The New South Wales Bar Association

13/54

16 August 2013

Ms Emma Hoiberg
NSW Law Reform Commission
DX 1227 SYDNEY

Dear Ms Hoiberg

Criminal Appeals

Thank you for giving the New South Wales Bar Association the opportunity to comment in relation to the reference on criminal appeals.

The current provisions for appeals in criminal matters are inconsistent and confusing, and are scattered across a number of different pieces of legislation. The current piecemeal statutory provisions tend to create uncertainty for practitioners and courts (not to mention self-represented appellants) in determining whether there is a right of appeal, the nature of any appeal, and the court to which an appeal lies. Sometimes, the current provisions lead to appeals being brought in the wrong forum.

It would be better for all criminal appeal provisions to be gathered together into one Act - probably by amendment of the *Criminal Appeal Act 1912* (**CAA**).

The Association makes the following submissions in response to the questions contained in 'Question Paper 1'.

Question 1

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

Appeal provisions should set out, in a codified form, in a single, accessible statute. This can be achieved by amendments to the CAA.

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

The focus should be upon creating a clear and concise 'code' to appeals, which deals with all types of appeals in criminal matters.

Selborne Chambers, 174 Phillip Street, Sydney 2000
DX 1204 Sydney • Tel (02) 9229 1736 • Fax (02) 9222 9678 • Email president@nswbar.asn.au
www.nswbar.asn.au
ACN 000 033 652 • ABN 18 526 414 014

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

The most fundamental need for change is to consolidate rights of appeal, and the nature of all appeals, into a single statute. There is also a need to change the current anomalous situation in which both the Court of Appeal and the Court of Criminal Appeal (**CCA**) hear appeals relating to criminal matters. The CCA should be the ultimate court of appeal in New South Wales in criminal matters.

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

There are a number of aspects of the current system of appeals which work well, and should be retained, but refined, and consolidated into a single statute. Those aspects which seem to work well include the following:

- Appeals from the Local Court to the District Court on conviction and sentence.
- Appeals from the Local Court to the Supreme Court on questions of law.
- Appeals to the CCA on conviction and sentence.

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

The Association does not foresee any practical problems, but considerable benefits, in consolidating and simplifying the appeals legislation.

Question 2

(1) *What should be the avenues of appeal from criminal proceedings in the:*

a) Local Court

The current rights of appeal by defendants and prosecutors, and the nature of those appeals, are broadly appropriate and should be retained but consolidated into a single statute, along with all other types of appeals.

The current scheme of appeals allows for 'merits review' appeals to the District Court (and Land and Environment Court in environmental matters), and provides also for appeals to the Supreme Court on questions of law, and (by leave) on questions of fact or mixed fact/law. This division of work generally works well, and should remain. In particular, the system which permits appeals on questions of law to the Supreme Court is valuable, in that it provides a mechanism by which the Supreme Court can declare and clarify the law, for the guidance of other courts.

b) Children's Court

The scheme of appeals from the Children's Court should be substantially the same as for appeals from the Local Court (as it is at present).

c) District Court

The current system of appeals against conviction and sentence (where such appeals are heard in the CCA) should, in broad terms, remain. The 'case stated procedure' should, however, be abandoned, and replaced by a provision for leave to be sought to appeal on a question of law (alone) to the CCA. Comments about stated case appeals are made under Question 5 below.

d) Supreme Court

The current system of appeals against conviction and sentence (to the CCA) should remain, but be consolidated into a single statute.

e) Land and Environment Court

The current system of appeals against conviction and sentence (to the CCA) should remain, but be consolidated into a single statute.

f) Drug Court

The current system of appeals against conviction and sentence (to the CCA) should remain, but be consolidated into a single statute.

g) Industrial Court

The current system of appeals against conviction and sentence (to the CCA) should remain, but be consolidated into a single statute.

