Police Association of NSW

Criminal Appeals: Preliminary Issues Question Paper 1

Police Association of New South Wales Submission

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Version Control

Purpose

The purpose of this document is to provide to the LRC's review of Criminal Appeals the Police Association of New South Wales response to its Preliminary Issues, Question Paper 1.

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Criminal Appeals

The Law Reform Commission has released for public comment Question Paper 1, relating to the review of the current criminal appeals process in NSW. Broadly speaking, the appellate system must be seen to be able to correct poor sentencing decisions and to be able to maintain proper sentencing standards. The sentencing hearing is central to the operation of criminal justice. Its central function requires a balancing between the needs of the community, the victim and the offender. A failure to maintain that balance will detract from the quality of justice and from community confidence in the justice and fairness of the system. Central to that balancing is a proper allocation of roles to the various participants in the process. As McHugh J. stated in Everett v R:

> *Uniformity in sentencing is a matter of great importance in maintaining confidence in the administration of justice in any jurisdiction. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes. To permit the Crown, as well as convicted persons, to appeal against sentences assists in maintaining confidence in the administration of justice.'*

In some of the issues raised in the Question Paper below, the Police Association recommends a comparative and comprehensive case analysis be conducted. In today's contemporary environment there is a need in contributing to building the knowledge base that will be used to assist the Criminal Justice System in future policies. An example of such an analysis is in the Judicial Commission of NSW's report on *Conviction appeals in NSW (Monograph 35 – June 2011*). The study – an evidence based approach – allows for the identification of potentially problematic areas and or legal reform priorities. The study is an analysis about conviction appeals for matters dealt with on indictment. It presents the findings of an empirical and legal analysis of conviction appeals in NSW between 1 January 2001 and 31 December 2007, reporting on the eventual outcomes of 206 cases in which the High Court of Criminal Appeal ordered retrials. The report examines whether the trends identified in the study period have continued in the post-study period. Such a report can well go towards (broadly speaking) developing reform and identifying problems; consolidating and simplifying the law; maintaining consistency in the law and improving the legal framework regarding (in this instance) criminal appeals. The study provides key findings in its empirical and legal analysis that need to be maintained and developed further in future research methodological studies. The study:

- Calculates conviction appeal success rates;
- Identifies principal offences in each appeal;
- Examines legislative bases for conviction appeals;
- Analyses grounds of appeal;

- Ascertains whether successful grounds of appeal were avoidable or unavoidable;
- Tracks the eventual outcomes of cases;

The above are just some of the central issues that an analysis is capable of ascertaining which will go towards the aim and the function of the appellate system in protecting the right of a fair trial. *Appellate courts must discharge their protective function without whittling away the central plank in the administration of justice – the finality of the verdict of the jury*[1].

In relation to the issues raised in Question paper 1, we provide the following comments:

Criminal Appeals: Preliminary Issues
Question Paper 1

Question 1

1. **If we were to consolidate and simplify the law relating to criminal appeals in NSW, what should we do?**
2. **What operatives and principles should we focus on in developing reform?**
3. **What changes should be made to the criminal appeals framework?**
4. **What aspects of the current criminal appeals framework work well and should not be changed?**
5. **What practical problems arise in consolidating or simplifying the criminal appeals framework?**

In answer to how the law regarding criminal appeals in NSW can be consolidated and simplified one should go back to the origins of the Criminal appeal system. Criminal Law is quite complex and as noted by the Judicial Commission of NSW the right of appeal is a fundamental part of the common law system. The first Court of Criminal Appeal was instituted less than a century ago in England in 1907.[2] The New South Wales Court of Criminal Appeal followed shortly after in 1912.[3] The reason behind the need for statutory reform in the early Twentieth Century was a series of high profile miscarriages of justice in which two innocent people were convicted of crimes they did not commit.[4] The Criminal Appeal Act 1912(NSW) expanded the opportunities for appellate review of convictions and sentences. As one writer

[1] Judicial Commission of NSW, Conviction appeals in New South Wales, Monograph 35, June 2011.
2 see Rosemary Pattenden, English Criminal Appeals 1844-1994: appeals against conviction and sentence in England
and Wales (1996) 5-33.
3 Criminal Appeal Act 1912 (NSW)
4 the two big miscarriage cases were those of Adolph Beck and George Edalji. For Beck's case, see: Pattenden, above n 130, 27-30; also, Jill Hunter and Kathryn Cronin, Evidence, Advocacy and Ethical Practice: a criminal trial commentary (1995) 394-5. For Edalji's case, see: Pattenden, above n 130, 30 (referring also to Sir Arthur Conan Doyle, who wrote several newspaper articles about Edalji's wrongful conviction).

put it, it marked a decisive break with the brutality that passed for criminal justice in the colonial period. The criminal justice system became more humane throughout the 19th century[5].

