Criminal Appeals: Preliminary Issues, QP 1
Submission by the NSW Office of the Director of Public Prosecutions – August 2013

1. Achieving the aims of our terms of reference

1.(1) If we were to consolidate and simplify the law relating to criminal appeals in NSW, what should we do?

Simplify the tests

The sole test for an appeal from a sentence both by the defence should be whether the sentence was manifestly excessive. The sole test for a Crown Appeal against sentence should be manifest inadequacy.

The same test should be applied in the District Court on sentence appeals from the Local Court and in the Court of Criminal Appeals from an appeal against a sentence in the District or Supreme Court.

The test for an appeal against conviction in the District or Supreme Court heard in the Court of Criminal Appeals should be simplified. It is not necessary to maintain three limbs and the proviso. A possible simpler test could be whether a substantial miscarriage of justice has occurred.

It is not suggested that the current tests for appeals from the Local Court to the District Court against conviction be altered.

Strengthen the requirements for leave to appeal.

We suggest that the reform implement in Western Australian to the requirements for leave to appeal should be considered.

Since 2 May 2005 in Western Australia, leave is required for each ground of appeal whether involving error of law or error of fact in any criminal appeal, the test for which is whether the ground has "a reasonable prospect of succeeding". Such applications

are routinely dealt with by a single judge and on the papers: *Criminal Appeals Act 2004* (WA).

That Act created the Court of Appeal and was precipitated by a WA Law Reform Commission report (Project 92, Review of the criminal and civil justice system in Western Australia). The Legislation is not a consolidation of pre-existing legislation. The purpose of the enactment of the requirement for leave to appeal provisions in the *Criminal Appeals Act* is said to have been to promote the aim of controlling the workload of the Court.

The WA Court of Appeal (Steytler P, Wheeler and Roberts Smith JA) in a judgment of the Court, considered the meaning and proper application of "the reasonable prospect of succeeding test" in **Samuels v The State of Western Australia** [[2005] WASCA 193; (2005) 30 WAR 473.

The statutory test is provided by ss 27 of the Act

> "(1) The leave of the Court of Appeal is required for each ground of appeal in an appeal under this Part.
> (2) After an appeal is commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding.
> (3) Unless the Court of Appeal gives leave to appeal on at least one ground of appeal in an appeal, the appeal is to be taken to have been dismissed.
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> (4) The Court of Appeal may decide whether or not to give leave to appeal -
> (a) with or without written or oral submissions from the parties to the appeal;
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> (b) before or at the hearing of, or when giving judgment on, the appeal."

Having considered the words of the statutory provision and the context in which they appear, and taking into account the arguments mounted by the parties, academic articles "What are 'reasonable prospects of success'?" ((2004) 78(12) ALJ 812), Nicholas Beaumont, and 2 NSW decisions said to which bear upon the point in issue (***Degiorgio v Dunn (No 2)*** [2005] NSWSC 3; (2005) 62 NSWLR 284, and ***Lemoto v Able Technical Pty Ltd*** [2005] NSWCA 153, both concerning Div 5C of Pt 11 ("the

restraint provisions") of the *Legal Practitioners Act 1987* (NSW) ("the NSW Act"),the Court held [at 55- 61]

> 55 Leave to appeal must not be granted unless the single Judge (or three-member Court) is brought to that degree of satisfaction, bearing in mind that the purpose of the legislative provisions is to weed out unmeritorious appeals. Yet at the same time the fundamental principle must be recognised that criminal appellants ought not to be shut out from challenging judicial decisions determining their rights or affecting their liberty, except by clear legislative intent and then only to the extent the legislation necessarily compels. The efficiency of courts and finality of litigation are not to be achieved by denying justice.
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> 56 The ordinary meaning of the words, taken in their context (which includes the legislative purpose) must accordingly be taken to mean that a ground is required to have a rational and logical prospect of succeeding; that is, it would not be irrational, fanciful or absurd to envisage it succeeding in that forum; in effect, that it has a real prospect of success. However, it is important to bear in mind that, because the test is directed to each ground, it seems that the answer to the question whether leave to appeal is or is not granted will not involve any consideration of whether, if the ground of appeal succeeds, the error in question has led to a substantial miscarriage of justice. That issue is left for determination on the appeal proper.
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> 57 As did the majority of the High Court (Gibbs CJ, Aickin, Wilson and Brennan JJ) in ***Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*** [1981] HCA 39; (1981) 148 CLR 170 at 177 in a different statutory context, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria, because the circumstances of each case are infinitely various. Furthermore, it is crucial to always recognise that the test to be applied is that expressed in the statutory provision itself, not some judicial restatement or reformulation of it. That said, the following considerations may afford some useful guidance upon its application.
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> 58 One approach advocated by senior counsel for the appellant which seems to us likely to have practical utility in many cases, is to ask whether the arguments in support of a ground are such as to call for a reply from the

respondent: *cf* ***R v McDonald*** (1992) 85 NTR 1 at 3, per Asche CJ, and ***Gooch & Pierce v The Queen*** [2002] NTCCA 3 at [6], per Martin CJ, Bailey and Riley JJ. If it does not, it is unlikely to have a reasonable prospect of succeeding. Also, where a ground so suffers from a lack of clarity that the Court or Judge is unable to understand it, there would be no reasonable prospect that ground could succeed in that form.

59 On the other hand, what is "reasonable" takes its colour from the circumstances. Thus, where a ground is on a point on which the law is unclear and is in a state of development, and where the ground might succeed were the point to be accepted, the ground would be unlikely to be held to have no reasonable prospect of succeeding.

60 The requirement for leave and the statutory test explained above call for a single Judge or this Court on such an application to give consideration to the merits of each proposed ground of appeal. That will not be a detailed consideration of all the evidence and all the issues in the case; it will be confined to the ground of appeal as particularised - but it must, of course, always be a full consideration of that which is advanced in the appellant's case in support of the application. That having been done, if the Court or Judge is not positively satisfied the ground has a reasonable prospect of success, leave to appeal must be refused. Where leave is refused, sufficient reasons should be given to enable the appellant to understand why that decision was made. As the High Court (Mason CJ, Brennan, Dawson and Toohey JJ) said in ***Bailey v Director of Public Prosecutions*** [1988] HCA 19; (1988) 62 ALJR 319 at 319 - 320, when the Court of Criminal Appeal is satisfied that an application for leave to appeal against sentence is without merits, the grounds of refusal of leave "should be stated, though they need not be elaborated".