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

The law with regard to judicial review is complex and confusing. The historical 'prerogative writ' jurisdiction (to grant relief in the nature of certiorari, mandamus and prohibition) is currently set out in section 69 of the *Supreme Court Act 1970*, and the jurisdiction to grant declaratory relief in section 75 of that Act. The retention of these avenues of 'appeal' is confusing, and represents an historical anachronism, given the existence (in the *Crimes (Appeal and Review) Act* (**CARA**)) of rights to appeal (or to seek leave to appeal) on a 'question of law'.

The *Supreme Court Act* provisions should be replaced by a codified appeal statute, which sets out all types of appeals and review, and removes the right to seek prerogative relief in criminal matters.

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

This is relatively uncommon.

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

The vast majority of appeals from the Local Court are currently heard in the District Court (as a 'rehearing'), where a review by that Court 'on the merits' can occur.

It is desirable to retain the current system, whereby appeals on the merits are heard in the District Court, but where an appeal can be taken to the Supreme Court in those cases where error of law is said to have occurred. The ability to appeal to the Supreme Court on questions of law provides a convenient means by which errors of law can be corrected, and guidance provided by the Supreme Court in relation to issues of importance in the criminal law. These types of appeal therefore effectively fulfil the traditional role of the Supreme Court, in the exercise of its 'supervisory jurisdiction'.

There is no evidence to suggest that this avenue of appeal is being abused. To the contrary, it appears that appeals to the Supreme Court on questions of law are relatively few (in comparison to District Court appeals), and that these judgments serve a useful purpose, in clarifying and declaring the law for the guidance of inferior courts.

It is preferable to retain the current scheme, whereby appeals against conviction and sentence (on the merits) are heard in the District Court. There should remain, however, an avenue of appeal to the Supreme Court where a 'question of law' is involved. The current scheme of such appeals in CARA (which sets out appeals as of right and appeals requiring leave) is broadly appropriate, and should be retained, but should appear in a single appeal statute.

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

These appeals should be heard by the CCA. The current system, whereby such matters may be heard by the Court of Appeal, is anomalous and confusing. Such appeals (to the CCA) should however, require the grant of leave, and should be restricted to questions of law.

(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?

A consolidating statute, setting out the avenues of appeal, should clarify that the ultimate appeal court (in NSW) shall be the CCA. No provision should be made for appeals in criminal matters to be heard by the Court of Appeal.

(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?

Distinctions should continue to be made between appeals on questions of fact, and appeals on questions of law. Appeals on factual grounds (conviction and sentence) from the Local Court should continue to be heard in the District Court. These types of appeals also permit the District Court to uphold an appeal where some error of law has been committed in the Local Court. These types of appeals should be retained.

Question 3

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

Currently, the various appeal provisions in place provide for appeals in a variety of circumstances. Broadly speaking, the current appeal provisions circumscribe the right of appeal, and nature of the appeal, by reference to the level of court from which the appeal is sought, and the nature of the decision in question. The current approach broadly reflects a policy that there should be a general right of appeal from the Local Court (in summary proceedings), but more limited access to appeals from decisions of judges of the District Court and Supreme Court. The current approach also (appropriately) restricts the circumstances in which an appeal can be brought from a decision made in committal proceedings.

This general approach should be retained. It is desirable for there to be a general right of appeal (in the form of a review on the merits by the District Court) from the lowest level of courts (i.e. Local Court and Children's Court). However, it is appropriate, in the interests of finality and proper use of court time, that limits should be placed upon the circumstances in which an appeal can be brought from the decision of a judge at District Court level, or higher.

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

It is appropriate to retain a restriction upon the circumstances in which the prosecution is able to appeal. It is considered that the current provisions, which set out limited circumstances in which the prosecution can appeal, are appropriate, and should be retained, but in a consolidated statute.

(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?

In summary proceedings, CARA requires, both for Prosecution and Defence, a grant of leave to appeal against an interlocutory 'order' made in summary proceedings (see sections 53(3)(b) and 57(1)(c) CARA). It is appropriate to retain the requirement for a grant of leave to appeal against such interlocutory orders. It is also desirable to retain the current distinction between an interlocutory 'decision' (where leave to appeal cannot be sought) and an interlocutory 'order' (where leave to appeal can be sought)[1]. This approach is consistent with the traditional reluctance of superior courts to intervene in criminal proceedings.