Broadly speaking, the main operatives and principles in developing criminal law reforms is the importance in the goal that the Court system (whether it be the Local, District, Supreme) is able to provide a structure for the earliest, most effective and efficient resolution of criminal matters. *"It is the goal of the court to preside over proceedings which are effective, efficient and timely*", as in the words of Mahoney JA in GIO v Glassock [1991], a phrase taken from the judgment - or as the JRC correctly points out, the principles of finality, efficiency and fairness are required for an efficient appeals system.

As the Judicial Commission of NSW fittingly states, the appellate system is a safeguard for ensuring that fair trials are conducted. It further states, in Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes. Courts have an overriding duty to maintain public confidence in the administration of justice. It also needs to be mentioned as well that as a legal principle rather than a legal rule, the principle of a fair trial has inherent flexibility which enables it to adapt to changing circumstances. In particular it enables the court to acknowledge fundamental changes in community expectations as to the requirements of a fair trial. What is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances.[6]

The LRC states that the current legislation creates a framework which is disjointed and complicated. It recommends (via Report 133, Bail) that consideration be given to amalgamating the Criminal Appeal Act 1912 (NSW) (CAA) and the Crimes (Appeal and Review) Act 2001 (NSW) (CARA). In August 2008, the CARA was reviewed in order to determine whether the policy objectives of the legislation remained valid and whether the terms of the Act remained appropriate for securing those objectives. In undertaking the review, submissions were invited from heads of jurisdictions, legal stakeholders and other interested parties. The Attorney General's Department's final report determined that (while the report contained a number of recommendations), the CARA remained largely effective in meeting its objective. The report noted that the Act provided an effective framework for parties aggrieved by decisions of magistrates and Local Courts to seek redress. It further went on to say that the Act created an informal and streamlined process that allowed the District Court to determine appeals within a short timeframe.

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[5] Judicial Commission of NSW, A matter of fact: the origins and history of the NSW Court of Criminal Appeal, June 2013.

6 The Truth Can Cost Too much: the Principle of a Fair trial, the Fourth Gerard Brennan Lecture, The Honourable JJ Spigelman, AC, Chief Justice of NSW, Bond University, Gold Coast, Queensland, 25 October 2003.

Whether both the Acts can be amalgamated (as suggested by the LRC's Bail Report 133) in order to simplify and make clearer the appeals framework - or as far as is possible - is worthy of consideration. Further to the LRC's recommendation 9.3(2) - *consideration should also be given to clarifying the relevant appeal provisions to ensure that, where the offender has been released pending the appeal, the court determining the appeal has sufficient power to order the commencement or recommencement of the original sentence, so as to give effect to the decision of that court.* The need for further comparative and comprehensive case analysis may be required to further assist in both of these said tasks by key stakeholders.

Question 2

1. **What should be the avenues of appeal from criminal proceedings in the:**
    a. **Local Court**

As it is currently, sentences imposed by Local Courts are open to a number of review and appeal avenues. Criminal appeals are generally governed by the *Crimes (*Appeal *and Review) Act 2001*(NSW) (the Act). Under section 11(1) of the Act, any person who has been sentenced by a Local Court may appeal to the District Court against the severity of the sentence.

b. Children's Court

The principles are the same (with some minor differences) as appeals from the Local Court with appeals from the Children's Court. The main point to make regarding Children's Court is that on a nationwide comparison basis the Children's Court presents as being efficient. It is imperative that it continues to provide a speedy, professional and efficient disposal of criminal proceedings against juvenile offenders. It needs to adapt to the changes in society and complexity in criminal procedures. It also needs to respond to the special needs of children in the criminal justice system whether as accused, victim or witnesses. Above all, it needs to retain public confidence in the institution of the Children's Court.