61 The Court was there dealing with s 5(1) of the *Criminal Appeal Act 1912* (NSW), which required an appellant to have leave to appeal against sentence. The Court said that under that provision, leave to appeal would ordinarily be granted when the applicant made out a sufficiently arguable case that the sentence imposed was inappropriate in all the circumstances.

In practise what occurs is that the Notice of Appeal is filed with draft grounds, which can be amended without leave in the Appellant's Case. The appellant (time limits and leave requirements apply equally to the State) has, according to the rules, 6 weeks to file an appellant's case but that is automatically extended administratively by the court to 8 weeks, (it is understood that this was as a result of negotiation with the WA Bar and Criminal Lawyers' Association when the Act was first implemented, as defence counsel complained they wouldn't be able to meet a 6 week deadline, which given the delays in obtaining transcripts, would no doubt be the situation in NSW).

If the appellant's case is not filed on time, it will usually go before a single judge of the CA for a directions hearing. Ultimately springing orders may be made and the appeal dismissed for failure to comply. If the appellant's case is filed and the grounds make no sense, the matter will also be listed before a single judge for a directions hearing to clarify the grounds.

The question of whether leave should be granted is then considered by a single judge in chambers. If a preliminary view is formed that none of the grounds have reasonable prospects, it will usually be listed *ex parte* for the appellant to have an opportunity to convince the court there is merit in a ground. If at the end of that ex parte hearing the Court remains unconvinced, a written judgment will be delivered and the ODPP simply given a copy.

If leave is granted on at least one ground, usually the other grounds are simply referred through to the hearing but the primary focus in the submissions and at the hearing is on the ground for which leave was granted. The Respondent is given 3 weeks to file an answer – submissions, once leave is granted. We understand that in WA this period is usually fine for a sentence appeal but generally a bit tight for a conviction appeal after trial. In the event that the ODPP can't meet the deadline, defence are asked, and generally agree, to sign a consent notice for an extension which is filed, triggering an order for an extension.

Such a system may provide a useful model – it having the capacity to filter out unmeritorious appeals and preserve prosecutorial resources. However, it is understood that large part of the efficiencies is driven by the WA CA itself, particularly all the ex parte hearings, (with no requirement for input from the prosecution).

Without the NSW Court being so motivated, the introduction of any leave system in NSW would fail to achieve the streamlined approach that it is understood has been achieved in WA.

1. (2) What objectives and principles should we focus on in developing reform?

Strengthening the principle of finality of first instance decisions, but also striking the right balance between finality and avenues of appeal because the existence of an appeal system serves to legitimise the decision-making process of the Court system (as argued by Nobles and Schiff: see S Thomson, '"Doing Justice": The Error Principle and Sentencing Appeals' (2011) 85 *Australian Law Journal* 668, 673-4).

1.(3) What changes should be made to the criminal appeals framework?

By strengthening leave requirements see our answer to 1 above.

1.(4) What aspects of the current criminal appeals framework work well and should not be changed?

See particular areas set out below.

(5) What practical problems arise in consolidating or simplifying the criminal appeals framework?

In relation to the suggested change to sentence appeals it should be noted that issues of parity and procedural unfairness would only be corrected by the Court of Criminal Appeal where the sentence was also manifestly excessive or manifestly inadequate.

Limiting sentence appeals from the Local Court to the District Court may create practical problems in the Local Court if:

- the entire record of the Local Court was required to be put before the District Court, including proceedings and remarks on sentence. This would place a substantial burden on already stretched transcription resources and operate against the overarching aim of efficiency;
- increased pressure is placed on Magistrates (or the perception thereof) to provide more fulsome remarks on sentence. While this may tend to enhance fairness, it may also tend to decrease the efficiency of the busiest courts in the State by volume.
- the large number of self-represented litigants in the Local Court had decreased accessibility to the appeal process.

There are some practical problems with the current appeal system in the Court of Criminal Appeal, notably:

- Unrepresented applicants / appellants require a disproportionally large amount of resources and time and need to be case managed more closely by the Courts.

- Delay in obtaining transcripts of proceedings. Consideration needs to be given to increasing resources for the Court Reporting Branch, and they should be included in consultations for this reference. Consideration also should be given to the automatic release of unrevised transcript if it has not been revised within a reasonable time frame by the court at first instance: see Criminal Appeal Rules 1952, Rule 8A which restricts the provision of transcript.

2. What should the avenues of appeal be in criminal proceedings?

2. (1) What should be the avenues of appeal from criminal proceedings in the:
(a) Local Court
(b) Children's Court
(c) District Court
(d) Supreme Court
(e) Land and Environment Court
(f) Drug Court, and
(g) Industrial Court?

The current avenues of appeal from criminal proceedings should be maintained subject to the suggested changes outlined under question 1 above and specific

recommended changes below. The following additional comments are made in respect of appeals from the Local and Children's Court to the Supreme Court.

Local Court and Children's Court to Supreme Court

There should continue to be a right of appeal from the Local Court or Children's Court to the Supreme Court against:

1) conviction or
2) the dismissal of summary proceedings,

but only on a ground raising a question of law alone.

There should also continue to be an appeal by leave by either party against an interlocutory order made in summary proceedings on a ground raising a question of law alone.

These appeals permit issues of law to be settled by the Supreme Court and provide binding authority for both the Local Court and the District Court (particularly in dealing with appeals from the Local Court).

The procedures for these appeals currently in place work well. Essentially there is a time limit of 28 days from the date of the decision for the lodging of an appeal, however that time may be extended by the Local Court on the basis of an application received within the 28 day time limit, and may be extended by the Supreme Court at any time.

Appeals are commenced by summons setting out the grounds, and supported by an affidavit exhibiting the transcript, exhibits, court record, and any other relevant material. A confined legal issue is concerned, which is usually able to be dealt with by the Supreme Court promptly.

2.(2) What arrangements should be made for judicial review?

