



**New South Wales  
Law Reform Commission**

# **Criminal Appeals: Preliminary issues**

## **Question Paper 1**

July 2013  
[www.lawreform.lawlink.nsw.gov.au](http://www.lawreform.lawlink.nsw.gov.au)

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## Make a submission

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We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your submission by:

- Post: GPO Box 5199, Sydney NSW 2001
- DX: DX 1227 Sydney
- Email: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

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## Purpose of this paper

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1.1 This paper seeks submissions which:

- identify problems with the current criminal appeals process in NSW or areas where law reform is required, and
- provide views on the issues raised in this paper.

This will assist us in formulating the ultimate direction and scope of our reference, and in developing proposals for reform.

1.2 We are interested in views about how we could consolidate and simplify the current criminal appeals framework. We also seek views on whether there are aspects of the current criminal appeals framework which work well and should not be changed.

1.3 The Attorney General has asked the NSW Law Reform Commission to:

review current avenues of appeals in all criminal matters, with a view to simplifying and streamlining appeal processes, and consolidating criminal appeal provisions into a single Act.

In undertaking this review the Commission should have regard to:

- the balance between the need for finality and the need to provide fair opportunity for appeal
- the need to provide for timely resolution of criminal appeal matters
- the characteristics and needs of the courts from and to which appeals lie
- any related matters the Commission considers appropriate.

1.4 We are asked to report by December 2013.

1.5 Matters raised in some previous references, as well as recent case law, form the basis for the issues in this paper. In Report 133, *Bail*, we considered the process for criminal appeals in NSW and noted the complexity of the current framework. As part of our reference on sentencing, we asked questions about the adequacy of the provisions for appeals against sentence, and we received a number of responses.

1.6 In the first part of this paper we ask general questions about reforming the criminal appeals framework. In the second part of this paper we ask questions about the need for reform of particular parts of the appeal process which have already been brought to our attention. We also invite submissions about any other areas of the criminal appeals process which we have not addressed.

1.7 In order to assist stakeholders in considering the issues, we have compiled a list of useful resources on our website:

[www.lawreform.lawlink.nsw.gov.au/lrc/lrc\\_currentprojects/lrc\\_criminalappeals.html](http://www.lawreform.lawlink.nsw.gov.au/lrc/lrc_currentprojects/lrc_criminalappeals.html).

## Criminal Appeals

- 1.8 Depending on the issues raised in submissions, we may release further question papers seeking submissions on more specific issues. We also intend to conduct face-to-face consultations with stakeholders on the issues presented.
- 1.9 We call for submissions by **Friday, 16 August 2013**.

### Achieving the aims of our terms of reference

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#### Question 1

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

#### Our aims

- 1.10 The overarching aim of our review is to **consolidate** and **simplify** the law relating to criminal appeals in NSW.
- 1.11 As our terms of reference require, we also seek to balance **finality** and **efficiency** on the one hand, with **fairness** on the other.
- 1.12 An efficient appeals system requires that the rules governing appeals contribute to the timely resolution of criminal matters at a reasonable cost to the parties and the state. Finality is an important aspect. The defendant, the victim and the public legitimately expect appeals will come to an end at some point (although there may be safeguards for later reopening and review for cases of miscarriage of justice).
- 1.13 Fairness is important in ensuring the integrity of the criminal justice system. Fairness requires that adequate appeal rights are available for both the defendant and the prosecution to correct errors of fact and law. It also requires that due regard be had to principles of good process like double jeopardy, which has traditionally limited the scope of prosecution appeals but has been re-examined in recent times.
- 1.14 Efficiency and fairness are sometimes in conflict, but not always. Undue delay in resolving matters can compromise fairness.

#### The need for consolidation

- 1.15 Three primary pieces of legislation govern criminal appeals and reviews in NSW:
- *Criminal Appeal Act 1912* (NSW) (CAA)

- *Crimes (Appeal and Review) Act 2001* (NSW) (CARA), and
  - *Supreme Court Act 1970* (NSW) (SCA).
- 1.16 The current legislation creates a framework which is disjointed and complicated. In Report 133, *Bail*, we recommended that consideration be given to amalgamating the CAA and the CARA into a single statute.<sup>1</sup> One aim of this review is to create, as far as is possible, a single consolidated statute for criminal appeals in NSW.
- 1.17 The separation of the criminal appeals framework into different pieces of legislation is an historical remnant and reflects the piecemeal way in which criminal appeals have developed over the last two centuries.
- 1.18 Initially, at common law in NSW there was no general right of appeal against a conviction or sentence. The only possibility was the Crown's grant of prerogative mercy.
- 1.19 Legislative rights of appeal in NSW were first created in 1835 to provide for appeals against decisions of magistrates.<sup>2</sup> At the time, magistrates were not judicial officers, and it was considered important that a superior court be able to review their decisions. Subsequent legislation gradually expanded this right of appeal.<sup>3</sup> In 2001 the existing *Justices Act 1902* (NSW) was substantially re-enacted in the CARA.
- 1.20 The right of appeal against decisions of the District and Supreme Courts initially adopted the common law position which prevailed in England. No appeal was available. The trial judge could refer a point of law to the appellate court, which then had the power to quash the conviction. It was not until the enactment of the CAA in 1912 that NSW introduced a wide-ranging system of appeals against both conviction and sentence.<sup>4</sup> That Act was modelled on the *Criminal Appeal Act 1907* (UK).

### The need for simplification

- 1.21 The current system is complex. Because there is no overarching appeals framework, different avenues of appeal have developed in different ways. In this reference we aim to simplify the appeals framework and, where appropriate, resolve some of the inconsistencies that have developed between different courts.
- 1.22 At the end of this paper we set out the avenues of criminal appeal in NSW. Examples of complexity in the current framework include:
- There are various avenues of appeal for matters prosecuted in the Local Court. Both parties may appeal to the District Court as of right, and also to the

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1. NSW Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 9.3.

2. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008).

3. *Justices Appeal Act of 1881* (NSW) 45 Vic No 4; subsequently *Justices Act 1902* (NSW) s 101-111; *Justices Act Amendment Act 1900* (NSW) s 9-20; subsequently *Justices Act 1902* (NSW) s 122-131.

4. See Justice P McLellan, "A Matter of Fact: The Origins of the Court of Criminal Appeal" (Paper presented at the Court of Criminal Appeal Dinner, Sydney, 3 December 2012) 22.

## Criminal Appeals

Supreme Court as of right on a question of law. Decisions of the Local Court dealing with environmental offences are appealed to the Land and Environment Court. Appeal decisions of the District Court or the Land and Environment Court can be further appealed to the Court of Criminal Appeal (CCA), or judicially reviewed by the Court of Appeal. Appeal decisions of the Supreme Court are appealed to the Court of Appeal.

- Decisions of the District Court and the Land and Environment Court determining an appeal from the Local Court are appealed to the CCA through the case stated procedure. The CCA has criticised this process as being complicated and expensive.
- The Court of Appeal can judicially review decisions of the Local Court, District Court and Land and Environment Court. This means that both the Court of Appeal and the CCA have jurisdiction to hear criminal proceedings through different avenues.
- There are different leave requirements for decisions of different courts. This means that some decisions may be more easily appealed than others. For example, the defendant can appeal against a sentence imposed in the Local Court as of right, but can only appeal against a sentence imposed in the District or Supreme Court with leave.
- Appeals from the Local Court to the District Court are by way of rehearing. This means that the appeal judge will come to his or her own view of the evidence without the need to show error by the Local Court. Appeals from the District and Supreme Courts require error to be proven before the CCA will intervene.
- Changes to the rule against double jeopardy introduced in 2006 now allow the prosecution to appeal against an acquittal, but only where the matter was heard by a judge sitting in the absence of a jury or where the judge directed the jury to acquit. The prosecution cannot appeal against a jury verdict of acquittal.
- Separate provisions apply to appeals from the Drug Court, Land and Environment Court and Industrial Court, as well as appeals from pronouncements and sentences under the habitual criminal provisions.

1.23 Some of these differences serve policy objectives, whereas others may not.

### Reforming particular aspects of the criminal appeals process

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1.24 In this section we discuss particular parts of the criminal appeals process, and we ask whether any changes need to be made.

1.25 With the aim of consolidation in mind, we discuss the criminal appeals process in a general way, referring to the particular provisions that apply in different courts where necessary. However, we also seek views on whether there are particular aspects of the criminal appeals process that should apply separately to different courts.

## What should the avenues of appeal be in criminal proceedings?

### Question 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?
- (2) What arrangements should be made for judicial review?
- (3) How often are decisions of the Local Court in a criminal matter appealed directly to the Supreme Court?
- (4) Is it preferable for the District Court to deal with all appeals from the Local Court in the first instance?
- (5) Which court should hear appeals from a decision of the Supreme Court on appeal from the Local Court?
- (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?
- (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?