c. District Court

As it is currently, the District Court to hear appeals of Local Court and Children's Court decisions, including care proceedings in the Children's Court. Appeals against the sentence and / or conviction of a lower court in a criminal case also made to the District Court in certain circumstances.

d. Supreme Court

As it is currently, the Court of Appeal is the highest civil court in the State. It hears appeals from civil proceedings before the Supreme Court, District Court, Land and Environment Court and certain State tribunals.

e. Land and Environment Court

As it is currently, the Court has an appellate and a review jurisdiction in relation to planning, building, environmental, mining and ancillary matters.

f. Drug Court, and

As it is currently, there is no appeal from a decision of the Drug Court to refuse to admit a person into the program or against the initial sentence imposed.

g. Industrial Court?

As it is currently, proceedings for category 3 offences heard by the Local Court may be appealed to the full bench of the Industrial Court.

2. What arrangements should be made for judicial review?

Judicial review is concerned with the legality of administrative decision-making. In Australia, judicial review is available at common law in all jurisdictions. In NSW, judicial review is currently only available at common law. A discussion paper was produced in March 2011 regarding reforming judicial review in NSW. The discussion paper analyses the current operation of judicial review in NSW and reforms in other jurisdictions, with particular focus on the ADJR Act. It asks whether there is a need for reform of judicial review and if so, what the key issues that should be addressed are. In particular, it asks:

- whether a statutory judicial review jurisdiction should be established,
- whether any such statutory jurisdiction should be modeled on the ADJR Act, or
- whether there are alternative options for the reform of common law judicial review in NSW.

The discussion paper considers six options for reform which are worthy of consideration by the LRC: The options include:

- Option 1: Creating a statutory right to reasons;
- Option 2: Reform of common law judicial review, including standing;
- Option 3: Creating a statutory judicial review jurisdiction modeled on the provisions of the ADJR Act, subject to a number of key modifications;
- Option 4: Creating a statutory judicial review jurisdiction that adopts a ‘natural justice’ test to define the scope of decisions that should be subject to judicial review;
- Option 5: Creating a statutory judicial review jurisdiction that adopts a 'public function' test to define the scope of decisions that should be subject to judicial review;
- Option 6: Introducing a 'public function' test, extending the scope of judicial review at common law.

3. How often are decisions of the Local Court in a criminal matter appealed directly to the Supreme Court?

The Local Court is the busiest and largest Court in Australia, the New South Wales Local Court is the primary interface between the community and the legal system in this State. It is responsible for dealing with a complex range of matters from different jurisdictions.

Stated cases, statutory prohibition and mandamus have been abolished as means of appeal from the local court to the Supreme Court. There can now be an appeal by the defendant as of right against a conviction order or sentence from the Local to the Supreme Court but only on a question of law alone: s. 52 Crimes (Appeal and Review) Act. If there is a question of fact or of mixed law and fact there can only be an appeal with leave of the court: s. 53 Crimes (Appeal and Review) Act.

An appeal is able to be made to a higher court, by any person convicted or sentenced by a lower court. Generally, you will need to show that there has been an error of law if making an appeal, except where the appeal is between local court and district court. According to a speech delivered by the Hon. J J Spigelman, AC, Chief Justice of NSW in 2006 said, only about two to three percent of New South Wales intermediate appeal court cases go to the High Court.

In a paper published by Andrew Haesler SC, Deputy Senior Public Defender in August 2005, there are three principle reasons for considering a Supreme Court Appeal.

- The first, is that sometimes the error simply will not be susceptible to correction on appeal to the District Court. This is particularly so with appeals on interlocutory matters.
- Secondly, sometimes not only to correct a particular Magistrate's decision, but also to establish a precedent, which will govern the decisions of all Magistrates and District Court Judges.
- Thirdly, a quick end to what could be protracted proceeding

4. Is it preferable for the District Court to deal with all appeals from the Local Court in the first instance?

The District Court is the intermediate Court in the State's judicial hierarchy. It is a trial court and has an appellate jurisdiction. In addition, the Judges of the Court preside over a range of tribunals.