Appeals in relation to interlocutory judgments or orders in committal proceedings are currently provided for in both CARA and the CAA. In this regard, CARA makes no provision for an appeal, or for seeking leave to appeal, against an interlocutory order made in committal proceedings. However, the CAA makes provision, in section 5F, for appeals against interlocutory judgments or orders to the CCA.

Firstly, these rights to appeal, or to seek leave to appeal, should be gathered into one statute. Secondly, appeals, or applications for leave to appeal against orders made in committal proceedings should be heard by a single Judge of the Supreme Court, not by the CCA.

[1] *Salter v DPP* [2009] NSWCA 357, at [32]; *LS v Director of Public Prosecutions* (2011) 81 NSWLR 551; [2011] NSWSC 1016 at [78].

The Association supports the retention of a requirement for a grant of leave before an appeal can be brought from an interlocutory judgment or order made in committal proceedings. This restriction is consistent with the nature and function of committal proceedings, which involve only a preliminary assessment of the prosecution case, and do not affect the rights of either the Prosecution or Defence in any final manner.

In proceedings on indictment, section 5F of the CAA currently regulates the rights of prosecution and defence to appeal, or to seek leave to appeal from an interlocutory judgment or order. Section 5F permits the prosecution to appeal against an interlocutory judgment or order, without the need for leave, but restricts the capacity of the prosecution to appeal against decisions or rulings on evidence to those cases where the decision or ruling substantially weakens, or eliminates the prosecution's case. Section 5F makes provision for 'any other party' (i.e. including an accused) to appeal to the CCA against an interlocutory judgment or order, only where the CCA grants leave, or where a trial judge certifies[2] the judgment or order to be a proper one for determination on appeal. These restrictions upon the capacity to appeal against interlocutory judgments or orders are generally appropriate.

Question 4

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

The Association supports the retention of the current broad approach, reflected in CARA and in the CAA, that leave should be required for appeals from certain categories of decisions and orders. The current provisions for leave reflect the policy that there should be finality in the decisions of criminal courts, and that there should be limited interference by superior courts in the criminal process. The current provisions also reflect a policy that convictions after a plea of guilty, and convictions recorded where the appellant has not appeared, should not lightly be set aside. Without being exhaustive, the law currently requires leave to appeal from the following:

- Appeals against conviction recorded in the appellant's absence.
- Appeals against conviction following a plea of guilty.
- Orders made in committal proceedings.
- Interlocutory orders made in summary proceedings.
- Appeals on questions of fact or mixed fact and law.
- Sentence appeals by offender to CCA.

(See sections 5, 5F CAA and CARA sections 12, 43, 53, 57).

This broad approach should be retained. However, it is submitted that the mechanism by which a judge or magistrate of the 'court of trial' may certify that a judgment or order is a proper one for determination on appeal (see section 5F(3)(b) CAA) should be repealed. The question of whether a judgment or order is appropriate for determination on appeal should be left to the CCA: see *Pellegrino v (Cth) Director of Public Prosecutions* [2008] NSWCCA 17, at [6], where Basten J noted that the granting of such a certificate deprives the appeal court the ability to determine whether the matter is an appropriate one for the grant of leave to appeal.

[2] See further, in regard to the "certificate" procedure, comments made under Q. 4(1) below.

(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 Association supports the retention of the current scheme (see further discussion in response to Question 7).

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?

The Association agrees that the 'case stated' procedure is cumbersome, time-consuming and should be abandoned. However, given that this is the only current avenue of appeal (apart from prerogative relief) from a decision of the District Court or Land and Environment Court (on appeal from the Local Court), it would be appropriate to establish some alternative (but limited) means of appeal to take the place of the 'stated case'. It would also be appropriate (in accordance with the general approach taken in this submission) to remove the current rights to seek prerogative relief, and to replace them with some consolidated form of statutory appeal, or capacity to seek leave to appeal.