- 1.26 There are currently a number of different avenues of appeal and review in criminal matters. This framework may potentially result in overlap or duplication. Apart from increasing the complexity of the appeals process, it may also result in additional costs and delay if parties pursue multiple avenues of appeal.
- 1.27 For criminal matters heard in the Local Court, District Court or Land and Environment Court, it also leads to the situation where both the Court of Appeal and the CCA potentially have jurisdiction over the same criminal prosecution.
- 1.28 Furthermore, many appeals may be sought as of right only where there is a question of law. It is not always easy to determine whether a ground of appeal raises a question of law, as opposed to a question of fact or a question of mixed fact and law.<sup>5</sup> This can require appellate courts to spend a considerable amount of time characterising the question raised on appeal, before they can give any consideration to the merits.

5. See, eg, *AG (NSW) v X* [2000] NSWCA 199; 49 NSWLR 653 [25]-[44] (Spigelman CJ); *Krishna v DPP (NSW)* [2007] NSWCCA 318; 178 A Crim R 220 [44]-[53] (Rothman J).

### What types of decisions should be subject to appeal?

#### 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?
- (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?

1.29 Although it varies depending on the court and the party lodging the appeal, generally appeals can be sought against:

- conviction
- sentence
- an order staying or dismissing summary proceedings
- refusal by the Local Court to annul a conviction
- an order made in committal proceedings
- an interlocutory order, in certain circumstances
- acquittal, in certain circumstances
- an order quashing an indictment
- an order for costs in summary proceedings
- a decision by the trial judge to discharge the jury
- a pronouncement or sentence under the *Habitual Criminals Act 1957* (NSW)

1.30 At the end of this paper we provide further information about when these decisions can be appealed.

#### ***What types of decisions should the prosecution be able to appeal?***

1.31 Not every decision made in a criminal matter is appealable. Historically the prosecution has had limited rights of appeal, and could not appeal against an acquittal. In 2006 the NSW Parliament introduced changes to the rule against double jeopardy.<sup>6</sup> As a result, the prosecution can now appeal an acquittal, but only where the acquittal was by a judge sitting alone, by a jury at the direction of the judge, or by the Supreme Court or Land and Environment Court in their summary jurisdiction. Appeals against acquittal are limited to questions of law.<sup>7</sup>

1.32 However, where a defendant pleads that he or she has been previously convicted or acquitted of the same offence,<sup>8</sup> and the judge accepts that plea, the prosecution cannot appeal the judge's decision.

6. *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

7. See *Crimes (Appeal and Review) Act 2001* (NSW) s 107.

8. Known as *autrefois convict*, or *autrefois acquit*: see *Criminal Procedure Act 1986* (NSW) s 156.

***What should the law be in respect of appeals against interlocutory orders?***

- 1.33 There are different requirements in each court for appealing against an interlocutory order made in criminal proceedings.
- 1.34 The CCA will not lightly intervene in appeals against interlocutory orders. Its position is that criminal trials should ordinarily proceed uninterrupted unless the rights of a party will be permanently affected or the interests of justice otherwise require.<sup>9</sup> Decisions of the CCA have effectively restricted the circumstances in which a defendant can appeal against an interlocutory order.<sup>10</sup> While this does not affect the defendant's right to appeal following conviction or sentence, having to wait until the final order is made may result in delay, and additional costs.

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

- 1.35 Currently there are different leave requirements for different types of appeals. Some decisions may be appealed as of right, whereas other decisions may be appealed only with leave of the appellate court or a certificate of the trial judge. Some appeals are restricted to questions of law, whereas other appeals may be sought on any ground.
- 1.36 This can lead to complexity and inconsistency. The same type of appeal may have different leave requirements depending on the party appealing or the court to or from which the appeal lies. For example:
- the prosecutor may appeal as of right against the leniency of a sentence imposed for an indictable offence in the District or Supreme Court, whereas the defendant may only appeal the severity of a sentence with the leave of the CCA, and
  - either party may appeal with leave against an interlocutory order made by the Local Court, whereas in the case of an interlocutory order made by the District or Supreme Court the prosecution may appeal as of right, and the defendant by leave only.
- 1.37 Where the matter is prosecuted in the Local Court, both the defendant and the prosecutor may appeal to the District Court as of right. We are interested in views about whether this broad right of appeal impacts upon the efficiency of the criminal justice system.
- 1.38 **Table 1** shows the type of decisions in criminal matters that may be appealed against and the leave requirements for each.

9. See, eg, *Kocer v The Queen* [2006] NSWCCA 328 [23].

10. See NSW Law Reform Commission, *Jury Selection*, Report 117 (2007) [11.51].



Table 1: Leave requirements for initiating a criminal appeal

Type of appeal	Local Court* → District Court	Local Court → Land and Environment Court	Local Court* → Supreme Court	District Court / Supreme Court^ → Court of Criminal Appeal
<b>Appeal against conviction/acquittal</b>				
Defendant	As of right (leave required if defendant absent at conviction or pleaded guilty). As of right against the refusal of the Local Court to annul a conviction.	As of right. With leave on a question of law if defendant absent at conviction or pleaded guilty.	As of right on a question of law. With leave on a question of fact or mixed fact and law.	<u>Indictable offences</u> : As of right on a question of law. With leave or certificate of the trial judge on any other ground. <u>A related summary offence or an offence heard in the Supreme or District Court's summary jurisdiction</u> : As of right.
Prosecution	No appeal available.	As of right on a question of law (in respect of an order staying or dismissing summary proceedings).	As of right on a question of law (in respect of an order staying or dismissing summary proceedings).	As of right on a question of law, where the acquittal was by a jury at the direction of the trial judge, by a judge sitting without a jury, or by the Supreme Court in its summary jurisdiction.
<b>Appeal against sentence</b>				
Defendant	As of right.	As of right.	As of right on a question of law. With leave on a question of fact or mixed fact and law.	<u>Indictable offences</u> : With leave. <u>A related summary offence or an offence heard in the Supreme or District Court's summary jurisdiction</u> : As of right.
Prosecution	As of right.	As of right. Leave required if the prosecutor is not the DPP or the Environment Protection Authority.	As of right on a question of law.	As of right, for both indictable and summary offences.
<b>Appeal against interlocutory orders</b>				
Defendant	No appeal available.	With leave on a question of law (includes orders made in committal proceedings).	With leave on a question of law (includes orders made in committal proceedings).	With leave or a certificate of the trial judge.
Prosecution	No appeal available.	With leave on a question of law (includes orders made in committal proceedings).	With leave on a question of law (includes orders made in committal proceedings).	As of right.

Type of appeal	Local Court* → District Court	Local Court → Land and Environment Court	Local Court* → Supreme Court	District Court / Supreme Court^ → Court of Criminal Appeal
<b>Appeal against costs order</b>				
Defendant	As of right.	As of right.	As of right on a question of law. With leave on a question of fact or mixed fact and law.	As of right in respect of an order made in the District or Supreme Court's summary jurisdiction or for a related summary offence.
Prosecution	As of right.	As of right on a question of law.	As of right on a question of law.	No appeal available.

\*Includes Children's Court.

^Includes Land and Environment Court (summary offences only).

## What changes should be made to the case stated procedure?

### Question 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?

- 1.39 A judge of the District Court or the Land and Environment Court may submit a question of law, arising on an appeal from the Local Court, to the CCA for determination.<sup>11</sup> This is known as a "case stated". Either party may ask the judge to state a case to the CCA. It is the only method of seeking appeal from a decision of the District Court or the Land and Environment Court that has determined an appeal from the Local Court. There is no general avenue of appeal, or even an ability to appeal on any question of law.<sup>12</sup>
- 1.40 In a case stated the judge must state the facts found in the proceedings and the questions of law for the CCA to consider. This process has been described as "to a high degree formalistic and technical".<sup>13</sup> As the CCA may not, strictly speaking, have regard to matters outside the stated case, its formulation is particularly important.<sup>14</sup>
- 1.41 The CCA has criticised the case stated procedure as being difficult and time consuming. Justice Schmidt has described it as "cumbersome, unwieldy and, in my view, ultimately unjust and unnecessarily expensive".<sup>15</sup>
- 1.42 A case stated application must be filed within 28 days after the end of the appeal proceedings in the District Court or the Land and Environment Court. However, the detail required in preparing a case stated and the length of time involved in

11. *Criminal Appeal Act 1912* (NSW) s 5B, s 5BA.

