The Shopfront

YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

15 August 2013

Dear Sir/Madam

## Criminal Appeals: Preliminary issues

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission in response to Question Paper 1 on Criminal Appeals.

### About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

### Scope of this submission

This submission will be limited to a discussion of appeals from the Local and Children's Courts to the District Court. We have considerable experience in this jurisdiction, having acted for significant numbers of juveniles as well as young adults aged 18 to 25.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@theshopfront.org

Yours faithfully

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Mission Australia

HERBERT SMITH FREEHILLS

The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army

## Previous comments made by the Shopfront Youth Legal Centre on sentence appeals from Local Court to District Court

In our submission to the NSWLRC in response to Question Paper 12 on sentencing, we said the following:

> *We oppose any changes to the test for appellate intervention in sentence appeals from the Local Court to the District Court.*
>
> *Firstly, the current appeal provisions are an important protection against sentences imposed by magistrates in circumstances which are not always ideal. It must be remembered that Local Court sentencing is generally done quickly, often on busy list days with significant time pressures on magistrates, legal representatives and prosecutors. Additionally, defendants in the Local Court are often unrepresented.*
>
> *Secondly, we have not seen any evidence that the District Court is clogged with unmeritorious appeals from the Local Court.*

## Comments in response to views expressed by other stakeholders in relation to sentence appeals

We have read the submissions referred to in footnote 28 of your Question Paper 1.

We agree with the comment made by the Law Society that:

> *The current system works efficiently, and the suggested change would result in more detailed judgments from Magistrates with a consequent adverse impact on the efficiency of their Local Court.*

We also agree with the submission made by the Office of the Director of Public Prosecutions. The ODPP suggests that changing the test may increase the amount of work to be done on the appeal and the workload in the Local Court, firstly because Magistrates may need to provide lengthier and more detailed judgments. It will also be necessary to obtain a transcript of the Local Court sentence proceedings, which will delay appeal proceedings (to the point where an appellant appealing a custodial sentence, unless granted appeal bail, runs the risk of the sentence expiring before the appeal can be heard).

The submission by the Chief Magistrate, his Honour Judge Henson, raises some important points. We agree that, historically, "*Magistrates were public servants rather than independent judicial officers and exercise a considerably narrower criminal jurisdiction than the Magistrates of the Local Court today.*" However, we respectfully disagree with His Honour's submission and we favour the retention of the current test for severity appeals.

Although the Chief Magistrate correctly states that s7 of the *Crimes (Appeal and Review) Act* provides for a severity appeal to be conducted by way of "rehearing of evidence given in the original Local Court proceedings", in practice, most severity appeals do not involve a "rehearing" in the true sense. Most severity appeals are determined on the papers. If fresh evidence is given, in our experience this is usually by tendering updated reports, testimonials and the like. Occasionally oral evidence is called from the appellant. There is no evidence that time is being wasted, or issues already ventilated in the Local Court are being unnecessarily revisited, in the course of hearing sentence appeals in the District Court.

We do not agree with the submission made by the NSW Police Force. While it may be correct that the rate of appeals from the Local Court to the District Court has increased, the increase has not been large, the trend has been downwards since 2009, and the proportion of Local Court matters which are appealed is still very low. There is no evidence that the District Court is inundated with unmeritorious appeals, or that severity appeals are taking up an undue amount of the District Court's resources.

We suggest that the following comments from the NSW Police Force are misconceived:

> *The District Court could continue to determine sentence appeals on the transcript of the oral sentencing remarks of the Magistrate, without Magistrates having to resort to excessive subtly and unnecessary discussion of legal principles. Anecdotally, whilst there may be a few exceptions, Magistrates already provide cogent reasons. A sample of*

> *transcripts obtained by the District Court following a sentence appeal from the Local Court would provide evidence of this.*

These comments appear to be based on a misunderstanding of how District Court severity appeals work in practice (this is not altogether surprising, given that police prosecutors do not appear in appeal proceedings). Sentence appeals to the District Court proceed on the basis of the bench papers, which typically include the police facts, criminal history, reports and any other material that was tendered on behalf of the accused. Transcripts are *not* obtained for severity appeals, except in rare cases.

The ODPP has correctly identified that, in order to assess whether the sentence was manifestly inadequate or excessive, it would be necessary to obtain a transcript of the submissions made and the Magistrate's findings in the Local Court. This would be a departure from current practice and would be expected to occasion delay and expense.

## Appeals against conviction

In our view the current system of conviction appeals to the District Court is working well and does not require any significant changes.

As with sentence appeals, the test for conviction appeals ought to recognise that Local Court decisions are not always made in ideal circumstances. Requiring an appellant to demonstrate error of law is too high a test and will cause particular disadvantage to unrepresented appellants.

The current procedure, whereby appeals are determined on the Local Court transcript, with leave being given to call fresh evidence or cross-examine witnesses only if this is in the interests of justice, strikes the right balance. It allows matters to be determined on their merits without the undue waste of time, inconvenience (and sometimes distress) to witnesses, and expense associated with a complete re-hearing.

## Summary and conclusion

We do not see the necessity to change the test for appeals to the District Court, either in relation to conviction or severity.

We suggest that such a change would not be in the interests of justice. There is a risk that it would reduce the accessibility of appeals for defendants, particularly for the those who are unrepresented.

It must be borne in mind that, unlike in superior courts, a large proportion of defendants in Local Courts are unrepresented and do not have a full opportunity to present their case or make the court aware of relevant circumstances.

Even if defendants are represented in the Local Court, sentences are often imposed by magistrates in less-than-ideal circumstances. Local Court sentencing is generally done quickly, often on busy list days with significant time pressures on magistrates, legal representatives and prosecutors.

There are also a significant number of appellants who are unrepresented in the District Court. They will find it difficult to make the legal arguments necessary to establish error of law or manifest excess.

Nor is there any evidence that a change to the appeal test would result in a saving of court time and costs. On the contrary, it would lead to delays in the District Court while awaiting transcripts for severity appeals. There is also a likelihood that it would involve more hearing time in the District Court, as advocates made lengthy submissions aimed at establishing legal error, manifest excess or manifest inadequacy. We also envisage a slowing down of proceedings in Local Courts, including judgments being reserved, as Magistrates would be more concerned about giving detailed reasons in an attempt to avoid falling into appellable error.

**The Shopfront Youth Legal Centre**
**August 2013**