It is accepted that there is a need to tightly restrict the capacity to appeal further once a District Court judge has determined an appeal from the Local Court. Currently, the capacity to appeal further in this situation is limited to the 'case stated' procedure, or to an application for prerogative relief. As has been submitted, these types of 'appeal' should be replaced. In their place, there should be established a right to seek leave to appeal (to the CCA) on limited grounds, namely:

- Denial of procedural fairness.
- Apprehended bias.
- *ultra vires.*
- Failure to exercise jurisdiction.
- Error of law on the face of the record.

These limited rights to seek leave to appeal would give due weight to the principle of finality in litigation. These rights to seek leave to appeal should be set out in clear terms in a consolidated statute, which deals with all kinds of appeals in criminal matters.

Question 6

(1) What should the time limit be for filing a criminal appeal in NSW?

The Association supports, in broad terms, the retention of the current time periods within which appeals must be brought, along with the specified capacity for the appeal court to great leave to file an appeal which is brought out of time. This approach provides a reasonable balance between the rights of the proposed appellant, and the need for finality and expedition in litigation.

This approach should apply to both the prosecution and defence. In other words, the law should be changed so as to impose these time limits on the prosecution with respect to appeals against sentence in the CCA. The current position is that, in practice, delay in commencement of the appeal works against the prospects of success for the Crown. That is, it may result in the appeal being dismissed, in the exercise of the Court's discretion. The Court has decided, in various decisions, that a delay of even two months is unacceptable or regrettable on the part of the Crown. The general approach of the Crown is that a Notice of Appeal should be filed no later than six to eight weeks from the sentence and it is often done much more quickly than that. Where Remarks on Sentence are required, the offender is notified in writing that an appeal is being considered. The current proposed time frame for leave to appeal against sentence is a Notice of Intention within 28 days that is valid for six months. That suggested time frame is, in fact, less onerous than what is, in practice, occurring now. Given the desirability of certainty for an offender, any proposed time frame should not be less onerous than the current practice.

It is submitted (in relation to the point made at paragraph 1.45 of the Question Paper – last sentence) that it is unlikely that a court would interpret section 62 of CARA as conferring a power to 'amend' the date of filing of an appeal so as to bring it 'within time', given the existence of specific provisions (e.g. sections 42 (3), 52 (2), 56 (2)) as to time limits. It would be desirable, in any amending (consolidating) appeal legislation, that it be made clear that the power to amend in these types of appeals does not permit the court to override the time limit provisions.

However, there is a good argument for retaining a provision which provides the Supreme Court with a discretion to grant leave to appeal out of time in cases where a 'question of law' is involved. This wider discretion is justified, given the 'supervisory' jurisdiction which the Supreme Court has traditionally exercised, for the guidance of lesser 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?

It is in the interests of finality in litigation that appeals to the District Court and the Land and Environment Court be restricted to set time periods. However, it would be desirable for there to be included a provision whereby these courts can grant leave to appeal outside the three month period, where exceptional circumstances justify it.

(3) What should the time limit be for a prosecution appeal against:

a) a costs order imposed by that Local Court?

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

Appeals by the prosecution against costs orders, and in respect of alleged manifest inadequacy of sentence, should be restricted to a 28 day period. This is justified, given the resources usually available to the prosecution, and the need for finality and certainty. However, where the prosecution needs to obtain relevant material (such as a transcript) in order to decide whether to bring an appeal, allowance should be made for this by means of a notification in writing that an appeal is being considered.

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?

There is no justification for changing the current approach to appeals from the Local Court to the District Court. The Local Court deals with a huge volume of cases, but only a relatively small percentage of these are subject to appeal to the District Court. The 'New South Wales Criminal Courts Statistics 2012' (BOCSAR) indicate that the Local Court finalised nearly 240,000 charges involving 110,000 defendants (BOCSAR page 3). The statistics indicate that the District Court dealt with a total of approximately 6,000 appeals (BOCSAR page 15). This would appear to represent only about 5% of the total number of persons dealt with by the Local Court.

Furthermore, the BOCSAR statistics indicate that the percentage of successful appeals to the District Court in 2012 was significant: over 60% of severity appeals, and over 25% of appeals against 'conviction and sentence'. These statistics indicate firstly, that the percentage of appeals is not large, and secondly, that a significant number of them lead to a successful result for the appellant.