12. See *Lavorato v The Queen* [2012] NSWCCA 61 [5]-[6] (Basten JA).

13. *Talay v The Queen* [2010] NSWCCA 308 [64] (Howie AJ).

14. *Talay v The Queen* [2010] NSWCCA 308 [17] (Simpson J).

15. *Lavorato v The Queen* [2012] NSWCCA 61 [72]. See also *Talay v The Queen* [2010] NSWCCA 308 [64] (Howie AJ).

obtaining a transcript of the proceedings can make it difficult to comply with this time limit.<sup>16</sup>

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

#### 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?

- 1.43 Most criminal appeals must be filed within 28 days of the first instance decision being made. **Table 2** sets out the time limits that apply to the filing of an appeal.

**Table 2: Time limits for filing a criminal appeal**

Party	Local Court* → District Court/Land and Environment Court	Local Court* → Supreme Court	District Court/Supreme Court^ → Court of Criminal Appeal
Defendant	<ul style="list-style-type: none"> <li>▪ 28 days from the Local Court's decision.</li> <li>▪ Between 28 days and 3 months after the Local Court's decision – leave of the appellate court is required.</li> </ul> <p>(CARA s 11(2), s 11A(2), s 12(3), s 13, s 31(2), s 32(4), s 33).</p>	<ul style="list-style-type: none"> <li>▪ 28 days from the Local Court's decision.</li> <li>▪ The Supreme Court may grant an extension of time.</li> </ul> <p>(CARA s 52(2), s 53(4); <i>Supreme Court Rules 1970</i> (NSW) pt 51B r 5-6).</p>	<ul style="list-style-type: none"> <li>▪ 28 days from the District Court or Supreme Court decision.</li> <li>▪ CCA may dispense with the time limit for the filing of a notice of appeal or notice of intention to appeal, or the requirement for such a notice to be provided.</li> </ul> <p>(CAA s 10(1)).</p>
Prosecution	<ul style="list-style-type: none"> <li>▪ 28 days after the relevant sentence was imposed.</li> </ul> <p>(CARA s 23(3)).</p>	<ul style="list-style-type: none"> <li>▪ 28 days from the Local Court's decision.</li> <li>▪ The Supreme Court may grant an extension of time.</li> </ul> <p>(CARA s 56(2); <i>Supreme Court Rules 1970</i> (NSW) pt 51B r 5-6).</p>	<ul style="list-style-type: none"> <li>▪ <u>For appeal against acquittal</u>: 28 days after the acquittal. The CCA may give leave for an appeal to be filed after this time.</li> <li>▪ <u>For appeal against sentence</u>: no time limit.</li> </ul> <p>(CARA s 107(3)). (<i>R v Ohar</i> (2004) 145 A Crim R 453).</p>

\*Includes Children's Court.

^Includes Land and Environment Court.

- 1.44 We have identified two potential problems with the current law relating to time limits.

16. *Lavorato v The Queen* [2012] NSWCCA 61 [14] (Basten JA), [70]-[71], [73] (Schmidt J).

***Should the District Court and the Land and Environment Court be able to accept an application filed out of time?***

- 1.45 A decision of the Local Court must be appealed to the District Court or the Land and Environment Court within 28 days of the decision being made. Applications filed between 28 days and 3 months after the Local Court decision require the leave of the court. However, there is no express provision in the CARA allowing the court to accept an application which is filed beyond this time. Section 62 of the CARA allows an appeal court hearing an appeal, or an application for leave to appeal, to amend the notice of appeal or application for leave to appeal if it is satisfied that the notice or application ought to be amended. It is not clear whether this power allows the court to amend the date of filing of the application, so as to bring it within the time limit.
- 1.46 By way of contrast, both the CCA and the Supreme Court have the power to grant an extension of time or to dispense with the time limit for filing an appeal. We seek views on whether the District Court and the Land and Environment Court should have a similar power.

***What should the time limits be for prosecution appeals?***

- 1.47 A prosecutor has 28 days after the “relevant sentence” is imposed in the Local Court to appeal to the District Court.<sup>17</sup> However, a costs order made against the prosecutor is not considered to be a “sentence”.<sup>18</sup> The CARA does not otherwise specify whether there is a time limit for the filing of a prosecution appeal against a costs order.
- 1.48 In addition, the CAA does not specify the time limit for the filing of a prosecution appeal against a sentence imposed by the District Court or Supreme Court. The CCA has interpreted this to mean that no time limit applies.<sup>19</sup> We seek views on whether having a time limit on prosecution appeals against sentence would assist in achieving efficiency in the criminal appeals system.

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

**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?

- 1.49 Appeals from the Local Court to the District Court or to the Land and Environment Court proceed by way of rehearing on the basis of the evidence given in the original Local Court proceedings.<sup>20</sup> Appeal by rehearing means that the judge will consider

17. *Crimes (Appeal and Review) Act 2001* (NSW) s 23(3).

18. See *Crimes (Appeal and Review) Act 2001* (NSW) s 3(1) (definition of “sentence”).

19. *R v Ohar* (2004) 145 A Crim R 453.

20. *Crimes (Appeal and Review) Act 2001* (NSW) s 17-18, s 37.

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the evidence that was before the Local Court and come to his or her own decision. There is no need to show that the Local Court made an error before the appeal can succeed.

- 1.50 In this way, appeal by rehearing is different from appeals in the strict sense, which require error to be proven. It is also different to a hearing *de novo*, at which the evidence will be given afresh. In an appeal by rehearing, the judge will form his or her own view of the facts, but will take into account the advantage the Local Court had by hearing the witnesses firsthand.<sup>21</sup>
- 1.51 The current form of appeal from Local Court decisions originated at a time when magistrates were not judicial officers. It was not possible for the Court of Quarter Sessions (now the District Court) to review decisions of the Court of Petty Sessions (now the Local Court), and so the appeal was heard afresh.<sup>22</sup> However, given that magistrates are now legally qualified judicial officers, it has been questioned whether the District Court's power of rehearing can still be justified.<sup>23</sup>
- 1.52 Furthermore, because there is no need to demonstrate error in an appeal by rehearing, it may be easier to successfully appeal a Local Court decision than a District or Supreme Court decision. In 2012, approximately 60% of appeals to the District Court against the severity of a sentence imposed in the Local Court were successful.<sup>24</sup> During the financial year 2011-12, only 47% of appeals against sentence to the CCA, for which leave is required, succeeded.<sup>25</sup>
- 1.53 The NSW Attorney General's Department reviewed the CARA in 2008 and concluded that the District Court should retain its broad power of rehearing for an appeal against conviction in the Local Court. However, in the case of an appeal against sentence, it suggested that the District Court should only intervene where the sentence could be shown to be manifestly excessive or manifestly inadequate.<sup>26</sup>
- 1.54 For our reference on sentencing we sought submissions on whether the current test for an appeal against sentence from the Local Court to the District Court should be changed by requiring the appellant to prove error.<sup>27</sup> Stakeholders expressed differing views about whether the current test was in need of reform.<sup>28</sup> We will take those submissions into account in this review, but we seek any further submissions on this issue.

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21. *Charara v The Queen* [2006] NSWCCA 244; 164 A Crim R 39 [18].

22. See NSW, *Parliamentary Debates*, Legislative Council, 17 September 1998, 7595 (JW Shaw).

23. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 30.

24. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2012* (2013) 130.

25. NSW Director of the Office of Public Prosecutions, *Annual Report 2011-2012* (2012) 54.

26. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 31, 33-34.

27. NSW Law Reform Commission, *Procedural and Jurisdictional Aspects*, Sentencing: Question Paper 12 (2012) 14-15, Question 12.6(1).

28. See G Henson, *Preliminary Submission PSE5*, 5-6; Shopfront Youth Legal Centre, *Submission SE37*, 3; NSW Office of the Director of Public Prosecutions, *Submission SE41*, 13; Law Society of NSW, *Submission SE43*, 14; NSW Police Force, *Submission SE45*, 2-5; NSW Bar Association, *Submission SE46*, 7. The submissions received for our sentencing reference can be viewed on our website: <http://bit.ly/1b3E7VS>.

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

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

1.55 In contrast to appeals from the Local Court, appeals from the District Court and Supreme Courts require error to be demonstrated before the CCA can intervene. We discuss below:

- the tests for an appeal against conviction and against sentence, and
- the differences between the test for an appeal against conviction and the test for a directed acquittal at first instance.

### *What should the test be for appeal against conviction and sentence?*

1.56 The CCA may allow an appeal against a conviction imposed in the District Court or Supreme Court if it is of the opinion that:

- (a) the verdict of the jury is unreasonable or cannot be supported, having regard to the evidence
- (b) the judgment of the trial court is wrong on a question of law, or
- (c) there was otherwise a miscarriage of justice.