There is merit in the above LRC suggestion as long as the primary goal of the court is to preside over proceedings which will lead to be effective, efficient and timely. The need for further comparative and comprehensive case analysis may be required to further assist in the LRC's proposal by key stakeholders.

5. What changes, if any, should be made to avoid the Court of Appeal and the Court of Criminal Appeal having jurisdiction over the same criminal matter?

New appeal cases are initially reviewed for competency and, if necessary, referred back to legal representatives to either substantiate the claim of appeal as of right, or seek leave to appeal. Applications for leave to appeal are examined to ascertain whether they are suitable for hearing concurrently with the argument on appeal.

6. **Which court should hear appeals from a decision of the Supreme Court on appeal from the Local Court?**
7. **In determining the avenues of appeal, should distinctions continue to be made between questions of law, and questions of fact or mixed fact/law? If not, what alternatives are there?**

As noted in the LRC report there are a number of different avenues of appeal in criminal matters that can and have resulted in duplication or overlap; not to mention additional costs and delays if parties go on to pursue multiple avenues of appeal. A need for a rigorous and comparative case analysis and statistical material would assist in producing an impartial and reasonable response to these questions. Whether the solution be (for instance) in appeals against sentence be limited to sentences that are manifestly excessive or inadequate, and require the appellant to demonstrate an error on the part of the magistrate – as suggested in the LRC's Question Papers 12 – is but one solution, nevertheless, a need for further case analysis is necessary in encapsulating practical problems (such as overlap and duplication) and in ascertaining avenues of appeal.

It is also interesting to note that the success rate of sentence appeals is less than 50%. Public Defender Chrissa Loukas' paper "Court of Criminal Appeal Update: Review of 2009" March 2010 (PD website): stated that successful severity appeals reached a high point of 45.2% in 2004. There has been a steady decline to 39.2% in 2007. Since then a recent survey of legally aided CCA severity appeals put the "success" rate at around 43% in 2009, that is 43% of those cases deemed to have "reasonable prospects of success" resulted in the imposition of lesser sentences.

Question 3

1. **What types of decisions in criminal proceedings should be subject to appeal?**
2. **What types of decisions should the prosecution be able to appeal?**

As it currently stands ie, generally appeals sought against:

- conviction
- acquittal, in certain circumstances
- sentence
- an order quashing an indictment
- an order staying or dismissing summary proceedings
- an order for costs in summary proceedings
- refusal by the Local Court to annul a conviction
- a decision by the trial judge to discharge the jury
- an order made in committal proceedings
- a pronouncement or sentence under the *Habitual Criminals Act*

- *1957* (NSW)
- an interlocutory order, in certain circumstances

Not every decision made in criminal matters is appealable. In all circumstances attention should be given to the need for procedural fairness.

3. **In what circumstances should a party be able to appeal an interlocutory order made in criminal proceedings? Should this be different for the prosecutor and for the defendant?**

Insertion of s5F into the Criminal Appeal Act in 1987 allowed the Crown and, with the court's leave or on the certificate of the trial judge, the accused, to appeal to the CCA against the interlocutory orders made at trial in criminal proceedings. In effect, s5F removed any role for the Court of Appeal in hearing appeals from interlocutory orders of the District court in criminal proceedings, vesting the CCA with jurisdiction to hear appeals from interlocutory orders in all criminal matters. This remains the position. The Attorney General envisaged that the amendments would "ensure that decisions adding to the body of criminal law in this State are made by the specialist CCA and that the court retains its established function of review of criminal matters".

There are different requirements in each court for appealing against interlocutory orders made in criminal proceedings. Internationally, in many American legal systems, interlocutory orders are not appealable, except in a few extraordinary cases. When the case is concluded, any aspect of an interlocutory order that has not become moot may be challenged in an appeal from the final judgment. However, in other legal systems, such as in England and Wales and in Canada, interlocutory orders in civil matters can be appealed by leave of the appellate court. In criminal matters in Canada, the general rule is that there are no interlocutory appeals, except where Parliament has expressly provided.