It is submitted that there is no justification to change the 'test' applicable to an appeal from the Local Court to the District Court or the Land and Environment Court. Furthermore, changing the test in these types of appeal to one that requires proof of 'error', is likely to result in significant delay and inefficiency. The current system in the Local Court is very efficient for at least the following reasons:

a) magistrates do not need to give extremely detailed, considered reasons on sentence, since the reasons are not reviewed on appeal; and
b) for this reason, magistrates rarely reserve on sentence.

If the test on appeal from a magistrate were changed, so as to require the demonstration of error, then it is likely that magistrates would be required to take much greater time in the crafting of 'remarks on sentence' with a view to the fact that their words may be closely scrutinised for error by a District Court judge. This will lead to very significant delay and inefficiency in the Local Court, with magistrates reserving more regularly on sentence (as District Court judges do, when sentencing on indictable matters).

It is the experience of members of the Association that appeals against conviction in the District Court are dealt with in a pragmatic way, without the need for 'nice' arguments about matters such as leave to appeal, and distinctions between errors of fact, and errors of law. Experience also indicates that in such appeals, leave to adduce additional evidence is not granted lightly. Furthermore, the BOCSAR statistics for 2012 indicate that the District Court dealt with 1,385 appeals on 'conviction and sentence'. This represents only a little over 1% of the persons dealt with in the Local Court during that year.

It is submitted that, for the above reasons, it would be undesirable to change the applicable test in such appeals.

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?

As regards an appeal against conviction, the Association supports the submission made by the National Criminal Law Liaison Committee of the Law Council of Australia to the Standing Committee of Attorneys General in 2010, which proposed the following provision:

Appeals against Conviction

(1) The Court must allow an appeal against a conviction if the Court is satisfied that the verdict is, on the evidence before the court at the time of the verdict, unreasonable.

(2) Subject to subsection (3), the Court must allow an appeal against a conviction if the Court is satisfied that:

a. there was an incorrect decision on a question of law; or
b. on any other basis whatsoever, there was a miscarriage of justice.

(3) If the Court is satisfied of a matter in subsection (2) the Court may dismiss the appeal if the Court is satisfied that:

a. the trial was fair; and

b. the verdict would not have been different if the identified miscarriage of justice under subsection (2)(a) or (b) had not occurred.

The Association considers that the arguments advanced by the National Criminal Law Liaison Committee in support of this proposal are persuasive:

- Paragraph (1): This provision is consistent with the common form provisions. If the verdict is 'unreasonable', the proviso in paragraph (3) should have no application. This provision makes two changes to the provision found in the common form appeal provisions and the new provision proposed above. First, it deletes the words 'or cannot be supported'. Those words may be regarded as otiose because if the verdict 'cannot be supported' then it is necessarily 'unreasonable'. Second, the addition of the words 'the evidence before the court at the time of the verdict' makes clear what evidence is to be considered by the appeal court in respect of this ground of appeal.

- Sub-paragraph (2)(a): This sub-paragraph uses the phrase 'an incorrect decision on a question of law' rather than the wording used in the common form provision ('the wrong decision of any question of law') or in the provision proposed by the Discussion Paper (error or an irregularity in, or in relation to, the trial). In truth, the precise language adopted does not matter since paragraph (a) is expressly stated to simply be a specific category of the much broader ground in paragraph (b) ('on any other basis whatsoever …'). However, retention of (a) makes it clear that 'miscarriage of justice' in (b) should be broadly understood.

- Sub-paragraph 2(b): This formulation reflects the common form provisions.