Even if error can be established, the CCA can nevertheless uphold the conviction if it is of the view that no substantial miscarriage of justice has occurred.<sup>29</sup>

1.57 In an appeal against sentence, in order for the appeal to succeed an error must be demonstrated in the sentencing court's exercise of its discretion. A sentencing court's discretion will have miscarried where:

- (a) the judge:
  - (i) acted on a wrong principle
  - (ii) allowed irrelevant or extraneous matters to guide the decision
  - (iii) mistook the facts
  - (iv) did not take into account a material consideration, or

29. *Criminal Appeal Act 1912* (NSW) s 5(1).

- (b) if, on the facts, the sentence was unreasonable or plainly unjust.<sup>30</sup>
- 1.58 Where there is no obvious error on the face of the sentencing transcript, a sentence may nevertheless be overturned if the CCA considers that it is manifestly excessive or manifestly inadequate. If error is proven, before it can resentence the offender the CCA must form a positive opinion that some other sentence is warranted in law and should have been passed.<sup>31</sup>
- 1.59 The Chief Judge of the District Court has 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.<sup>32</sup>
- 1.60 For our reference on sentencing we asked for submissions on whether there should be a change to the test for an appeal against sentence. We suggested that the test for miscarriage of discretion could be replaced with a single test of whether the sentence was manifestly excessive or manifestly inadequate.<sup>33</sup>
- 1.61 Stakeholders expressed differing views about whether the current test needed reform.<sup>34</sup> We will take those submissions into account in this review, but we seek any further submissions on this issue.

### ***Should the tests for directed acquittal and appeal against conviction be the same?***

- 1.62 Recent case law has highlighted the differences between the test for a directed acquittal and the test for overturning a conviction on appeal. At trial, a judge may only direct the jury to enter a verdict of acquittal where the evidence, at its highest, is not capable of supporting a verdict of guilty.<sup>35</sup> The test on appeal, however, appears to be lower and asks whether the jury verdict is unreasonable, or cannot be supported, having regard to the evidence.<sup>36</sup> The difference in tests may lead to a situation where a trial judge cannot direct an acquittal, but on appeal the CCA can overturn the conviction.
- 1.63 This occurred in *Smith v The Queen*, where the appellant was convicted of murder. Because there was some evidence suggesting that the appellant was responsible

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30. *House v The King* (1936) 55 CLR 499, 505.

31. *Criminal Appeal Act 1912* (NSW) s 5(3). A similar discretion, although differently worded, applies to Crown appeals against sentence: s 5D(1).

32. R O Blanch, *Preliminary Submission PSE3*, 3.

33. NSW Law Reform Commission, *Procedural and Jurisdictional Aspects*, Sentencing: Question Paper 12 (2012) 14-15, Question 12.6(1).

34. See R O Blanch, *Preliminary Submission PSE3*, 3; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 7; NSW Office of the Director of Public Prosecutions, *Submission SE41*, 13; NSW Bar Association, *Submission SE46*, 7; Legal Aid NSW, *Submission SE50*, 23-24. The submissions received for our sentencing reference can be viewed on our website: <http://bit.ly/1b3E7VS>.

35. *Doney v The Queen* (1990) 171 CLR 207, 215.

36. *Criminal Appeal Act 1912* (NSW) s 6(1).



for the deceased's death, the trial judge could not direct the jury to acquit. However, on appeal the CCA held that there was a reasonable scenario consistent with the appellant's innocence, which made the jury's verdict unreasonable.<sup>37</sup> Although the appellant was ultimately acquitted, having to appeal the conviction meant that the appellant spent a significant amount of time in prison and resulted in additional costs and delays for both parties, as well as for the courts.

- 1.64 In England and Wales, the test for a directed acquittal was changed to align with the test for appeal against conviction introduced by the *Criminal Appeal Act 1966* (UK). The judge may direct an acquittal if a verdict of guilty would be unsafe or unsatisfactory. However, the High Court of Australia has decided not to adopt this test.<sup>38</sup>

### Should the tests for appeal be consistent between different courts?

#### Question 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?

- 1.65 Currently there are very different tests that apply in appeals from the Local Court to the District Court and the Land and Environment Court, and from the District and Supreme Courts to the CCA. Consistent tests across all courts in NSW would assist in achieving consolidation and simplification.

### Should fresh evidence be available on appeal?

#### 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?

- 1.66 In appeals from the Local Court to the District Court, there are different rules for the giving of fresh evidence, depending on whether the appeal is against sentence or against conviction:
- in an appeal against conviction, fresh evidence may only be given **with the leave of the District Court**, and only if the court is satisfied that it is in the interests of justice that the fresh evidence be given,<sup>39</sup> and
  - in an appeal against sentence, fresh evidence may be given **as of right**.<sup>40</sup>

37. *Smith v The Queen* [2013] NSWCCA 64 [82].

38. *Doney v The Queen* (1990) 171 CLR 207, 213-5.

39. *Crimes (Appeal and Review) Act 2001* (NSW) s 18(1)-(2). In the Land and Environment Court leave is required to give fresh evidence in both appeals against sentence and against conviction: s 37(2), s 47.

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- 1.67 Historically, in both types of appeals fresh evidence could be given without leave. In 1998, the legislation was amended so that appeals against conviction required leave to give fresh evidence.<sup>41</sup> It is not clear why the law was not similarly amended with respect to appeals against sentence.
- 1.68 There is an argument that the need to introduce fresh evidence on a sentencing appeal should rarely arise, because both the prosecution and defence are under an obligation to produce all relevant material to the first instance court.<sup>42</sup> On the other hand, the circumstances of the offender that are relevant to the sentencing discretion may change pending an appeal, and it should be possible to admit such evidence as a matter of course without the need for the District Court to grant leave.
- 1.69 In 2008 the NSW Attorney General's Department reviewed the CARA and suggested that leave of the District Court should be required to give fresh evidence in both appeals against sentence and appeals against conviction. However, it recommended that there be further consultation on this proposal.<sup>43</sup>
- 1.70 The CCA may hear fresh evidence in appeals against both conviction and sentence if it is necessary or expedient in the interests of justice to do so. It has broad powers, including to order the production of any document or exhibit connected with the proceedings, order anyone who would have been a compellable witness at the trial to give evidence, receive evidence (if tendered) of any person who is a competent but not compellable witness, refer a question to a commissioner for inquiry, and appoint a person with special expert knowledge to act as assessor to the court.<sup>44</sup>

### What should the powers of the court be on appeal?

#### 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?

- 1.71 The powers of an appellate court vary depending on the type of appeal and the court hearing the appeal. In particular, the CCA has far greater powers following a successful appeal against conviction than is available to the District or Supreme Courts. **Table 3** sets out the powers of appellate courts on the hearing of an appeal.

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40. *Crimes (Appeal and Review) Act 2001* (NSW) s 17.

41. *Justices Legislation Amendment (Appeals) Act 1998* (NSW) sch 1 [2].

42. See NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 29.

43. NSW Attorney General's Department, *Crimes (Appeal and Review) Act 2001: Report on the Statutory Review of the Act* (2008) 29-30.

44. *Criminal Appeal Act 1912* (NSW) s 12.