Question 4

1. **What should the leave requirements be for filing a criminal appeal in NSW?**
2. **What limits, if any, should be put on the ability to appeal as of right from the Local Court to the District Court?**

Currently as it stands, there are different leave requirements for different types of appeals eg. an appeal may be limited to the length of a disqualification period that may have been imposed, or the structure of sentences imposed, or a failure to find special circumstances when a sentence of imprisonment was imposed – the list is endless.

As the Judicial Commission states, since 2007, the New South Wales Court of Criminal Appeal has held that the statutory requirement of leave to appeal should not be treated as a mere formality. The court has not yet articulated the factors relevant to the granting of leave other than to hold that the decision

whether to grant leave "involves an assessment of the arguability of the ground relied upon". The question of leave also arises for consideration under r 4 of the Criminal Appeal Rules which imposes a further leave hurdle to argue a ground of appeal where an objection has not been made in relation to a direction (or omission to direct) or to the reception or exclusion of evidence at trial.

The Association agrees with the LRC's aim in improving the efficiency of the criminal justice system by trying to alleviate the inconsistencies that an appeal may have in the different leave requirements that exist.

Question 5

1. **Should the case stated procedure from decisions of the District Court and the Land and Environment Court be changed or replaced? If so, how?**

Jurisdiction was conferred on the Court to hear and determine matters which had previously been heard in the former Land Appeal Court of New South Wales. Subsequently, the Court was given jurisdiction to hear objections to and appeals against valuations of land, the levying of rates or charges and the assessment of ratable property under various Acts, and claims made for compensation by reason of the acquisition of land under the Public Works Act 1912 (NSW) where such claim exceeded a certain amount.. The right of appeal by way of case stated for the decision of the Supreme Court was retained.

The Court of Criminal Appeal has criticized the case stated procedure as being difficult and time consuming via Lavorato v The Queen [2012] NSWCCA61 [72]. Whether the procedures be changed or replaced requires further case analysis and the procedure be reviewed as ultimately the goal of the court is to preside over proceedings which are effective, efficient and timely.

Question 6

1. **What should the time limit be for filing a criminal appeal in NSW? Should it be different for different courts?**
2. **Should the District Court and the Land and Environment Court have the power to accept an application for appeal filed more than three months after the Local Court decision was made?**
3. **What should the time limit be for a prosecution appeal against:**
    a. **a costs order imposed by the Local Court?**
    b. **the leniency of a sentence imposed by the District Court or the Supreme Court?**

There is a time limit in which most appeals must be filed. The period of time in which a notice of intention to appeal is to be lodged is within 28 days after the imposition of the sentence, however the Court has the power to extend the time in which notice is required to be given. If the notice of intention to appeal is outside the 28 day period then an application for leave to appeal out of time must be made. The relevant statutory provisions are found in the Criminal Appeal Act 1912 (NSW) and the Criminal

Appeal Rules. Section 10 of the Criminal Appeal Act 1912 sets out the method and time for an appeal. Section 10(3) confers an unfettered discretion upon the court to extend the time where it is just in all the circumstances that such an order should be made.

If one misses the 28-day time limit, one can lodge a late application for leave to appeal up to three months after their conviction or sentence date, but they must state the reasons why their application is late. The court generally will not grant leave to appeal unless it is satisfied that it is 'in the interests of justice' to do so.

The Police Association is opposed to an increase in the time allowed for appeals as this would seriously offend one of the basic pillars of the administration of justice, being finality. The effect on primary and secondary victims, witnesses and our members would be to allow matters to continue on for an inordinate amount of time, An increase in time allowed for appeals would also interfere with the management of exhibits and the restoration of property seriously impacting on the day to day operations of our members and the delivery of services in the community. Comparatively, NSW allows appeals in a reasonable time.

In the Northern Territory for instance, there is no statutory deadline for prosecution appeals. However, defence appeals must be lodged within 28 days and, accordingly, the CDPP policy is to lodge prosecution appeals within 28 days. Note: there is no requirement, nor is it the practice, in the NT to notify the defendant where an appeal is under consideration.