Applications for judicial review of all decisions of the Local Court and Children's Court in criminal matters should continue to be available to the Supreme Court to ensure that jurisdiction is appropriately exercised.

However it is suggested that some of the procedural requirements under Part 59 of the UCPR are unnecessarily complex in relation to applications arising from criminal proceedings. Instead, the more simple procedures applicable to appeals under Part 5 of the CAR Act should also apply to these applications.

Applications for judicial review of decisions made in the District Court and Supreme Court in criminal matters should be able to be dealt with by the Court of Criminal Appeal (CCA) rather than the Court of Appeal. For this purpose the CCA would need to be granted the supervisory jurisdiction currently only held by the Court of Appeal.

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

Decisions of the Local Court in criminal matters are not frequently appealed directly to the Supreme Court, however as noted above that facility is a valuable method of settling questions of law affecting the Local Court generally.

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

No. Appeals from the Local Court raising a 'question of law alone' should continue to be dealt with by the Supreme Court. Unlike decisions of the District Court, those of the Supreme Court are binding on the Local Court and thereby promote certainty and consistency in Local Court decisions. Further, both parties are entitled to a decision made in the Local Court on the basis of a correct application of the law, which may then be the subject of appeals on grounds including factual matters to the District Court as appropriate.

2.(5) Which court should hear appeals from a decision of the Supreme Court on appeal from the Local Court?

Appeals from decisions of the Supreme Court on appeal from the Local or Children's Court are currently heard in the Court of Appeal. These appeals would be more properly dealt with in the Court of Criminal Appeal.

2.(6) 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?

The supervisory jurisdiction of the Supreme Court over decisions of the District Court and single justices of the Supreme Court currently vests in the Court of Appeal. There would appear to be value in also investing that jurisdiction in the Court of Criminal Appeal in relation to criminal proceedings.

2. (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?

There is value in maintaining these distinctions, particularly in relation to the restriction on appeals from the Local or Children's Court to the Supreme Court to questions of law alone. While it is true that a court may spend time in characterising the questions raised by an appeal, it is important that the Supreme Court's appellate resources be focussed on legal and jurisdictional rather than factual issues, particularly when there is already provision for factual matters to be appealed to the District Court.

3. What types of decisions should be subject to appeal?

3.(1) What types of decisions in criminal proceedings should be subject to appeal?

Conviction, sentence, interlocutory decisions which are currently appellable.

We suggest that there should no longer be an appeal available to a defendant against a conviction imposed in the Local Court or Children's Court to the Supreme Court on the basis of a question of fact or mixed question of fact and law (currently available by leave under s 53(1) of the CAR Act). Appeals on these grounds are, it is suggested, more properly dealt with in the District Court.

We also suggest that there should no longer be an appeal available to the Supreme Court against an order made 'against a person' in committal proceedings (s 53(3)(a) and 57(1)(b)). Apart from the difficulties in distinguishing between an order made 'in relation to a person' and any other orders, there is already provision for appeals to the CCA from interlocutory orders made in committal proceedings (s 5F CA Act). Jurisdictional error in committal proceedings is able to be dealt with by the procedures for judicial review.

3.(2) What types of decisions should the prosecution be able to appeal?

All existing appeal rights should be maintained. However one anomaly is that for the purposes of an appeal against sentence from the Local or Children's Court to the District Court or Supreme Court, the decision of a court to revoke a good behaviour bond is considered a 'sentence', and therefore able to be appealed by a defendant (under subsection (ba) of the definition of the term 'sentence' in s 3 of the CAR Act). However the decision of a court to refuse to revoke a good behaviour bond is not within that definition, and is accordingly not able to be appealed by the prosecution under either s 23 or s 56(1)(a) of the CAR Act. It is suggested that, for consistency, the definition of the term 'sentence' in s 3 should be extended to include the refusal to revoke a good behaviour bond. (di)

The Question Paper also raises the issue of whether the prosecution should be able to appeal the upholding of a plea of autrefois convict or autrefois acquit (1.31-1.32)

In *R v Stone* [2005] NSWCCA 344 the Crown appealed under s 5F(2) against a judge's decision to uphold a plea of autrefois convict. Smart AJ said:

> 122 ...That was not an interlocutory judgment or order, but a final decision. It allowed Mr Stone to go at large and precluded any trial taking place on the indictment which had been presented. To all intents and purposes it was an acquittal of the more serious offence of supplying a prohibited drug. In *Maxwell* at 521 Toohey J pointed out that the absence of a formal record is not determinative.
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> 123 There is a long and correct tradition in this State of this Court not entertaining appeals against acquittals whether by jury verdict or direction of

> the judge. Section 5A(2)(a) enables the Attorney General or the Director of Public Prosecutions to submit a question of law for determination by this Court at any time after the conclusion of a trial on indictment where the accused has been acquitted. It does not enable this Court to set aside the acquittal.

As his Honour stated, the decision was effectively an acquittal and not amenable to appeal. This case preceded the introduction of s 107 of the *Crimes (Appeal and Review) Act 2001* pursuant to the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006*, which commenced on 15 December 2006. The Second Reading speech for the introduction of the legislation made no reference to appeals against decisions to uphold a plea of autrefois convict. Nor did it suggest that such decisions were consciously excluded from the legislation on the basis that they should not be amenable to appeal.

Consideration should be given to extending s 107(1) to extend to decisions to accept a plea in bar. It should be noted that the Crown has utilised s 107 sparingly. Only three appeals have been lodged since the introduction of Part 8, Division 3 (*R v PL* (2009) 199 A Crim R 199; *R v PL* [2012] NSWCCA 31; *R v XHR* [2012] NSWCCA 247) No applications have been lodged by the Director under Part 8, Division 2.

3.(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?

The current arrangements for the appeal to the Supreme Court against interlocutory orders made in the Local Court are appropriate.