Table 3: Powers of appellate courts on appeal

Type of appeal	District Court (on appeal from Local Court)	Supreme Court (on appeal from Local Court)	Court of Criminal Appeal (on appeal from District or Supreme Court)
Appeal against conviction/acquittal	<ul style="list-style-type: none"> <li>▪ Set aside conviction.</li> <li>▪ Dismiss appeal.</li> <li>▪ In the case of a person who pleaded guilty or was convicted in their absence – set aside the conviction and remit the matter to the Local Court for determination.</li> <li>▪ In the case of a successful appeal against a refusal by the Local Court to annul the conviction – the District Court <i>must</i> remit the matter to the Local Court.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Set aside conviction.</li> <li>▪ Set aside conviction and remit matter to Local Court for redetermination in accordance with Supreme Court’s directions.</li> <li>▪ In the case of an appeal against a stay or dismissal of summary proceedings – set aside order and make such other order as it thinks just.</li> <li>▪ Dismiss appeal.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Quash the conviction and direct a judgment and verdict of acquittal to be entered.</li> <li>▪ Affirm the sentence or pass such other sentence as appears warranted, if the defendant was properly convicted on some other count or part of the indictment.</li> <li>▪ Substitute a verdict of guilty for another offence and pass sentence, where the jury must have been satisfied of the facts which proved the appellant guilty of that offence.</li> <li>▪ Order a new trial if the court considers that a miscarriage of justice has occurred.</li> <li>▪ If it appears to the court that the defendant committed the act charged but was not guilty by reason of mental illness - quash the conviction and order that the defendant be detained in strict custody until released by due process of law, or make any other order considered appropriate.</li> <li>▪ Affirm the acquittal.</li> <li>▪ Quash the acquittal and order a new trial.</li> <li>▪ Dismiss appeal.</li> </ul>
Appeal against sentence	<ul style="list-style-type: none"> <li>▪ Set aside sentence.</li> <li>▪ Vary sentence.</li> <li>▪ Dismiss appeal.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Set aside sentence.</li> <li>▪ Vary sentence.</li> <li>▪ Dismiss appeal.</li> <li>▪ Set aside sentence and remit matter to Local Court for redetermination in accordance with Supreme Court’s directions (defendant appeals only).</li> </ul>	<ul style="list-style-type: none"> <li>▪ Quash the sentence and pass another sentence in substitution.</li> <li>▪ Quash or vary any other sentence passed at the trial.</li> <li>▪ Dismiss appeal.</li> </ul>
Appeal against summary offence heard in the District or Supreme Court	N/A	N/A	<p><u>For appeals by the defendant (conviction and/or sentence):</u></p> <ul style="list-style-type: none"> <li>▪ Confirm the determination.</li> <li>▪ Order that the determination be vacated. Make any determination that the District or Supreme Court could have made on the evidence heard on the appeal.</li> </ul> <p><u>For appeals by the Crown (sentence only):</u></p> <ul style="list-style-type: none"> <li>▪ Confirm, quash, set aside or vary the sentence.</li> <li>▪ Impose such sentence as may seem proper. (But cannot impose a sentence that the District or Supreme Court would not have had the power to impose).</li> <li>▪ Exercise any power that the Supreme Court or District Court might have exercised.</li> </ul>

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Type of appeal	District Court (on appeal from Local Court)	Supreme Court (on appeal from Local Court)	Court of Criminal Appeal (on appeal from District or Supreme Court)
Appeal against interlocutory order	N/A	<ul style="list-style-type: none"> <li>▪ Set aside order and make such other order as it thinks just.</li> <li>▪ Dismiss appeal.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Affirm the judgment, order, decision or ruling.</li> <li>▪ Vacate the judgment, order, decision or ruling. Give or make some other judgment, order, decision or ruling.</li> </ul>

*The Land and Environment Court has District Court powers for appeals against conviction and sentence, and Supreme Court powers for appeals against interlocutory orders.*

- 1.72 We discuss two specific issues regarding the powers of appellate courts: the lack of a District Court power to remit the matter back to the Local Court; and the powers available to the CCA in an appeal against conviction where the defendant pleaded guilty.

### ***Should the District Court have a power to remit?***

- 1.73 The District Court does not have an express general power to remit the matter back to the Local Court if an appeal is successful.<sup>45</sup> In *DPP (NSW) v Emanuel*, the defendant was denied procedural fairness by the Local Court in the hearing of an offence for which he was subsequently convicted. On appeal, the District Court quashed the conviction and remitted the matter to the Local Court, on the basis that the Local Court had no jurisdiction to make the original order. The DPP sought judicial review of the District Court's decision in the Court of Appeal. The Court of Appeal concluded that the District Court was in error, as it had no power to remit the matter to the Local Court.<sup>46</sup>
- 1.74 The Court of Appeal recognised the difficulty caused by the District Court not having the power to remit in that case. An appeal against conviction in the District Court is by way of rehearing, and fresh evidence can only be given by leave. Where there had not been a proper hearing in the Local Court, it would then be difficult for there to be a "rehearing" on appeal. Furthermore, there is no general right of appeal from an appeal decision of the District Court, the only avenue of appeal being through the limited case stated procedure. It would be anomalous for a defendant to be convicted at his or her first proper hearing, according to law, without a general right of appeal.<sup>47</sup>
- 1.75 Justice Basten considered that there are two possible ways to resolve this problem. The first is for the District Court to have a power of remittal. The second is to require the defendant to appeal directly to the Supreme Court alleging an error of law, or apply for judicial review, on the ground that the original proceedings were invalid. However, this course of action may increase delay and expense, and may provide

45. It has a power of remittal only in specific circumstances: see *Crimes (Appeal and Review) Act 2001* (NSW) s 16A(3), s 20(1)(c).

46. *DPP (NSW) v Emanuel* [2009] NSWCA 42; 193 A Crim R 552.

47. *DPP (NSW) v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [57].

for divided avenues of appeal in circumstances where the defendant seeks to appeal on more than one ground.<sup>48</sup>

### ***What powers should be available on appeal where the defendant pleaded guilty?***

- 1.76 If an appeal against conviction to the CCA is successful, the CCA may substitute a guilty verdict for that offence with a guilty verdict for another offence, where the jury must have been satisfied of the facts which proved the appellant guilty of that other offence. It may impose any sentence for the other offence which it considers warranted.<sup>49</sup> This is an alternative to the court acquitting the defendant or ordering a new trial. However, this power currently only applies where there has been a finding of guilt by a jury. It does not apply where the defendant pleaded guilty. It may be desirable for the CCA to be able to impose a substituted verdict in cases of guilty pleas, to avoid having to remit the matter to a lower court.

### **What power should an appellate court have to award costs?**

#### **Question 12**

What powers should courts have to award costs on appeal?

- 1.77 On an appeal from the Local Court, the CARA provides that the District Court and the Land and Environment Court may make any order as to costs that they consider just.<sup>50</sup> However, for appeals to the CCA, no costs are allowed on either side.<sup>51</sup> This means that each party must bear its own costs in an appeal.<sup>52</sup>
- 1.78 There is no express provision in the CARA allowing the Supreme Court to award costs in relation to an appeal from the Local Court. In *ACP v Munro*, Justice Button concluded that he had the power to order costs in an appeal before the Supreme Court, despite the absence of an explicit statutory power to do so, but suggested that parliament should consider this possible gap in the costs power.<sup>53</sup>

### **Should there be a stay of the sentence pending appeal?**

#### **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 s 63 and s 69 of the *Crimes (Appeal and Review) Act 2001* (NSW)?

48. *DPP (NSW) v Emanuel* [2009] NSWCA 42; 193 A Crim R 552 [58]-[59].

49. *Criminal Appeal Act 1912* (NSW) s 7(2).

50. *Crimes (Appeal and Review) Act 2001* (NSW) s 28(3), s 49(4). There is a limit on the costs that can be awarded against a public prosecutor: s 70.

51. *Criminal Appeal Act 1912* (NSW) s 17.

52. But see *Costs in Criminal Cases Act 1967* (NSW).

53. *ACP v Munro* [2012] NSWSC 1510 [106].

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- 1.79 For appeals from the Local Court, the execution of any sentence or penalty imposed is stayed pending final determination of the appeal.<sup>54</sup>
- 1.80 However, if the sentence is confirmed on appeal, s 69 of the CARA provides that any good behaviour bond that the offender entered into as a consequence of the original sentence continues to have effect according to its terms, except to the extent to which the appeal court otherwise orders and despite any stay of execution which has been in force. It seems unclear how this section should operate, given that the sentence will have been stayed pending the appeal.
- 1.81 Where the defendant has been convicted in the District or Supreme Court, there is no automatic stay of the sentence pending appeal to the CCA. If the defendant has been convicted on indictment and imprisoned, he or she may be granted bail pending the appeal only if special or exceptional circumstances exist.<sup>55</sup> Any period that the defendant spends released on bail does not count as part of the term of imprisonment.<sup>56</sup> The sentence will recommence following determination of the appeal.<sup>57</sup>

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

#### 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 s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to reopen proceedings?

- 1.82 The ability of a first instance court to reopen its own judgment can be an alternative to an appeal. Section 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to reopen proceedings on its own motion, or on the application of one of the parties, to correct a sentence where it imposed a penalty that was contrary to law, or where it failed to impose a penalty that was required to be imposed by law. For the most part, this power has been used to correct minor sentencing errors of law so as to ensure that the intended purpose of the decision is carried into effect, although it has been held to have a broader reach.<sup>58</sup>
- 1.83 The CCA recently considered the scope of s 43 in *Achurch v The Queen (No 2)*.<sup>59</sup> The court was asked to use s 43 to reopen its previous decision.

54. *Crimes (Appeal and Review) Act 2001* (NSW) s 63.

55. *Bail Act 1978* (NSW) s 30AA. See also *Bail Act 2013* (NSW) s 22 (not yet in force).

56. *Criminal Appeal Act 1912* (NSW) s 18(2).

57. See *Criminal Appeal Act 1912* (NSW) s 28A.

58. *Meakin v DPP* [2011] NSWCA 373; 216 A Crim R 128 [29]-[31]; *Erceg v District Court of NSW* [2003] NSWCA 379; 143 A Crim R 455 [104]-[109].

