1. **Is it a cause for concern when almost half the defence appeals against sentence or conviction are successful?**

The statistic that 50 per cent of appeals lodged are successful is largely meaningless. The statistic needs to be put into perspective.

First, the number of appeals lodged in the Court of Appeal represents a small fraction of the criminal proceedings in the superior courts (County Court and Supreme Court). In the vast majority of those cases there is no appealable error.

Secondly, the majority of criminal appeals are sentence appeals. Forty per cent of applications for leave to appeal against sentence are refused at the application stage, by a single judge. It follows that amongst the small percentage of sentences which come before an appeal bench are cases with some prospect of success. Likewise with conviction appeals, which are only funded by VLA where there is some real merit in the appeal.

Thirdly, and of critical importance to any evaluation of success rates of appeals, there are multiple possible sources of error. It is only by an examination of the ground(s) on which a particular appeal succeeds that any conclusion can be drawn as to the source of (and responsibility for) the error.

2. **Is it cause for concern when 19 retrials are ordered and three acquittals directed as a result of judicial error?**

3. **If so, what are the specific concerns eg cost, time, resources, impact on victims and/or accused?**

Much the same comments apply. The bald reference to 19 retrials is virtually meaningless unless considered in the context of the vast number of trials conducted every week, without error or incident, in the County Court and the Supreme Court.

Of course, any retrial is unfortunate because of the additional time and cost involved, and the need to have both victim(s) and accused go through the stress of a trial a second time. It is unsurprising, however, that a number of retrials have to be held. As the Victorian Law Reform Commission reported in 2009, the law governing the directions which trial judges must give to juries has, over recent decades, become enormously complex. It was for that reason that the Chief Justice and the President of the Court of
Appeal established the Ad Hoc Group on Criminal Trials in 2006, under the leadership of Vincent JA and Eames JA.

The report of that Group led to the Attorney-General’s reference to the Law Reform Commission on the complexity of trial directions. The President and Coghlan J are now participating in the first phase of the implementation of the Commission’s recommendations, examining proposals for simplification of trial directions on particular matters.

As to the entry of acquittals on appeal, it should be appreciated that trial judges have no power to acquit if there is even the slimmest evidence. Only the Court of Appeal can decide that the evidence, taken as a whole, was insufficient to found a conviction. Further, an acquittal is sometimes ordered, even though the evidence would justify a retrial, where the appellant has already served all, or almost all, of the sentence imposed.

4. Why is the bar set higher for Crown appeals than defence appeals?

As the President explained in *DPP v Josefski* (2005) 13 VR 85, Crown appeals on sentence have always been regarded as falling “into a very special category”. The reason for this was explained by the High Court in 1994, in *Everett v R* (1994) 181 CLR 295, 299, as follows:

“An appeal by the Crown against sentence has long been accepted in this country as cutting across the time honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed.”

The High Court had earlier said that a Crown appeal was “... contrary to deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy.” In 2005, McHugh J noted in *York v R* that, “… Since the conferral on the Crown of rights of appeal against sentences, appellate courts have been much influenced in their approach to such appeals by the principle of double jeopardy.”

As the President pointed out in *Josefski*, it is the common law’s abhorrence of double jeopardy which explains why a Crown appeal on sentence should only occur in the “rare and exceptional case”. It also explains why appeal courts have a residual discretion to dismiss a Crown appeal, even if the sentence is inadequate, for example where the sentenced person has been at liberty since sentence was first imposed. If, however, the Court concludes that only a custodial sentence will suffice, the fact that the person has been at liberty will not prevent him/her from being sentenced to imprisonment: see, for example, *DPP v Tokava* [2006] VSCA 156.
Manifest inadequacy is not sufficient by itself to warrant the allowing of a Crown appeal. Long-established authority makes clear that the Court should only intervene where error of principle is demonstrated: see, for example, DPP v Higgs [2010] VSCA 154.

The Court of Appeal is still operating under the established rule that resentencing following a successful Crown appeal must allow a discount for double jeopardy. A Crown appeal may be dismissed in the exercise of discretion if the effect of the discount would be such that there would be no material difference between the resentencing and the sentence originally imposed.

The double jeopardy discount has been abolished, however, by the Criminal Procedure Act. This change will apply to appeals where the sentence was passed after 1 January 2010.

5. Can you appreciate concerns about the apparent inconsistency that results eg the Court of Appeal regularly finding that a sentence is manifestly inadequate but refusing to change it?

It is simply not correct to suggest that this occurs “regularly”. It does happen from time to time, for the reasons of principle explained in the previous answer.

6. Not that I expect comment on individual cases, but in one such case the offender received a three-year sentence wholly suspended for bashing two people in an unprovoked attack and inflicted broken arms, a fractured skull and other injuries with a cricket bat. Can you understand public disquiet over such an outcome?

As the question acknowledges, it is not appropriate to comment on individual sentencing decisions. Even if it were, no sensible comment could be made until after reading all of the material presented, by defence and prosecution, to the sentencing judge.

As you are probably aware, research conducted in different jurisdictions in recent years has consistently shown that, when members of the public are fully informed of all the facts and circumstances of a particular case, their views on sentencing tend to be – if anything – more lenient than the view of the relevant sentencing judge.