This question raises the issue of whether an accused should be able to appeal against the exclusion of evidence, as the Crown has a right of appeal under s 5F(3A) of the *Criminal Appeal Act 1912*. It has long been recognised that decisions or rulings on the admissibility of the evidence are not amenable to appeal by an accused at an interlocutory stage. Any error by a trial judge in this regard may be raised as a ground of appeal in the event a verdict adverse to the accused is returned. By contrast, as recognised in the Second Reading Speech for the *Crimes Legislation Further Amendment Act 2003*, which introduced s 5F(3A) (the Hon John Watkins, Minister for Police, Legislative Assembly, 2 December 2003):

> This amendment amends the Criminal Appeal Act to allow the Crown to appeal against an evidentiary ruling which substantially weakens the Crown case. If an acquittal results from an erroneous evidentiary ruling, the Crown has no avenue of appeal against the acquittal. The Crown should therefore be able to test the correctness of such a ruling made during the trial, so that an accused may not derive the benefit of an acquittal secured as a result of an erroneous evidentiary ruling.

The right of appeal under 5F(3A) is exercised sparingly by the Crown. Extending this provision to an accused would most likely result in the unnecessary disruption of trial proceedings.

4. What should the leave requirements be for filing a criminal appeal?

4.(1) What should the leave requirements be for filing a criminal appeal in NSW?

In general terms, the applicant should be required to demonstrate an arguable case in order to obtain leave.

4.(2) What limits, if any, should be put on the ability to appeal as of right from the Local Court to the District Court?

The question paper seeks views as to whether the broad right of appeal impacts upon the efficiency of the criminal justice system. In our view it is timely to review the rationale of the current right to appeal, in light of the fact that Magistrates are now legally qualified and other changes over time to the criminal justice system (including volume of work and resources). In this regard our answers to questions 7(2) and 10 (2) should be considered.

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

A 'case stated appeal' under s 5B(1) of the Criminal Appeal Act does not usually create significant difficulty. As the case law sets out, that procedure permits a District

Court or Land and Environment Court judge to seek the advice of the CCA on a question of law that has arisen during an appeal, and to then apply that advice on resumption of the proceedings before him or her. However s 5B(1) is not frequently used, and would in all likelihood be used even less frequently were the procedure under s5B(2) to be simplified. Accordingly it is worth considering whether s5B(1) should be retained.

However stated case appeals under s 5B(2) are highly unsatisfactory in a number of respects, as has been repeatedly observed by the CCA (in particular in *Lavorato v R* and *Talay v R*).

The current s 5B(2) should be replaced by a provision similar to that in s 56 of the CAR Act for appeal to the Supreme Court from the Local Court. Essentially the new provision should permit either an appellant or respondent to a District Court appeal to appeal to the CCA against a decision of the District Court either upholding or dismissing an appeal, but only on a ground that involves a question of law alone.

If an amendment in those terms were made:

- a form of notice of appeal should be prescribed, and the Criminal Appeal Rules amended to provide for the obtaining of the necessary material from the District Court, including the judgment and orders made, the transcript of the proceedings and the exhibits,

- a time limit should be specified (either of 28 days or longer), but the District Court should be empowered to extend that time on the basis of an application filed within the prescribed time, and the CCA should be empowered to extend time at any stage.

6. What should the time limit be for filing a criminal appeal?

6.(1) What should the time limit be for filing a criminal appeal in NSW? Should it be different for different courts?

Generally, a 28 day limit should apply, as in section 10 of the *Criminal Appeal Act 1912*. Query whether the Notice of Intention to Appeal system introduced under the *Criminal Appeal Rules 1952* has complicated and delayed the appeal process to the Court of Criminal Appeal. And see above under question 1.

The 28 day time limit currently applicable to appeals from the Local Court and Children's Court to the Supreme Court under Part 5 of the CAR Act, and the provision for its' extension, is appropriate.

The 3 month time limit for applications under s 69 of the Supreme Court Act, and the provision for its' extension, is also appropriate.

The fact that these time limits differ is not of practical concern because of the power in each case to extend time for an unlimited period where that is appropriate.

The District Court should however have power to grant leave to the prosecution to appeal under s 23 of the CAR Act against a sentence imposed in the Local Court or Children's Court after the expiry of the 28 day period for appeal as of right but within 3 months of the decision, in accordance with the provisions for appeals against sentences by defendants.

6.(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?

No. In furtherance of the objective of finality a line has to be drawn at some point. The 3 month time limit provides sufficient opportunity for appeal rights to be exercised, particularly given that appeals are generally as of right, with no requirement that error necessarily be demonstrated. Appeals from the Local Court to the Supreme Court or from the District Court to the Supreme Court/CCA require the identification of error and the formulation of grounds of appeal.

Section 62 of the CAR Act should not be used to amend the date of filing absent, for example, compelling evidence that steps were taken to exercise appeal rights and those steps were only frustrated by administrative error or the like.

6.(3) What should the time limit be for a prosecution appeal against:
(a) a costs order imposed by the Local Court?

Any time limit imposed should be the same as that in relation to costs orders against defendants, which is currently 28 days as of right, but 3 months with leave.

(b) the leniency of a sentence imposed by the District Court or the Supreme Court?

There should be no time limit stated in the *Criminal Appeal Act 1912* (as is currently the case) as the Crown must file an appeal on a contingency basis in some cases when an offender lodges an appeal against conviction or sentence .A contingent Crown appeal often occurs where, after the appellant has filed his grounds of appeal and submissions, it becomes readily apparent that if the appellant has, either only appealed some of the relevant sentences which formed part of a totality sentencing exercise, or, if the appellant is successful in appealing only some sentences, as part of a larger group of sentences of which totality was important, that it may be necessary for the Crown to appeal (on a contingent basis) those sentences which formed part of the totality of sentences which the appellant did not appeal, or those sentences that may be impacted by a partially successful appeal. The Crown appeal is contingent on whether the appellant's appeal is successful. If the Crown did not institute the contingent appeal, the remaining sentences, untouched by the appeal by the appellant, which were not manifestly inadequate as part of the totality sentencing exercise, may now be so. Often the Crown is not aware of the need for a contingent Crown appeal until the grounds of appeal and submissions of the appellant are filed which may be many months, or even a year, after the imposition of the sentences. A recent example of a contingent Crown appeal was Lowe v R [2013] NSWCCA 141 .

The ODPP promptly files Crown appeals against sentence to the Court of Criminal Appeal as a usual practice in any event and there is no need for reform in this area.

If there is to be any time limit, (and in any event) the transcript of the ROS and the POS need to be improved and be made available promptly say within 10 days after the matter is completed.