59. [2013] NSWCCA 117.



- 1.84 The CCA confirmed that s 43 is to be interpreted broadly. However, its use should be confined to cases where the error is apparent from the sentence itself, rather than from an analysis of the legal reasoning which underpins the sentence.<sup>60</sup> It is not to be treated as an alternative to an appeal. However, Chief Justice Bathurst and Justice Garling suggested that s 43 may be an appropriate avenue for review where the CCA itself is alleged to have made the error. Unless special leave is granted to appeal to the High Court, the CCA is effectively the final court for criminal appeals in NSW.<sup>61</sup>
- 1.85 Justice Johnson noted that the courts had interpreted s 43 more broadly than parliament had intended when it enacted the provision. However, because the CCA had not been asked to reconsider its previous decisions about s 43, he suggested that the matter be referred to the Attorney General for possible reform.<sup>62</sup>
- 1.86 In our recent reference on sentencing, we sought submissions on whether greater emphasis should be given to s 43.<sup>63</sup> We will have regard to submissions received in response to that question. However, we invite any further submissions on the use of s 43, particularly in light of *Achurch*.

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

#### Question 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?
- (2) In what circumstances should the Local Court be required to annul a conviction or sentence?

- 1.87 The Local Court, on application by either the prosecutor or defendant, can annul a conviction or sentence imposed in that court.<sup>64</sup> An annulment application may be made by a defendant if he or she was not in appearance before the Local Court when the conviction or sentence was made or imposed.
- 1.88 The Local Court *must* grant the defendant's application for annulment if:
- (a) the defendant was unaware of the original proceedings
  - (b) the defendant was prevented by "accident, illness, misadventure or other cause" from taking action in relation to the original Local Court proceedings, or

60. *Achurch v The Queen (No 2)* [2013] NSWCCA 117 [66] (Bathurst CJ and Garling J), [108] (McLellan JA), [118] (Johnson J), [164] (Bellew J).

61. *Achurch v The Queen (No 2)* [2013] NSWCCA 117 [68].

62. *Achurch v The Queen (No 2)* [2013] NSWCCA 117 [160], see also [117].

63. NSW Law Reform Commission, *Procedural and Jurisdictional Aspects*, Sentencing: Question Paper 12 (2012) Question 12.6(2).

64. *Crimes (Appeal and Review) Act 2001* (NSW) s 4(1).



## Criminal Appeals

- (c) having regard to the circumstances of the case, it is in the interests of justice.<sup>65</sup>
- 1.89 Paragraphs (b) and (c) are to be widely interpreted.<sup>66</sup>
- 1.90 The “interests of justice” consideration in paragraph (c) could encompass a wide range of circumstances and effectively turn an annulment application into a quasi-appeal. Where a defendant files an informal written plea of guilty, he or she will not be “in appearance” before the Local Court at the time the conviction or sentence is made or imposed.<sup>67</sup> However, the defendant could then seek an annulment of the conviction on the ground that it is in the interests of justice to do so. The Local Court *must* grant the annulment application if it is satisfied that this is the case.
- 1.91 Furthermore, a defendant who was absent when convicted by the Local Court must first apply for annulment before he or she can appeal to the District Court or the Land and Environment Court.<sup>68</sup> This may, in effect, treat annulment as the first step in the appeals process.

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

#### Question 16

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

- 1.92 We seek views on whether there are any other problems or matters of importance that we should canvas in this reference.

## Current law

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- 1.93 In this section we describe the current avenues of criminal appeal in NSW.
- 1.94 **Figure 1** provides an overview of the criminal appeals process from decisions of the Local Court. **Figure 2** shows the criminal appeals process from decisions of the District Court and Supreme Court.

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65. *Crimes (Appeal and Review) Act 2001* (NSW) s 9(1).

66. *Miller v DPP* [2004] NSWCA 90; 145 A Crim R 95 [31], [39].

67. Written pleas that comply with *Criminal Procedure Act 1986* (NSW) s 182 are taken to be appearances: s 182(3)(b).

68. *Crimes (Appeal and Review) Act 2001* (NSW) s 12(2), s 32(3).

Figure 1: Criminal appeals process from the Local Court

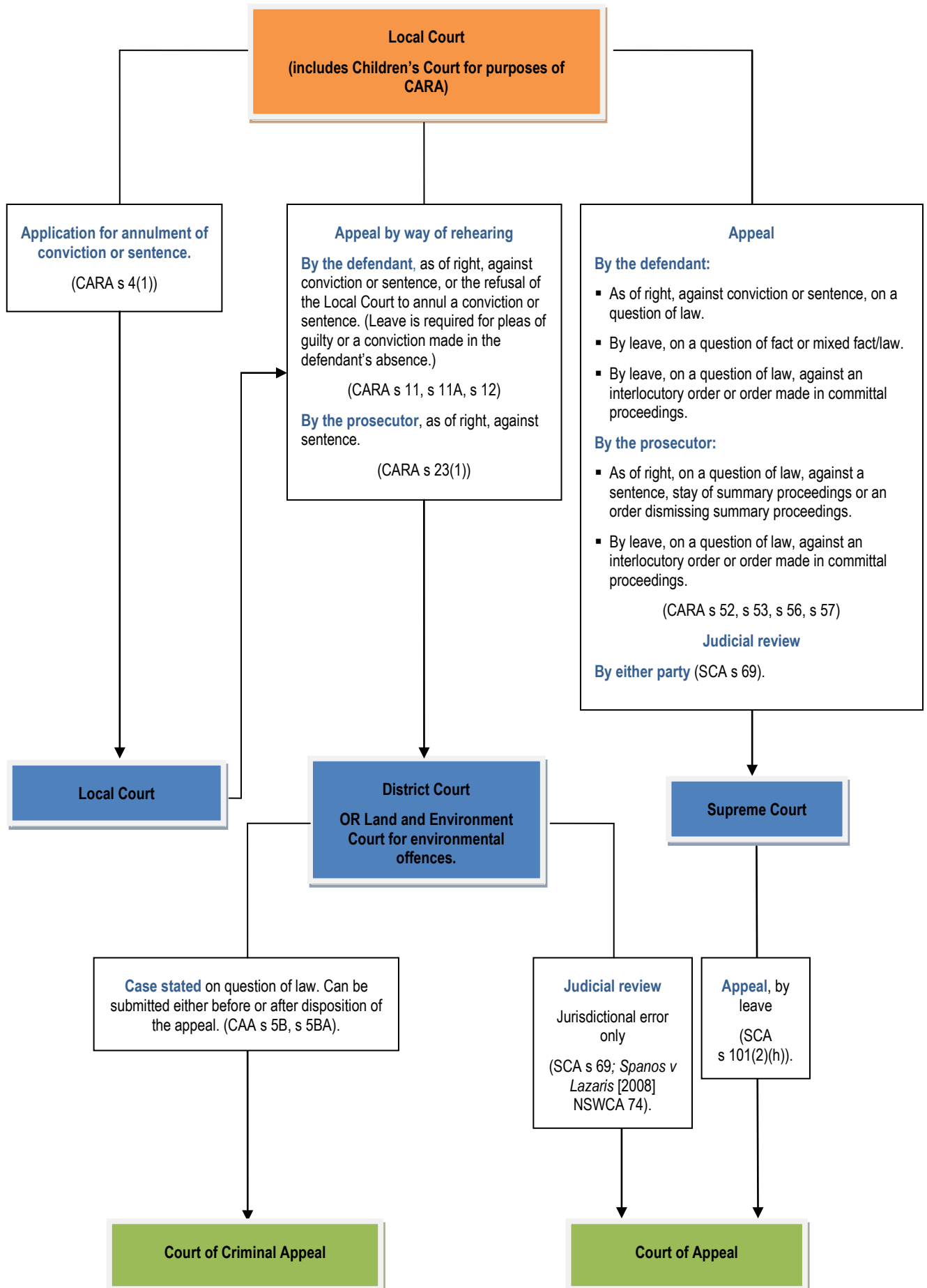
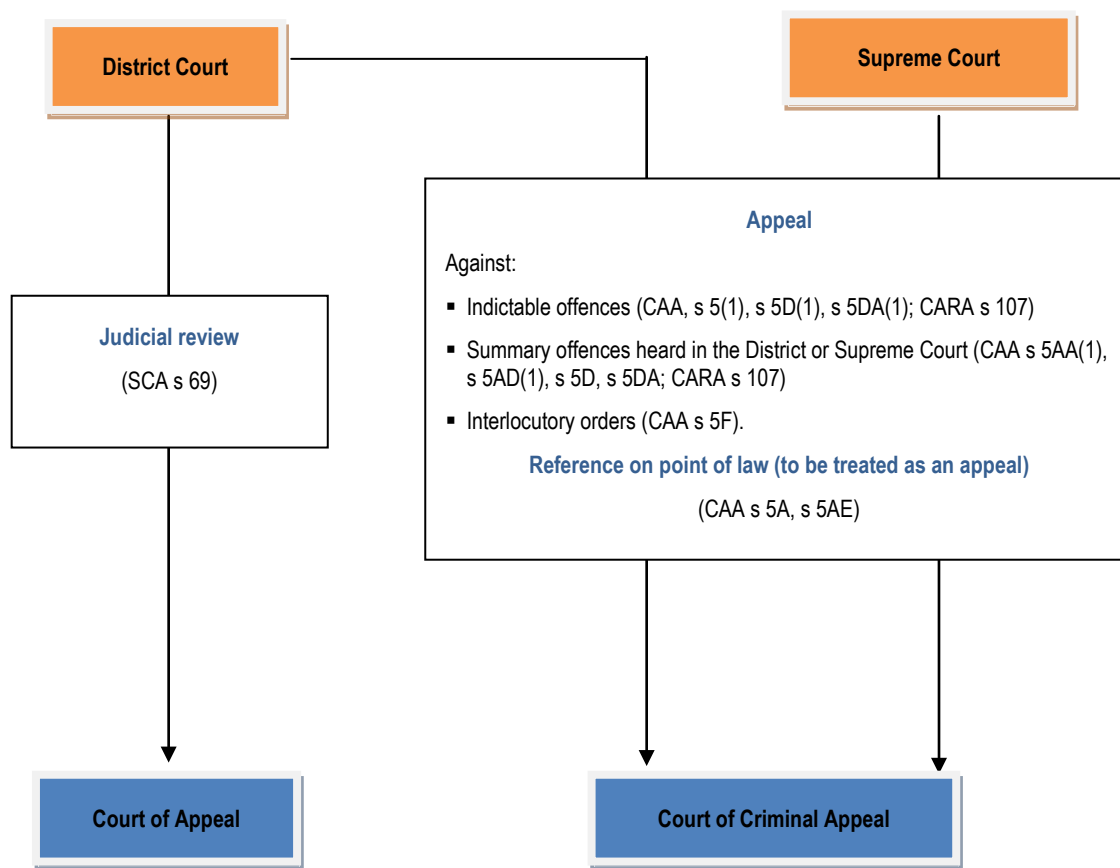