You may have seen, for example, the report of 15 March 2010 in “The Age”, regarding research by a Melbourne University criminologist, Austin
Lovegrove, published in the British journal “Criminology and Criminal Justice”. According to the press report:

“When offenders’ backgrounds were explained, most people were willing to make allowance for human weakness. They considered issues such as intoxication, lack of violent intent, low intellect, poor education and troubled backgrounds, remorse and willingness to confess, and previous good character as issues to be taken into account.”

We would also refer you to a 2008 book edited by Arie Freiberg and Karen Gelb, entitled Penal Populism, Sentencing Councils and Sentencing Policy. The following appears at p 32:

“But when members of the public are asked to consider specific cases, or are given more detailed information about crime and punishment issues, then their views are usually more nuanced and reflective, to the point where their judgments are usually in line with the sentences that are actually given in these cases or are sometimes even less punitive than those of the judges who were dealing with the particular case.”

The source for this statement is a 2003 work entitled Penal Populism and Public Opinion, published by Oxford University Press.

This is very important information about what public attitudes on sentencing really are. It must be brought to account if there is to be a balanced discussion of the adequacy of sentences imposed, particularly in individual cases.

7. Will you respond to claims by unnamed critics that the Court of Appeal is dominated by judges with libertarian, legal aid or defence backgrounds which are reflected in its decisions?

It is inappropriate to respond, other than to say that a review of the membership of the Court of Appeal would show that the “claims by unnamed critics” are without foundation.

8. Is the Chief Justice concerned about the almost palpable tension between the Court of Appeal and the DPP, as reflected in comments in appeal judgments about the DPP’s role and responsibilities?

There is no tension between the Court of Appeal and the DPP, palpable or otherwise.
The Court has, in several judgments, said that a consideration of the adequacy of current sentencing practices for a particular offence can only take place in an appropriate case mounted by the Director. The recent decision in *Winch v The Queen* [2010] VSCA 141 is an example of such a case being mounted. You will have noted what the majority said about the valuable research carried out by the OPP, which enabled the majority to express a view about the inappropriateness of suspended sentences for “glassing”.

9. **What are the current waiting lists and delays in Court of Appeal criminal matters?**

The Court endeavours to list appeals so that an appeal is heard and determined ahead of the earliest possible release date of the offender. In cases where the release date does not require an early listing, the current period of delay from filing to hearing is two years, for both conviction and sentence appeals.

The length of time to hearing has increased because of continuing increases in the number of appeals filed. The Court continues to increase its rate of finalising appeals, but the rate of increase in filings has been even greater.

Regrettably the problem of delays in criminal appeals has been present for a very long time. The Court does the best it can with the available resources.

10. **How and when is the Venne review likely to change the way the Court of Appeal goes about its business?**

Following the visit of Master Venne in May, the Court has under active consideration proposals for changes in the management of criminal appeals. The nature of the changes, and their likely impact on the Court’s work, will be announced in coming weeks.

11. **Is the question of guideline judgments likely to be raised in the context of the review by the Sentencing Council?**

The Sentencing Advisory Council has previously expressed views about the value of guideline judgments.

The Council has commenced a review of the data on criminal appeals. It is expected that there will be consultations between the Court and the Council on this topic in coming months.

12. **Could guideline judgments lead to more consistency in higher court sentencing and improve the Court of Appeal’s workload?**
As the decision in *R v MacNeil-Brown* (2008) 20 VR 677 makes clear (see para [4]), the Court is concerned to promote consistency and reduce appellable error. One of the means of promoting consistency is for prosecutors to assist sentencing judges with submissions on the applicable sentencing range. Other means include statements of principles in judgments, and the increasing use in appeal judgments of tabulations of comparative sentences.

The Court regularly gives guidance to sentencing judges on questions of principle: see, for example, *R v Verdins* (2007) 16 VR 269; *Markovic v The Queen* [2010] VSCA 105.

13. **Is it cause for concern when eight judges are appealed against five or more times in a year?**

For similar reasons to those set out earlier, this statistic is meaningless in isolation. No meaningful conclusion could be drawn without knowing the number of criminal trials conducted by a particular judge in the relevant period, whether the appeal(s) succeeded or not and, if so, on what ground(s).

14. **Is any review or assessment done of frequently appealed judges in relation to the need for further judicial education etc?**

If a judge was considered to be having difficulty, the head of jurisdiction could speak to him or her. Judicial education is widely available for all, and judges of all jurisdictions actively participate in the varied programs of the Judicial College of Victoria.

**Additional information**

The Court of Appeal has made clear in a series of decisions that it is actively interested in the question of the adequacy of current sentencing. see *Nguyen v The Queen* [2010] VSCA 127 (concerning cultivation of a commercial quantity of cannabis):

“As this Court has now said in relation to a range of offences – sexual penetration of a child under 10;1 persistent sexual abuse of a child under 16;2 and aggravated burglary3 – these questions about the adequacy of current sentencing practices are matters of the first importance.”

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1 See *DPP v CPD* [2009] VSCA 114.
2 See *DPP v DDJ* [2009] VSCA 115.
3 See *DPP v El Hajje* [2009] VSCA 160.