7. What should the test be for an appeal from the Local Court?

7.(1) What should the test be for an appeal against sentence and against conviction from Local Court decisions?

The test should be manifest excess for sentence appeal.

The test should remain the same for a conviction appeal.

7.(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?

There are conflicting views within the ODPP as to whether demonstration of an error should be necessary to succeed in an appeal from the Local Court to the District Court or to the Land and Environment Court. Those in favour of requiring such error were of the view that an unfettered right of appeal was a remnant of the days when lay Magistrates made decisions and there was a greater need for supervision of decisions. Those opposed to requiring error of law considered that a requirement to focus on "error" may result in additional time being spent on appeals in the District Court. Pleading error may unnecessarily complicate the process. This would place a substantial burden on already stretched transcription resources and operate against the overarching aim of efficiency. Further, it was argued that increased pressure would be placed on Magistrates (or the perception thereof) to provide more fulsome remarks on sentence. While this may tend to enhance fairness, it may also tend to decrease the efficiency of the busiest courts in the State by volume. It was also suggested that the large number of self-represented litigants in the Local Court may have a decreased accessibility to the appeal process if error was required to be established.

Ultimately, the ODPP have recommended a change in relation to sentence appeals, noting that it is possible that the transcript would not be required if the sole basis for a sentence appeal is whether there was manifest excess and the original sentence material was available. No change is recommended to the conviction appeal test due to concern about the additional time and complexity that an error test would entail and because it was considered likely that "unreasonable verdict" would have to remain open as a factual challenge to verdict, thereby making it unlikely that the number of appeals would be greatly reduced.

8. What should the test be for an appeal from the District Court and Supreme Court?

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

See above under answer to question 1.

8.(2) Should the test for an appeal against sentence be changed to a single test of whether the sentence is manifestly excessive or manifestly inadequate?

Yes.

In relation to the suggested change to sentence appeals it should be noted that issues of parity and procedural unfairness would likely only be corrected by the Court of Criminal Appeal where the sentence was also manifestly excessive or manifestly inadequate: see NSW Law Reform Commission, *Criminal Appeals: Preliminary Issues*, Question Paper 1 (2013) [1.31], in which it is stated that "[f]airness is important in ensuring the integrity of the criminal justice system" including appeal rights for "both the defendant and the prosecution to correct errors of fact and law", and [1.61] and the submissions referred to in footnote 34. See also NSW Law Reform Commission, *Sentencing: Procedural and Jurisdictional Aspects*, Question Paper 12 (2012) [12.52]-[12.60].

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

No. These are two quite different types of appeal.

An issue raised by this question is whether directing a verdict of acquittal should be available where the trial judge is of the view that any conviction would be unreasonable and could not be supported by the evidence, one of the tests available for an appeal against conviction under s 6(1) of the Act. In determining the question under s 6(1), the CCA is to make "an independent assessment of the evidence, both as to its sufficiency and its quality."

There are good reasons for distinguishing between what the CCA does when dealing with a ground of appeal asserting that the verdict was unreasonable and the judge's role when dealing with whether to direct a verdict of acquittal.

In *R v R* (1989) 18 NSWLR 74, the question of law raised under s 5A(2)(a) of the Act was:

> Does the trial judge have the power to direct a verdict of acquittal where the trial judge assesses the evidence is such that a verdict of guilty based upon it would be unsafe and unsatisfactory?

The CCA answered the question in the negative, Gleeson CJ stating at [85]:

> It is one thing to recognise in Courts of Criminal Appeal a power to review a jury's determination of fact. It is another thing altogether to permit a trial judge to pre-empt such a determination.

The High Court took the same approach in *Doney v The Queen* (1990) 171 CLR 207.

The question of whether to direct an acquittal is a question of law, whereas the accused's guilt or otherwise is a question of fact which, on appeal, the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, it would nevertheless be dangerous in all the circumstances to allow the verdict of guilty to stand (*M v The Queen* (1994) 181 CLR 487 at 492-493; *SKA v The Queen* (2011) 243 CLR 400 at [14]). This emphasises the "supervisory or reviewing" role of the CCA (*R* at 83; *Doney* at 215).

To align the tests would undermine the role of the jury as the trier of fact; the jury's verdict should not be interfered with on this basis unless the CCA concludes that a reasonable jury ought to have had a reasonable doubt.

9. 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?

No. Any effective requirement for the Local Court to give much more detailed sentencing remarks would reduce its efficiency: see NSW Law Reform Commission, *Sentencing: Procedural and Jurisdictional Aspects*, Question Paper 12 (2012) [12.60].

There should not be any change to the tests for different types of appeals to the Court of Criminal Appeal as the case law is clear.

10. Should fresh evidence be available on appeal?

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?

There is no need to change the current tests for the Court of Criminal Appeal as the relevant case law is sufficient.

10.(2) What leave arrangements should be in place in order to give fresh evidence in appeals from the Local Court to the District Court?

The current provisions are adequate. However consideration could be given to introducing a similar leave requirement for fresh evidence in appeals against sentence in furtherance of the goals of finality and efficiency. The test would not have to be as high as the "fresh evidence" test in appeals to the CCA, but if material is sought to be relied upon in an appeal to the District Court a reasonable explanation should be proffered for why it was not put before the Local Court at first instance.

11. What should the powers of the court be on appeal?

11.(1) What powers should courts have on appeal? Should different courts have different powers?

CCA

There should not be any change to the powers of the Court of Criminal Appeal under the *Criminal Appeal Act 1912* as the current powers are not shown to be deficient and considerable flexibility of powers is required to meet the justice of some cases.

District Court

The District Court on appeal from the Local Court should have the power to substitute a verdict of guilty for another offence that would have been available at first instance. The absence of this power can give rise to a number of undesirable scenarios.

Scenario 1

An accused person X is convicted of assault occasioning actual bodily harm in company in the Local Court. At the time of the conviction a backup charge of assault occasioning actual bodily harm is before the Local Court. X appeals against conviction to the District Court. The appeal is solely focused upon whether or not X was relevantly "in company". The Judge is satisfied that all of the elements of assault occasioning actual bodily harm are made out, but that X was not relevantly "in company". The appeal is allowed and the conviction is quashed.