Figure 2: Criminal appeals process from the District Court and Supreme Court



### Matters prosecuted in the Local Court

1.95 There are numerous avenues of criminal appeal from decisions of the Local Court, depending on the type of offence and the type of appeal being sought. The CARA governs Local Court appeals. **Table 4** summarises these avenues of appeal. For the purposes of the CARA, Local Court includes the Children’s Court.<sup>69</sup>

Table 4: Avenues of criminal appeal from decisions of the Local Court

	Defendant	Prosecution
Local Court → Local Court	Annulment of the conviction or sentence, where the defendant did not appear when the conviction was made or the sentence imposed. (CARA s 4(1))	Annulment of the conviction or sentence. (CARA s 4(1))
Local Court → District Court	As of right, against conviction or sentence or both, or against the refusal of the Local Court to annul a conviction or sentence.  With leave, against a conviction made in the defendant’s absence or following a plea of guilty.  (CARA s 11, s 11A, s 12(1))	As of right, against a sentence imposed in proceedings for: (a) an indictable offence dealt with summarily, (b) a prescribed summary offence, or (c) a summary offence that has been prosecuted by or on behalf of the DPP.  (CARA s 23(1))

69. *Crimes (Appeal and Review) Act 2001* (NSW) s 3 (definition of “Local Court”).

	Defendant	Prosecution
<p><b>Local Court</b> → <b>Land and Environment Court</b> (for environmental offences<sup>70</sup>)</p>	<p>As of right, against conviction or sentence.</p> <p>With leave, against:</p> <ul style="list-style-type: none"> <li>▪ a conviction made in the defendant's absence or following a plea of guilty</li> <li>▪ an order made in committal proceedings or an interlocutory order, but only on a ground that involves a question of law.</li> </ul> <p>(CARA s 31-32)</p>	<p>As of right, against sentence.</p> <p>As of right, on a question of law, against:</p> <ul style="list-style-type: none"> <li>▪ an order staying summary proceedings,</li> <li>▪ an order dismissing a matter the subject of summary proceedings, or</li> <li>▪ an order for costs against the prosecutor in summary proceedings.</li> </ul> <p>With leave, against an order made in committal proceedings or an interlocutory order, but only on a ground that involves a question of law.</p> <p>(Prosecution includes Environment Protection Authority). (CARA s 42-43)</p>
<p><b>Local Court</b> → <b>Supreme Court</b></p>	<p>As of right on a question of law, against conviction or sentence.</p> <p>With leave, against:</p> <ul style="list-style-type: none"> <li>▪ conviction or sentence, where the ground involves a question of fact or mixed fact and law</li> <li>▪ an order made in committal proceedings, an interlocutory order<sup>71</sup> or a conviction or sentence for an environmental offence, on a question of law.</li> </ul> <p>(CARA s 52-53)</p>	<p>As of right, against:</p> <ol style="list-style-type: none"> <li>(a) a sentence imposed by the Local Court in summary proceedings,</li> <li>(b) a stay by the Local Court of summary proceedings, or</li> <li>(c) an order of the Local Court dismissing summary proceedings.</li> </ol> <p>With leave, against:</p> <ol style="list-style-type: none"> <li>(a) a sentence imposed for an environmental offence,</li> <li>(b) an order made in committal proceedings, or</li> <li>(c) an interlocutory order.</li> </ol> <p>(CARA s 56-57)</p>
	<p>Either party can also apply to the Supreme Court for judicial review of the Local Court's decision. (SCA s 69)</p>	

1.96 In appeal proceedings heard by the District Court or the Land and Environment Court, a judge of that court may submit a question of law arising on the appeal to the CCA for determination.<sup>72</sup> This is known as a “case stated”. Either party may request the judge to state a case to the CCA. A stated case may be referred to the CCA either before or after disposition of the appeal.<sup>73</sup>

1.97 The Court of Appeal can judicially review decisions of the District Court in relation to appeals brought from the Local Court,<sup>74</sup> but the review is limited to questions of

70. As defined in *Crimes (Appeal and Review) Act 2001* (NSW) s 3.

71. It appears that a magistrate's refusal to make a diversionary order under *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32 would be classed as an interlocutory order: *DPP v El Mawas* [2006] NSWCA 154; 66 NSWLR 93 [26].

72. *Criminal Appeal Act 1912* (NSW) s 5B(1), s 5BA(1).

73. *Criminal Appeal Act 1912* (NSW) s 5B(2), s 5BA(2).

74. *Supreme Court Act 1970* (NSW) s 48, s 69.

## Criminal Appeals

whether the District Court has committed a jurisdictional error in dealing with the Local Court appeal.<sup>75</sup>

- 1.98 Decisions of the Supreme Court dealing with appeals from the Local Court can be further appealed to the Court of Appeal, subject to a grant of leave.<sup>76</sup>

### Matters prosecuted in the District Court and the Supreme Court

- 1.99 Decisions of the District Court and the Supreme Court in criminal matters may be appealed to the CCA. The CAA largely governs these appeals. In **Table 5** we summarise these appeal provisions.

**Table 5: Criminal appeals from decisions of the District Court and Supreme Court**

	Defendant	DPP / Attorney General
District/ Supreme Court → Court of Criminal Appeal	For conviction on indictment: (a) against the conviction, as of right, on a ground that involves a question of law (b) against the conviction, on any other ground, with leave of the CCA or a certificate of the trial judge, and (c) against the sentence, with leave. (CAA s 5(1))	As of right, against: (a) any sentence imposed by the trial court <sup>77</sup> (CAA s 5D(1), s 5DA(1)) (b) an acquittal: (i) by a jury at the direction of the trial judge (ii) by a judge of the Supreme Court or District Court in proceedings for an indictable offence tried without a jury, on a question of law. (CARA s 107)
	For: (a) conviction in the summary jurisdiction of the Supreme Court or District Court, or (b) conviction of a related summary offence in a criminal case dealt with by the Supreme Court or District Court, as of right, against the conviction and any sentence imposed. (CAA s 5AA(1), s 5AD(1))	As of right, against: (a) any sentence imposed in respect of related summary offences (CAA s 5DB(1)) (b) an order quashing an information or indictment, or any count thereof (CAA s 5C) (c) an acquittal by the Supreme Court in its summary jurisdiction in any proceedings in which the Crown was a party, on a question of law (CARA s 107).
	With leave or upon the certificate of the trial judge, in respect of an interlocutory judgment or order made in the proceedings. <sup>78</sup> (CAA s 5F(3)) With leave, against a pronouncement or sentence made against the defendant under the <i>Habitual Criminals Act 1957</i> (NSW). (CAA s 5E)	As of right, against: (a) a decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case (b) an interlocutory judgment or order made in the proceedings. <sup>79</sup> (CAA s 5F(2), (3A)).