- Paragraph (3): This reformulation of the proviso in the common form provisions (which use the language 'no substantial miscarriage of justice') seeks to address both the vagueness of that formulation and the uncertainties created by the extensive High Court jurisprudence on that formulation. Specifically, sub-paragraph (3)(a) attempts to provide much clearer guidance as to what is a 'fundamental' flaw such that the more general requirement (see (b)) need not be considered. The High Court has never provided clear guidance in that regard. Various different formulations and examples may be noted:

    - 'an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings' (*Wilde v The Queen* (1988) 164 CLR 365)
    - 'proceedings have so far miscarried as hardly to be a trial at all' (*Wilde*, followed by Mason CJ, Brennan and Toohey JJ in *Glennon v the Queen* (1994) 179 CLR 1)
    - 'there has not been a fair trial according to law' (Deane and Gaudron JJ in *Glennon*)
    - 'such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso' (*Weiss v R* [2005] HCA 81).
    - 'there has been a significant denial of procedural fairness at trial' (*Weiss*).
    - 'a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just': *Nudd v R* [2006] HCA 9 per Gleeson CJ).

  The formulation 'the trial was fair' adopts the formulation of Deane and Gaudron JJ in *Glennon* but leaves out the words 'according to law'. It is desirable as a matter of policy that an appeal court should never dismiss an appeal where the appellant did not receive a 'fair trial'. In that regard, it may be noted that Article 14 of the International Covenant on Civil and Political Rights confers on a criminal accused a right to 'a fair … hearing'. It is the view of the Committee that, if there has been some irregularity that has resulted in a trial that is not fair, the appeal should be allowed without any need to consider the effect of the irregularity on the verdict pursuant to (3)(b).

Subparagraph (3)(b) adopts the orthodox test for the application of the proviso (which appeared to have been doubted in *Weiss* but was re-affirmed by Gummow and Hayne JJ in *AK v The State of Western Australia* [2008] HCA 8 at [59]).

The proposed provision does not incorporate the further requirement for the application of the proviso in the common form provisions as held by the High Court in *Weiss* – that the appeal court must itself be satisfied beyond reasonable doubt of the guilt of the appellant.

The Association does not support adoption of the Victorian provision found in section 276 of the *Criminal Procedure Act 2009* (Vic). That provision does not address that aspect of the common form provision that is most in need of reform – the ambiguous phrase 'substantial miscarriage of justice'. Further, if an appellant has demonstrated that there was an incorrect decision on a question of law or, for any reason, a miscarriage of justice, it is inappropriate to impose an onus on the appellant to also demonstrate that a 'substantial miscarriage of justice' resulted. The judgment of the High Court in *Baini v The Queen* [2012] HCA 59 does not alter this analysis.

As regards an appeal against sentence, the Association supports retention of the existing provision in section 6(3). It leaves a very broad discretion to the CCA to determine the appeal, in the context of general principles limiting appellate review of errors in (sentencing) discretion. No attempt should be made to codify those general principles, which must be adapted to the particular circumstances of the sentence appeal. In particular, the proposal to adopt a 'single test of whether the sentence is manifestly excessive or manifestly inadequate' is strongly opposed. That proposal, which would significantly limit the role of the CCA in finding error, would thereby significantly limit the guidance which the CCA could provide to sentencing courts.

Further, the proposal would produce injustice. For example, if there has been an error in the exercise of the sentencing discretion, so that it has miscarried to the disadvantage of the offender, it would be quite wrong in principle for the CCA to dismiss the appeal on the basis that the sentence was not 'manifestly excessive' (ie it was within the range of permissible sentences).

Rather, the CCA should determine for itself what would be the appropriate sentence, avoiding the error made at first instance. Of course, if no lesser sentence than that imposed at first instance is appropriate, the appeal may be dismissed – but that is not because the sentence imposed at first instance was not 'manifestly excessive'. Equally, if fresh evidence is admitted on the sentence appeal which shows that a lesser sentence is appropriate, the appeal should not be dismissed on the basis that the sentence imposed at first instance was not 'manifestly excessive'.

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

On balance, the Bar Association considers that the test for a directed acquittal at trial should remain as it is. That is (as noted in *Doney v R* (1990) 171 CLR 207) that the judge can only direct a verdict of not guilty where the evidence, taken at its highest, is not capable of supporting guilt. This acknowledges the long standing policy that the question of whether an accused should be convicted is a matter for the jury, while the question of whether the accused could be convicted is a matter for the judge. A change of this test would be to encroach upon the role of the jury, and is arguably not justified, given the capacity of the CCA to intervene on appeal in circumstances where (inter alia) the verdict of the jury is found by a full bench to be unsafe.