The following time limits currently apply to appeals from decisions of intermediate/superior courts (but may change if State legislation is altered):

State	**Time**	**Provision/comments**
High Court	28 days	For special leave, see Part 41.02.1 *High Court Rules 2004*
ACT	28 days	r5103(d) ACT Court Procedure Rules 2006
NSW	1 month	Time limit is CDPP policy (see above) but Crown is to notify offender as soon as possible (see Practice Note No. SC CCA 1 (v.2)).
NT	28 days	Time limit is CDPP policy
QLD	1 month	s671 of the *Criminal Code* (Qld)
SA	21 days	r4A Supreme Court Criminal Appeal Rules 1996
TAS	14 days	See s407 of the Criminal Code Act 1924 (Tas)
VIC	28 days	S 287 and 288 Criminal Procedure Act 2009
WA	21 days	s28(3) Criminal Appeals Act 2004

Question 7

1. **What should the test be for an appeal against sentence and against conviction from Local Court decisions?**
2. **Should there be a need to demonstrate error to succeed in an appeal from the Local Court to the District Court or to the Land and Environment Court?**

The primary reform issue considered in the Attorney General's Department review of the CARA in 2008, was whether the nature of appeal against the decisions of Local Courts to the District Court remained appropriate. One argument raised was that unlike magistrates in Courts of Petty Sessions, Local Court magistrates are professional and independent judicial officers and their decisions should not be overturned in the absence of error being established. The countervailing view was that the requirement to establish error may slow proceedings in the Local Court as magistrates take the time to provide detailed reasons. In addition, unrepresented defendants experience difficulties in being able to frame grounds of appeal to establish an error. The review contains the recommendation that the Attorney General's Department undertake consultation to determine whether rights in relation to appeal against sentence to the District Court should be limited to sentences that are manifestly excessive or inadequate.

Question 8

1. **What should the test be for an appeal against sentence and against conviction from decisions of the District Court and Supreme Court?**

As the Judicial Commission of NSW identifies three conceptual bases upon which an appeal shall be allowed;

- first, if the court is of opinion that "the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence" (limb 1)
- second, that "the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law" (limb 2)
- third, that "on any other ground whatsoever there was a miscarriage of justice" (limb 3).

There is merit in the suggestion put forward by the Chief Judge of the District Court who suggested that an appeal against sentence which considers whether errors have been made in the sentencing process can lead to judges spending an unnecessary amount of time preparing reasons for their sentencing decisions in order to demonstrate lack of error. It also takes away attention from the question of whether the sentence imposed was appropriate overall.

2. **Should the test for an appeal against sentence be changed to a single test of whether the sentence is manifestly inadequate?**

The single test for an appeal needs to be carefully considered as it can risk; (as pointed out in Question Papers 8-12 of the LRC review)

- judgments from the sentencing court becoming less transparent;
- judgments of the sentencing court incorporating submissions of a party in a way that may be not apparent to other interested parties;
- Unfairness in the sense that cases with demonstrated error would not have that error corrected;
- CCA provides a mechanism for a measure of consistency in sentencing, and authoritative judgments of questions of principle. The single test may reduce this mechanism
- An increase in Crown appeals.

3. **Should the test for a directed acquittal be the same as the test for an appeal against conviction?**

The difference in tests has shown to have led to a situation where a trial judge cannot direct an acquittal but on appeal the CCA can overturn the conviction. If this situation is to be avoided then there is merit in pursuing the argument particularly in terms of reducing costs to both of the parties and delays as well as taking up unnecessary time of the courts.

Question 9

1. **Should the tests for appeal against conviction and appeal against sentence be consistent across all courts in NSW? If so, what should the tests be? If not, what differences should there be and why?**

In terms of the discretion of the CCA, and as it is stated in the Judicial Commission of NSW, whether an appeal to the CCA is an appeal against conviction, or an appeal either against severity of sentence by the convicted person or against adequacy of sentence by the Crown, the appeal is not by way of rehearing, and the bases upon which the CCA may intervene in any of the situations are narrow. For example, mere disagreement with the exercise of the discretion of a sentencing judge is not sufficient reason to intervene.

There is though merit in consistent tests being placed across all courts in NSW that would and could assist in achieving consolidation and simplification in appeals. However, there is a further need for rigorous case analysis and empirical studies in examining this proposal.