While there is no plea in bar to the charge being brought again in this scenario, it would be a remarkably inefficient process.

Scenario 2

An accused person Z is convicted of an offence under s 193C(1) of the Crimes Act (deal with suspected proceeds of crime) in the Local Court. At the time of the conviction there is not an offence under s 527C(1) of the Crimes Act (goods in custody) before the Local Court. Z appeals against conviction to the District Court. The appeal is solely focused upon whether the property is "proceeds of crime" derived from a "serious offence". The Judge is satisfied of that all the elements of goods in custody are made out, but cannot be satisfied that the property is "proceeds of crime" derived from a "serious offence". The appeal is allowed and the conviction is quashed.

In this scenario there is a real risk that the charge under s 527C(1) of the Crimes Act would be statute-barred by the time proceedings were resolved in the District Court.

This power could be introduced by an amendment to s 20(2) of the Crimes (Appeal and Review) Act 2001 by inserting something such as:

(d) by setting aside the conviction and entering a conviction for an alternate offence available in the original Local Court proceedings

Consideration could also be given to giving the District Court power to intervene and resentence of its own initiative in circumstances where some, but not all, convictions have been quashed.

11.(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?

The existing powers to remit are generally adequate. What should be avoided are situations where de facto summary hearings take place in the District Court. Those situations are undesirable as they are unduly costly (due to the increased expense of the jurisdiction) and restrict the appeal rights of parties.

To the extent that there is any ambiguity, it should be make clear in the legislation that appeals against AVO orders made by consent in the Local Court can be remitted to the Local Court.

11.(3) What powers should the Court of Criminal Appeal have on an appeal against conviction where the defendant pleaded guilty?

There should not be any change to the powers of the Court of Criminal Appeal under the *Criminal Appeal Act 1912* as the current powers are not shown to be deficient.

12. What power should an appellate court have to award costs?

There should not be any change to the Criminal Appeal Act 1912 section 17 in respect of appeals by the Crown as there is an element of public interest in these types of appeal. Consideration might be given to allowing the Court of Criminal Appeal power to award costs against an applicant / appellant if the appeal was considered to be unmeritorious, however the more effective method to achieve this (particularly for applicants / appellants who have little or no funds) would be to strengthen the leave requirements as submitted above.

There should be no power to award costs on appeals from the Local Court or the Children's Court to the Supreme Court from criminal proceedings, including applications for judicial review under s 69 of the Supreme Court Act.

13. Should there be a stay of the sentence pending appeal?

13.(1) What should the law be regarding the operation of a sentence pending determination of an appeal?

CCA

The sentence should continue to operate pending the appeal.

District Court

Generally the sentence should continue to operate pending the appeal. Any stay should be a discretionary decision for the courts.

Appeals to the Supreme Court

Section 63 should be amended to clarify that the lodging of an appeal by the prosecution under s 23 or s 56(1)(a) of the CAR Act does not operate to stay the execution of a sentence.

There are also some uncertainties in relation to the provisions dealing with the staying of sentences pending an application for judicial review of a decision of the District Court on appeal to the Court of Appeal under s 69 of the Supreme Court Act.

That matter is dealt with by s 69C of the SC Act, which provides that:

> **69C Stay of execution of conviction, order or sentence pending review**
>
> (1) This section and section 69D apply to proceedings in the Court for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court (or part of such a conviction or order) or sentence imposed by the Local Court.
> (2) The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced.
> (3) Subsection (2) does not apply to a person (the ***claimant***) who is in custody when proceedings seeking judicial review are commenced unless and until

the claimant enters into a bail undertaking in accordance with the *Bail Act 1978*, or bail is dispensed with.

(4) The stay of execution continues until the proceedings for judicial review are finally determined, subject to any order or direction of the Court.

(5) Despite subsection (2), any period during which the stay is in force is not to be taken into account when calculating the length of a period of disqualification from holding a driver licence resulting from a conviction under the road transport legislation within the meaning of the *Road Transport Act 2013*.

Problem 1 - are Apprehended Violence Orders (AVOs) stayed by s 69C(2)?

S 69C(2) is not clearly worded. The preferable interpretation is that it only stays the execution of a 'sentence' imposed as a consequence of either 1) a conviction or 2) another order. However it would appear at least arguable that when an AVO made or varied in the District Court on an appeal is the subject of an application for judicial review to the Supreme Court (Court of Appeal), the AVO is covered by the term "any other order" in s 69C(2), and is stayed. The heading "Stay of execution of conviction, order or sentence pending review" tends to support the latter interpretation.

The history of s 69C(2) is quite complex - it appears to have been adapted from sections 107 and 127 of the now repealed Justices Act, but the changes in context are such that it is difficult to import the reasoning behind the original provisions into the present one.

The same potential problem does not arise in relation to appeals against AVOs to the District Court under s 84 of the Crimes (Domestic and Personal) Violence Act, because s 85 of that Act provides that lodging an appeal under s 84 does not stay the AVO despite s 63 of the CAR Act, which may otherwise apply to impose a stay. The only reason the provisions of s 63 may be said to apply is that s 84(4) provides that the CAR Act applies to s 84 appeals.

In the result it would appear that an amendment to s either s69C of the Supreme Court Act or the Crimes (Domestic and Personal Violence) Act is desirable to make it clear, without conceding that it was ever not the case, that commencing judicial

review proceedings in relation to a District Court appeal decision to grant or vary an AVO does not stay the AVO.

Problem 2 - is someone on an Intensive Correction Order (ICO) or Home Detention Order (HDO) 'in custody' for the purposes of s 69C(3)?

In one matter an appellant was sentenced in the Local Court to an ICO. He appealed unsuccessfully to the District Court against both his conviction and sentence. He then lodged an application for judicial review of the District Court's decision to the Supreme Court (Court of Appeal) under s 69 of the Supreme Court Act.

Probation and Parole officers informed the DPP that they were advised that, although subject to the ICO, the appellant was not 'in custody' within the meaning of s 69C(3) at the time of lodging his application for judicial review, and therefore that the ICO was stayed by the lodging of that application (under s 69C(2)) . Consequently the ICO was not carried out, and the appellant was also not subject to bail.