However, it should be noted that a significant minority of the members of the Criminal Law Committee of the Bar Association consider that there would be merit in moving to the United Kingdom position and allowing a trial judge to direct a verdict of acquittal in cases where the judge is satisfied that a verdict of guilty would be unsafe or unreasonable. The trial judge, unlike the CCA, has the benefit of seeing the witnesses testify. Adopting the UK position would provide capacity to expeditiously terminate weak or demonstrably unreliable prosecution cases. Given the limits on obtaining bail on appeal, it would avoid the accused having to spend time in custody prior to an appeal against conviction. This is an important issue and the Bar Association supports careful consideration of it by the New South Wales Law Reform Commission (assuming that it falls within the Terms of Reference).

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?

As noted in response to Question 7 above, it is the view of the Association that there should be no change to the nature of appeals from the Local Court to the District Court and Land and Environment Court. It is also the view of the Association that the need for error should continue to be an element of appeals from the District Court and Supreme Court. This pays due regard to the 'seniority' in the judicial hierarchy occupied by Judges of these courts. As has been submitted under Question 7 above, it is most undesirable to introduce the need for error to be demonstrated in appeals from the Local Court, due to the additional work and delay that this is likely to introduce into the Local Court.

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?

The Association supports the retention of the current provisions regulating the receipt of fresh evidence on appeal. In particular, there is justification, in an appeal against sentence to the District Court, for a right to lead fresh evidence (without leave), given that an appellant's circumstances will not infrequently have changed.

With regard to appeals to the CCA, there is justification in retaining that Court's wide discretion (both in conviction appeals and in sentence appeals) to receive fresh evidence where proper grounds are established. The principles applicable to the receipt of fresh evidence are well established in case law. However, it would be beneficial to set those principles out in a 'codified' form in a single statute.

Question 11

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

The Association supports the retention, in broad terms, of the current powers which various courts have on appeal. The differences which exist among these powers are an acknowledgement of the respective places in the judicial hierarchy occupied by magistrates of the Local Court on the one hand, and Judges of the District and Supreme Courts on the other hand. The differences also represent a reasonable compromise between the public interest in finality, and efficiency, and the public interest in providing appellants with reasonable avenues of appeal.

(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?

It would be inappropriate to give to the District Court a power to remit to the Local Court. The District Court's role on appeal should continue to be by way of 'rehearing' rather than review and remittal. In rare cases, such as that encountered in *DPP v Emanuel* [2009] NSWCA 42, a provision permitting an appellant to appeal to the Supreme Court on a question of law would provide an adequate safeguard.

(3) What powers should the CCA have on an appeal against conviction where the defendant pleaded guilty?

Appeals to the CCA against conviction where the appellant has pleaded guilty should require a grant of leave, applying the principles which are established with respect to applications to withdraw a plea of guilty. There is much practical sense in conferring a power on the CCA to impose a substituted verdict (for an equal or less serious offence) in circumstances where, on appeal, the CCA finds that the conviction after plea of guilty for the offence in question cannot be maintained. The Association supports the creation of a specific statutory provision to this effect.

Question 12

What powers should courts have to award costs on appeal?

The ordinary and traditional rule in criminal proceedings is that costs are not awarded, either in favour of, or against the Crown. This rule has however, been altered by statute in recent years, with limited provision now made for the award of costs against a public prosecutor (e.g. section 70 CARA; sections 117, 214, 257D *Criminal Procedure Act 1986*).

There should be a consistent rule as to the power of a court to award costs on appeal in criminal proceedings. In appeals to the Supreme Court, the Court has power to award costs, and not infrequently does so: see, e.g., *DPP v Elskaf* [2012] NSWSC 21, at [80]; *Lawler v Johnson & Director of Public Prosecutions* [2002] NSWSC 864; (2002) 56 NSWLR 1. In appeals to the Supreme Court under CARA, the power to award costs against a public prosecutor is restricted by section 70. However, where an appeal is brought by application for prerogative relief, it appears that the question of costs is 'at large'. This illustrates once again the anomalous situation arising from the fact that, in appeals from the Local Court to the Supreme Court, there exists 'dual' appeals – either under CARA, or by way of prerogative relief.

