higher court (see Australian Human Rights Commission 2011). It is useful to first set out the general scope of the right to review.

A number of principles can be identified from the international jurisprudence relating to the ICCPR, and these give some guidance as to the scope and meaning of s 25(4) of the Charter (see Judicial college of Victoria, *Charter of Human Rights Bench Book*, 6.19.8). In summary:

- The phrase 'according to law' relates to the way in which the review is to be carried out and the court responsible.
- If there is more than one avenue of appeal within the court hierarchy, the convicted person must be given the opportunity to pursue each of those avenues.[3]
- Under the ICCPR, 'the right in art 14(5) requires a convicted person to have access to the written judgment of the trial court and other relevant documents, such as trial transcripts, necessary to exercise the right'.[4]

The procedures and requirements in the appeal provisions under the CPA seem to comply with the requirements set out in art 14(5) of the ICCPR and may be the reason why s 25(4) of the Charter has not, to date, been considered by the courts in Victoria.

For the purposes of this article, the more specific issue is whether the domestic requirement of leave to appeal is consistent with the Victorian and ACT statutory provisions (and the ICCPR) which guarantee the right to review. This in turn raises the question of the meaning of 'review'. Although an appeal can be described as a form of review it is significant that the above statutory provisions do not use the word 'appeal.' In this context a 'review' could have three possible meanings.

First, it could mean a judicial review in the sense of an application to the Supreme Court for judicial review under O 56 of the *Supreme Court (General Civil Procedure) Rules 2015*

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3 Judicial College of Victoria, *Charter of Human Rights Bench Book* at 6.19.8. This principle does not, however, apply in Victoria in respect to appeals from the Magistrates' Court. Section 273 of the CPA states that if a person appeals to the Supreme Court on a question of law, the person cannot appeal to the County Court in respect of the same matter.

4 See Judicial College of Victoria, *Human Rights Bench Book* at 6.19.8 [8], citing the UN Human Rights Committee, General Comment No 32, [49].

(Vic) seeking an order in the nature of one of the prerogative writs such as certiorari or prohibition, or the equivalent in other jurisdictions. However, it is most unlikely that this is the meaning of 'review' in s 25(4) of the Victorian Charter or s 22(4) of the ACT Act because judicial review is a civil procedure, whereas the heading for s 25(4) and the ACT equivalent is 'Rights in Criminal Proceedings'. Moreover, because s 25(4) and the ACT equivalent refer to a conviction and sentence, it is more likely to mean a statutory right to appeal rather than a non-statutory right such as judicial review.

The second meaning of 'review' could be a full hearing and determination of an appeal (following a grant of leave to appeal). Clearly s 25(4) of the Charter and the ACT Act includes this form of review, and is probably the par excellence of the meaning of 'review'. However, the issue is whether 'review' also includes an application for leave to appeal, which is the third possible meaning.

There is no doubt that on an application for leave to appeal the Court of Appeal in Victoria does 'review' the conviction or sentence. As stated above, this review can be undertaken by one or more judges of the Court of Appeal and can be undertaken with or without an oral hearing. If an oral hearing is not held, the application is determined on the papers which includes a 'Written Case' up to 10 pages long which sets out in detail the grounds of the appeal and the evidence relied on to support those grounds. Moreover, in most leave applications the Court of Appeal is required to consider all, or most, of the evidence led at trial, and to consider the ultimate grounds of appeal if leave was granted. For example, on an application for leave to appeal a sentence, the Court must determine if there is no reasonable prospect that the Court of Appeal would impose a less severe sentence. To determine this, the Court must look at all the relevant facts and circumstances of the particular case and in this sense is akin to a 'full blown' appeal.

Similarly, on an application for leave to appeal a conviction where the ground of appeal is that the verdict of the jury is unsafe or unsatisfactory, the Court of Appeal must itself determine the strength of the overall case (*M v R*). It is not uncommon, for example, for the Victorian Court of Appeal on a leave application to provide a very detailed judgment which analyses each and every ground relied upon, including reference to pages of the transcript.

According to the Australian Human Rights and Equal Opportunity Commission (2014), the right to a 'review' does not require a full rehearing of the case. Article 14(5) of the ICCPR will be satisfied 'where a higher court "looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case"'. Further, if an application is determined and dismissed by a single judge, the applicant can have the application considered a second time by two or more Appeal Judges — in effect, a double review.

On this basis it is suggested that providing a person with a right to seek leave to appeal clearly satisfies s 25(4) of the Victorian Charter and s 22(4) of the ACT Act even if there is no hearing of the appeal itself. The early and expeditious dismissal of unmeritorious appeals is consistent with the Victorian and ACT human rights Acts, so long as the application's lack of merit has been properly determined after providing natural justice for the applicant.

Importantly, both the Victorian and the ACT human rights Acts provide for 'reasonable limits as can be demonstratively justified in a free and democratic society' on the human rights listed in the Acts (ss 7 and 28 respectively). It is suggested that the requirement of leave is such a reasonable limitation on the right to have a conviction and sentence reviewed.

However, if an appeal court did not provide any reasons at all, or inadequate reasons, to explain why leave was refused, then arguably there might not have been an adequate review.

Conclusion

The ability of aggrieved parties to appeal a conviction, sentence or other decision is a critical aspect of access to justice. Proper access is part of the rule of law. The requirement of leave to appeal constitutes a potential obstacle to full and unconditional access to an appeal. However, the ability of courts to control both the number and types of cases being appealed is a necessary component of the administration of contemporary criminal justice. The requirement of leave thus involves public interest considerations and private interest considerations.

In Victoria, there are significant differences in the applicable test for determining whether leave should be granted in criminal cases. These differences in 'stringency' reflect differences in the underlying purposes of the various appeals discussed in this article, and strike different balances in the 'private-public' interest considerations.

Further, in Victoria, and in other jurisdictions, significant reforms have taken place in recent years to the procedure for applying for leave to appeal. These reforms indicate a greater willingness on the part of appellate judges to initiate procedural change in order to gain greater efficiencies in appellate proceedings. This sort of 'managerial' role is a distinct change to the traditional model of appellate judges whose role was seen as limited to 'on the bench' decision-making, and leaving administrative matters to court administrators.

There is also a clear trend in a number of jurisdictions in Australia to have the leave application determined by one or two Judges of Appeal instead of the traditional full bench of at least three judges. This trend is coupled with the related trend of determining applications 'on the papers', and in some cases (for example, the NT and the High Court), potentially denying the applicant any opportunity to make oral submissions.

There is no doubt the reforms in Victoria have resulted in significant improvements to appeal processes. The backlog of cases has been reduced and the elapsed time between filing an application for leave to appeal and the finalisation of the appeal has also reduced. The overall number of appeals has also reduced. These reforms represent enormous savings for the courts and the government, as well as reducing trauma for many victims of crime and witnesses. These reforms appear to have been implemented without any diminution of the rights or interests of persons convicted. There is an argument that the test for determining leave to appeal a conviction should be placed on a statutory footing. The procedural changes in Victoria and the High Court will significantly increase the pressure on lawyers for appellants to prepare the documentation in a new format and within much shorter time frames.

Further research is needed to determine the impact of these reforms on the willingness of potential appellants to in fact commence applications for leave to appeal a conviction and sentence. In Victoria it is clear that, since the reforms, the percentage of successful applications for leave to appeal sentence has significantly decreased, as has the number of applications.

Finally, it has been suggested that the requirement of leave to appeal is consistent with the right of a person under s 25(4) of the Victorian Charter and the ACT ACT to have his or her conviction and sentence reviewed.

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