S 63(2)(c) of the CAR Act which deals with stays of execution of sentences pending appeals under that Act to either the District Court or Supreme Court provides that the execution of the sentence of an appellant 'in custody' is not stayed unless he enters bail or bail is dispensed with under the Bail Act.

S 63(5) of the CAR Act provides that in s 63 a reference to an appellant who is 'in custody' includes a reference to a person who is the subject of an ICO or HDO.

It would appear that there should be consistency between these provisions, and that an additional clause should be added to s 69C of the Supreme Court Act in the same terms as s 63(5) of the *CAR Act* to make that clear.

13.(2) Are there any problems with the interaction between s 63 and s 69 of the *Crimes (Appeal and Review) Act 2001* (NSW)?

There are mixed views among ODPP lawyers about the interaction of these provision.

Our understanding is that the interaction between s 63 and s 69 avoids the following scenario:

1. The appellant is convicted and enters into a good behaviour bond;
2. An appeal is lodged (and execution of the sentence is stayed by s 63);
3. The appellant breaches the bond;
4. The appellant is called up for breach of the bond and re-sentenced;
5. The appeal against the original bond is heard and the bond is set aside, leaving no basis for steps 3 and 4 above.

The stay of execution at step 2 above prevents the action on the breach at steps 3 and 4 from taking place prior to the hearing of the appeal against the original bond. In that sense it is a stay of execution, although liability for a breach can still accrue during the period of the "stay" (given that "the original sentence continues to have effect according to its terms...despite any stay of execution that has been in force"[1]). As per the above response to 13(1), the position of appellants could be made clear by an information sheet attaching to the Notice of Appeal to the District Court.

However the consequence of s 69 also appears to be that, although a defendant is not liable for any 'breach' of a good behaviour bond during a stay of execution of the bond pursuant to s 63(2) of the CAR Act, if the bond is confirmed on appeal its' expiry date remains the same as when originally imposed, such that it is effectively shortened.

It would appear that if a defendant has had the benefit of a stay of execution of a bond pending an appeal, and the appellate court has not determined to reduce the length of the bond, then the period of the bond should be extended by the period of the stay.

14. In what circumstances should a court be able to reopen its own proceedings?

14.(1) In what circumstances should a court be able to reopen its own criminal proceedings?

[1] S 69 Crimes (Appeal and Review) Act 2011

The circumstances are outlined in the decision of Achurch v R (No 2) [2013] NSWCCA 117 The decision in **Achurch** gives appropriate flexibility to the reopening of sentencing proceedings.

14.(2) Should the Court of Criminal Appeal have a different power to reopen its own proceedings than lower courts?

No.

14.(3) How often is an application made to a court under s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to reopen proceedings?

We don't keep the result on our CASES database. Anecdotally, this seems to be done in a reasonably small number of cases at first instance. The ODPP do make application where necessary to use s.43 rather than appeal to the Court of Criminal Appeal. In light of the decision of **Achurch,** that option is open for many current appellants.

15. When should the Local Court be required to annul a conviction or sentence?

15.(1) How often is an application made to the Local Court under s 4 of the *Crimes (Appeal and Review) Act 2001* (NSW) for annulment of a conviction or sentence?

This is not an area where the ODPP has any experience.

15.(2) In what circumstances should the Local Court be required to annul a conviction or sentence?

The current test provisions in section 4 appear to be appropriate.

16. What other aspects of the criminal appeals process should we consider?

16.1. Case Management and streamlining appeal procedures

Case management by the Courts especially so in relation to unrepresented applicants / appellant who absorb a disproportionately large amount of scarce resources for the Courts and the prosecution.

Consideration should be given to consulting the Courts on implementing limits on the length of submissions, summaries of trial and other appeal documents required by the Courts, and in the presentation of oral argument: see the *High Court Rules*.

Remarks on sentence should be made available when requested on an urgent basis when consideration is being given to a Crown appeal.

Consider introducing time limits for oral submissions (say, 30 minutes), which can be extended by application to registrar for complex matters.

16.2.Potential Problems with s29(1) (b) and s 29 (2) of the CAR Act.

S 29 provides:

> ***"29 Limits on appeals***
>
> *(1) No appeal may be made to the District Court under this Part against a decision of the Local Court:*
> *(a) in relation to an environmental offence against which an appeal may be made under Part 4, or*
> *(b) that is or has previously been the subject of an appeal or application for leave to appeal to the District Court under this Part, or*
> *(c) that is or has previously been the subject of an appeal or application for leave to appeal to the Supreme Court under Part 5.*
> *(2) Subsection (1) (c) does not prevent a person who has made an appeal or application for leave to appeal to the Supreme Court under Part 5 from making an appeal or application for leave to appeal to the District Court under this Part if:*
> *(a) the Supreme Court has remitted the matter on appeal to the Local Court for redetermination, and the Local Court has redetermined the matter, or*
> *(b) the Supreme Court has refused leave to appeal in relation to an appeal made on a ground of mixed law and fact."*

A literal reading of s 29(1)(b) suggests that if a sentence imposed in the Local Court is the subject of an appeal by the defendant, then no appeal against the same sentence may be lodged by the prosecution under s 23 of the CAR Act, and vice versa. It has been argued that to fulfil the apparent intention of this provision it should be read as if it said '**A person may not lodge an appeal** to the District Court under this Part against a decision of the Local Court (b) that is or has previously been the subject of an appeal or application for leave to appeal **by that person** to the District Court under this Part.." (changes in bold).

To our knowledge this is how the provision has been interpreted by the District Court in the past, however it would appear that that should be clarified to avoid the matter being raised in future matters.

Similarly, a literal reading of s 29(2) suggests that the exception to s 29(1)(c) to permit an appeal to the District Court following a remittal from the Supreme Court does not extend to permit a prosecution appeal to the District Court under s 23 of the CAR Act in those circumstances. This provision should also be amended to make the position clear.