It is submitted that these anomalies should be remedied by a comprehensive set of provisions, in a consolidated appeal statute, setting out the powers to award (or not to award) costs, in all types of appeals involving criminal matters. There should be one general rule as to costs. Given the 'traditional' rule with costs in criminal cases, the most appropriate 'default' rule is that costs should not be recoverable (by either side), except where exceptional circumstances are made out.

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 section 63 and section 69 of the CARA?

The Association does not support any change in the current position relating to the operation of a sentence pending determination of an appeal (which varies depending on the sentencing court in question). The Association is not aware of any problem with the interaction between section 63 and section 69 of the CARA.

Question 14

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

The Association supports the retention of a power (such as section 43 of the *Crimes (Sentencing Procedure) Act*) for a court to re-open its own proceedings to correct patent error. This is plainly desirable, to avoid the need for appeals to correct slips. However, and as is apparent from the decision of the CCA in *Achurch v R (No 2)* [2013] NSWCCA 117, there can be considerable difficulty in determining the extent of jurisdiction conferred by a provision such as section 43 (and what errors fall within an expression such as 'contrary to law').

The power of a court to re-open its own proceedings should be retained, in a statutory provision similar to section 43 of the *Crimes (Sentencing Procedure) Act*. There is, however, as noted by Johnson J in *Achurch* at [160], a need to re-examine section 43, given the wide interpretation that it has received in some cases. It is submitted that any statutory provision providing power to re-open proceedings needs to be expressed in terms that clearly limit the power as one aimed at correcting patent errors, or errors on the face of the record (not questions going to the merits).

(2) Should the CCA have a different power to reopen its own proceedings than lower courts?

No. It is in the interests of finality of proceedings that all courts, including the CCA, be restricted in their jurisdiction to re-open proceedings to those cases where patent error is made out (see *Achurch* at [66], [108], [155], [159]).

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

It is the impression of the Association that applications under section 43 are relatively uncommon.

Question 15

(1) How often is an application made to the Local Court under section 4 on the CARA for annulment of a conviction or sentence?

The Association is unaware of the prevalence of applications to the Local Court under section 4, however it is our impression that the number of such applications is not large, in the context of the work carried out in that court.

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

The Association is unaware of the statistics in relation to the number of applications to the Local Court under section 4 of CARA. It is our impression though that the number of such applications is not large in the context of the work carried out in that court. Section 4 serves a valuable purpose and most Magistrates take a reasonable and pragmatic approach to the section. The Association supports the retention of a provision like section 4 of CARA. Such a provision should be placed into a single consolidated statute dealing with all criminal appeals and applications for review.

It would be desirable, in any such provision, for it to be made clear that the reference to a defendant who was 'not in appearance before the Local Court' does not include a defendant who makes a conscious choice not to appear in person, or who files an informal 'written plea'. This would prevent unmeritorious applications for annulment by defendants who intentionally choose not to appear.

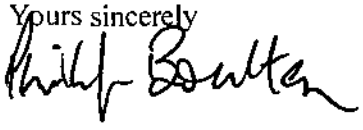
Question 16

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

The Association suggests that the New South Wales Law Reform Commission should consider the scope of appellate review in the light of the enactment in South Australia of a new provision enabling a 'second or subsequent appeal' (section 353A *Criminal Law Consolidation Act 1935*) and the recurring question whether a Criminal Cases Review Commission (modelled on the UK scheme) should be adopted in NSW. In 2012 the Law Council of Australia adopted a Policy Statement recommending a Commonwealth Criminal Cases Review Commission. This independent government-funded body would receive applications from defendants claiming to have been wrongfully convicted, have the resources and powers to investigate their claims and the power to refer matters back to the appeal court where they would have a real possibility of success. While the Law Council's recommendation is for a Commonwealth body, this could be a model for the New South Wales.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



Phillip Boulten SC
President