Question 10

1. **What should the powers of an appellate court be to receive fresh evidence or other material on the hearing of an appeal? Does this depend on the type of decision being appealed from?**
2. **What leave arrangements should be in place in order to give fresh evidence in appeals from the Local Court to the District Court?**

According to the Attorney General's review of CARA, the right of the parties to give fresh evidence in appeals against sentences should be restricted by leave of the District Court. In the case of a prosecutor,

leave should be granted in only exceptional cases in view of the obligation to provide all relevant material at the original sentencing hearing. In the case of a defendant, there may be a wider range of circumstances in which it may be appropriate to give leave. If a defendant omitted matters in mitigation of the offence at the original sentencing hearing or failed to address the court on a particular sentencing option, then it may be appropriate to allow the defendant the opportunity to bring fresh evidence. The test for the defendant to bring fresh evidence should be based on whether it is in the interests of justice for fresh evidence to be adduced. This test is consistent with the test that already applies to defendants in relation to appeals to the Land and Environment Court under Part 4 of the Act. This proposal will align the process of appeals against sentence more closely with appeals against convictions.

In practical terms, the proposal would mean that an appeal against sentence would be determined by the District Court on the basis of the Local Court papers, together with the transcript of proceedings that include submissions by both the prosecutor and defendant and the reasons for decision by the magistrate. Any supplementary evidence or oral submissions would require leave of the District Court.

In summary, in order to adduce fresh evidence on a sentence appeal the evidence must:

- be of such significance that the sentencing judge may have regarded it as having a real bearing on the sentence;
- the appellant did not know or did not realise the significance of the material; and
- the appellant's legal advisers did not know of it

Question 11

1. **What powers should courts have on appeal? Should different courts have different powers?**
2. **In what circumstances, if any, should the District Court have the power on appeal to remit the matter to the Local Court? Should the power differ depending on whether the appeal is against conviction or against sentence?**
3. **What powers should the Court of Criminal Appeal have on an appeal against conviction where the defendant pleaded guilty?**

The powers of an appellate court should vary depending on the type of appeal and the court hearing the appeal, as it currently does.

There is merit in the two possibilities of Justice Basten's considerations to resolve the problem of the District Court's power to remit. Both courses of actions require rigorous case analysis in order to consider the best possible model that does not involve delay and expense and does not divide avenues of appeal in circumstances where the defendant seeks to appeal on more than one ground.

There is also merit in the recommendation that the CCA be able to impose a substituted verdict in cases of guilty pleas in order to avoid having to remit the matter to a lower court.

Question 12

1. **What powers should courts have to award costs on appeal?**

According to the Judicial Commission of NSW, the court has complete discretion to determine by whom, to whom and to what extent party/party costs are to be paid. Further, the general approach is to order costs in accordance with the outcome of the proceedings as a whole, without attempting to differentiate between particular issues on which the party may not have succeeded – this model seems appropriate enough. The recommendation by Justice Button on the other hand, for parliament to consider the possibility of the existing gap in the costs power requires further case analysis.

Question 13

1. **What should the law be regarding the operation of a sentence pending determination of an appeal?**
2. **Are there any problems with the interaction between s63 and s69 of the Crimes (Appeal and Review) Act 2001 (NSW)?**

Sections 63 and s69 of the CARA seem somewhat unclear as to how they operate and require greater clarification by way of further case analysis.

Question 14

1. **In what circumstances should a court be able to reopen its own criminal proceedings?**
2. **Should the Court of Criminal Appeal have a different power to reopen its own proceedings than lower courts?**
3. **How often is an application made to a court under s43 of the Crimes (Sentencing Procedure) Act 1999 (NSW) to reopen proceedings?**

As the LRC states, the ability of a first instance court to reopen its own judgment can be an alternative to an appeal; but according to the CCA's confirmation that s43 is not be treated as an alternative to an appeal. Justice Johnson noted that the courts had interpreted s43 more broadly than parliament had intended and so perhaps the matter needs to be referred to the Attorney General for reform and or clarification as recommended.