16.3. *The operation of s 42 of the CAR Act.*

We also have concerns about the operation of s42 of CAR Act, so far as is presently relevant, s 42 of the CAR Act is in the following terms:

> *(1) The Director of Public Prosecutions may appeal to the Land and Environment Court against a sentence imposed on a person by a Local Court in relation to an environmental offence for which proceedings have been prosecuted by or on behalf of a public authority (other than the Environment Protection Authority).*
>
> *(2) The Environment Protection Authority may appeal to the Land and Environment Court against a sentence imposed on a person by the Local Court in relation to an environmental offence for which proceedings have been prosecuted by or on behalf of the Environment Protection Authority.*

The **first concern** is the fact that, pursuant to s 42(1), the Director of Public Prosecutions (DPP) is the only body permitted to appeal against a sentence imposed in the Local Court for an environmental offence which has been prosecuted by a public authority other than the Environment Protection Authority (EPA).

In contrast, the predecessor to ss 42(1) and (2) of the Act was ss 133AS (1) and (2) of the now repealed Justices Act 1902, which was in the following terms:

> ***133AS When the Crown may appeal against a sentence***
>
> *(1) The Director of Public Prosecutions may appeal under this Division to the Land and Environment Court against any sentence imposed by a Magistrate in proceedings for an environmental offence if those proceedings have been instituted or carried on by the Director of Public Prosecutions.*
>
> *(2) The Environment Protection Authority may appeal under this Division to the Land and Environment Court against any sentence imposed by a Magistrate in proceedings for an environmental offence if those proceedings have been instituted or carried on by the Environment Protection Authority*

Thus under the previous provisions Crown appeals as of right against sentence to the LEC were only available in relation to matters prosecuted by either the DPP or the EPA, and each of those bodies had the right to appeal only in relation to matters they had prosecuted.

It would appear that, at the time of the introduction of the CAR Act, a decision was made by the legislature to extend the range of matters from which such appeals were available so as to include matters prosecuted by public authorities other than the DPP and the EPA. However it is not clear why the right to appeal against sentence in such matters was given to the DPP rather than the EPA, an office which regularly appears in the LEC and would in my view be better placed than the DPP to conduct such appeals.

Consideration should be given to amending s 42(1) of the CAR Act so that the EPA, rather than the DPP is authorised to lodge such appeals.

The **second concern** is the definition of the term 'public authority' as it appears in s 42(1) of the CAR Act. Pursuant to the current environmental legislation, prosecutions for many environmental offences may be conducted in the Local Court by or on behalf of local councils, which are defined as 'public authorities' for the purposes of that Act. However for the purposes of s 42(1) of the CAR Act the term 'public authority' is differently defined and, it appears, excludes local councils.

Pursuant to s 3 of the CAR Act:

> ***public authority*** *means:*
>
> *(a) the Crown, or*
> *(b) an authority within the meaning of the Public Finance and Audit Act 1983, or*
> *(c) an officer or employee of such an authority acting in the course of his or her employment*

An analysis of each of the subparagraphs of this definition suggests that local councils are not included, which means that no Crown appeal to the LEC against sentence is available in relation to a matter prosecuted by a local council in the Local Court. It is not clear why that should be the case, and it would appear that consideration should be given to amending the legislation to correct that omission.

The **third concern** is the relationship between sections 23 and 42 of the CAR Act. While s 42 provides for Crown appeals against sentence to the LEC in relation to an environmental offence prosecuted by a public authority in the Local Court, s 23 empowers the DPP to appeal to the District Court against sentences imposed in the Local Court in a wide range of other matters.

Pursuant to s29 (1)(a) of the CAR Act, an appeal under s 23 may not be lodged against a decision of the Local Court in relation to an environmental offence which may be the subject of an appeal to the LEC.

However it would appear that sentences imposed for environmental offences prosecuted otherwise than by a public authority may be the subject of Crown appeals by the DPP to the District Court under s 23.

This appears inconsistent with apparent legislative intention that all Crown appeals against sentences imposed for environmental offences should be dealt with in the LEC.

The CAR Act commenced operation on 7 July 2003, and a stated object was to "re-enact the provisions of Parts 4A, 5, 5A and 5B of the Justices Act 1902" subject to

some minor amendments. As noted above, the predecessor to s 42(1) of the CAR Act was s 133AS of the *Justices Act* (contained in Part 5B), which was introduced pursuant to the Justices Legislation Amendment (Appeals) Bill 1997. In relation to appeals from the Local Court to the LEC, the following is contained in the 2nd Reading Speech of The Hon. J.W. Shaw (the then Attorney General) of 17 September 1998 (my emphasis):

> *"Honourable members should be made aware that in relation to certain environmental offences appeals from the Local Court are referred to the Land and Environment Court for determination, although the appeals procedures for both types of appeals are the same. The appeals procedure to the Land and Environment Court is set out in part 5B of the bill. At the request of the Chief Judge of Land and Environment Court the opportunity has been taken however to broaden the definition of environmental offence. New section 133 W extends this definition to mean an offence against the environment protection legislation as defined in the Protection of the Environment Administration Act 1991.*
>
> ***In practical terms this will mean that all environmental offences will be referred to the Land and Environment Curt on appeal, as opposed to some environmental matters going to the District Court, thus ensuring that these matters are dealt with consistently on appeal.****"*

While this amendment concerned an extension of the range of offences covered by Part 5B of the former Justices Act, rather than the issue I have raised, it appears that the intention of the legislature was to provide that all appeals from the Local Court in relation to environmental offences be dealt with in the LEC. This apparent intention does not appear to be reflected in the current legislation.

16.4. Section 5G appeals

Section 5G provides for an appeal against the discharge of the jury. In order to preserve the jury while an appeal is being heard, s 53C(1)(2) of the *Jury Act 1977* provides that a court that discharges a jury under s 53(1)(a) "may stay the proceedings on such terms as the court... thinks fit if a party gives notice of an intention to lodge an application for leave to appeal for review of the decision under section 5G." Section 53(1)(a) deals with the discharge of the entire jury following the discharge of an individual juror. However, there is no specific power to stay the proceedings following the discharge of the entire jury for any other reason unrelated to the prior discharge of

an individual juror, even though the discharge of the jury itself would be appealable under s 5G.

Dealing with questions of leave

In an application for leave to appeal against a decision to discharge the jury (*WC v R* [2012] NSWCCA 231), the Chief Justice directed the Chief Judge at Common Law to deal with the leave application as a single judge of the CCA. Leave was refused. This approach is supported.

Office of the Director of Public Prosecutions
August 2013