75. While the supervisory jurisdiction may generally include errors of law appearing on the face of the record, *District Court Act 1973* (NSW) s 176 has been taken as limiting the power of the Supreme Court to intervening in cases of jurisdictional error: *Spanos v Lazaris* [2008] NSWCA 74 [15].

76. *Supreme Court Act 1970* (NSW) s 101(2)(h). See, eg, *Eades v DPP* (NSW) [2010] NSWCA 241.

77. The Environment Protection Authority may also appeal against any sentence pronounced in the Supreme Court in respect of an environmental offence: *Criminal Appeal Act 1912* (NSW) s 5D(1A).

78. Applies to proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme or District Court, and proceedings under *Criminal Procedure Act 1986* (NSW) ch 2, pt 2, div 5: *Criminal Appeal Act 1912* (NSW) s 5F(1).

	Defendant	DPP / Attorney General
	With leave, against a decision by the court to discharge the jury. (CAA s 5G)	With leave, against a decision by the court to discharge the jury. (CAA s 5G)
	After trial and conviction on indictment, the trial judge can state a question of law that arises in respect of the trial or conviction to the CCA. The CCA will deal with the question as if it were an appeal. (CAA s 5A) A question of law may also be submitted to the CCA (and <i>must</i> be submitted if requested by the Crown) for determination during the course of summary proceedings. (CAA s 5AE)	

- 1.100 The Court of Appeal can judicially review a conviction or sentence imposed by the District Court in its original criminal jurisdiction.<sup>80</sup> However, it has been suggested that the Court of Appeal's supervisory jurisdiction should only be invoked where appeal to the CCA is not available.<sup>81</sup> In practice, therefore, it seems that judicial review is rarely used.

### Matters prosecuted in specialist courts

- 1.101 The Land and Environment Court, the Industrial Court and the Drug Court operate as specialist courts in NSW. The criminal appeal provisions differ slightly for each.

**Table 6: Avenues of criminal appeal from specialist courts in NSW**

	Defendant	DPP / Attorney General
<b>Land and Environment Court</b> → <b>Court of Criminal Appeal</b>	As of right against conviction/sentence. As of right, against an order to pay costs, or dismissal of an application for an order for costs. With leave, if an order for costs is made in the defendant's favour. In respect of an interlocutory judgment or order made in the proceedings, with leave of the CCA or upon the certificate of the trial judge. (CAA s 5AB, s 5F)	As of right: (a) against sentence <sup>82</sup> (CAA s 5D) (b) against an acquittal on a ground that involves a question of law (CARA s 107) (c) against a decision by the Land and Environment Court to quash an application, or a charge specified in an application, for an order for the apprehension of a person charged with a summary offence (CAA s 5C) (d) an interlocutory judgment or order made in the proceedings. (CAA s 5F)
	A question of law may also be submitted to the CCA (and <i>must</i> be submitted if requested by the Crown) for determination during the course of the proceedings. (CAA s 5AE)	
<b>Drug Court</b> → <b>Court of Criminal Appeal</b>	Against final sentence imposed, as of right. (CAA s 5AF, s 5D(1))	

79. Applies to proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme or District Court and proceedings under *Criminal Procedure Act 1986* (NSW) ch 2, pt 2, div 5: *Criminal Appeal Act 1912* (NSW) s 5F(1).

80. *Supreme Court Act 1970* (NSW) s 48, s 69.

81. *Fairfax Digital Australia and New Zealand Pty Ltd v District Court of NSW* [2012] NSWCA 172 [8]; see also *R v Swansson* [2007] NSWCA 67; 69 NSWLR 406 [45] (Spigelman CJ).

82. The Environment Protection Authority may also appeal if it prosecuted the proceedings in the Land and Environment Court: *Criminal Appeal Act 1912* (NSW) s 5D(1A).

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	Defendant	DPP / Attorney General
Single judge Industrial Court → Full bench Industrial Court <sup>83</sup>	As of right, against the conviction and any sentence imposed. (CAA s 5AA(1))	As of right, against sentence. (CAA s 5D)

### *Land and Environment Court*

- 1.102 The Land and Environment Court has summary jurisdiction to hear proceedings for certain environmental offences (known as its “Class 5 jurisdiction”).<sup>84</sup>
- 1.103 The Land and Environment Court also has jurisdiction to hear appeals against summary environmental offences heard in the Local Court. A judge of the Land and Environment Court may submit a question of law arising on the appeal to the CCA for determination by way of the case stated procedure.<sup>85</sup>
- 1.104 The Court of Appeal may also exercise supervisory jurisdiction over decisions of the Land and Environment Court.<sup>86</sup>

### *Industrial Court*

- 1.105 The Industrial Court is the name for the Industrial Relations Commission sitting in its judicial capacity.
- 1.106 Both the Local Court and the Industrial Court, sitting in its summary jurisdiction, may hear work health and safety “category 3 offences”, which are the least serious breaches of health and safety duties.<sup>87</sup>
- 1.107 Proceedings for category 3 offences heard by the Local Court may be appealed to the full bench of the Industrial Court.<sup>88</sup> Where proceedings for category 3 offences are heard by a single judge of the Industrial Court, appeal lies to the full bench of the Industrial Court and the provisions of the CAA will apply to that appeal.<sup>89</sup>
- 1.108 A privative clause prevents appeal or review from a decision of the Industrial Court,<sup>90</sup> but it has been held that this does not prevent the Court of Appeal from judicially reviewing for jurisdictional error.<sup>91</sup>

83. The provisions of the CAA apply to an appeal from a single judge of the Industrial Court to the Full Bench: *Industrial Relations Act 1996* (NSW) s 196(2).

84. See *Land and Environment Court Act 1979* (NSW) s 21 for a list of proceedings that fall within the Land and Environment Court’s summary jurisdiction.

85. *Criminal Appeal Act 1912* (NSW) s 5BA(1).

86. *Supreme Court Act 1970* (NSW) s 69; see also s 48(1)(a)(i).

87. *Work Health and Safety Act 2011* (NSW) s 229B(2); for a definition of “Category 3 offence” see s 33.

88. *Work Health and Safety Act 2011* (NSW) s 229B(6); *Industrial Relations Act 1996* (NSW) s 197.

89. *Industrial Relations Act 1996* (NSW) s 196.

90. See *Industrial Relations Act 1996* (NSW) s 179.

91. *Kirk v Industrial Court of NSW* [2010] HCA 1; 239 CLR 531 [105].



### Drug Court

- 1.109 The Drug Court is a specialist court that oversees a diversionary program for drug-dependent offenders. When a person is accepted into the Drug Court program, he or she is sentenced by the Drug Court according to the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW), but an order is made suspending the sentence.<sup>92</sup> At the completion of the program, the Drug Court imposes a final sentence on the person, which takes into account his or her degree of participation in the program.<sup>93</sup> The Drug Court may reduce the initial sentence imposed, but cannot increase it.
- 1.110 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. The final sentence may be appealed to the CCA. The Court of Appeal may also exercise supervisory jurisdiction over decisions of the Drug Court.<sup>94</sup>

### Appeals from the Court of Appeal and Court of Criminal Appeal

- 1.111 Appeals from decisions of the Court of Appeal and the CCA lie to the High Court of Australia. Special leave is required.<sup>95</sup>
- 1.112 In considering whether to grant special leave to appeal, the High Court will have regard to:
- (a) whether the proceedings involve a question of law that is of general public importance or in respect of which the High Court is required to resolve differences in opinion between State level courts, and
  - (b) whether the interests of justice, either generally or in the particular case, require the High Court to consider the appeal.<sup>96</sup>
- 1.113 This means that only a small proportion of cases Australia-wide will be heard by the High Court. However, because appeals to the High Court are governed by federal law, review of this avenue of appeal is outside the scope of our reference.

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92. *Drug Court Act 1998* (NSW) s 7A.

93. *Drug Court Act 1998* (NSW) s 12.

94. *Supreme Court Act 1970* (NSW) s 69; see also s 48(1)(a)(vi).

95. *Judiciary Act 1903* (Cth) s 35.

96. *Judiciary Act 1903* (Cth) s 35A.





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