As reported in Judicial Commission in NSW, recent case law;

Power to reopen proceedings to correct sentencing errors — Crimes (Sentencing Procedure) Act 1999, s43 — Crown appeal against sentence applying principles laid down in R v Way (2004) 60 NSWLR 168 upheld prior to High Court decision in Muldrock v The Queen (2011) 244 CLR 120 — application to reopen Crown appeal — jurisdiction under s43 only enlivened where error led to a "penalty that is

contrary to law" — generally error will be apparent from sentence itself and not from reasoning underpinning sentence — s43 should not be used as an alternate to an appeal or as a vehicle to review standard non-parole period cases decided before Muldrock — sentences imposed in CCA within reasonable discretion of court and could (in accordance with correct principle) have been lawfully imposed by the court — Achurch v R (No 2) [2013] NSWCCA 117 — recent law item (posted 22/5/2013)

Question 15

1. **How often is an application made to the Local Court under s4 of the Crimes (Appeal and Review) Act 2001 (NSW) for annulment of a conviction or sentence?**
2. **In what circumstances should the Local Court be required to annul a conviction or sentence?**

Usually a person may want to have a conviction annulled because:

- The charge cannot stand as a matter of law. For example, the facts on which the client was convicted may not support the charge or all of the elements of the offence may not have been made out.
- The person may wish to preserve their right of appeal to the District Court on all grounds (that is, against conviction).
- The person may wish to obtain the benefit of a guilty plea. The person might not otherwise be entitled to this benefit, if convicted in his or her absence. A successful annulment of a conviction, followed by a plea of guilty being entered, will mean that the Magistrate should then give a discount at sentence for the plea of guilty.
- To remove a fail to appear entry; a warrant entry; from their criminal record.

Section 4 of the Crimes (Appeal and Review) Act 2001 provides that a person may apply to the Local Court for an annulment of the original conviction. However, an annulment application to the Registrar of the Local Court must be made within 2 years of the date of the conviction or date on which the penalty was imposed.

It is the experience of our members that far too many applications are granted in some Local Courts for reasons beyond the contemplation of the section. It is our members concern that the inappropriate granting of annulments seriously offends one of the basic pillars of the administration of justice, being finality. The effect on primary and secondary victims, witnesses and our members is that matters continue on for an inordinate amount of time after they were assumed to be finalized.

The reason for non-appearance at the original court matter should only include matters beyond the control of the applicant, and should be considered on balance in the light of the effect on the victims,

witnesses and Police. The time for an application for an annulment should also be reduced to reflect the onus on accused persons who have been personally served to remain informed of the process of their court matter. It is acknowledged that safeguards for persons with cognitive impairments may struggle to understand the court system and we would welcome the, now common, safeguards to apply to the applications of these persons.

Question 16

1. **What other issues relating to criminal appeals should we consider in our review?**

Statistics

National statistics on charges, trial, and sentencing of suspects need to be made available at all levels of courts in Australia. The Australian Bureau of Statistics (ABS) publishes a limited amount of statistics on defendants whose cases were initiated and finalised at higher criminal courts. Sentencing data for adult offenders have been available since 2002–03 from all states and territories. The ABS is continuing to work towards a more detailed and regular sentencing collection for higher courts, Magistrates' courts and children's courts.

Also national statistics on the number of persons sentenced in each particular category such as;

- fines
- good behaviour bonds
- probation orders
- suspended sentences
- community supervisions
- community custody
- home detentions
- periodic detentions
- imprisonment

Data regarding reoffending by persons on parole or bail should be available and collated by an agency. It would seem appropriate that the body responsible for reporting on criminal statistics, the Bureau of Crime Statistics and Research (BOCSAR) should be analysing this information and providing it to the public and the judiciary. This has become particularly relevant in light of the recent, very serious instances of parolees committing violent crimes. This type of data would be very important information that would assist decision makers regarding both parole and bail applications, and would also make decision makers accountable, allowing the public to have confidence that their interests were being protected by the application of parole and bail laws.

Judicial Officers

According to the Local Court of NSW, Annual Report, the number of NSW judicial officers per head of population remains the lowest of any magistrate's court in the country for some years. According to Judge Graeme Henson, under funding may lead to further deterioration in the capacity to maintain effective standards of support of the judiciary at the level of the Local Court. "*without a reasoned investment in court support, the ability of the Magistracy to maintain its standards of excellence risk being compromised to the potential detriment of the community*". This needs to be seriously looked at. The same can be said of the Supreme Court – *the Court cannot function without adequate physical or technological facilities or without an adequate number of judicial officers to enable it to perform its tasks*.

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